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THE CONSTITUTION

of the

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

Centennial Edition

INTERIM EDITION: ANALYSIS OF CASES DECIDED
BY THE SUPREME COURT OF THE UNITED STATES
TO JUNE 27, 2016

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To Johnny Killian

Senior Editor Emeritus

(1938–2008)

Justice Antonin Scalia

Associate Justice, United States Supreme Court

(1936–2016)

Special thanks to

Shirley Loo

Sam Bosch

for invaluable assistance in the preparation of this document

AUTHORIZATION

PUBLIC LAW 91–589, 84 STAT. 1585, 2 U.S.C. § 168

JOINT RESOLUTION Authorizing the preparation and printing of a revised edition of the Constitution of the United States of America—Analysis and Interpretation, of decennial revised editions thereof, and of biennial cumulative supplements to such revised editions.

Whereas the Constitution of the United States of America—Analysis and Interpretation, published in 1964 as Senate Document Numbered 39, Eighty-eighth Congress, serves a very useful purpose by supplying essential information, not only to the Members of Congress but also to the public at large;

Whereas such document contains annotations of cases decided by the Supreme Court of the United States to June 22, 1964;

Whereas many cases bearing significantly upon the analysis and interpretation of the Constitution have been decided by the Supreme Court since June 22, 1964;

Whereas the Congress, in recognition of the usefulness of this type of document, has in the last half century since 1913, ordered the preparation and printing of revised editions of such a document on six occasions at intervals of from ten to fourteen years; and

Whereas the continuing usefulness and importance of such a document will be greatly enhanced by revision at shorter intervals on a regular schedule and thus made more readily available to Members and Committees by means of pocket-part supplements: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Librarian of Congress shall have prepared—

(1) a hardbound revised edition of the Constitution of the United States of America—Analysis and Interpretation, published as Senate Document Numbered 39, Eighty-eighth Congress (referred to hereinafter as the "Constitution Annotated"), which shall contain annotations of decisions of the Supreme Court of the United States through the end of the October 1971 term of the Supreme Court, construing provisions of the Constitution;

(2) upon the completion of each of the October 1973, October 1975, October 1977, and October 1979 terms of the Su-

preme Court, a cumulative pocket-part supplement to the hardbound revised edition of the Constitution Annotated prepared pursuant to clause (1), which shall contain cumulative annotations of all such decisions rendered by the Supreme Court after the end of the October 1971 term;

(3) upon the completion of the October 1981 term of the Supreme Court, and upon the completion of each tenth October term of the Supreme Court thereafter, a hardbound decennial revised edition of the Constitution Annotated, which shall contain annotations of all decisions theretofore rendered by the Supreme Court construing provisions of the Constitution; and

(4) upon the completion of the October 1983 term of the Supreme Court, and upon the completion of each subsequent October term of the Supreme Court beginning in an odd-numbered year (the final digit of which is not a 1), a cumulative pocket-part supplement to the most recent hardbound decennial revised edition of the Constitution Annotated, which shall contain cumulative annotations of all such decisions rendered by the Supreme Court which were not included in that hardbound decennial revised edition of the Constitution Annotated.

Sec. 2. All hardbound revised editions and all cumulative pocket-part supplements shall be printed as Senate documents.

Sec. 3. There shall be printed four thousand eight hundred and seventy additional copies of the hardbound revised editions prepared pursuant to clause (1) of the first section and of all cumulative pocket-part supplements thereto, of which two thousands six hundred and thirty-four copies shall be for the use of the House of Representatives, one thousand two hundred and thirty-six copies shall be for the use of the Senate, and one thousand copies shall be for the use of the Joint Committee on Printing. All Members of the Congress, Vice Presidents of the United States, and Delegates and Resident Commissioners, newly elected subsequent to the issuance of the hardbound revised edition prepared pursuant to such clause and prior to the first hardbound decennial revised edition, who did not receive a copy of the edition prepared pursuant to such clause, shall, upon timely request, receive one copy of such edition and the then current cumulative pocket-part supplement and any further supplements thereto. All Members of the Congress, Vice Presidents of the United States, and Delegates and Resident Commissioners,

no longer serving after the issuance of the hardbound revised edition prepared pursuant to such clause and who received such edition, may receive one copy of each cumulative pocket-part supplement thereto upon timely request.

Sec. 4. Additional copies of each hardbound decennial revised edition and of the cumulative pocket-part supplements thereto shall be printed and distributed in accordance with the provisions of any concurrent resolution hereafter adopted with respect thereto.

Sec. 5. There are authorized to be appropriated such sums, to remain available until expended, as may be necessary to carry out the provisions of this joint resolution.

Approved December 24, 1970.

INTRODUCTION TO THE 2012 CENTENNIAL EDITION

The need for a comprehensive treatise on the Constitution was apparent to Congress from early in the 20th century. In 1911, the Senate Manual (a compilation of the Senate's parliamentary procedures) included the United States Constitution and amendments with citations to U.S. Supreme Court constitutional decisions. A century later, the field of constitutional law has expanded exponentially. As a result, this present iteration of that early publication exceeds 2300 hundred pages, and references almost 6000 cases. Consistent with its publication in the 21st Century, this volume is available at the website of the Government Printing Office (www.gpo.gov/constitutionannotated) and will be updated regularly as Supreme Court cases are decided.

Sixty years ago, Professor Edward S. Corwin wrote an introduction to this treatise that broadly explored then existent trends of constitutional adjudication. In some respects—the law of federalism, the withdrawal of judicial supervision of economic regulation, the continued expansion of presidential power and the consequent overshadowing of Congress—he has been confirmed in his evaluations. But, in other respects, entire new vistas of fundamental law of which he was largely unaware have opened up. *Brown v. Board of Education* was but two Terms of the Court away, and the revolution in race relations brought about by all three branches of the Federal Government could have been only dimly perceived. The apportionment-districting decisions were still blanketed in time; abortion as a constitutionally protected liberty was unheralded. The Supreme Court's application of many provisions of the Bill of Rights to the States was then nascent, and few could anticipate that the expanded meaning and application of these Amendments would prove revolutionary. Sixty years has also exposed the ebb and flow of constitutional law, from the liberal activism of the 1960s and 1970s to a more recent posture of judicial restraint or even conservative activism. Throughout this period of change, however, certain movements, notably expansion of the protection of speech and press, continued apace despite ideological shifts.

This brief survey is primarily a suggestive review of the Court's treatment of the doctrines of constitutional law over the last sixty years, with a closer focus on issues that have arisen since the last volume of this treatise was published ten years ago. For instance, in previous editions we noted the rise of federalism concerns, but only in the last two decade has the strength of the Court's deference toward states become apparent. Conversely, in this treatise as well as in previous ones, we note the rise of the equal protection clause as a central concept of constitutional jurisprudence in the period 1952–1982. Although that rise has somewhat abated in recent years, the clause remains one of the predominant sources of constitutional constraints upon the Federal Government and the States. Similarly, the due process clauses of the Fifth and Fourteenth Amendments, recently slowed in their expansion, remain significant both in terms of procedural protections for civil and criminal litigants and in terms of the application of substantive due process to personal liberties.

SECTION I

Issues relating to national federalism as a doctrine have proved to be far more pervasive and encompassing than it was possible to anticipate in 1952. In some respects, of course, later cases only confirmed those decisions already on the books. The foremost example of this confirmation has been the enlargement of congressional power under the commerce clause. The expansive reading of that clause's authorization to Congress to reach many local incidents of business and production was already apparent by 1952. Despite the abundance of new legislation under this power during the 1960s to 1980s, the doctrine itself was scarcely enlarged beyond the limits of that earlier period. Under the commerce clause, Congress can assert legislative jurisdiction on the basis of movement over a state boundary, whether antecedent or subsequent to the point of regulation; can regulate other elements touching upon those transactions, such as in-

struments of transportation; or can legislate solely upon the premise that certain transactions by their nature alone or as part of a class sufficiently *affect* interstate commerce as to warrant national regulation. Civil rights laws touching public accommodations and housing, environmental laws affecting land use regulation, criminal laws, and employment regulations touching health and safety are only the leading examples of enhanced federal activity under this authority.

Over the last two decades, however, the Court has established limits on the seemingly irrevocable expansion of the commerce power. While the Court has declined to overrule even its most expansive rulings regarding "affects" on commerce, it has limited the exercise of this authority to the regulation of activities which were both economic in nature and which had a nontrivial or "substantial" affect on commerce (although regulation of non-economic activity would still be allowed if they were an essential part of a larger economic regulatory scheme). The Court also seems far less likely to defer to Congressional findings of the existence of an economic effect. The relevant cases arose in an area of traditional state concern—the regulation of criminal activity—and the new doctrine resulted in the invalidation of recently-passed federal laws, including a ban on gun possession in schools and the provision of civil remedies to compensate gender-motivated violence. The Court has most recently found chronological limits to commercial regulation, holding that the prospect of a future activity—seeking health care—could not justify requiring the present purchase of health insurance by individuals.

The exercise of authority over commerce by the states, on the other hand, has over the last sixty years been greatly restricted by federal statutes and a broad doctrine of federal preemption, increasingly resulting in the setting of national standards. Only under Chief Justice Burger and Chief Justice Rehnquist was the Court not so readily prepared to favor preemption, especially in the area of labor-management relations. The Court did briefly inhibit federal regulation with respect to the States' own employees under the Tenth Amendment, but this decision failed to secure a stable place in the doctrine of federalism, being overruled in less than a decade. Also noteworthy has been a rather strict application of the negative aspect of the commerce clause to restrain state actions that either discriminate against or overly inhibit interstate commerce.

Much of the same trend towards national standards has resulted from application of the Bill of Rights to the States through the due process clause of the Fourteenth Amendment, a matter dealt with in greater detail below. The Court has again and again held that when a provision of the Bill of Rights is applied, it means the same whether a State or the Federal Government is the challenged party (although a small but consistent minority has argued otherwise). Some flexibility, however, has been afforded the States by the judicial loosening of the standards of some of these provisions, as in the characteristics of the jury trial requirement. Adoption of the exclusionary rule in Fourth Amendment and other cases also looked to a national standard, but the more recent disparagement of the rule by majorities of the Court has relaxed its application to both States and Nation.

While the Tenth Amendment would appear to represent one of the most clear statements of a federalist principle in the Constitution, it has historically had a relatively insignificant independent role in limiting federal powers. Although the Court briefly interpreted the Tenth Amendment in the 1970s substantively to protect certain "core" state functions from generally applicable laws, this distinction soon proved unworkable, and was overruled a decade late. More recently, the Court reserved the question as to whether a law regulating only state activities would be constitutionally suspect, although a workable test for this distinction has not yet been articulated. However, limits on the process by which the Federal Government regulates the states, developed over the most recent decade, have proved more resilient. This becomes important when the Congress is unsatisfied with the most common methods of influencing state regulations—grant conditions or conditional imposition of federal regulations (states being given the opportunity to avoid such regulation by effectuating their own regulatory schemes). Only in those cases where the Congress attempts to directly "commandeer" state legislatures or executive branch officials, *i.e.* ordering states to legislate or execute federal laws, has the Tenth Amendment served as an effective bar.

The concept of state sovereign immunity from citizen suits has also been infused with new potency over the last decade, while exposing deep theoretical differences among the Justices. To a minority of the Justices, state sovereign immunity is limited to the textual restriction articulated in the Eleventh Amendment, which prevents citizens of one state from bringing a federal suit against another state. To a majority of the Justices, however, the Eleventh Amendment was merely a technical correction made by Congress after an erroneous approval by the Court of a citizen-state diversity suit in *Chisholm v. Georgia*. These justices prefer the reasoning of the post-Eleventh Amendment case of *Hans v. Louisiana*, which, using non-textual precepts of federalism, dismissed a constitutionally based suit against a state by its own citizens. The true significance of this latter case was not realized until 1992 in *Seminole Tribe of Florida v. Florida*, where the Court made clear that suits by citizens against states brought under federal statutes also could not stand, at least if the statutes were based on Congress's Article I powers. The "fundamental postulate" of deference to the "dignity" of state sovereignty was also the basis for the Court's recent decisions to prohibit federal claims by citizens against states in either a state's own courts or federal agencies.

The Court has ruled, however, that Congress can abrogate state sovereign immunity under the Bankruptcy Clause and section 5 of the Fourteenth Amendment. Nevertheless, the Court has also shown a significant lack of deference to Congress regarding its Civil War era power, requiring a showing of "congruence and proportionality" between the alleged harm to constitutional rights and the legislative remedy. Thus, states have been found to remain immune from federal damage suits for such issues as disability discrimination or patent infringement, while the Congress has been found to be without any power to protect religious institutions from the application of generally applicable state laws. Further, where Congress attempted to create a federal private right of action for victims of gender-related violence, alleging discriminatory treatment of these cases by the state, the Court also found that Congress exceeded its mandate, as the enforcement power of the 14th Amendment can only be applied against state discrimination. In all these case, the Court found that Congress had not sufficiently identified patterns of unconstitutional conduct by the States.

The Spending Clause, long seen as one of the last bedrocks of congressional authority, has also come under the Court's increasing scrutiny. While the Court had opined on the limits of the authority of Congress to impose "voluntary" grant conditions on states, it was not until Congress required states to adopt a broad expansion of Medicaid or leave that program that the Court found such legislation to be overly "coercive." The impact of the decision, however, was diminished not only by the Court severing only the enforcement mechanism (making the states' decision to participate voluntary), but by indications (both in reasoning and *dicta*) that the standard set by the splintered Court would be easily met by most Spending Clause regulation.

The overriding view of the present Court is that where it has discretion, even absent constitutional mandate, it will apply federalism concerns to limit federal powers. For instance, the equity powers of the federal courts to interfere in ongoing state court proceedings and to review state court criminal convictions under *habeas corpus* have been curtailed, invoking a doctrine of comity and prudential restraint. But the critical fact, the scope of congressional power to regulate private activity, remains: the limits on congressional power under the commerce clause and other Article I powers, as well as under the power to enforce the Reconstruction Amendments, remain principally those of congressional self-restraint.

SECTION II

For much of the latter half of the 20th century, aggregation of national power in the presidency continued unabated. The trend was not much resisted by congressional majorities, which, indeed, continued to delegate power to the Executive Branch and to the independent agencies at least to the same degree or greater than before. The President himself assumed the existence of a substantial reservoir of inherent power to effectuate his policies, most notably in the field of foreign affairs and national defense. Only in the wake of the Watergate affair did Congress move to assert itself and attempt to claim some form of partnership with the President. This is most notable with respect to war powers and the declaration of national emergencies,

but is also true for domestic presidential concerns, as in the controversy over the power of the President to impound appropriated funds.

Perhaps coincidentally, the Supreme Court during the same period effected a strong judicial interest in the adjudication of separation-of-powers controversies. Previously, despite its use of separation-of-power language, the Court did little to involve itself in actual controversies, save perhaps the *Myers* and *Humphrey* litigations over the President's power to remove executive branch officials. But that restraint evaporated in 1976. Since then there have been several Court decisions in this area, although in *Buckley v. Valeo* and subsequent cases the Court appeared to cast the judicial perspective favorably upon presidential prerogative. In other cases statutory construction was utilized to preserve the President's discretion. Only very recently has the Court evolved an arguably consistent standard in this area, a two-pronged standard of aggrandizement and impairment, but the results still are cast in terms of executive preeminence.

The larger conflict has been political, and the Court resisted many efforts to involve it in litigation over the use of troops in Vietnam. In the context of treaty termination, the Court came close to declaring the resurgence of the political question doctrine to all such executive-congressional disputes. While a significant congressional interest in achieving a new and different balance between the political branches appeared to have survived cessation of the Vietnam conflict, such efforts largely diminished after the terrorist attacks of September 11, 2001. While Congressional assertion of such interest may well involve the judiciary to a greater extent in the future, the congressional branch is not without effective weapons of its own in this regard.

SECTION III

The Court's practice of overturning economic legislation under principles of substantive due process in order to protect "property" was already in sharp decline when Professor Corwin wrote his introduction in the 1950s. In a few isolated cases, however, especially regarding the obligation of contracts clause and perhaps the expansion of the regulatory takings doctrine, the Court demonstrated that some life is left in the old doctrines. On the other hand, the word "liberty" in the due process clauses of the Fifth and Fourteenth Amendment has been seized upon by the Court to harness substantive due process to the protection of certain personal and familial privacy rights, most controversially in the abortion cases.

Although the decision in *Roe v. Wade* seemed to foreshadow broad constitutional protections for personal activities, this did not occur immediately, as much due to conceptual difficulties as to ideological resistance. Early iterations of a right to "privacy" or "to be let alone" seemed to involve both the notion that certain information should be "private" and the idea that certain personal "activities" should only be lightly regulated. Then, for a time, the privacy cases appeared to be limited to certain areas of personal concern: marriage, procreation, contraception, family relationships, medical decision making and child rearing. Most recently, however, the Court has brought the outer limits of the doctrine into question again by overturning a sodomy law directed at homosexuals without attempting to show that such behavior was in fact historically condoned. This raises the question as to what limiting principles remain available in evaluating future arguments based on personal autonomy.

Whereas much of the Bill of Rights is directed toward prescribing the process of how governments may permissibly deprive one of life, liberty, or property—for example by judgment of a jury of one's peers or with evidence seized through reasonable searches—the First Amendment is by its terms both substantive and absolute. While the application of the First Amendment has never been presumed to be so absolute, the effect has often been indistinguishable. Thus, the trend over the years has been to withdraw more and more speech and "speech-plus" from the regulatory and prohibitive hand of government and to free not only speech directed to political ends but speech that is totally unrelated to any political purpose.

The constitutionalization of the law of defamation, narrowing the possibility of recovery for damage caused by libelous and slanderous criticism of public officials, political candidates, and public figures, epitomizes this trend. In addition, the government's right to proscribe the advocacy of violence or unlawful activity has become more restricted. Obscenity abstractly remains

outside the protective confines of the First Amendment, but the Court's changing definitional approach to what may be constitutionally denominated obscenity has closely confined most governmental action taken against the verbal and pictorial representation of matters dealing with sex. Commercial speech, long the outcast of the First Amendment, now enjoys a protected if subordinate place in free speech jurisprudence. Freedom to picket, to broadcast leaflets, and to engage in physical activity representative of one's political, social, economic, or other views, enjoys wide though not unlimited protection. False statements, long derided as being of little First Amendment value, were brought within the ambit of free speech, although the standard of protection afforded to such a law—here, lying about one's military record—remains unsettled.

While First Amendment doctrine remains sensitive to the make-up of the Court, the trend for many years has been a substantial though uneven expansion. In particular, the association of the right to spend for political purposes with the right to associate together for political activity has meant that much governmental regulation of campaign finance and of limitations upon the political activities of citizens and public employees had become suspect if not impermissible. For example, during the last decade, confronted with renewed attempts by Congress to level the playing field between differing voices with disparate economic resources, the Court first accepted, and then rejected these new regulations. In the process, corporations, long barred from direct political advocacy, were given even greater access to the political arena.

SECTION IV

Unremarked by scholars of some sixty years ago was the place of the equal protection clause in constitutional jurisprudence—simply because at that time Holmes' pithy characterization of it as a "last resort" argument was generally true. Subsequently, however, especially during the Warren era, equal protection litigation occupied a position of almost predominant character in each Term's output. The rational basis standard of review of different treatments of individuals, businesses, or subjects remained of little concern to the Justices. Rather, the clause blossomed after *Brown v. Board of Education*, as the Court confronted state and local laws and ordinances drawn on the basis of race. This aspect of the doctrinal use of the clause is still very evident on the Court's docket, though in ever new and interesting forms.

Of worthy attention has been the application of equal protection, now in a three-tier or multi-tier set of standards of review, to legislation and other governmental action classifying on the basis of sex, illegitimacy, and alienage. Of equal importance was the elaboration of the concept of "fundamental" rights, so that when the government restricts one of these rights, it must show not merely a reasonable basis for its actions but a justification based upon compelling necessity. Wealth distinctions in the criminal process, for instance, were viewed with hostility and generally invalidated. The right to vote, nowhere expressly guaranteed in the Constitution (but protected against abridgment on certain grounds in the Fifteenth, Nineteenth, and Twenty-sixth Amendments) nonetheless was found to require the invalidation of all but the most simple voter qualifications; most barriers to ballot access by individuals and parties; and the practice of apportionment of state legislatures on any basis other than population. In the controversial decision of *Bush v. Gore*, the Court relied on the right to vote in effectively ending the disputed 2000 presidential election, noting that the Florida Supreme Court had allowed the use of non-unified standards to evaluate challenged ballots. Although the Court's decision was of real political import, it was so limited by its own terms that it carries no doctrinal significance.

In other respects, the reconstituted Court has made some tentative rearrangements of equal protection doctrinal developments. The suspicion-of-wealth classification was largely though not entirely limited to the criminal process. Governmental discretion in the political process was enlarged a small degree. But the record generally is one of consolidation and maintenance of the doctrines, a refusal to go forward much but also a disinclination to retreat much. Only recently has the Court, in decisional law largely cast in remedial terms, begun to dismantle some of the structure of equal protection constraints on institutions, such as schools, prisons, state hospitals, and the like. Now, we see the beginnings of a sea change in the Court's perspective on legislative and executive remedial action, affecting affirmative action and race conscious steps in the electoral process, with the equal protection clause being used to cabin political discretion.

SECTION V

Criminal law and criminal procedure during the 1960s and 1970s has been doctrinally unstable. The story of the 1960s was largely one of the imposition of constitutional constraint upon federal and state criminal justice systems. Application of the Bill of Rights to the States was but one aspect of this story, as the Court also constructed new teeth for these guarantees. For example, the privilege against self-incrimination was given new and effective meaning by requiring that it be observed at the police interrogation stage and furthermore that criminal suspects be informed of their rights under it. The right was also expanded, as was the Sixth Amendment guarantee of counsel, by requiring the furnishing of counsel or at least the opportunity to consult counsel at "critical" stages of the criminal process—interrogation, preliminary hearing, and the like—rather than only at and proximate to trial. An expanded exclusionary rule was applied to keep material obtained in violation of the suspect's search and seizure, self-incrimination, and other rights out of evidence.

In sentencing, substantive as well as procedural guarantees have come in and out of favor. The law of capital punishment, for instance, has followed a course of meandering development, with the Court almost doing away with it and then approving its revival by the States. More recently, awakened legislative interest in the sentencing process, such as providing enhanced sentences for "hate crimes," has faltered on holdings that increasing the maximum sentence for a crime can only be based on facts submitted to a jury, not a judge, and that such facts must be proved beyond a reasonable doubt.

During the last two decades, however, the Court has also redrawn some of these lines. The self-incrimination and right-to-counsel doctrines have been eroded in part (although in no respect has the Court returned to the constitutional jurisprudence prevailing before the 1960s). The exclusionary rule has been cabined and redefined in several limiting ways. Search and seizure doctrine has been revised to enlarge police powers, and the exception for "special needs" has allowed such practices as suspicionless, random drug-testing in the workplace and at schools. But, a reformation of the requirements for confronting witnesses at trial has, in some cases, increased the complexity and effectiveness of prosecutions. Further, a realist view of modern criminal process led to a willingness to consider the adequacy of defense counsel beyond representation at trial.

An expansion of the use of *habeas corpus* powers of the federal courts undergirded the 1960s procedural and substantive development, thus sweeping away many jurisdictional restrictions previously imposed upon the exercise of review of state criminal convictions. Concomitantly with the narrowing of the precedents of the 1950s and 1960s Court, however, came a retraction of federal *habeas* powers, both by the Court and through federal legislation.

SECTION VI

The past decade saw the Court's most extensive examination of gun rights under the Second Amendment, with five Justices holding that, at a minimum, the amendment constitutionally enshrines an individual's right to possess an operational handgun in one's home for self protection. This finding mostly was regarded as unremarkable: it largely comported with the expectations and realities of gun ownership in the U.S. and was not expected to lead to wholesale loosening of government regulation, or even to weigh heavily in political debate. Most initial scholarly interest focused more on the Court's interpretational methodology.

"Originalism"—the notion that the meaning of constitutional text is fixed at the time it is proposed and ratified—found favor as an interpretational method in the nineteenth century, fell out of favor beginning in the Progressive era, but regained some currency in the 1980s. The paucity of judicial precedent on constitutionally protected gun rights made "originalism" appear a particularly apt approach as the Court considered the Second Amendment during its 2007–2008 term. The result was a thorough airing of the merits and variations in originalist analysis. Is the "plain meaning" of the words of the original text as it would have been understood at the time it was drafted paramount, or should the intent and expectations of the drafters prevail? This distinction can lead to different opinions on whether the Second Amendment protects individual or collective rights. Is "originalism" more "objective" and "faithful" than "living Con-

stitution" analysis? Some commentators asserted that "originalism" is both unduly rigid in limiting analysis to contemporaneous sources and malleable in presenting the interpreter with a range of often contradictory historical materials. In any event, a constitutional case in the twenty-first century without a line of probative judicial precedent to guide decision-making is rare, and contemporary constitutional analysis is more typically informed by a combination of earlier Court decisions, traditional practices, a desire to sustain foundational principles in an evolving society, and pragmatic considerations.

SECTION VII

The last six decades were among the most significant in the Court's history. They saw some of the most sustained efforts to change the Court or its decisions or both with respect to a substantial number of issues. On only a few past occasions was the Court so centrally a subject of political debate and controversy in national life or an object of contention in presidential elections. One can doubt that the public any longer perceives the Court as an institution above political dispute, any longer believes that the answers to difficult issues in litigation before the Justices may be found solely in the text of the document entrusted to their keeping. While the Court has historically enjoyed the respect of the bar and the public, a sense has arisen that the institution is not immune from the partisan politics affecting other branches. Its decisions, however, are generally accorded uncoerced acquiescence, and its pronouncements are accepted as authoritative, binding constructions of the constitutional instrument.

Indeed, it can be argued that the disappearance of the myth of the absence of judicial choice strengthens the Court as an institution to the degree that it explains and justifies the exercise of discretion in those areas of controversy in which the Constitution does not speak clearly or in which different sections lead to different answers. The public attitude thus established is then better enabled to understand division within the Court and within the legal profession generally, and all sides are therefore seen to be entitled to the respect accorded the search for answers. Although the Court's workload has declined of late, a significant proportion of its cases are still "hard" cases; while hard cases need not make bad law they do in fact lead to division among the Justices and public controversy. Increased sophistication, then, about the Court's role and its methods can only redound to its benefit.

HISTORICAL NOTE ON FORMATION OF THE CONSTITUTION

In June 1774, the Virginia and Massachusetts assemblies independently proposed an intercolonial meeting of delegates from the several colonies to restore union and harmony between Great Britain and her American Colonies. Pursuant to these calls there met in Philadelphia in September of that year the first Continental Congress, composed of delegates from 12 colonies. On October 14, 1774, the assembly adopted what has become to be known as the Declaration and Resolves of the First Continental Congress. In that instrument, addressed to his Majesty and to the people of Great Britain, there was embodied a statement of rights and principles, many of which were later to be incorporated in the Declaration of Independence and the Federal Constitution.[1]

This Congress adjourned in October with a recommendation that another Congress be held in Philadelphia the following May. Before its successor met, the battle of Lexington had been fought. In Massachusetts the colonists had organized their own government in defiance of the royal governor and the Crown. Hence, by general necessity and by common consent, the second Continental Congress assumed control of the "Twelve United Colonies", soon to become the "Thirteen United Colonies" by the cooperation of Georgia. It became a de facto government; it called upon the other colonies to assist in the defense of Massachusetts; it issued bills of credit; it took steps to organize a military force, and appointed George Washington commander in chief of the Army.

While the declaration of the causes and necessities of taking up arms of July 6, 1775,[2] expressed a "wish" to see the union between Great Britain and the colonies "restored", sentiment for independence was growing. Finally, on May 15, 1776, Virginia instructed her delegates to the Continental Congress to have that body "declare the united colonies free and indepen-

[1] The colonists, for example, claimed the right "to life, liberty, and property", "the rights, liberties, and immunities of free and natural-born subjects within the realm of England"; the right to participate in legislative councils; "the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of [the common law of England]"; "the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws"; "a right peaceably to assemble, consider of their grievances, and petition the king." They further declared that the keeping of a standing army in the colonies in time of peace without the consent of the colony in which the army was kept was "against law"; that it was "indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other"; that certain acts of Parliament in contravention of the foregoing principles were "infringement and violations of the rights of the colonists." Text in C. Tansill (ed.), Documents Illustrative of the Formation of the Union of the American States, H. Doc. No. 358, 69th Congress, 1st sess. (1927), 1. *See also* H. Commager (ed.), Documents of American History (New York; 8th ed. 1964), 82.

[2] Text in Tansill, op. cit., 10.

dent States."[3] Accordingly on June 7 a resolution was introduced in Congress declaring the union with Great Britain dissolved, proposing the formation of foreign alliances, and suggesting the drafting of a plan of confederation to be submitted to the respective colonies.[4] Some delegates argued for confederation first and declaration afterwards. This counsel did not prevail. Independence was declared on July 4, 1776; the preparation of a plan of confederation was postponed. It was not until November 17, 1777, that the Congress was able to agree on a form of government which stood some chance of being approved by the separate States. The Articles of Confederation were then submitted to the several States, and on July 9, 1778, were finally approved by a sufficient number to become operative.

Weaknesses inherent in the Articles of Confederation became apparent before the Revolution out of which that instrument was born had been concluded. Even before the thirteenth State (Maryland) conditionally joined the "firm league of friendship" on March 1, 1781, the need for a revenue amendment was widely conceded. Congress under the Articles lacked authority to levy taxes. She could only request the States to contribute their fair share to the common treasury, but the requested amounts were not forthcoming. To remedy this defect, Congress applied to the States for power to lay duties and secure the public debts. Twelve States agreed to such an amendment, but Rhode Island refused her consent, thereby defeating the proposal.

Thus was emphasized a second weakness in the Articles of Confederation, namely, the liberum veto which each State possessed whenever amendments to that instrument were proposed. Not only did all amendments have to be ratified by each of the 13 States, but all important legislation needed the approval of 9 States. With several delegations often absent, one or two States were able to defeat legislative proposals of major importance.

Other imperfections in the Articles of Confederation also proved embarrassing. Congress could, for example, negotiate treaties with foreign powers, but all treaties had to be ratified by the several States. Even when a treaty was approved, Congress lacked authority to secure obedience to its stipulations. Congress could not act directly upon the States or upon individuals. Under such circumstances foreign nations doubted the value of a treaty with the new Republic.

Furthermore, Congress had no authority to regulate foreign or interstate commerce. Legislation in this field, subject to unimportant exceptions, was left to the individual States. Disputes between States with common interests in the navigation of certain rivers and bays were inevitable. Discriminatory regulations were followed by reprisals.

Virginia, recognizing the need for an agreement with Maryland respecting the navigation and jurisdiction of the Potomac River, appointed in June 1784, four commissioners to "frame such liberal and equitable regulations

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[3] Id. at 19.
[4] Id. at 21.

concerning the said river as may be mutually advantageous to the two States." Maryland in January 1785 responded to the Virginia resolution by appointing a like number of commissioners [5] "for the purpose of settling the navigation and jurisdiction over that part of the bay of Chesapeake which lies within the limits of Virginia, and over the rivers Potomac and Pocomoke" with full power on behalf of Maryland "to adjudge and settle the jurisdiction to be exercised by the said State, respectively, over the waters and navigations of the same."

At the invitation of Washington the commissioners met at Mount Vernon, in March 1785, and drafted a compact which, in many of its details relative to the navigation and jurisdiction of the Potomac, is still in force.[6] What is more important, the commissioners submitted to their respective States a report in favor of a convention of all the States "to take into consideration the trade and commerce" of the Confederation. Virginia, in January 1786, advocated such a convention, authorizing its commissioners to meet with those of other States, at a time and place to be agreed on, "to take into consideration the trade of the United States; to examine the relative situations and trade of the said State; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several State, such an act relative to this great object, as when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same." [7]

This proposal for a general trade convention seemingly met with general approval; nine States appointed commissioners. Under the leadership of the Virginia delegation, which included Randolph and Madison, Annapolis was accepted as the place and the first Monday in September 1786 as the time for the convention. The attendance at Annapolis proved disappointing. Only five States—Virginia, Pennsylvania, Delaware, New Jersey, and New York—were represented; delegates from Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. Because of the small representation, the Annapolis convention did not deem "it advisable to proceed on the business of their mission." After an exchange of views, the Annapolis delegates unanimously submitted to their respective States a report in which they suggested that a convention of representatives from all the States meet at Philadelphia on the second Monday in May 1787 to examine the defects in the existing system of government and formulate "a plan for supplying such defects as may be discovered." [8]

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[5] George Mason, Edmund Randolph, James Madison, and Alexander Henderson were appointed commissioners for Virginia; Thomas Johnson, Thomas Stone, Samuel Chase, and Daniel of St. Thomas Jenifer for Maryland.

[6] Text of the resolution and details of the compact may be found in Wheaton v. Wise, 153 U.S. 155 (1894).

[7] Transill, op. cit., 38.

[8] Id. at 39.

The Virginia legislature acted promptly upon this recommendation and appointed a delegation to go to Philadelphia. Within a few weeks New Jersey, Pennsylvania, North Carolina, Delaware, and Georgia also made appointments. New York and several other States hesitated on the ground that, without the consent of the Continental Congress, the work of the convention would be extra-legal; that Congress alone could propose amendments to the Articles of Confederation. Washington was quite unwilling to attend an irregular convention. Congressional approval of the proposed convention became, therefore, highly important. After some hesitancy Congress approved the suggestion for a convention at Philadelphia "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the States render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union."

Thereupon, the remaining States, Rhode Island alone excepted, appointed in due course delegates to the Convention, and Washington accepted membership on the Virginia delegation.

Although scheduled to convene on May 14, 1787, it was not until May 25 that enough delegates were present to proceed with the organization of the Convention. Washington was elected as presiding officer. It was agreed that the sessions were to be strictly secret.

On May 29 Randolph, on behalf of the Virginia delegation, submitted to the convention 15 propositions as a plan of government. Despite the fact that the delegates were limited by their instructions to a revision of the Articles, Virginia had really recommended a new instrument of government. For example, provision was made in the Virginia plan for the separation of the three branches of government; under the Articles executive, legislative, and judicial powers were vested in the Congress. Furthermore the legislature was to consist of two houses rather than one.

On May 30 the Convention went into a committee of the whole to consider the 15 propositions of the Virginia plan seriatim. These discussion continued until June 13, when the Virginia resolutions in amended form were reported out of committee. They provided for proportional representation in both houses. The small States were dissatisfied. Therefore, on June 14 when the Convention was ready to consider the report on the Virginia plan, Paterson of New Jersey requested an adjournment to allow certain delegations more time to prepare a substitute plan. The request was granted, and on the next day Paterson submitted nine resolutions embodying important changes in the Articles of Confederation, but strictly amendatory in nature. Vigorous debate followed. On June 19 the States rejected the New Jersey plan and voted to proceed with a discussion of the Virginia plan. The small States became more and more discontented; there were threats of withdrawal. On July 2,

the Convention was deadlocked over giving each State an equal vote in the upper house—five States in the affirmative, five in the negative, one divided.[9]

The problem was referred to a committee of 11, there being 1 delegate from each State, to effect a compromise. On July 5 the committee submitted its report, which became the basis for the "great compromise" of the Convention. It was recommended that in the upper house each State should have an equal vote, that in the lower branch each State should have one representative for every 40,000 inhabitants, counting three-fifths of the slaves, that money bills should originate in the lower house (not subject to amendment by the upper chamber). When on July 12 the motion of Gouverneur Morris of Pennsylvania that direct taxation should also be in proportion to representation was adopted, a crisis had been successfully surmounted. A compromise spirit began to prevail. The small States were not willing to support a strong national government.

Debates on the Virginia resolutions continued. The 15 original resolutions had been expanded into 23. Since these resolutions were largely declarations of principles, on July 24 a committee of five[10] was elected to draft a detailed constitution embodying the fundamental principles which had thus far been approved. The Convention adjourned from July 26 to August 6 to await the report of its committee of detail. This committee, in preparing its draft of a Constitution, turned for assistance to the State constitutions, to the Articles of Confederation, to the various plans which had been submitted to the Convention and other available material. On the whole the report of the committee conformed to the resolutions adopted by the Convention, though on many clauses the members of the committee left the imprint of their individual and collective judgments. In a few instances the committee avowedly exercised considerable discretion.

From August 6 to September 10 the report of the committee of detail was discussed, section by section, clause by clause. Details were attended to, further compromises were effected. Toward the close of these discussions, on September 8, another committee of five[11] was appointed "to revise the style of and arrange the articles which had been agreed to by the house."

On Wednesday, September 12, the report of the committee of style was ordered printed for the convenience of the delegates. The Convention for 3 days compared this report with the proceedings of the Convention. The Constitution was ordered engrossed on Saturday, September 15.

The Convention met on Monday, September 17, for its final session. Several of the delegates were disappointed in the result. A few deemed the new

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[9] The New Hampshire delegation did not arrive until July 23, 1787.

[10] Rutledge of South Carolina, Randolph of Virginia, Gorham of Massachusetts, Ellsworth of Connecticut, and Wilson of Pennsylvania.

[11] William Samuel Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King of Massachusetts.

Constitution a mere makeshift, a series of unfortunate compromises. The advocates of the Constitution, realizing the impending difficulty of obtaining the consent of the States to the new instrument of Government, were anxious to obtain the unanimous support of the delegations from each State. It was feared that many of the delegates would refuse to give their individual assent to the Constitution. Therefore, in order that the action of the Convention would appear to be unanimous, Gouverneur Morris devised the formula "Done in Convention, by the unanimous consent of the States present the 17th of September . . . In witness whereof we have hereunto subscribed our names." Thirty-nine of the forty-two delegates present thereupon "subscribed" to the document.[12]

The convention had been called to revise the Articles of Confederation. Instead, it reported to the Continental Congress a new Constitution. Furthermore, while the Articles specified that no amendments should be effective until approved by the legislatures of all the States, the Philadelphia Convention suggested that the new Constitution should supplant the Articles of Confederation when ratified by conventions in nine States. For these reasons, it was feared that the new Constitution might arouse opposition in Congress.

Three members of the Convention—Madison, Gorham, and King—were also Members of Congress. They proceeded at once to New York, where Congress was in session, to placate the expected opposition. Aware of their vanishing authority, Congress on September 28, after some debate, decided to submit the Constitution to the States for action. It made no recommendation for or against adoption.

Two parties soon developed, one in opposition and one in support of the Constitution, and the Constitution was debated, criticized, and expounded clause by clause. Hamilton, Madison, and Jay wrote a series of commentaries, now known as the Federalist Papers, in support of the new instrument of government.[13] The closeness and bitterness of the struggle over ratification and the conferring of additional powers on the central government can scarcely be exaggerated. In some States ratification was effected only after a bitter struggle in the State convention itself.

Delaware, on December 7, 1787, became the first State to ratify the new Constitution, the vote being unanimous. Pennsylvania ratified on December 12, 1787, by a vote of 46 to 23, a vote scarcely indicative of the struggle which had taken place in that State. New Jersey ratified on December 19, 1787, and Georgia on January 2, 1788, the vote in both States being unanimous. Connecticut ratified on January 9, 1788; yeas 128, nays 40. On February 6, 1788, Massachusetts, by a narrow margin of 19 votes in a convention

[12] At least 65 persons had received appointments as delegates to the Convention; 55 actually attended at different times during the course of the proceedings; 39 signed the document. It has been estimated that generally fewer than 30 delegates attended the daily sessions.

[13] These commentaries on the Constitution, written during the struggle for ratification, have been frequently cited by the Supreme Court as an authoritative contemporary interpretation of the meaning of its provisions.

with a membership of 355, endorsed the new Constitution, but recommended that a bill of rights be added to protect the States from federal encroachment on individual liberties. Maryland ratified on April 28, 1788; yeas 63, nays 11. South Carolina ratified on May 23, 1788; yeas 149, nays 73. On June 21, 1788, by a vote of 57 to 46, New Hampshire became the ninth State to ratify, but like Massachusetts she suggested a bill of rights.

By the terms of the Constitution nine States were sufficient for its establishment among the States so ratifying. The advocates of the new Constitution realized, however, that the new Government could not succeed without the addition of New York and Virginia, neither of which had ratified. Madison, Marshall, and Randolph led the struggle for ratification in Virginia. On June 25, 1788, by a narrow margin of 10 votes in a convention of 168 members, that State ratified over the objection of such delegates as George Mason and Patrick Henry. In New York an attempt to attach conditions to ratification almost succeeded. But on July 26, 1788, New York ratified, with a recommendation that a bill of rights be appended. The vote was close—yeas 30, nays 27.

Eleven States having thus ratified the Constitution,[14] the Continental Congress—which still functioned at irregular intervals—passed a resolution on September 13, 1788, to put the new Constitution into operation. The first Wednesday of January 1789 was fixed as the day for choosing presidential electors, the first Wednesday of February for the meeting of electors, and the first Wednesday of March (i.e. March 4, 1789) for the opening session of the new Congress. Owing to various delays, Congress was late in assembling, and it was not until April 30, 1789, that George Washington was inaugurated as the first President of the United States.

[14] North Carolina added her ratification on November 21, 1789; yeas 184, nays 77. Rhode Island did not ratify until May 29, 1790; yeas 34, nays 32.

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THE CONSTITUTION OF THE UNITED STATES OF AMERICA

LITERAL PRINT

CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term

of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the

United States and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President *pro tempore*, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the

Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take

Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be im-

posed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or *ex post facto* Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in the Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article II.

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Sen-

ate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and

Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the su-

preme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for

their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;— between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article IV.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names,

G^{o}. WASHINGTON—Presid^{t}.
and deputy from Virginia

The Word, "the," being interlined between the seventh and eighth Lines of the first Page, The Word "Thirty" being partly written on an Erazure in the fifteenth Line of the first Page, The Words "is tried" being interlined between the thirty second and thirty third Lines of the first Page and the Word "the" being interlined between the forty third and forty fourth Lines of the second Page.

Attest WILLIAM JACKSON
Secretary

New Hampshire	JOHN LANGDON NICHOLAS GILMAN
Massachusetts	NATHANIEL GORHAM RUFUS KING

Connecticut	Wm Saml Johnson Roger Sherman
New York	Alexander Hamilton
New Jersey	Wil: Livingston David Brearley. Wm Patterson. Jona: Dayton
Pennsylvania	B Franklin Thomas Mifflin Robt Morris Geo. Clymer Thos FitzSimons Jared Ingersol James Wilson Gouv Morris
Delaware	Geo: Read Gunning Bedford Jun John Dickinson Richard Bassett Jaco: Broom
Maryland	James McHenry Dan of St Thos Jenifer Danl Carroll
Virginia	John Blair— James Madison Jr.
North Carolina	Wm Blount Richd Dobbs Spaight Hu Williamson
South Carolina	J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler
Georgia	William Few Abr Baldwin

In Convention Monday, September 17th 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, Mr Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place

assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

Go: Washington—Presidt.

W. Jackson Secretary.

AMENDMENTS

TO THE

CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION [1]

AMENDMENT [I.] [2]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peace-

[1] In *Dillon v. Gloss*, 256 U.S. 368 (1921), the Supreme Court stated that it would take judicial notice of the date on which a State ratified a proposed constitutional amendment. Accordingly the Court consulted the State journals to determine the dates on which each house of the legislature of certain States ratified the Eighteenth Amendment. It, therefore, follows that the date on which the governor approved the ratification, or the date on which the secretary of state of a given State certified the ratification, or the date on which the Secretary of State of the United States received a copy of said certificate, or the date on which he proclaimed that the amendment had been ratified are not controlling. Hence, the ratification date given in the following notes is the date on which the legislature of a given State approved the particular amendment (signature by the speaker or presiding officers of both houses being considered a part of the ratification of the "legislature"). When that date is not available, the date given is that on which it was approved by the governor or certified by the secretary of state of the particular State. In each case such fact has been noted. Except as otherwise indicated information as to ratification is based on data supplied by the Department of State.

[2] Brackets enclosing an amendment number indicate that the number was not specifically assigned in the resolution proposing the amendment. It will be seen, accordingly, that only the Thirteenth, Fourteenth, Fifteenth, and Sixteenth Amendments were thus technically ratified by number. The first ten amendments along with two others that were not ratified were proposed by Congress on September 25, 1789, when they passed the Senate, having previously passed the House on September 24 (1 ANNALS OF CONGRESS 88, 913). They appear officially in 1 Stat. 97. Ratification was completed on December 15, 1791, when the eleventh State (Virginia) approved these amendments, there being then 14 States in the Union.

The several state legislatures ratified the first ten amendments to the Constitution on the following dates: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; New York, February 27, 1790; Pennsylvania, March 10, 1790; Rhode Island, June 7, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791. The two amendments that then failed of ratification prescribed the ratio of representation to population in the House, and specified that no law varying the compensation of members of Congress should be effective until after an intervening election of Representatives. The first was ratified by ten States (one short of the requisite number) and the second, by six States; subsequently, this second proposal was taken up by the States in the period 1980–1992 and was proclaimed as ratified as of May 7, 1992. Connecticut, Georgia, and Massachusetts ratified the first ten amendments in 1939.

ably to assemble, and to petition the government for a redress of grievances.

AMENDMENT [II.]

A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT [III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT [VII.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT [VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT [IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT [X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT [XI.] [3]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one on the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT [XII.] [4]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as Presi-

[3] The Eleventh Amendment was proposed by Congress on March 4, 1794, when it passed the House, 4 ANNALS OF CONGRESS 477, 478, having previously passed the Senate on January 14, Id., 30, 31. It appears officially in 1 Stat. 402. Ratification was completed on February 7, 1795, when the twelfth State (North Carolina) approved the amendment, there being then 15 States in the Union. Official announcement of ratification was not made until January 8, 1798, when President John Adams in a message to Congress stated that the Eleventh Amendment had been adopted by three-fourths of the States and that it "may now be deemed to be a part of the Constitution." In the interim South Carolina had ratified, and Tennessee had been admitted into the Union as the sixteenth State.

The several state legislatures ratified the Eleventh Amendment on the following dates: New York, March 27, 1794; Rhode Island, March 31, 1794; Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 26, 1794; Vermont, between October 9 and November 9, 1794; Virginia, November 18, 1794; Georgia, November 29, 1794; Kentucky, December 7, 1794; Maryland, December 26, 1794; Delaware, January 23, 1795; North Carolina, February 7, 1795; South Carolina, December 4, 1797.

[4] The Twelfth Amendment was proposed by Congress on December 9, 1803, when it passed the House, 13 ANNALS OF CONGRESS 775, 776, having previously passed the Senate on December 2. Id., 209. It was not signed by the presiding officers of the House and Senate until December 12. It appears officially in 2 Stat. 306. Ratification was probably completed on June 15, 1804, when the legislature of the thirteenth State (New Hampshire) approved the amendment, there being then 17 States in the Union. The Governor of New Hampshire, however, vetoed this act of the legislature on June 20, and the act failed to pass again by two-thirds vote then required by the state constitution. Inasmuch as Article V of the Federal Constitution specifies that amendments shall become effective "when ratified by legislatures of three-fourths of the several States or by conventions in three-fourths thereof," it has been generally believed that an approval or veto by a governor is without significance. If the ratification by New Hampshire be deemed ineffective, then the amendment became operative by Tennessee's ratification on July 27, 1804. On September 25, 1804, in a circular letter to the Governors of the several States, Secretary of State Madison declared the amendment ratified by three-fourths of the States.

The several state legislatures ratified the Twelfth Amendment on the following dates: North Carolina, December 22, 1803; Maryland, December 24, 1803; Kentucky, December 27, 1803; Ohio, between December 5 and December 30, 1803; Virginia, between December 20, 1803 and February 3, 1804; Pennsylvania, January 5, 1804; Vermont, January 30, 1804; New York, February 10, 1804; New Jersey, February 22, 1804; Rhode Island, between February 27 and March 12, 1804; South Carolina, May 15, 1804; Georgia, May 19, 1804; New Hampshire, June 15, 1804; and Tennessee, July 27, 1804. The amendment was rejected by Delaware on January 18, 1804, and by Connecticut at its session begun May 10, 1804. Massachusetts ratified this amendment in 1961.

dent, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-

thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII.[5]

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV.[6]

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

[5] The Thirteenth Amendment was proposed by Congress on January 31, 1865, when it passed the House, CONG. GLOBE (38th Cong., 2d Sess.) 531, having previously passed the Senate on April 8, 1864. Id., (38th cong., 1st Sess.), 1940. It appears officially in 13 Stat. 567 under the date of February 1, 1865. Ratification was completed on December 6, 1865, when the legislature of the twenty-seventh State (Georgia) approved the amendment, there being then 36 States in the Union. On December 18, 1865, Secretary of State Seward certified that the Thirteenth Amendment had become a part of the Constitution, 13 Stat. 774.

The several state legislatures ratified the Thirteenth Amendment on the following dates: Illinois, February 1, 1865; Rhode Island, February 2, 1865; Michigan, February 2, 1865; Maryland, February 3, 1865; New York, February 3, 1865; West Virginia, February 3, 1865; Missouri, February 6, 1865; Maine, February 7, 1865; Kansas, February 7, 1865; Massachusetts, February 7, 1865; Pennsylvania, February 8, 1865; Virginia, February 9, 1865; Ohio, February 10, 1865; Louisiana, February 15 or 16, 1865; Indiana, February 16, 1865; Nevada, February 16, 1865; Minnesota, February 23, 1865; Wisconsin, February 24, 1865; Vermont, March 9, 1865 (date on which it was "approved" by Governor); Tennessee, April 7, 1865; Arkansas, April 14, 1865; Connecticut, May 4, 1865; New Hampshire, June 30, 1865; South Carolina, November 13, 1865; Alabama, December 2, 1865 (date on which it was "approved" by Provisional Governor); North Carolina, December 4, 1865; Georgia, December 6, 1865; Oregon, December 11, 1865; California, December 15, 1865; Florida, December 28, 1865 (Florida again ratified this amendment on June 9, 1868, upon its adoption of a new constitution); Iowa, January 17, 1866; New Jersey, January 23, 1866 (after having rejected the amendment on March 16, 1865); Texas, February 17, 1870; Delaware, February 12, 1901 (after having rejected the amendment of February 8, 1865). The amendment was rejected by Kentucky on February 24, 1865, and by Mississippi on December 2, 1865.

[6] The Fourteenth Amendment was proposed by Congress on June 13, 1866, when it passed the House, CONG. GLOBE (39th Cong., 1st Sess.) 3148, 3149, having previously passed the Senate on June 8. Id., 3042. It appears officially in 14 Stat. 358 under date of June 16, 1866. Ratification was probably completed on July 9, 1868, when the legislature of the twenty-eighth State

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial

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(South Carolina or Louisiana) approved the amendment, there being then 37 States in the Union. However, Ohio and New Jersey had prior to that date "withdrawn" their earlier assent to this amendment. Accordingly, Secretary of State Seward on July 20, 1868, certified that the amendment had become a part of the Constitution if the said withdrawals were ineffective. 15 Stat. 706–707. Congress on July 21, 1868, passed a joint resolution declaring the amendment a part of the Constitution and directing the Secretary to promulgate it as such. On July 28, 1868, Secretary Seward certified without reservation that the amendment was a part of the Constitution. In the interim, two other States, Alabama on July 13 and Georgia on July 21, 1868, had added their ratifications.

The several state legislatures ratified the Fourteenth Amendment on the following dates: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 9, 1866; New Jersey, September 11, 1866 (the New Jersey Legislature on February 20, 1868 "withdrew" its consent to the ratification; the Governor vetoed that bill on March 5, 1868; and it was repassed over his veto on March 24, 1868); Oregon, September 19, 1866 (Oregon "withdrew" its consent on October 15, 1868); Vermont, October 30, 1866; New York, January 10, 1867; Ohio, January 11, 1867 (Ohio "withdrew" its consent on January 15, 1868); Illinois, January 15, 1867; West Virginia, January 16, 1867; Michigan, January 16, 1867; Kansas, January 17, 1867; Minnesota, January 17, 1867; Maine, January 19, 1867; Nevada, January 22, 1867; Indiana, January 23, 1867; Missouri, January 26, 1867 (date on which it was certified by the Missouri secretary of state); Rhode Island, February 7, 1867; Pennsylvania, February 12, 1867; Wisconsin, February 13, 1867 (actually passed February 7, but was not signed by legislative officers until February 13); Massachusetts, March 20, 1867; Nebraska, June 15, 1867; Iowa, March 9, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; North Carolina, July 2, 1868 (after having rejected the amendment on December 13, 1866); Louisiana, July 9, 1868 (after having rejected the amendment on February 6, 1867); South Carolina, July 8, 1868 (after having rejected the amendment on December 20, 1866); Alabama, July 13, 1868 (date on which it was "approved" by the Governor); Georgia, July 21, 1868 (after having rejected the amendment on November 9, 1866—Georgia ratified again on February 2, 1870); Virginia, October 8, 1869 (after having rejected the amendment on January 9, 1867); Mississippi, January 17, 1870; Texas, February 18, 1870 (after having rejected the amendment on October 27, 1866); Delaware, February 12, 1901 (after having rejected the amendment February 7, 1867). The amendment was rejected (and not subsequently ratified) by Kentucky on January 8, 1867. Maryland and California ratified this amendment in 1959.

officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.[7]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XVI.[8]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment

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[7] The Fifteenth Amendment was proposed by Congress on February 26, 1869, when it passed the Senate, CONG. GLOBE (40th Cong., 3rd Sess.) 1641, having previously passed the House on February 25. Id., 1563, 1564. It appears officially in 15 Stat. 346 under the date of February 27, 1869. Ratification was probably completed on February 3, 1870, when the legislature of the twenty-eighth State (Iowa) approved the amendment, there being then 37 States in the Union. However, New York had prior to that date "withdrawn" its earlier assent to this amendment. Even if this withdrawal were effective, Nebraska's ratification on February 17, 1870, authorized Secretary of State Fish's certification of March 30, 1870, that the Fifteenth Amendment had become a part of the Constitution. 16 Stat. 1131.

The several state legislatures ratified the Fifteenth Amendment on the following dates: Nevada, March 1, 1869; West Virginia, March 3, 1869; North Carolina, March 5, 1869; Louisiana, March 5, 1869 (date on which it was "approved" by the Governor); Illinois, March 5, 1869; Michigan, March 5, 1869; Wisconsin, March 5, 1869; Maine, March 11, 1869; Massachusetts, March 12, 1869; South Carolina, March 15, 1869; Arkansas, March 15, 1869; Pennsylvania, March 25, 1869; New York, April 14, 1869 (New York "withdrew" its consent to the ratification on January 5, 1870); Indiana, March 14, 1869; Connecticut, May 19, 1869; Florida, June 14, 1869; New Hampshire, July 1, 1869; Virginia, October 8, 1869; Vermont, October 20, 1869; Alabama, November 16, 1869; Missouri, January 7, 1870 (Missouri had ratified the first section of the 15th Amendment on March 1, 1869; it failed to include in its ratification the second section of the amendment); Minnesota, January 13, 1870; Mississippi, January 17, 1870; Rhode Island, January 18, 1870; Kansas, January 19, 1870 (Kansas had by a defectively worded resolution previously ratified this amendment on February 27, 1869); Ohio, January 27, 1870 (after having rejected the amendment on May 4, 1869); Georgia, February 2, 1870; Iowa, February 3, 1870; Nebraska, February 17, 1870; Texas, February 18, 1870; New Jersey, February 15, 1871 (after having rejected the amendment on February 7, 1870); Delaware, February 12, 1901 (date on which approved by Governor; Delaware had previously rejected the amendment on March 18, 1869). The amendment was rejected (and was not subsequently ratified) by Kentucky, Maryland, and Tennessee. California ratified this amendment in 1962 and Oregon in 1959.

[8] The Sixteenth Amendment was proposed by Congress on July 12, 1909, when it passed the House, 44 CONG. REC. (61st Cong., 1st Sess.) 4390, 4440, 4441, having previously passed the Senate on July 5. Id., 4121. It appears officially in 36 Stat. 184. Ratification was completed on February 3, 1913, when the legislature of the thirty-sixth State (Delaware, Wyoming, or New

among the several States, and without regard to any census of enumeration.

AMENDMENT [XVII.] [9]

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue

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Mexico) approved the amendment, there being then 48 States in the Union. On February 25, 1913, Secretary of State Knox certified that this amendment had become a part of the Constitution. 37 Stat. 1785.

The several state legislatures ratified the Sixteenth Amendment on the following dates: Alabama, August 10, 1909; Kentucky, February 8, 1910; South Carolina, February 19, 1910; Illinois, March 1, 1910; Mississippi, March 7, 1910; Oklahoma, March 10, 1910; Maryland, April 8, 1910; Georgia, August 3, 1910; Texas, August 16, 1910; Ohio, January 19, 1911; Idaho, January 20, 1911; Oregon, January 23, 1911; Washington, January 26, 1911; Montana, January 27, 1911; Indiana, January 30, 1911; California, January 31, 1911; Nevada, January 31, 1911; South Dakota, February 1, 1911; Nebraska, February 9, 1911; North Carolina, February 11, 1911; Colorado, February 15, 1911; North Dakota, February 17, 1911; Michigan, February 23, 1911; Iowa, February 24, 1911; Kansas, March 2, 1911; Missouri, March 16, 1911; Maine, March 31, 1911; Tennessee, April 7, 1911; Arkansas, April 22, 1911 (after having rejected the amendment at the session begun January 9, 1911); Wisconsin, May 16, 1911; New York, July 12, 1911; Arizona, April 3, 1912; Minnesota, June 11, 1912; Louisiana, June 28, 1912; West Virginia, January 31, 1913; Delaware, February 3, 1913; Wyoming, February 3, 1913; New Mexico, February 3, 1913; New Jersey, February 4, 1913; Vermont, February 19, 1913; Massachusetts, March 4, 1913; New Hampshire, March 7, 1913 (after having rejected the amendment on March 2, 1911). The amendment was rejected (and not subsequently ratified) by Connecticut, Rhode Island, and Utah.

[9] The Seventeenth Amendment was proposed by Congress on May 13, 1912, when it passed the House, 48 CONG. REC. (62d Cong., 2d Sess.) 6367, having previously passed the Senate on June 12, 1911. 47 CONG. REC. (62d Cong., 1st Sess.) 1925. It appears officially in 37 Stat. 646. Ratification was completed on April 8, 1913, when the thirty-sixth State (Connecticut) approved the amendment, there being then 48 States in the Union. On May 31, 1913, Secretary of State Bryan certified that it had become a part of the Constitution. 38 Stat. 2049.

The several state legislatures ratified the Seventeenth Amendment on the following dates: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, January 15, 1913; Kansas, January 17, 1913; Oregon, January 23, 1913; North Carolina, January 25, 1913; California, January 28, 1913; Michigan, January 28, 1913; Iowa, January 30, 1913; Montana, January 30, 1913; Idaho, January 31, 1913; West Virginia, February 4, 1913; Colorado, February 5, 1913; Nevada, February 6, 1913; Texas, February 7, 1913; Washington, February 7, 1913; Wyoming, February 8, 1913; Arkansas, February 11, 1913; Illinois, February 13, 1913; North Dakota, February 14, 1913; Wisconsin, February 18, 1913; Indiana, February 19, 1913; New Hampshire, February 19, 1913; Vermont, February 19, 1913; South Dakota, February 19, 1913; Maine, February 20, 1913; Oklahoma, February 24, 1913; Ohio, February 25, 1913; Missouri, March 7, 1913; New Mexico, March 13, 1913; Nebraska, March 14, 193; New Jersey, March 17, 1913; Tennessee, April 1, 193; Pennsylvania, April 2, 1913; Connecticut, April 8, 1913; Louisiana, June 5, 1914. The amendment was rejected by Utah on February 26, 1913.

writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT [XVIII.] [10]

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

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[10] The Eighteenth Amendment was proposed by Congress on December 18, 1917, when it passed the Senate, CONG. REC. (65th Cong. 2d Sess.) 478, having previously passed the House on December 17. Id., 470. It appears officially in 40 Stat. 1059. Ratification was completed on January 16, 1919, when the thirty-sixth State approved the amendment, there being then 48 States in the Union. On January 29, 1919, Acting Secretary of State Polk certified that this amendment had been adopted by the requisite number of States. 40 Stat. 1941. By its terms this amendment did not become effective until 1 year after ratification.

The several state legislatures ratified the Eighteenth Amendment on the following dates: Mississippi, January 8, 1918; Virginia, January 11, 1918; Kentucky, January 14, 1918; North Dakota, January 28, 1918 (date on which approved by Governor); South Carolina, January 29, 1918; Maryland, February 13, 1918; Montana, February 19, 1918; Texas, March 4, 1918; Delaware, March 18, 1918; South Dakota, March 20, 1918; Massachusetts, April 2, 1918; Arizona, May 24, 1918; Georgia, June 26, 1918; Louisiana, August 9, 1918 (date on which approved by Governor); Florida, November 27, 1918; Michigan, January 2, 1919; Ohio, January 7, 1919; Oklahoma, January 7, 1919; Idaho, January 8, 1919; Maine, January 8, 1919; West Virginia, January 9, 1919; California, January 13, 1919; Tennessee, January 13, 1919; Washington, January 13, 1919; Arkansas, January 14, 1919; Kansas, January 14, 1919; Illinois, January 14, 1919; Indiana, January 14, 1919; Alabama, January 15, 1919; Colorado, January 15, 1919; Iowa, January 15, 1919; New Hampshire, January 15, 1919; Oregon, January 15, 1919; Nebraska, January 16, 1919; North Carolina, January 16, 1919; Utah, January 16, 1919; Missouri, January 16, 1919; Wyoming, January 16, 1919; Minnesota, January 17, 1919; Wisconsin, January 17, 1919; New Mexico, January 20, 1919; Nevada, January 21, 1919; Pennsylvania, February 25, 1919; New Jersey, March 9, 1922; New York, January 29, 1919; Vermont, January 29, 1919.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT [XIX.] [11]

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT [XX.] [12]

SECTION 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of

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[11] The Nineteenth Amendment was proposed by Congress on June 4, 1919, when it passed the Senate, CONG. REC. (66th Cong., 1st Sess.) 635, having previously passed the house on May 21. Id., 94. It appears officially in 41 Stat. 362. Ratification was completed on August 18, 1920, when the thirty-sixth State (Tennessee) approved the amendment, there being then 48 States in the Union. On August 26, 1920, Secretary of Colby certified that it had become a part of the Constitution. 41 Stat. 1823.

The several state legislatures ratified the Nineteenth Amendment on the following dates: Illinois, June 10, 1919 (readopted June 17, 1919); Michigan, June 10, 1919; Wisconsin, June 10, 1919; Kansas, June 16, 1919; New York, June 16, 1919; Ohio, June 16, 1919; Pennsylvania, June 24, 1919; Massachusetts, June 25, 1919; Texas, June 28, 1919; Iowa, July 2, 1919 (date on which approved by Governor); Missouri, July 3, 1919; Arkansas, July 28, 1919; Montana, August 2, 1919 (date on which approved by governor); Nebraska, August 2. 1919; Minnesota, September 8, 1919; New Hampshire, September 10, 1919 (date on which approved by Governor); Utah, October 2, 1919; California, November 1, 1919; Maine, November 5, 1919; North Dakota, December 1, 1919; South Dakota, December 4, 1919 (date on which certified); Colorado, December 15, 1919 (date on which approved by Governor); Kentucky, January 6, 1920; Rhode Island, January 6, 1920; Oregon, January 13, 1920; Indiana, January 16, 1920; Wyoming, January 27, 1920; Nevada, February 7, 1920; New Jersey, February 9, 1920; Idaho, February 11, 1920; Arizona, February 12, 1920; New Mexico, February 21, 1920 (date on which approved by govrnor); Oklahoma, February 28, 1920; West Virginia, March 10, 1920 (confirmed September 21, 1920); Washington, March 22, 1920; Tennessee, August 18, 1920; Vermont, February 8, 1921. The amendment was rejected by Georgia on July 24, 1919; by Alabama, on September 22, 1919; by South Carolina on January 29, 1920; by Virginia on February 12, 1920; by Maryland on February 24, 1920; by Mississippi on March 29, 1920; by Louisiana on July 1, 1920. This amendment was subsequently ratified by Virginia in 1952, Alabama in 1953, Florida in 1969, and Georgia and Louisiana in 1970.

[12] The Twentieth Amendment was proposed by Congress on March 2, 1932, when it passed the Senate, CONG. REC. (72d Cong., 1st Sess.) 5086, having previously passed the House on March 1. Id., 5027. It appears officially in 47 Stat. 745. Ratification was completed on January 23,

Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

1933, when the thirty-sixth State approved the amendment, there being then 48 States in the Union. On February 6, 1933, Secretary of State Stimson certified that it had become a part of the Constitution. 47 Stat. 2569.

The several state legislatures ratified the Twentieth Amendment on the following dates: Virginia, March 4, 1932; New York, March 11, 1932; Mississippi, March 16, 1932; Arkansas March 17, 1932; Kentucky, March 17, 1932; New Jersey, March 21, 1932; South Carolina, March 25, 1932; Michigan, March 31, 1932; Maine, April 1, 1932; Rhode Island, April 14, 1932; Illinois, April 21, 1932; Louisiana, June 22, 1932; West Virginia, July 30, 1932; Pennsylvania, August 11, 1932; Indiana, August 15, 1932; Texas, September 7, 1932; Alabama, September 13, 1932; California, January 3, 1933; North Carolina, January 5, 1933; North Dakota, January 9, 1933; Minnesota, January 12, 1933; Arizona, January 13, 1933; Montana, January 13, 1933; Nebraska, January 13, 1933; Oklahoma, January 13, 1933; Kansas, January 16, 1933; Oregon, January 16, 1933; Delaware, January 19, 1933; Washington, January 19, 1933; Wyoming, January 19, 1933; Iowa, January 20, 1933; South Dakota, January 20, 1933; Tennessee, January 20, 1933; Idaho, January 21, 1933; New Mexico, January 21, 1933; Georgia, January 23, 1933; Missouri, January 23, 1933; Ohio, January 23, 1933; Utah, January 23, 1933; Colorado, January 24, 1933; Massachusetts, January 24, 1933; Wisconsin, January 24, 1933; Nevada, January 26, 1933; Connecticut, January 27, 1933; New Hampshire, January 31, 1933; Vermont, February 2, 1933; Maryland, March 24, 1933; Florida, April 26, 1933.

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT [XXI.] [13]

SECTION 1. The eighteenth article of amendment to the Constitution of the United State is hereby repealed.

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[13] The Twenty-first Amendment was proposed by Congress on February 20, 1933, when it passed the House, CONG. REC. (72d Cong., 2d Sess.) 4516, having previously passed the Senate on February 16. Id., 4231. It appears officially in 47 Stat. 1625. Ratification was completed on December 5, 1933, when the thirty-sixth State (Utah) approved the amendment, there being then 48 States in the Union. On December 5, 1933, Acting Secretary of State Phillips certified that it had been adopted by the requisite number of States. 48 Stat. 1749.

The several state conventions ratified the Twenty-first Amendment on the following dates: Michigan, April 10, 1933; Wisconsin, April 25, 1933; Rhode Island, May 8, 1933; Wyoming, May 25, 1933; New Jersey, June 1, 1933; Delaware, June 24, 1933; Indiana, June 26, 1933; Massachusetts, June 26, 1933; New York, June 27, 1933; Illinois, July 10, 1933; Iowa, July 10, 1933; Connecticut, July 11, 1933; New Hampshire, July 11, 1933; California, July 24, 1933; West Virginia, July 25, 1933; Arkansas, August 1, 1933; Oregon, August 7, 1933; Alabama, August 8, 1933; Tennessee, August 11, 1933; Missouri, August 29, 1933; Arizona, September 5, 1933; Nevada, September 5, 1933; Vermont, September 23, 1933; Colorado, September 26, 1933; Washington, October 3, 1933; Minnesota, October 10, 1933; Idaho, October 17, 1933; Maryland, October 18, 1933; Virginia, October 25, 1933; New Mexico, November 2, 1933; Florida, November 14, 1933; Texas, November 24, 1933; Kentucky, November 27, 1933; Ohio, December 5, 1933; Pennsylvania, December 5, 1933; Utah, December 5, 1933; Maine, December 6, 1933; Montana, August 6, 1934. The amendment was rejected by a convention in the State of South Carolina, on December 4, 1933. The electorate of the State of North Carolina voted against holding a convention at a general election held on November 7, 1933.

SECTION 2. The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT [XXII.] [14]

SECTION 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of Presi-

[14] The Twenty-second Amendment was proposed by Congress on March 24, 1947, having passed the House on March 21, 1947, CONG. REC. (80th Cong., 1st Sess.) 2392, and having previously passed the Senate on March 12, 1947. Id., 1978. It appears officially in 61 Stat. 959. Ratification was completed on February 27, 1951, when the thirty-sixth State (Minnesota) approved the amendment, there being then 48 States in the Union. On March 1, 1951, Jess Larson, Administrator of General Services, certified that it had been adopted by the requisite number of States. 16 FED. REG. 2019.

A total of 41 state legislatures ratified the Twenty-second Amendment on the following dates: Maine, March 31, 1947; Michigan, March 31, 1947; Iowa, April 1, 1947; Kansas, April 1, 1947; New Hampshire, April 1, 1947; Delaware, April 2, 1947; Illinois, April 3, 1947; Oregon, April 3, 1947; Colorado, April 12, 1947; California, April 15, 1947; New Jersey, April 15, 1947; Vermont, April 15, 1947; Ohio, April 16, 1947; Wisconsin, April 16, 1947; Pennsylvania, April 29, 1947; Connecticut, May 21, 1947; Missouri, May 22, 1947; Nebraska, May 23, 1947; Virginia, January 28, 1948; Mississippi, February 12, 1948; New York, March 9, 1948; South Dakota, January 21, 1949; North Dakota, February 25, 1949; Louisiana, May 17, 1950; Montana, January 25, 1951; Indiana, January 29, 1951; Idaho, January 30, 1951; New Mexico, February 12, 1951; Wyoming, February 12, 1951; Arkansas, February 15, 1951; Georgia, February 17, 1915; Tennessee, February 20, 1951; Texas, February 22, 1951; Utah, February 26, 1951; Nevada, February 26, 1951; Minnesota, February 27, 1951; North Carolina, February 28, 1951; South Carolina, March 13, 1951; Maryland, March 14, 1951; Florida, April 16, 1951; and Alabama, May 4, 1951.

dent, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT [XXIII.] [15]

SECTION 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall

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[15] The Twenty-third Amendment was proposed by Congress on June 16, 1960, when it passed the Senate, CONG. REC. (86th Cong., 2d Sess.) 12858, having previously passed the House on June 14. Id., 12571. It appears officially in 74 Stat. 1057. Ratification was completed on March 29, 1961, when the thirty-eighth State (Ohio) approved the amendment, there being then 50 States in the Union. On April 3, 1961, John L. Moore, Administrator of General Services, certified that it had been adopted by the requisite number of States. 26 FED. REG. 2808.

The several state legislatures ratified the Twenty-third Amendment on the following dates: Hawaii, June 23, 1960; Massachusetts, August 22, 1960; New Jersey, December 19, 1960; New York, January 17, 1961; California, January 19, 1961; Oregon, January 27, 1961; Maryland, January 30, 1961; Idaho, January 31, 1961; Maine, January 31, 1961; Minnesota, January 31, 1961; New Mexico, February 1, 1961; Nevada, February 2, 1961; Montana, February 6, 1961; Colorado, February 8, 1961; Washington, February 9, 1961; West Virginia, February 1961; Alaska, February 10, 1961; Wyoming, February 13, 1961; South Dakota, February 14, 1961; Delaware, February 20, 1961; Utah, February 21, 1961; Wisconsin, February 21, 1961; Pennsylvania, February 28, 1961; Indiana, March 3, 1961; North Dakota, March 3, 1961; Tennessee, March 6, 1961; Michigan, March 8, 1961; Connecticut, March 9, 1961; Arizona, March 10, 1961; Illinois, March 14, 1961; Nebraska, March 15, 1961; Vermont, March 15, 1961; Iowa, March 16, 1961; Missouri, March 20, 1961; Oklahoma, March 21, 1961; Rhode Island, March 22, 1961; Kansas, March 29, 1961; Ohio, March 29, 1961; and New Hampshire, March 30, 1961.

meet in the District and perform such duties as provided by the twelfth article of amendment.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT [XXIV.] [16]

SECTION 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

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[16] The Twenty-fourth Amendment was proposed by Congress on September 14, 1962, having passed the House on August 27, 1962. CONG. REC. (87th Cong., 2d Sess.) 17670 and having previously passed the Senate on March 27, 1962. Id., 5105. It appears officially in 76 Stat. 1259. Ratification was completed on January 23, 1964, when the thirty-eighth State (South Dakota) approved the Amendment, there being then 50 States in the Union. On February 4, 1964, Bernard L. Boutin, Administrator of General Services, certified that it had been adopted by the requisite number of States. 25 FED. REG. 1717. President Lyndon B. Johnson signed this certificate.

Thirty-eight state legislatures ratified the Twenty-fourth Amendment on the following dates: Illinois, November 14, 1962; New Jersey, December 3, 1962; Oregon, January 25, 1963; Montana, January 28, 1963; West Virginia, February 1, 1963; New York, February 4, 1963; Maryland, February 6, 1963; California, February 7, 1963; Alaska, February 11, 1963; Rhode Island, February 14, 1963; Indiana, February 19, 1963; Michigan, February 20, 1963; Utah, February 20, 1963; Colorado, February 21, 1963; Minnesota, February 27, 1963; Ohio, February 27, 1963; New Mexico, March 5, 1963; Hawaii, March 6, 1963; North Dakota, March 7, 1963; Idaho, March 8, 1963; Washington, March 14, 1963; Vermont, March 15, 1963; Nevada, March 19, 1963; Connecticut, March 20, 1963; Tennessee, March 21, 1963; Pennsylvania, March 25, 1963; Wisconsin, March 26, 1963; Kansas, March 28, 1963; Massachusetts, March 28, 1963; Nebraska, April 4, 1963; Florida, April 18, 1963; Iowa, April 24, 1963; Delaware, May 1, 1963; Missouri, May 13, 1963; New Hampshire, June 16, 1963; Kentucky, June 27, 1963; Maine, January 16, 1964; South Dakota, January 23, 1964.

AMENDMENT [XXV.] [17]

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SECTION 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SECTION 3. Whenever the President transmits to the President *pro tempore* of the Senate and the Speaker of the House of Representatives has written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

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[17] This Amendment was proposed by the Eighty-ninth Congress by Senate Joint Resolution No. 1, which was approved by the Senate on February 19, 1965, and by the House of Representatives, in amended form, on April 13, 1965. The House of Representatives agreed to a Conference Report on June 30, 1965, and the Senate agreed to the Conference Report on July 6, 1965. It was declared by the Administrator of General Services, on February 23, 1967, to have been ratified.

This Amendment was ratified by the following States:

Nebraska, July 12, 1965; Wisconsin, July 13, 1965; Oklahoma, July 16, 1965; Massachusetts, August 9, 1965; Pennsylvania, August 18, 1965; Kentucky, September 15, 1965; Arizona, September 22, 1965; Michigan, October 5, 1965; Indiana, October 20, 1965; California, October 21, 1965; Arkansas, November 4, 1965; New Jersey, November 29, 1965; Delaware, December 7, 1965; Utah, January 17, 1966; West Virginia, January 20, 1966; Maine, January 24, 1966; Rhode Island, January 28, 1966; Colorado, February 3, 1966; New Mexico, February 3, 1966; Kansas, February 8, 1966; Vermont, February 10, 1966; Alaska, February 18, 1966; Idaho, March 2, 1966; Hawaii, March 3, 1966; Virginia, March 8, 1966; Mississippi, March 10, 1966; New York, March 14, 1966; Maryland, March 23, 1966; Missouri, March 30, 1966; New Hampshire, June 13, 1966; Louisiana, July 5, 1966; Tennessee, January 12, 1967, Wyoming, January 25, 1967; Washington, January 26, 1967; Iowa, January 26, 1967; Oregon, February 2, 1967; Minnesota, February 10, 1967; Nevada, February 10, 1967; Connecticut, February 14, 1967; Montana, February 15, 1967; South Dakota, March 6, 1967; Ohio, March 7, 1967; Alabama, March 14, 1967; North Carolina, March 22, 1967 Illinois, March 22, 1967; Texas, April 25, 1967; Florida, May 25, 1967.

Publication of the certifying statement of the Administrator of General Services that the Amendment had become valid was made on February 25, 1967, F.R. Doc 67–2208, 32 FED. REG. 3287.

SECTION 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President *pro tempore* of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives has written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President *pro tempore* of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT [XXVI.] [18]

SECTION 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age.

SECTION 2. The Congress shall have the power to enforce this article by appropriate legislation.

AMENDMENT [XXVII.] [19]

No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

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[18] The Twenty-sixth Amendment was proposed by Congress on March 23, 1971, upon passage by the House of Representatives, the Senate having previously passed an identical resolution on March 10, 1971. It appears officially in 85 Stat. 825. Ratification was completed on July 1, 1971, when action by the legislature of the 38th State, North Carolina, was concluded, and the Administrator of the General Services Administration officially certified it to have been duly ratified on July 5, 1971. 36 FED. REG. 12725.

As of the publication of this volume, 42 States had ratified this Amendment:

Connecticut, March 23, 1971; Delaware, March 23, 1971; Minnesota, March 23, 1971; Tennessee, March 23, 1971; Washington, March 23, 1971; Hawaii, March 24, 1971; Massachusetts, March 24, 1971; Montana, March 29, 1971; Arkansas, March 30, 1971; Idaho, March 30, 1971; Iowa, March 30, 1971; Nebraska, April 2, 1971; New Jersey, April 3, 1971; Kansas, April 7, 1971; Michigan, April 7, 1971; Alaska, April 8, 1971; Maryland, April 8, 1971; Indiana, April 8, 1971; Maine, April 9, 1971; Vermont, April 16, 1971; Louisiana, April 17, 1971; California, April 19, 1971; Colorado, April 27, 1971; Pennsylvania, April 27, 1971; Texas, April 27, 1971; South Carolina, April 28, 1971; West Virginia, April 28, 1971; New Hampshire, May 13, 1971; Arizona, May 14, 1971; Rhode Island, May 27, 1971; New York, June 2, 1971; Oregon, June 4, 1971; Missouri, June 14, 1971; Wisconsin, June 22, 1971; Illinois, June 29, 1971; Alabama, June 30, 1971; Ohio, June 30, 1971; North Carolina, July 1, 1971; Oklahoma, July 1, 1971; Virginia, July 8, 1971; Wyoming, July 8, 1971; Georgia, October 4, 1971.

[19] This purported amendment was proposed by Congress on September 25, 1789, when it passed the Senate, having previously passed the House on September 24. (1 ANNALS OF CONGRESS 88, 913). It appears officially in 1 Stat. 97. Having received in 1789–1791 only six state ratifications, the proposal then failed of ratification while ten of the 12 sent to the States by Congress were ratified and proclaimed and became the Bill of Rights. The provision was proclaimed as having been ratified and having become the 27th Amendment, when Michigan ratified on May 7, 1992, there being 50 States in the Union. Proclamation was by the Archivist of the United States, pursuant to 1 U.S.C. § 106b, on May 19, 1992. F.R.Doc. 92–11951, 57 FED. REG. 21187. It was also proclaimed by votes of the Senate and House of Representatives. 138 CONG. REC. (DAILY ED) S 6948–49, H 3505–06.

The several state legislatures ratified the proposal on the following dates: Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; Delaware, January 28, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791; Ohio, May 6, 1873; Wyoming, March 6, 1978; Maine, April 27, 1983; Colorado, April 22, 1984; South Dakota, February 1985; New Hampshire, March 7, 1985; Arizona, April 3, 1985; Tennessee, May 28, 1985; Oklahoma, July 10, 1985; New Mexico, February 14, 1986; Indiana, February 24, 1986; Utah, February 25, 1986; Arkansas, March 13, 1987; Montana, March 17, 1987; Connecticut, May 13,

1987; Wisconsin, July 15, 1987; Georgia, February 2, 1988; West Virginia, March 10, 1988; Louisiana, July 7, 1988; Iowa, February 9, 1989; Idaho, March 23, 1989; Nevada, May 25, 1989; Kansas, April 5, 1990; Florida, May 31, 1990; North Dakota, Mary 25, 1991; Alabama, May 5, 1992; Missouri, May 5, 1992; Michigan, May 7, 1992. New Jersey subsequently ratified on May 7, 1992.

PROPOSED AMENDMENTS NOT RATIFIED BY THE STATES

PROPOSED AMENDMENTS NOT RATIFIED BY THE STATES

During the course of our history, in addition to the 27 amendments which have been ratified by the required three-fourths of the States, six other amendments have been submitted to the States but have not been ratified by them.

Beginning with the proposed Eighteenth Amendment, Congress has customarily included a provision requiring ratification within seven years from the time of the submission to the States. The Supreme Court in *Coleman v. Miller*, 307 U.S. 433 (1939), declared that the question of the reasonableness of the time within which a sufficient number of States must act is a political question to be determined by the Congress.

In 1789, at the time of the submission of the Bill of Rights, twelve proposed amendments were submitted to the States. Of these, Articles III–XII were ratified and became the first ten amendments to the Constitution. Proposed Articles I and II were not ratified with these ten, but, in 1992, Article II was proclaimed as ratified, 203 years later. The following is the text of proposed Article I:

> ARTICLE I. After the first enumeration required by the first article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.

Thereafter, in the 2d session of the 11th Congress, the Congress proposed the following amendment to the Constitution relating to acceptance by citizens of the United States of titles of nobility from any foreign government.

The proposed amendment which was not ratified by three-fourths of the States reads as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring),* That the following section be submitted to the legislatures of the several states, which, when ratified by the legislatures of three fourths of the states, shall be valid and binding, as a part of the constitution of the United States.
>
> If any citizen of the United States shall accept, claim, receive or retain any title of nobility or honour, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.

During the second session of the 36th Congress on March 2, 1861, the following proposed amendment to the Constitution relating to slavery was

signed by the President. It is interesting to note in this connection that this is the only proposed amendment to the Constitution ever signed by the President. The President's signature is considered unnecessary because of the constitutional provision that upon the concurrence of two-thirds of both Houses of Congress the proposal shall be submitted to the States and shall be ratified by three-fourths of the States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid, to all intents and purposes, as part of the said Constitution, viz:

"ARTICLE THIRTEEN

"No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State."

In more recent times, only three proposed amendments have not been ratified by three-fourths of the States. The first is the proposed child-labor amendment, which was submitted to the States during the 1st session of the 68th Congress in June 1924, as follows:

JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which when ratified by the legislatures of three-fourths of the several States, shall be valid to all intents and purposes as a part of the Constitution:

ARTICLE———

SECTION 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under 18 years of age.

SECTION 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

The second proposed amendment to have failed of ratification is the equal rights amendment, which formally died on June 30, 1982, after a disputed congressional extension of the original seven-year period for ratification.

HOUSE JOINT RESOLUTION 208

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when

ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

"SECTION 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"SECTION 3. This amendment shall take effect two years after the date of ratification."

The third proposed amendment relating to representation in Congress for the District of Columbia failed of ratification, 16 States having ratified as of the 1985 expiration date for the ratification period.

HOUSE JOINT RESOLUTION 554

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE

"SECTION 1. For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.

"SEC. 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.

"SEC. 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.

"SEC. 4. This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

THE
CONSTITUTION OF THE UNITED STATES OF AMERICA

WITH ANALYSIS

THE PREAMBLE

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

PURPOSE AND EFFECT OF THE PREAMBLE

Although the preamble is not a source of power for any department of the Federal Government,[1] the Supreme Court has often referred to it as evidence of the origin, scope, and purpose of the Constitution.[2] "Its true office," wrote Joseph Story in his *Commentaries*, "is to expound the nature and extent and application of the powers actually conferred by the Constitution, and not substantively to create them. For example, the preamble declares one object to be, 'provide for the common defense.' No one can doubt that this does not enlarge the powers of Congress to pass any measures which they deem useful for the common defence. But suppose the terms of a given power admit of two constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one could promote and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation, to be adopted?" [3]

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[1] Jacobson v. Massachusetts, 197 U.S. 11 (1905).

[2] *E.g.*, the Court has read the preamble as bearing witness to the fact that the Constitution emanated from the people and was not the act of sovereign and independent States. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), and that it was made for, and is binding only in, the United States of America. Downes v. Bidwell, 182 U.S. 244 (1901); *In re* Ross, 140 U.S. 453, 464 (1891).

[3] 1 J. Story, Commentaries on the Constitution of the United States (Boston: 1833), 462. For a lengthy exegesis of the preamble phrase by phrase, *see* M. Adler & W. Gorman, The American Testament (New York: 1975), 63–118.

ARTICLE I

LEGISLATIVE DEPARTMENT

CONTENTS

LEGISLATIVE DEPARTMENT

ARTICLE I

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SEPARATION OF POWERS AND CHECKS AND BALANCES

The Constitution nowhere contains an express injunction to preserve the boundaries of the three broad powers it grants, nor does it expressly enjoin maintenance of a system of checks and balances. Yet, it does grant to three separate branches the powers to legislate, to execute, and to adjudicate, and it provides throughout the document the means by which each of the branches could resist the blandishments and incursions of the others. The Framers drew up our basic charter against a background rich in the theorizing of scholars and statesmen regarding the proper ordering in a system of government of conferring sufficient power to govern while withholding the ability to abridge the liberties of the governed.[1]

The Theory Elaborated and Implemented

When the colonies separated from Great Britain following the Revolution, the framers of their constitutions were imbued with the profound tradition of separation of powers, and they freely and expressly embodied the principle in their charters.[2] The theory of checks and balances, however, was not favored, because it was drawn from Great Britain, and, as a consequence, violations of the separation-of-powers doctrine by the legislatures of the states were common-

[1] Among the best historical treatments are M. Vile, Constitutionalism and the Separation of Powers (1967), and W. Gwyn, The Meaning of the Separation of Powers (1965).

[2] Thus the Constitution of Virginia of 1776 provided: "The legislative, executive, and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them, at the same time[.]" Reprinted in 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 52 (W. S. Windler ed., 1979). *See also* 5 id. at 96, Art. XXX of Part First, Massachusetts Constitution of 1780: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."

place prior to the convening of the Convention.[3] Theory as much as experience guided the Framers in the summer of 1787.[4]

The doctrine of separation of powers, as implemented in drafting the Constitution, was based on several generally held principles: the separation of government into three branches, legislative, executive, and judicial; the conception that each branch performs unique and identifiable functions that are appropriate to each; and the limitation of the personnel of each branch to that branch, so that no one person or group should be able to serve in more than one branch simultaneously. To a great extent, the Constitution effectuated these principles, but critics objected to what they regarded as a curious intermixture of functions, in, for example, the veto power of the President over legislation and to the role of the Senate in the appointment of executive officers and judges and in the treaty-making process. It was to these objections that Madison turned in a powerful series of essays.[5]

Madison recurred to "the celebrated" Montesquieu, the "oracle who is always consulted," to disprove the contentions of the critics. "[T]his essential precaution in favor of liberty," that is, the separation of the three great functions of government, had been achieved, but the doctrine did not demand rigid separation. Montesquieu and other theorists "did not mean that these departments ought to have no *partial agency* in, or *control* over, the acts of each other," but rather liberty was endangered "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."[6] That the doctrine did not demand absolute separation provided the basis for preservation of separation of powers in action. Neither sharply drawn demarcations of institutional boundaries nor appeals to the electorate were sufficient.[7] Instead, the security against concentration of powers "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." Thus, "[a]mbition must be made to counteract ambi-

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[3] "In republican government the legislative authority, necessarily, predominates." THE FEDERALIST, No. 51 (J. Cooke ed. 1961), 350 (Madison). *See also* id. at No. 48, 332–334. This theme continues today to influence the Court's evaluation of congressional initiatives. *E.g.*, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 273–74, 277 (1991). *But compare* id. at 286 n.3 (Justice White dissenting).

[4] The intellectual history through the state period and the Convention proceedings is detailed in G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969) (*see* index entries under "separation of powers").

[5] THE FEDERALIST Nos. 47–51 (J. Cooke ed. 1961), 323–353 (Madison).

[6] Id. at No. 47, 325–326 (emphasis in original).

[7] Id. at Nos. 47–49, 325–343.

tion. The interest of the man must be connected with the constitutional rights of the place." [8]

Institutional devices to achieve these principles pervade the Constitution. Bicameralism reduces legislative predominance, while the presidential veto gives to the President a means of defending his priorities and preventing congressional overreaching. The Senate's role in appointments and treaties checks the President. The courts are assured independence through good-behavior tenure and security of compensation, and the judges through judicial review will check the other two branches. The impeachment power gives to Congress the authority to root out corruption and abuse of power in the other two branches. And so on.

Judicial Enforcement

Throughout much of our history, the "political branches" have contended between themselves in application of the separation-of-powers doctrine. Many notable political disputes turned on questions involving the doctrine. Because the doctrines of separation of powers and of checks and balances require both separation and intermixture,[9] the role of the Supreme Court in policing the maintenance of the two doctrines is problematic at best. Indeed, it is only in recent decades that cases involving the doctrines have regularly been decided by the Court. Previously, informed understandings of the principles have underlain judicial construction of particular clauses or guided formulation of constitutional common law. That is, the nondelegation doctrine was from the beginning suffused with a separation-of-powers premise,[10] and the effective demise of the doctrine as a judicially enforceable construct reflects the Court's inability to give any meaningful content to it.[11] On the other hand, periodically, the Court has taken a strong separation position on behalf of the President, sometimes unsuccessfully [12] and sometimes successfully.

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[8] Id. at No. 51, 349.

[9] "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Justice Jackson concurring).

[10] *E.g.*, Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[11] *See* Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Justice Scalia dissenting).

[12] The principal example is Myers v. United States, 272 U.S. 52 (1926), written by Chief Justice Taft, himself a former President. The breadth of the holding was modified in considerable degree in Humphrey's Executor v. United States, 295 U.S. 602 (1935), and the premise of the decision itself was recast and largely softened in Morrison v. Olson, 487 U.S. 654 (1988).

Following a lengthy period of relative inattention to separation of powers issues, the Court since 1976[13] has recurred to the doctrine in numerous cases, and the result has been a substantial curtailing of congressional discretion to structure the National Government. Thus, the Court has interposed constitutional barriers to a congressional scheme to provide for a relatively automatic deficit-reduction process because of the critical involvement of an officer with significant legislative ties,[14] to the practice set out in more than 200 congressional enactments establishing a veto of executive actions,[15] and to the vesting of broad judicial powers to handle bankruptcy cases in officers not possessing security of tenure and salary.[16] On the other hand, the highly debated establishment by Congress of a process by which independent special prosecutors could be established to investigate and prosecute cases of alleged corruption in the Executive Branch was sustained by the Court in a opinion that may presage a judicial approach in separation of powers cases more accepting of some blending of functions at the federal level.[17]

Important as the results were in this series of cases, the development of two separate and inconsistent doctrinal approaches to separation of powers issues occasioned the greatest amount of commentary. The existence of the two approaches, which could apparently be employed in the discretion of the Justices, made difficult the prediction of the outcomes of differences over proposals and alternatives in governmental policy. Significantly, however, it appeared that the Court most often used a more strict analysis in cases in which infringements of executive powers were alleged and a less strict analysis when the powers of the other two branches were concerned. The special prosecutor decision, followed by the decision sustaining the Sentencing Commission, may signal the adoption of a single analysis, the less strict analysis, for all separation of power cases or it may turn out to be but an exception to the Court's dual doctrinal approach.[18]

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[13] Beginning with Buckley v. Valeo, 424 U.S. 1, 109–43 (1976), a relatively easy case, in which Congress had attempted to reserve to itself the power to appoint certain officers charged with enforcement of a law.

[14] Bowsher v. Synar, 478 U.S. 714 (1986).

[15] INS v. Chadha, 462 U.S. 919 (1983).

[16] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[17] Morrison v. Olson, 487 U.S. 654 (1988). *See also* Mistretta v. United States, 488 U.S. 361 (1989).

[18] The tenor of a later case, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252 (1991), was decidedly formalistic, but it involved a factual situation and a doctrinal predicate easily rationalized by the principles of *Morrison* and *Mistretta*, aggrandizement of its powers by Congress. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989), reasserted the fundamental status of *Marathon*, again in a bankruptcy courts context, although the issue was

Although the two doctrines have been variously characterized, the names generally attached to them have been "formalist," applied to the more strict line, and "functional," applied to the less strict. The formalist approach emphasizes the necessity to maintain three distinct branches of government through the drawing of bright lines demarcating the three branches from each other determined by the differences among legislating, executing, and adjudicating.[19] The functional approach emphasizes the core functions of each branch and asks whether the challenged action threatens the essential attributes of the legislative, executive, or judicial function or functions. Under this approach, there is considerable flexibility in the moving branch, usually Congress acting to make structural or institutional change, if there is little significant risk of impairment of a core function or in the case of such a risk if there is a compelling reason for the action.[20]

Chadha used the formalist approach to invalidate the legislative veto device by which Congress could set aside a determination by the Attorney General, pursuant to a delegation from Congress, to suspend deportation of an alien. Central to the decision were two conceptual premises. First, the action Congress had taken was legislative, because it had the purpose and effect of altering the legal

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the right to a jury trial under the Seventh Amendment rather than strictly speaking a separation-of-powers question. Freytag v. Commissioner, 501 U.S. 868 (1991), pursued a straightforward appointments-clause analysis, informed by a separation-of-powers analysis but not governed by it. Finally, in Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 467 (1989) (concurring), Justice Kennedy would have followed the formalist approach, but he explicitly grounded it on the distinction between an express constitutional vesting of power as against implicit vestings. Separately, the Court has for some time viewed the standing requirement for access to judicial review as reflecting a separation-of-powers component—confining the courts to their proper sphere—Allen v. Wright, 468 U.S. 737, 752 (1984), but that view seemed largely superfluous to the conceptualization of standing rules. However, in Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992), the Court imported the take-care clause, obligating the President to see to the faithful execution of the laws, into standing analysis, creating a substantial barrier to congressional decisions to provide for judicial review of executive actions. It is not at all clear, however, that the effort, by Justice Scalia, enjoys the support of a majority of the Court. Id. at 579–81 (Justices Kennedy and Souter concurring). The cited cases seem to demonstrate that a strongly formalistic wing of the Court continues to exist.

[19] "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . must be resisted. Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable." INS v. Chadha, 462 U.S. 919, 951 (1983). *See* id. at 944–51; Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–66 (1982) (plurality opinion); Bowsher v. Synar, 478 U.S. 714, 721–727 (1986).

[20] CFTC v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 587, 589–93 (1985). The Court had first formulated this analysis in cases challenging alleged infringements on presidential powers, United States v. Nixon, 418 U.S. 683, 713 (1974); Nixon v. Administrator of General Services, 433 U.S. 425, 442–43 (1977), but it had subsequently turned to the more strict test. *Schor* and *Thomas* both involved provisions challenged as infringing judicial powers.

rights, duties, and relations of persons outside the Legislative Branch, and thus Congress had to comply with the bicameralism and presentment requirements of the Constitution.[21] Second, the Attorney General was performing an executive function in implementing the delegation from Congress, and the legislative veto was an impermissible interference in the execution of the laws. Congress could act only by legislating, by changing the terms of its delegation.[22] In *Bowsher*, the Court held that Congress could not vest even part of the execution of the laws in an officer, the Comptroller General, who was subject to removal by Congress because to do so would enable Congress to play a role in the execution of the laws. Congress could act only by passing other laws.[23]

On the same day that *Bowsher* was decided through a formalist analysis, the Court in *Schor* used the less strict, functional approach in resolving a challenge to the power of a regulatory agency to adjudicate a state common-law issue—the very kind of issue that *Northern Pipeline*, in a formalist plurality opinion with a more limited concurrence, had denied to a non-Article III bankruptcy court.[24] Sustaining the agency's power, the Court emphasized "the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'"[25] It held that, in evaluating such a separation of powers challenge, the Court had to consider the extent to which the "essential attributes of judicial power" were reserved to Article III courts and conversely the extent to which the non-Article III entity exercised the jurisdiction and powers normally vested only in Article III courts, the origin and importance of the rights to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[26] *Bowsher*, the Court said, was not contrary, because, "[u]nlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch."[27] The test was a balancing one—whether Congress had impermissi-

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[21] INS v. Chadha, 462 U.S. 919, 952 (1983).

[22] 462 U.S. at 952.

[23] Bowsher v. Synar, 478 U.S. 714, 726–727, 733–734 (1986).

[24] Although the agency in *Schor* was an independent regulatory commission and the bankruptcy court in *Northern Pipeline* was either an Article I court or an adjunct to an Article III court, the characterization of the entity is irrelevant and, in fact, the Court made nothing of the difference. The issue in each case was whether the judicial power of the United States could be conferred on an entity that was not an Article III court.

[25] CFTC v. Schor, 478 U.S. 833, 848 (1986) (quoting Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 587 (1985)).

[26] *Schor*, 478 U.S. at 851.

[27] 478 U.S. at 856.

bly undermined the role of another branch without appreciable expansion of its own power.

Although the Court, in applying one or the other analysis in separation-of-powers cases, had never indicated its standards for choosing one analysis over the other, beyond implying that the formalist approach was proper when the Constitution fairly clearly committed a function or duty to a particular branch and the functional approach was proper when the constitutional text was indeterminate and a determination must be made on the basis of the likelihood of impairment of the essential powers of a branch, the overall results had been a strenuous protection of executive powers and a concomitant relaxed view of the possible incursions into the powers of the other branches. It was thus a surprise when, in the independent counsel case, the Court, again without stating why it chose that analysis, used the functional standard to sustain the creation of the independent counsel.[28] The independent-counsel statute, the Court emphasized, was not an attempt by Congress to increase its own power at the expense of the executive nor did it constitute a judicial usurpation of executive power. Moreover, the Court stated, the law did not "impermissibly undermine" the powers of the Executive Branch nor did it "disrupt the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."[29] Acknowledging that the statute undeniably reduced executive control over what it had previously identified as a core executive function, the execution of the laws through criminal prosecution, through its appointment provisions and its assurance of independence by limitation of removal to a "good cause" standard, the Court nonetheless noticed the circumscribed nature of the reduction, the discretion of the Attorney General to initiate appointment, the limited jurisdiction of the counsel, and the power of the Attorney General to ensure that the laws are faithfully executed by the counsel. This balancing, the Court thought, left the President with sufficient control to ensure that he is able to perform his constitutionally assigned functions. A notably more pragmatic, functional analysis suffused the opinion of the Court when it upheld the constitutionality of the Sentencing

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[28] To be sure, the Appointments Clause (Article II, § 2) specifically provides that Congress may vest in the courts the power to appoint inferior officers, Morrison v. Olson, 487 U.S. 654, 670–677 (1988), making possible the contention that, unlike *Chadha* and *Bowsher*, *Morrison* is a textual commitment case. But the Court's separate evaluation of the separation of powers issue does not appear to turn on that distinction. Id. at 685–96. Nevertheless, the existence of this possible distinction should make one wary about lightly reading *Morrison* as a rejection of formalism when executive powers are litigated.

[29] 487 U.S. at 695 (quoting, respectively, *Schor*, 478 U.S. at 856, and Nixon v. Administrator of General Services, 433 U.S. at 443).

Commission.[30] Charged with promulgating guidelines binding on federal judges in sentencing convicted offenders, the seven-member Commission, three members of which had to be Article III judges, was made an independent entity in the judicial branch. The President appointed all seven members, the judges from a list compiled by the Judicial Conference, and he could remove from the Commission any member for cause. According to the Court, its separation-of-powers jurisprudence is always animated by the concerns of encroachment and aggrandizement. "Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."[31] Thus, to each of the discrete questions, the placement of the Commission, the appointment of the members, especially the service of federal judges, and the removal power, the Court carefully analyzed whether one branch had been given power it could not exercise or had enlarged its powers impermissibly and whether any branch would have its institutional integrity threatened by the structural arrangement.

Although it is possible, even likely, that *Morrison* and *Mistretta* represent a decision by the Court to adopt the functional analysis for all separation-of-powers cases, the history of adjudication since 1976 and the shift of approach between *Myers* and *Humphrey's Executor* suggest caution. Recurrences of the formalist approach have been noted. Additional decisions must be forthcoming before it can be decided that the Court has finally settled on the functional approach.

BICAMERALISM

By providing for a national legislature of two Houses, the Framers, deliberately or adventitiously, served several functions. Examples of both unicameralism and bicameralism abounded. Some of the ancient republics, to which the Framers often repaired for the learning of experience, had two-house legislatures, and the Parliament of Great Britain was based in two social orders, the hereditary aristocracy represented in the House of Lords and the freeholders of the land represented in the House of Commons. A number of state legislatures, following the Revolution, were created unicam-

[30] Mistretta v. United States, 488 U.S. 361 (1989). Significantly, the Court acknowledged reservations with respect to the placement of the Commission as an independent entity in the judicial branch. Id. at 384, 397, 407–08. As in *Morrison*, Justice Scalia was the lone dissenter, arguing for a fairly rigorous application of separation-of-powers principles. Id. at 413, 422–27.

[31] 488 U.S. at 382.

eral, and the Continental Congress, limited in power as it was, consisted of one house.

From the beginning in the Convention, in the Virginia Plan, a two-house Congress was called for. The Great Compromise, one of the critical decisions leading to a successful completion of the Convention, resolved the dispute about the national legislature by providing for a House of Representatives apportioned on population and a Senate in which the states were equally represented. The first function served, thus, was federalism.[32] Coextensively important, however, was the separation-of-powers principle served. The legislative power, the Framers both knew and feared, was predominant in a society dependent upon the suffrage of the people, and it was important to have a precaution against the triumph of transient majorities. Hence, the Constitution's requirement that before lawmaking could be carried out bills must be deliberated in two Houses, their Members beholden to different constituencies, was in pursuit of this observation from experience.[33]

Events since 1787, of course, have altered both the separation-of-powers and the federalism bases of bicameralism, in particular the adoption of the Seventeenth Amendment resulting in the popular election of Senators, so that the differences between the two Chambers are today less pronounced.

ENUMERATED, IMPLIED, RESULTING, AND INHERENT POWERS

Two important doctrines of constitutional law—that the Federal Government is one of enumerated powers and that legislative powers may not be delegated—are derived in part from this section. The classic statement of the former is by Chief Justice Marshall in *McCulloch v. Maryland*: "This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted." [34] That, however, "the executive power" is not confined to those items expressly enumerated in Article II was asserted early in the history of the Constitution by both Madison and Hamilton and is

[32] THE FEDERALIST, No. 39 (J. Cooke ed. 1961), 250–257 (Madison).

[33] Id. at No. 51, 347–353 (Madison). The assurance of the safeguard is built into the presentment clause. Article I, § 7, cl. 2; *see also* id. at cl. 3. The structure is not often the subject of case law, but it was a foundational matter in INS v. Chadha, 462 U.S. 919, 944–951 (1983).

[34] 17 U.S. (4 Wheat.) 316, 405 (1819).

found in decisions of the Court;[35] a similar latitudinarian conception of "the judicial power of the United States" was voiced in Justice Brewer's opinion for the Court in *Kansas v. Colorado*.[36] But, even when confined to "the legislative powers herein granted," the doctrine is severely strained by Chief Justice Marshall's broad conception of some of these powers, as he described them in *McCulloch v. Maryland*. He asserts that "[t]he sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government";[37] he characterizes "the power of making war, or levying taxes, or of regulating commerce" as "great substantive and independent power[s]";[38] and he declares that the power conferred by the "necessary and proper" clause embraces all legislative "means which are appropriate" to carry out the legitimate ends of the Constitution, unless inconsistent "with the letter and spirit of the constitution."[39]

Nine years later, Marshall introduced what Story in his *Commentaries* labels the concept of "resulting powers," which are those that "rather be a result from the whole mass of the powers of the National Government, and from the nature of political society, than a consequence or incident of the powers specially enumerated."[40] Story's reference is to Marshall's opinion in *American Ins. Co. v. Canter*,[41] that "the constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[42] And from the power to acquire territory, Marshall continues, arises, as "the inevitable consequence," the right to govern it.[43]

Subsequently, powers have been repeatedly ascribed to the National Government by the Court on grounds that ill accord with the doctrine of enumerated powers: the power to legislate in effectuation of the "rights expressly given, and duties expressly enjoined" by the Constitution;[44] the power to impart to the paper currency of

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[35] *See* discussion under Article II, § 1, cl. 1, Executive Power: Theory of the Presidential Office, *infra*.

[36] 206 U.S. 46, 82 (1907).

[37] 17 U.S. (4 Wheat.) at 407.

[38] 17 U.S. at 411.

[39] 17 U.S. at 421.

[40] 2 J. Story, Commentaries on the Constitution of the United States 1256 (1833). *See also* id. at 1286 and 1330.

[41] 26 U.S. (1 Pet.) 511 (1828).

[42] 26 U.S. at 542.

[43] 26 U.S. at 543.

[44] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616, 618–19 (1842).

the government the quality of legal tender in the payment of debts;[45] the power to acquire territory by discovery;[46] the power to legislate for the Indian tribes wherever situated in the United States;[47] the power to exclude and deport aliens;[48] and to require that those who are admitted be registered and fingerprinted;[49] and finally the complete powers of sovereignty, both those of war and peace, in the conduct of foreign relations. Thus, in *United States v. Curtiss-Wright Export Corp.*,[50] decided in 1936, Justice Sutherland asserted the dichotomy of domestic and foreign powers, with the former limited under the enumerated powers doctrine and the latter virtually free of any such restraint. That doctrine has been the source of much scholarly and judicial controversy, but, although limited, it has not been repudiated.

Yet, for the most part, these holdings do not, as Justice Sutherland suggested, directly affect "the internal affairs" of the nation; they touch principally its peripheral relations, as it were. The most serious inroads on the doctrine of enumerated powers are, in fact, those that have taken place under cover of the doctrine—the vast expansion in recent years of national legislative power in the regulation of commerce among the states and in the expenditure of the national revenues. Marshall laid the ground for these developments in some of the language quoted above from *McCulloch v. Maryland*.

DELEGATION OF LEGISLATIVE POWER

The History of the Doctrine of Nondelegability

The Supreme Court has sometimes declared categorically that "the legislative power of Congress cannot be delegated,"[51] and on other occasions has recognized more forthrightly, as Chief Justice Marshall did in 1825, that, although Congress may not delegate powers that "are strictly and exclusively legislative," it may delegate "powers which [it] may rightfully exercise itself."[52] The categorical statement has never been literally true, the Court having upheld the delegation at issue in the very case in which the statement was

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[45] Juilliard v. Greenman, 110 U.S. 421, 449–450 (1884). *See also* Justice Bradley's concurring opinion in Knox v. Lee, 79 U.S. (12 Wall.) 457, 565 (1871).

[46] United States v. Jones, 109 U.S. 513 (1883).

[47] United States v. Kagama, 118 U.S. 375 (1886).

[48] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[49] Hines v. Davidowitz, 312 U.S. 52 (1941).

[50] 299 U.S. 304 (1936).

[51] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). *See also* Field v. Clark, 143 U.S. 649, 692 (1892).

[52] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41 (1825).

made.[53] The Court has long recognized that administration of the law requires exercise of discretion,[54] and that, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[55] The real issue is where to draw the line. Chief Justice Marshall recognized "that there is some difficulty in discerning the exact limits," and that "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."[56] Accordingly, the Court's solution has been to reject delegation challenges in all but the most extreme cases, and to accept delegations of vast powers to the President or to administrative agencies.

With the exception of a brief period in the 1930s when the Court was striking down New Deal legislation on a variety of grounds, the Court has consistently upheld grants of authority that have been challenged as invalid delegations of legislative power.

The modern doctrine may be traced to the 1928 case, *J. W. Hampton, Jr. & Co. v. United States*, in which the Court, speaking through Chief Justice Taft, upheld Congress's delegation to the President of the authority to set tariff rates that would equalize production costs in the United States and competing countries.[57] Although formally invoking the contingency theory, the Court's opinion also looked forward, emphasizing that in seeking the cooperation of another branch Congress was restrained only according to "common sense and the inherent necessities" of the situation.[58] This vague statement was elaborated somewhat in the statement that the Court would sustain delegations whenever Congress provided an "intelli-

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[53] The Court in *Shreveport Grain & Elevator* upheld a delegation of authority to the FDA to allow reasonable variations, tolerances, and exemptions from misbranding prohibitions that were backed by criminal penalties. It was "not open to reasonable dispute" that such a delegation was permissible to fill in details "impracticable for Congress to prescribe."

[54] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928) ("In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination").

[55] Mistretta v. United States, 488 U.S. 361, 372 (1989). *See also* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility").

[56] Wayman v. Southard, 23 U.S. (10 Wheat.) at 42. For particularly useful discussions of delegations, *see* 1 K. Davis, Administrative Law Treatise Ch. 3 (2d ed., 1978); L. Jaffe, Judicial Control of Administrative Action ch. 2 (1965).

[57] 276 U.S. 394 (1928).

[58] 276 U.S. at 406.

gible principle" to which the President or an agency must conform.[59]

As characterized by the Court, the delegations struck down in 1935 in *Panama Refining*[60] and *Schechter*[61] were not only broad but unprecedented. Both cases involved provisions of the National Industrial Recovery Act. At issue in *Panama Refining* was a delegation to the President of authority to prohibit interstate transportation of what was known as "hot oil"—oil produced in excess of quotas set by state law. The problem was that the Act provided no guidance to the President in determining whether or when to exercise this authority, and required no finding by the President as a condition of exercise of the authority. Congress "declared no policy, . . . established no standard, [and] laid down no rule," but rather "left the matter to the President without standard or rule, to be dealt with as he pleased."[62] At issue in *Schechter* was a delegation to the President of authority to promulgate codes of fair competition that could be drawn up by industry groups or prescribed by the President on his own initiative. The codes were required to implement the policies of the Act, but those policies were so general as to be nothing more than an endorsement of whatever might be thought to promote the recovery and expansion of the particular trade or industry. The President's authority to approve, condition, or adopt codes on his own initiative was similarly devoid of meaningful standards, and "virtually unfettered."[63] This broad delegation was "without precedent." The Act supplied "no standards" for any trade or industry group, and, unlike other broad delegations that had been upheld, did not set policies that could be implemented by an administrative agency required to follow "appropriate administrative procedure." "Instead of prescribing rules of conduct, [the Act] authorize[d] the making of codes to prescribe them."[64]

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[59] 276 U.S. at 409. The "intelligible principle" test of *Hampton* is the same as the "legislative standards" test of A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935), and Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

[60] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[61] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[62] 293 U.S. at 430, 418, respectively. Similarly, the executive order exercising the authority contained no finding or other explanation by which the legality of the action could be tested. Id. at 431–33.

[63] 295 U.S. at 542.

[64] 295 U.S. at 541. Other concerns were that the industrial codes were backed by criminal sanction, and that regulatory power was delegated to private individuals. *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989).

Since 1935, the Court has not struck down a delegation to an administrative agency.[65] Rather, the Court has approved, "without deviation, Congress's ability to delegate power under broad standards."[66] The Court has upheld, for example, delegations to administrative agencies to determine "excessive profits" during wartime,[67] to determine "unfair and inequitable distribution of voting power" among securities holders,[68] to fix "fair and equitable" commodities prices,[69] to determine "just and reasonable" rates,[70] and to regulate broadcast licensing as the "public interest, convenience, or necessity require."[71] During all this time the Court "has not seen fit . . . to enlarge in the slightest [the] relatively narrow holdings" of *Panama Refining* and *Schechter*.[72] Again and again, the Court has distinguished the two cases, sometimes by finding adequate standards in the challenged statute,[73] sometimes by contrasting the vast scope of the power delegated by the National Industrial Recovery Act,[74] and sometimes by pointing to required administrative findings and procedures that were absent in the NIRA.[75] The Court has also relied on the constitutional doubt principle of statutory construction to narrow interpretations of statutes that, interpreted broadly, might have presented delegation issues.[76]

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[65] A year later, the Court invalidated the Bituminous Coal Conservation Act on delegation grounds, but that delegation was to private entities. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[66] Mistretta v. United States, 488 U.S. 361, 373 (1989).

[67] Lichter v. United States, 334 U.S. 742 (1948).

[68] American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

[69] Yakus v. United States, 321 U.S. 414 (1944).

[70] FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

[71] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[72] Hampton v. Mow Sun Wong, 426 U.S. 88, 122 (1976) (Justice Rehnquist, dissenting).

[73] Mistretta v. United States, 488 U.S. 361, 373–79 (1989).

[74] *See*, *e.g.*, Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (contrasting the delegation to deal with "unprecedented economic problems of varied industries" with the delegation of authority to deal with problems of the banking industry, where there was "accumulated experience" derived from long regulation and close supervision); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001) (the NIRA "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition'").

[75] *See*, *e.g.*, Yakus v. United States, 321 U.S. 414, 424–25 (1944) (*Schechter* involved delegation "not to a public official . . . but to private individuals"; it suffices if Congress has sufficiently marked the field within which an administrator may act "so it may be known whether he has kept within it in compliance with the legislative will.")

[76] *See*, *e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 645–46 (1980) (plurality opinion) (invalidating an occupational safety and health regulation, and observing that the statute should not be interpreted to authorize enforcement of a standard that is not based on an "understandable" quantification of risk); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974) ("hurdles revealed in [*Schechter* and J. W. Hampton, Jr. & Co. v. United States] lead us to read the Act narrowly to avoid constitutional problems").

Concerns in the scholarly literature with respect to the scope of the delegation doctrine [77] have been reflected in the opinions of some of the Justices.[78] Nonetheless, the Court's decisions continue to approve very broad delegations,[79] and the practice will likely remain settled.

The fact that the Court has gone so long without holding a statute to be an invalid delegation does not mean that the nondelegation doctrine is a dead letter. The long list of rejected challenges does suggest, however, that the doctrine applies only to standardless delegations of the most sweeping nature.

The Nature and Scope of Permissible Delegations

Application of two distinct constitutional principles contributed to the development of the nondelegation doctrine: separation of powers and due process. A rigid application of separation of powers would prevent the lawmaking branch from divesting itself of any of its power and conferring it on one of the other branches. But the doctrine is not so rigidly applied as to prevent conferral of significant authority on the executive branch.[80] In *J. W. Hampton, Jr. & Co. v. United States*,[81] Chief Justice Taft explained the doctrine's import in the delegation context. "The Federal Constitution . . . divide[s]

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[77] *E.g.*, *A Symposium on Administrative Law: Part I—Delegation of Powers to Administrative Agencies*, 36 AMER. U. L. REV. 295 (1987); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985); Aranson, Gellhorn & Robinson, *A Theory of Legislative Delegation*, 68 CORN. L. REV. 1 (1982).

[78] American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 543 (1981) (Chief Justice Burger dissenting); Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (then-Justice Rehnquist concurring). *See also* United States v. Midwest Video Corp., 406 U.S. 649, 675, 677 (1972) (Chief Justice Burger concurring, Justice Douglas dissenting); Arizona v. California, 373 U.S. 546, 625–26 (1963) (Justice Harlan dissenting in part). Occasionally, statutes are narrowly construed, purportedly to avoid constitutional problems with delegations. *E.g.*, *Industrial Union Dep't* , 448 U.S. at 645–46 (plurality opinion); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974).

[79] *E.g.*, Mistretta v. United States, 488 U.S. 361, 371–79 (1989). *See also* Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 220–24 (1989); Touby v. United States, 500 U.S. 160, 164–68 (1991); Whitman v. American Trucking Ass'ns, 531 U.S. 547 (2001). While expressing considerable reservations about the scope of delegations, Justice Scalia, in *Mistretta*, 488 U.S. at 415–16, conceded both the inevitability of delegations and the inability of the courts to police them.

Notice Clinton v. City of New York, 524 U.S. 417 (1998), in which the Court struck down the Line Item Veto Act, intended by Congress to be a delegation to the President, finding that the authority conferred on the President was legislative power, not executive power, which failed because the presentment clause had not and could not have been complied with. The dissenting Justices argued that the law was properly treated as a delegation and was clearly constitutional. Id. at 453 (Justice Scalia concurring in part and dissenting in part), 469 (Justice Breyer dissenting).

[80] Field v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[81] 276 U.S. 394 (1928).

the governmental power into three branches. . . . [I]n carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination." [82]

In *Loving v. United States*,[83] the Court distinguished between its usual separation-of-powers doctrine—emphasizing arrogation of power by a branch and impairment of another branch's ability to carry out its functions—and the delegation doctrine, "another branch of our separation of powers jurisdiction," which is informed not by the arrogation and impairment analyses but solely by the provision of standards.[84] This confirmed what had long been evident—that the delegation doctrine is unmoored to traditional separation-of-powers principles.

The second principle underlying delegation law is a due process conception that undergirds delegations to administrative agencies. The Court has contrasted the delegation of authority to a public agency, which typically is required to follow established procedures in building a public record to explain its decisions and to enable a reviewing court to determine whether the agency has stayed within its ambit and complied with the legislative mandate, with delegations to private entities, which typically are not required to adhere to such procedural safeguards.[85]

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[82] 276 U.S. at 406. Chief Justice Taft traced the separation of powers doctrine to the maxim, *Delegata potestas non potest delegari* (a delegated power may not be delegated), 276 U.S. at 405, but the maxim does not help differentiate between permissible and impermissible delegations, and Court has not repeated this reference in later delegation cases.

[83] 517 U.S. 748 (1996).

[84] 517 U.S. at 758–59.

[85] Carter v. Carter Coal Co., 298 U.S. 238, 310–12 (1936); Yakus v. United States, 321 U.S. 414, 424–25 (1944). Because the separation-of-powers doctrine is inapplicable to the states as a requirement of federal constitutional law, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), it is the Due Process Clause to which federal courts must look for authority to review delegations by state legislatures. *See*, *e.g.*, Eubank v. City of Richmond, 226 U.S. 137 (1912); Embree v. Kansas City Road Dist., 240 U.S. 242 (1916).

Two theories suggested themselves to the early Court to justify the results of sustaining delegations. The Chief Justice alluded to the first in *Wayman v. Southard*.[86] He distinguished between "important" subjects, "which must be entirely regulated by the legislature itself," and subjects "of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details." While his distinction may be lost, the theory of the power "to fill up the details" remains current. A second theory, formulated even earlier, is that Congress may legislate contingently, leaving to others the task of ascertaining the facts that bring its declared policy into operation.[87]

Filling Up the Details.—In finding a power to "fill up the details," the Court in *Wayman v. Southard*[88] rejected the contention that Congress had unconstitutionally delegated power to the federal courts to establish rules of practice.[89] Chief Justice Marshall agreed that the rulemaking power was a legislative function and that Congress could have formulated the rules itself, but he denied that the delegation was impermissible. Since then, of course, Congress has authorized the Supreme Court to prescribe rules of procedure for the lower federal courts.[90]

Filling up the details of statutes has long been the standard. For example, the Court upheld a statute requiring the manufacturers of oleomargarine to have their packages "marked, stamped and branded as the Commissioner of Internal Revenue . . . shall prescribe," rejecting a contention that the prosecution was not for violation of law but for violation of a regulation.[91] "The criminal offence," said Chief Justice Fuller, "is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail."[92] *Kollock* was not the first such case,[93] and it was followed by a multitude of delegations that the Court sustained. In one such case, for example, the Court upheld an act directing the Secretary of the Trea-

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[86] 23 U.S. (10 Wheat.) 1, 41 (1825).

[87] *The Brig Aurora*, 11 U.S. (7 Cr.) 382 (1813).

[88] 23 U.S. (10 Wheat.) 1 (1825).

[89] Act of May 8, 1792, § 2, 1 Stat. 275, 276.

[90] The power to promulgate rules of civil procedure was conferred by the Act of June 19, 1934, 48 Stat. 1064; the power to promulgate rules of criminal procedure was conferred by the Act of June 29, 1940, 54 Stat. 688. These authorities are now subsumed under 28 U.S.C. § 2072. In both instances Congress provided for submission of the rules to it, presumably reserving the power to change or to veto the rules. Additionally, Congress has occasionally legislated rules itself. *See*, *e.g.*, 82 Stat. 197 (1968), 18 U.S.C. §§ 3501–02 (admissibility of confessions in federal courts).

[91] *In re* Kollock, 165 U.S. 526 (1897).

[92] 165 U.S. at 533.

[93] United States v. Bailey, 34 U.S. (9 Pet.) 238 (1835); Caha v. United States, 152 U.S. 211 (1894).

sury to promulgate minimum standards of quality and purity for tea imported into the United States.[94]

Contingent Legislation.—An entirely different problem arises when, instead of directing another department of government to apply a general statute to individual cases, or to supplement it by detailed regulation, Congress commands that a previously enacted statute be revived, suspended, or modified, or that a new rule be put into operation, upon the finding of certain facts by an executive or administrative officer. Since the delegated function in such cases is not that of "filling up the details" of a statute, authority for it must be sought under some other theory.

Contingent delegation was approved in an early case, *The Brig Aurora*,[95] upholding the revival of a law upon the issuance of a presidential proclamation. After previous restraints on British shipping had lapsed, Congress passed a new law stating that those restrictions should be renewed in the event the President found and proclaimed that France had abandoned certain practices that violated the neutral commerce of the United States. To the objection that this was an invalid delegation of legislative power, the Court answered briefly that "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."[96]

The theory was used again in *Field v. Clark*,[97] where the Tariff Act of 1890 was assailed as unconstitutional because it directed the President to suspend the free importation of enumerated commodities "for such time as he shall deem just" if he found that other countries imposed upon agricultural or other products of the United States duties or other exactions that "he may deem to be reciprocally unequal and unjust." In sustaining this statute the Court relied heavily upon two factors: (1) legislative precedents, which demonstrated that "in the judgment of the legislative branch of the government, it is often desirable, if not essential, . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations,"[98] and (2) that the act did "not, in any real sense, invest the

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[94] Buttfield v. Stranahan, 192 U.S. 470 (1904). *See also* United States v. Grimaud, 220 U.S. 506 (1911) (upholding act authorizing executive officials to make rules governing use of forest reservations); ICC v. Goodrich Transit Co., 224 U.S. 194 (1912) (upholding delegation to prescribe methods of accounting for carriers in interstate commerce).

[95] 11 U.S. (7 Cr.) 382 (1813).

[96] 11 U.S. (7 Cr.) at 388.

[97] 143 U.S. 649 (1892).

[98] 143 U.S. at 691.

President with the power of legislation. . . . Congress itself prescribed, in advance, the duties to be levied, . . . while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . He had no discretion in the premises except in respect to the duration of the suspension so ordered." [99] By similar reasoning, the Court sustained the flexible provisions of the Tariff Act of 1922 whereby duties were increased or decreased to reflect differences in cost of production at home and abroad, as such differences were ascertained and proclaimed by the President.[100]

Standards.—Implicit in the concept of filling in the details is the idea that there is some intelligible guiding principle or framework to apply. Indeed, the requirement that Congress set forth "intelligible principles" or "standards" to guide as well as limit the agency or official in the performance of its assigned task has been critical to the Court's acceptance of legislative delegations. In theory, the requirement of standards serves two purposes: "it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people . . . , [and] it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged." [101]

The only two instances in which the Court has found an unconstitutional delegation to a public entity have involved grants of discretion that the Court found to be unbounded, hence standardless. Thus, in *Panama Refining Co. v. Ryan*,[102] the President was authorized to prohibit the shipment in interstate commerce of "hot oil"—oil produced in excess of state quotas. Nowhere—not in the language conferring the authority, nor in the "declaration of policy," nor in any other provision—did the statute specify a policy to guide the President in determining when and under what circumstances to exercise the power.[103] Although the scope of granted authority in *Panama Refining* was narrow, the grant in *A. L. A. Schechter Poultry Corp. v. United States* [104] was sweeping. The National Indus-

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[99] 143 U.S. at 692, 693.

[100] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

[101] Arizona v. California, 373 U.S. 546, 626 (1963) (Justice Harlan, dissenting).

[102] 293 U.S. 388 (1935).

[103] The Court, in the view of many observers, was influenced heavily by the fact that the President's orders were nowhere published and notice of regulations bearing criminal penalties for their violations was spotty at best. *Cf.* E. Corwin, The President: Office and Powers 1787–1957 394–95 (4th ed. 1958). The result of the Government's discomfiture in Court was enactment of the Federal Register Act, 49 Stat. 500 (1935), 44 U.S.C. § 301, providing for publication of Executive Orders and agency regulations in the daily Federal Register.

[104] 295 U.S. 495 (1935).

trial Recovery Act devolved on the executive branch the power to formulate codes of "fair competition" for all industry in order to promote "the policy of this title." The policy was "to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, . . . and otherwise to rehabilitate industry. . . ." [105] Though much of the opinion is written in terms of the failure of these policy statements to provide meaningful standards, the Court was also concerned with the delegation's vast scope—the "virtually unfettered" discretion conferred on the President of "enacting laws for the government of trade and industry throughout the country." [106]

Typically the Court looks to the entire statute to determine whether there is an intelligible standard to guide administrators, and a statute's declaration of policies or statement of purposes can provide the necessary guidance. If a statute's declared policies are not open-ended, then a delegation of authority to implement those policies can be upheld. For example, in *United States v. Rock Royal Co-operative, Inc.*,[107] the Court contrasted the National Industrial Recovery Act's statement of policy, "couched in most general terms" and found lacking in *Schechter*, with the narrower policy that an agricultural marketing law directed the Secretary of Agriculture to implement.[108] Similarly, the Court found ascertainable standards in the Emergency Price Control Act's conferral of authority to set prices for commodities if their prices had risen in a manner "inconsistent with the purposes of this Act." [109]

The Court has been notably successful in finding standards that are constitutionally adequate. Standards have been ascertained to exist in such formulations as "just and reasonable," [110] "public inter-

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[105] 48 Stat. 195 (1933), Tit. I, § 1.

[106] 295 U.S. at 542. A delegation of narrower scope led to a different result in Fahey v. Mallonee, 332 U.S. 245, 250 (1947), the Court finding explicit standards unnecessary because "[t]he provisions are regulatory" and deal with but one enterprise, banking, the problems of which are well known and the authorized remedies as equally well known. "A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields." The Court has recently explained that "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." Whitman v. American Trucking Ass'ns, 531 U.S. 457, 475 (2001) (Congress need not provide "any direction" to EPA in defining "country elevators," but "must provide substantial guidance on setting air standards that affect the entire national economy").

[107] 307 U.S. 533 (1939).

[108] 307 U.S. at 575. Other guidance in the marketing law limited the terms of implementing orders and specified the covered commodities.

[109] Yakus v. United States, 321 U.S. 414 (1944) (the principal purpose was to control wartime inflation, and the administrator was directed to give "due consideration" to a specified pre-war base period).

[110] Tagg Bros. & Moorhead v. United States, 280 U.S. 420 (1930).

est,"[111] "public convenience, interest, or necessity,"[112] "unfair methods of competition,"[113] and "requisite to protect the public health [with] an adequate margin of safety."[114] Thus, in *National Broadcasting Co. v. United States*,[115] the Court found that the discretion conferred on the Federal Communications Commission to license broadcasting stations to promote the "public interest, convenience, or necessity" conveyed a standard "as complete as the complicated factors for judgment in such a field of delegated authority permit."[116] Yet the regulations upheld were directed to the contractual relations between networks and stations and were designed to reduce the effect of monopoly in the industry, a policy on which the statute was silent.[117] When, in the Economic Stabilization Act of 1970, Congress authorized the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries," and the President responded by imposing broad national controls, the lower court decision sustaining the action was not even appealed to the Supreme Court.[118] Explicit standards are not even required in all situations, the Court having found standards reasonably implicit in a delegation to the Federal Home Loan Bank Board to regulate banking associations.[119]

The Court has emphatically rejected the idea that administrative implementation of a congressional enactment may provide the intelligible standard necessary to uphold a delegation. The Court's decision in *Lichter v. United States*[120] could be read as approving of a bootstrap theory, the Court in that case having upheld the validity of a delegation of authority to recover "excessive profits" as applied to profits earned prior to Congress's incorporation into the statute of the administrative interpretation.[121] In *Whitman v. Ameri-*

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[111] New York Central Securities Corp. v. United States, 287 U.S. 12 (1932).

[112] Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933).

[113] FTC v. Gratz, 253 U.S. 421 (1920).

[114] Whitman v. American Trucking Ass'ns, 531 U.S. 547 (2001).

[115] 319 U.S. 190 (1943).

[116] 319 U.S. at 216.

[117] Similarly, the promulgation by the FCC of rules creating a "fairness doctrine" and a "right to reply" rule has been sustained, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), as well as a rule requiring the carrying of anti-smoking commercials. Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied sub nom.* Tobacco Institute v. FCC, 396 U.S. 842 (1969).

[118] Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737 (D.D.C. 1971). The three-judge court relied principally on *Yakus*.

[119] Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (the Court explained that both the problems of the banking industry and the authorized remedies were well known).

[120] 334 U.S. 742 (1948).

[121] In upholding the delegation as applied to the pre-incorporation administrative definition, the Court explained that "[t]he statutory term 'excessive profits,' in its context, was a sufficient expression of legislative policy and standards to render

can Trucking Associations,[122] however, the Court asserted that *Lichter* mentioned agency regulations only "because a subsequent Congress had incorporated the regulations into a revised version of the statute." [123] "We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute," [124] the Court concluded.

Even in "sweeping regulatory schemes" that affect the entire economy, the Court has "never demanded . . . that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'" [125] Thus Congress need not quantify how "imminent" is too imminent, how "necessary" is necessary enough, how "hazardous" is too hazardous, or how much profit is "excess." Rather, discretion to make such determinations may be conferred on administrative agencies.[126]

Although Congress must ordinarily provide some guidance that indicates broad policy objectives, there is no general prohibition on delegating authority that includes the exercise of policy judgment. In *Mistretta v. United States*,[127] the Court approved congressional delegations to the United States Sentencing Commission, an independent agency in the judicial branch, to develop and promulgate guidelines binding federal judges and cabining their discretion in sentencing criminal defendants. Although the Court enumerated the standards Congress had provided, it admitted that significant discretion existed with respect to making policy judgments about the relative severity of different crimes and the relative weight of the characteristics of offenders that are to be considered, and stated forthrightly that delegations may carry with them "the need to exercise judgment on matters of policy." [128] A number of cases illustrate the point. For example, the Court has upheld complex economic regulations of industries in instances in which the agencies had first denied possession of such power, had unsuccessfully sought authorization from Congress, and had finally acted without the requested congressional guidance.[129] The Court has also recognized that, when

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it constitutional." 334 U.S. at 783. The "excessive profits" standard, prior to definition, was contained in Tit. 8 of the Act of October 21, 1942, 56 Stat. 798, 982. The administrative definition was added by Tit. 7 of the Act of February 25, 1944, 58 Stat. 21, 78.

[122] 531 U.S. 547 (2001).

[123] 531 U.S. at 472.

[124] 531 U.S. at 472.

[125] Whitman v. American Trucking Ass'ns, 531 U.S. 457, 475 (2001).

[126] *Whitman*, 531 U.S. at 475–76.

[127] 488 U.S. 361 (1989).

[128] 488 U.S. at 378.

[129] *E.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry., 387 U.S. 397 (1967).

Administrations change, new officials may have sufficient discretion under governing statutes to change or even reverse agency policies.[130]

It seems therefore reasonably clear that the Court does not require much in the way of standards from Congress. The minimum upon which the Court usually insists is that Congress use a delegation that "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."[131] Where the congressional standards are combined with requirements of notice and hearing and statements of findings and considerations by the administrators, so that judicial review under due process standards is possible, the constitutional requirements of delegation have been fulfilled.[132] This requirement may be met through the provisions of the Administrative Procedure Act,[133] but where that Act is inapplicable or where the Court sees the necessity for exceeding its provisions, due process can supply the safeguards of required hearing, notice, supporting statements, and the like.[134]

Preemptive Reach of Delegated Authority.—In exercising a delegated power the President or another officer may effectively suspend or rescind a law passed by Congress, or may preempt state law. A rule or regulation properly promulgated under authority received from Congress is *law*, and under the supremacy clause of

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[130] Chevron, U.S.A. v. NRDC, 467 U.S. 837, 842–45, 865–66 (1984) ("[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." Id. at 865). *See also* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 42–44, 46–48, 51–57 (1983) (recognizing agency could have reversed its policy but finding reasons not supported on record).

[131] Yakus v. United States, 321 U.S. 414, 425 (1944).

[132] Yakus v. United States, 321 U.S. 414, 426; Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 218 (1989); American Light & Power Co. v. SEC, 329 U.S. 90, 107, 108 (1946); Opp Cotton Mills v. Administrator, 312 U.S. 126, 144 (1941). It should be remembered that the Court has renounced strict review of economic regulation wholly through legislative enactment, forsaking substantive due process, so that review of the exercise of delegated power by the same relaxed standard forwards a consistent policy. *E.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[133] Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. §§ 551–559. In NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), six Justices agreed that a Board proceeding had been in fact rule-making and not adjudication and that the APA should have been complied with. The Board won the particular case, however, because of a coalescence of divergent views of the Justices, but the Board has since reversed a policy of not resorting to formal rule-making.

[134] *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Wisconsin v. Constantineau, 400 U.S. 433 (1971).

the Constitution can preempt state law.[135] Similarly, a valid regulation can supersede a federal statute. Early cases sustained contingency legislation giving the President power, upon the finding of certain facts, to revive or suspend a law,[136] and the President's power to raise or lower tariff rates equipped him to alter statutory law.[137] The Court in *Opp Cotton Mills v. Administrator*[138] upheld Congress's decision to delegate to the Wage and Hour Administrator of the Labor Department the authority to establish a minimum wage in particular industries greater than the statutory minimum but no higher than a prescribed figure. Congress has not often expressly addressed the issue of repeals or supersessions, but in authorizing the Supreme Court to promulgate rules of civil and criminal procedure and of evidence it directed that such rules supersede previously enacted statutes with which they conflict.[139]

Delegations to the President in Areas of Shared Authority

Foreign Affairs.—That the delegation of discretion in dealing with foreign relations stands upon a different footing than the transfer of authority to regulate domestic concerns was asserted in *United States v. Curtiss-Wright Corporation*.[140] There the Court upheld a joint resolution of Congress making it unlawful to sell arms to certain warring countries upon certain findings by the President, a typically contingent type of delegation. But Justice Sutherland for the Court proclaimed that the President is largely free of the constitutional constraints imposed by the nondelegation doctrine when he acts in foreign affairs.[141] Sixty years later, the Court, relying on *Curtiss-Wright*, reinforced such a distinction in a case involving the Presi-

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[135] City of New York v. FCC, 486 U.S. 57, 63–64 (1988); Louisiana PSC v. FCC, 476 U.S. 355, 368–69 (1986); Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153–54 (1982).

[136] *E.g.*, *The Brig Aurora*, 11 U.S. (7 Cr.) 382 (1813).

[137] *E.g.*, J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892).

[138] 312 U.S. 126 (1941).

[139] *See* 28 U.S.C. § 2072. In Davis v. United States, 411 U.S. 233, 241 (1973), the Court referred in passing to the supersession of statutes without evincing any doubts about the validity of the results. When Congress amended the Rules Enabling Acts in the 100th Congress, Pub. L. 100–702, 102 Stat. 4642, 4648, amending 28 U.S.C. § 2072, the House would have altered supersession, but the Senate disagreed, the House acquiesced, and the old provision remained. *See* H.R. 4807, H. REP. NO. 100–889, 100th Cong., 2d sess. (1988), 27–29; 134 CONG REC. 23573–84 (1988), id. at 31051–52 (Sen. Heflin); id. at 31872 (Rep. Kastenmeier).

[140] 299 U.S. 304, 319–29 (1936).

[141] 299 U.S. at 319–22. For a particularly strong, recent assertion of the point, *see* Haig v. Agee, 453 U.S. 280, 291–92 (1981). This view also informs the Court's analysis in Dames & Moore v. Regan, 453 U.S. 654 (1981). *See also* United States v. Chemical Foundation, 272 U.S. 1 (1926) (Trading With Enemy Act delegation to dispose of seized enemy property).

dent's authority over military justice.[142] Whether or not the President is the "sole organ of the nation" in its foreign relations, as asserted in *Curtiss-Wright*,[143] a lesser standard of delegation is applied in areas of power shared by the President and Congress.

Military.—Superintendence of the military is another area in which shared power with the President affects delegation doctrine. The Court in *Loving v. United States* [144] approved a virtually standardless delegation to the President.

Article 118 of the Uniform Code of Military Justice (UCMJ) [145] provides for the death penalty for premeditated murder and felony murder for persons subject to the Act, but the statute does not comport with the Court's capital punishment jurisdiction, which requires the death sentence to be cabined by standards so that the sentencing authority must narrow the class of convicted persons to be so sentenced and must justify the individual imposition of the sentence.[146] However, the President in 1984 had promulgated standards that purported to supply the constitutional validity the UCMJ needed.[147]

The Court in *Loving* held that Congress could delegate to the President the authority to prescribe standards for the imposition of the death penalty—Congress's power under Article I, § 8, cl. 14, is not exclusive—and that Congress had done so in the UCMJ by providing that the punishment imposed by a court-martial may not exceed "such limits as the President may prescribe." [148] Acknowledging that a delegation must contain some "intelligible principle" to guide the recipient of the delegation, the Court nonetheless held this not to be true when the delegation was made to the President in his role as Commander-in-Chief. "The same limitations on delegation do not apply" if the entity authorized to exercise delegated authority itself possesses independent authority over the subject matter. The President's responsibilities as Commander-in-Chief require him to superintend the military, including the courts-martial, and

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[142] Loving v. United States, 517 U.S. 748, 772–73 (1996).
[143] 299 U.S. at 319.
[144] 517 U.S. 748 (1996).
[145] 10 U.S.C. §§ 918(1), (4).
[146] The Court assumed the applicability of Furman v. Georgia, 408 U.S. 238 (1972), and its progeny, to the military, 517 U.S. at 755–56, a point on which Justice Thomas disagreed, id. at 777.
[147] Rule for Courts-Martial; *see* 517 U.S. at 754.
[148] 10 U.S.C. §§ 818, 836(a), 856.

thus the delegated duty is interlinked with duties already assigned the President by the Constitution.[149]

Delegations to States and to Private Entities

Delegations to the States.—Beginning in the Nation's early years, Congress has enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.[150] Challenges to the practice have been uniformly rejected. Although the Court early expressed its doubt that Congress could compel state officers to act, it entertained no such thoughts about the propriety of authorizing them to act if they chose.[151] When, in the *Selective Draft Law Cases*,[152] the contention was made that the 1917 statute authorizing a military draft was invalid because of its delegations of duties to state officers, the argument was rejected as "too wanting in merit to require further notice." Congress continues to empower state officers to act.[153] Presidents who have objected have done so not on delegation grounds, but rather on the basis of the Appointments Clause.[154]

Delegations to Private Entities.—The Court has upheld statutory delegations to private persons in the form of contingency legislation. It has upheld, for example, statutes providing that restrictions upon the production or marketing of agricultural commodities are to become operative only upon a favorable vote by a prescribed majority of those persons affected.[155] The Court's rationale has been

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[149] 517 U.S. at 771–74. *See also* United States v. Mazurie, 419 U.S. 544, 556–57 (1974) (limits on delegation are "less stringent" when delegation is made to an Indian tribe that can exercise independent sovereign authority over the subject matter).

[150] *See* Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925); Holcomb, *The States as Agents of the Nation*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1187 (1938).

[151] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (duty to deliver fugitive slave); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861) (holding that Congress could not compel a governor to extradite a fugitive). Doubts over Congress's power to compel extradition were not definitively removed until Puerto Rico v. Branstad, 483 U.S. 219 (1987), in which the Court overruled *Dennison*.

[152] 245 U.S. 366, 389 (1918).

[153] *E.g.*, Pub. L. 94–435, title III, 90 Stat. 1394, 15 U.S.C. § 15c (state attorneys general may bring antitrust *parens patriae* actions); Medical Waste Tracking Act, Pub. L. 100–582, 102 Stat. 2955, 42 U.S.C. § 6992f (states may impose civil and possibly criminal penalties against violators of the law).

[154] *See* 24 *Weekly Comp. of Pres. Docs.* 1418 (1988) (President Reagan). The only judicial challenge to such a practice resulted in a rebuff to the presidential argument. Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power Council, 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

[155] Currin v. Wallace, 306 U.S. 1 (1939); United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 577 (1939); Wickard v. Filburn, 317 U.S. 111, 115–116 (1942); United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

that such a provision does not involve any delegation of legislative authority, because Congress has merely placed a restriction upon its own regulation by withholding its operation unless it is approved in a referendum.[156]

The Court has also upheld statutes that give private entities actual regulatory power, rather than that merely make regulation contingent on such entities' approval. The Court, for example, upheld a statute that delegated to the American Railway Association, a trade group, the authority to determine the standard height of draw bars for freight cars and to certify the figure to the Interstate Commerce Commission, which was required to accept it.[157] The Court simply cited *Buttfield v. Stranahan*,[158] in which it had sustained a delegation to the Secretary of the Treasury to promulgate minimum standards of quality and purity for imported tea, as a case "completely in point" and resolving the issue without need of further consideration.[159] Similarly, the Court had enforced statutes that gave legal effect to local customs of miners with respect to claims on public lands.[160]

The Court has struck down delegations to private entities, but not solely because they were to private entities. In *Schechter*, it condemned the involvement of private trade groups in the drawing up of binding codes of competition in conjunction with governmental agencies, but the Court's principal objection was to the statute's lack of adequate standards.[161] In *Carter v. Carter Coal Co.*,[162] the Court struck down the Bituminous Coal Conservation Act in part because the statute penalized persons who failed to observe minimum wage and maximum hour regulations drawn up by prescribed majorities of coal producers and coal employees. But the problem for the Court apparently was not so much that the statute delegated to private entities as that it delegated to private entities whose interests were adverse to the interests of those regulated, thereby denying the lat-

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[156] Currin v. Wallace, 306 U.S. 1, 15, 16 (1939).

[157] St. Louis, Iron Mt. & So. Ry. v. Taylor, 210 U.S. 281 (1908).

[158] 192 U.S. 470 (1904).

[159] 210 U.S. at 287.

[160] Jackson v. Roby, 109 U.S. 440 (1883); Erhardt v. Boaro, 113 U.S. 527 (1885); Butte City Water Co. v. Baker, 196 U.S. 119 (1905).

[161] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935). In two subsequent cases, the Court referred to *Schechter* as having struck down a delegation for its lack of standards. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001).

[162] 298 U.S. 238 (1936). *But compare* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (upholding a delegation in the Bituminous Coal Act of 1937).

ter due process.[163] And several later cases have upheld delegations to private entities.[164]

Even though the Court has upheld some delegations to private entities by reference to cases involving delegations to public agencies, some uncertainty remains as to whether identical standards apply in the two situations. *Schechter* contrasted the National Industrial Recovery Act's broad and virtually standardless delegation to the President, assisted by private trade groups,[165] with other broad delegations of authority to administrative agencies, characterized by the Court as bodies of experts "required to act upon notice and hearing," and further limited by the requirement that binding orders must be "supported by findings of fact which in turn are sustained by evidence."[166] The absence of these procedural protections, designed to ensure fairness—as well as the possible absence of impartiality identified in *Carter Coal*—could be cited to support closer scrutiny of private delegations. Although the Court has emphasized the importance of administrative procedures in upholding broad delegations to administrative agencies,[167] it has not, since *Schechter* and *Carter Coal*, relied on the distinction to strike down a private delegation.

Particular Subjects or Concerns—Closer Scrutiny or Uniform Standard?

The Court has strongly implied that the same principles govern the validity of a delegation regardless of the subject matter of the delegation. "[A] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes."[168] Holding that "the delegation of discretionary authority under Congress's taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges," the

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[163] "One person may not be entrusted with the power to regulate the business of another, and especially of a competitor." 298 U.S. at 311.

[164] *See*, *e.g.*, Schweiker v. McClure, 456 U.S. 188 (1992) (adjudication of Medicare claims, without right of appeal, by hearing officer appointed by private insurance carrier upheld under due process challenge); Association of Amer. Physicians & Surgeons v. Weinberger, 395 F. Supp. 125 (N.D. Ill.) (three-judge court) (delegation to Professional Standards Review Organization), *aff'd per curiam*, 423 U.S. 975 (1975); Noblecraft Industries v. Secretary of Labor, 614 F.2d 199 (9th Cir. 1980) (Secretary authorized to adopt interim OSHA standards produced by private organization). Executive Branch objections to these kinds of delegations have involved appointments clause arguments rather than delegation issues per se.

[165] The Act conferred authority on the President to approve the codes of competition, either as proposed by the appropriate trade group, or with conditions that he added. Thus the principal delegation was to the President, with the private trade groups being delegated only recommendatory authority. 295 U.S. at 538–39.

[166] 295 U.S. at 539.

[167] *See*, *e.g.*, Yakus v. United States, 321 U.S. 414, 424–25 (1944).

[168] Lichter v. United States, 334 U.S. 742, 778–79 (1948).

Court explained in *Skinner v. Mid-America Pipeline Company* [169] that there was "nothing in the placement of the Taxing Clause" in Article I, § 8 that would distinguish it, for purposes of delegation, from the other powers enumerated in that clause.[170] Thus, the test in the taxing area is the same as for other areas—whether the statute has provided the administrative agency with standards to guide its actions in such a way that a court can determine whether the congressional policy has been followed.

This does not mean that Congress may delegate its power to determine whether taxes should be imposed. What was upheld in *Skinner* was delegation of authority to the Secretary of Transportation to collect "pipeline safety user fees" for users of natural gas and hazardous liquid pipelines. "Multiple restrictions" placed on the Secretary's discretion left no doubt that the constitutional requirement of an intelligible standard had been met. Cases involving the power to impose criminal penalties, described below, further illustrate the difference between delegating the underlying power to set basic policy—whether it be the decision to impose taxes or the decision to declare that certain activities are crimes—and the authority to exercise discretion in implementing the policy.

Crime and Punishment.—The Court has confessed that its "cases are not entirely clear as to whether more specific guidance is in fact required" for delegations relating to the imposition of criminal sanctions.[171] It is clear, however, that some essence of the power to define crimes and set a range of punishments is not delegable, but must be exercised by Congress. This conclusion derives in part from the time-honored principle that penal statutes are to be strictly construed, and that no one should be "subjected to a penalty un-

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[169] 490 U.S. 212, 223 (1989). In National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974), and FPC v. New England Power Co., 415 U.S. 345 (1974), the Court had appeared to suggest that delegation of the taxing power would be fraught with constitutional difficulties. It is difficult to discern how this view could have been held after the many cases sustaining delegations to fix tariff rates, which are in fact and in law taxes. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892); *see also* FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (delegation to President to raise license "fees" on imports when necessary to protect national security). Nor should doubt exist respecting the appropriations power. *See* Synar v. United States, 626 F. Supp. 1374, 1385–86 (D.D.C.) (three-judge court), *aff'd on other grounds sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

[170] 490 U.S. at 221. Nor is there basis for distinguishing the other powers enumerated in § 8. *See*, *e.g.*, Loving v. United States, 517 U.S. 748 (1996). *But see* Touby v. United States, 500 U.S. 160, 166 (1991) (it is "unclear" whether a higher standard applies to delegations of authority to issue regulations that contemplate criminal sanctions), discussed in the next section.

[171] Touby v. United States, 500 U.S. 160, 166 (1991).

less the words of the statute plainly impose it." [172] Both *Schechter* [173] and *Panama Refining* [174]—the only two cases in which the Court has invalidated delegations—involved broad delegations of power to "make federal crimes of acts that never had been such before." [175] Thus, Congress must provide by statute that violation of the statute's terms—or of valid regulations issued pursuant thereto—shall constitute a crime, and the statute must also specify a permissible range of penalties. Punishment in addition to that authorized in the statute may not be imposed by administrative action.[176]

However, once Congress has exercised its power to declare certain acts criminal, and has set a range of punishment for violations, authority to flesh out the details may be delegated. Congress may provide that violation of valid administrative regulations shall be punished as a crime.[177] For example, the Court has upheld a delegation of authority to classify drugs as "controlled substances," and thereby to trigger imposition of criminal penalties, set by statute, that vary according to the level of a drug's classification by the Attorney General.[178]

Congress may also confer on administrators authority to prescribe criteria for ascertaining an appropriate sentence within the range between the maximum and minimum penalties that are set by statute. The Court upheld Congress's conferral of "significant discretion" on the Sentencing Commission to set binding sentencing guidelines establishing a range of determinate sentences for all categories of federal offenses and defendants.[179] Although the Commission was given significant discretionary authority "to determine the relative severity of federal crimes, . . . assess the relative weight of

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[172] Tiffany v. National Bank of Missouri, 85 U.S. (18 Wall.) 409, 410 (1873).

[173] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[174] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[175] Fahey v. Mallonee, 332 U.S. 245, 249 (1947).

[176] L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, 404 (1944) ("[I]t is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute").

[177] United States v. Grimaud, 220 U.S. 506 (1911). The Forest Reserve Act at issue in *Grimaud* clearly provided for punishment for violation of "rules and regulations of the Secretary." The Court in *Grimaud* distinguished United States v. Eaton, 144 U.S. 677 (1892), which had held that authority to punish for violation of a regulation was lacking in more general language authorizing punishment for failure to do what was "required by law." 220 U.S. at 519. Extension of the principle that penal statutes should be strictly construed requires that the prohibited acts be clearly identified in the regulation. M. Kraus & Bros. v. United States, 327 U.S. 614, 621 (1946). The Court summarized these cases in Loving v. United States, 517 U.S. 748 (1996), drawing the conclusion that "there is no absolute rule . . . against Congress's delegation of authority to define criminal punishments."

[178] Touby v. United States, 500 U.S. 160 (1991).

[179] Mistretta v. United States, 488 U.S. 361 (1989).

the offender characteristics listed by Congress, . . . to determine which crimes have been punished too leniently and which too severely, [and] which types of criminals are to be considered similar," Congress also gave the Commission extensive guidance in the Act, and did not confer authority to create new crimes or to enact a federal death penalty for any offense.[180]

Delegation and Individual Liberties.—Some Justices have argued that delegations by Congress of power to affect the exercise of "fundamental freedoms" by citizens must be closely scrutinized to require the exercise of a congressional judgment about meaningful standards.[181] The only pronouncement in a majority opinion, however, is that, even with regard to the regulation of liberty, the standards of the delegation "must be adequate to pass scrutiny by the accepted tests."[182] The standard practice of the Court has been to interpret the delegation narrowly so as to avoid constitutional problems.[183]

Perhaps refining the delegation doctrine, at least in cases where Fifth Amendment due process interests are implicated, the Court held that a government agency charged with the efficient administration of the executive branch could not assert the broader interests that Congress or the President might have in barring lawfully resident aliens from government employment. The agency could assert only those interests Congress charged it with promoting, and if the action could be justified by other interests, the office with responsibility for promoting those interests must take the action.[184]

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[180] 488 U.S. at 377–78. "As for every other offense within the Commission's jurisdiction, the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments." Id. at 378 n.11.

[181] United States v. Robel, 389 U.S. 258, 269 (1967) (Justice Brennan concurring). The view was specifically rejected by Justices White and Harlan in dissent, id. at 288–89, and ignored by the majority.

[182] Kent v. Dulles, 357 U.S. 116, 129 (1958).

[183] Kent v. Dulles, 357 U.S. 116 (1958); Schneider v. Smith, 390 U.S. 17 (1968); Greene v. McElroy, 360 U.S. 474, 506–08 (1959) (Court will not follow traditional principles of congressional acquiescence in administrative interpretation to infer a delegation of authority to impose an industrial security clearance program that lacks the safeguards of due process). More recently, the Court has eschewed even this limited mode of construction. Haig v. Agee, 453 U.S. 280 (1981).

[184] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (5-to-4 decision). The regulation was reissued by the President, E. O. 11935, 3 C.F.R. 146 (1976), reprinted in 5 U.S.C. § 3301 (app.), and sustained in Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978).

CONGRESSIONAL INVESTIGATIONS

Source of the Power to Investigate

No provision of the Constitution expressly authorizes either house of Congress to make investigations and exact testimony to the end that it may exercise its legislative functions effectively and advisedly. But such a power had been frequently exercised by the British Parliament and by the Assemblies of the American Colonies prior to the adoption of the Constitution.[185] It was asserted by the House of Representatives as early as 1792 when it appointed a committee to investigate the defeat of General St. Clair and his army by the Indians in the Northwest and empowered it to "call for such persons, papers, and records, as may be necessary to assist their inquiries." [186]

The Court has long since accorded its agreement with Congress that the investigatory power is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress. "We are of the opinion," wrote Justice Van Devanter for a unanimous Court, "that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised." [187]

And, in a 1957 opinion generally hostile to the exercise of the investigatory power in the post-War years, Chief Justice Warren did

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[185] Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 159–166 (1926); M. DIMOCK, CONGRESSIONAL INVESTIGATING COMMITTEES ch. 2 (1929).

[186] 3 ANNALS OF CONGRESS 490–494 (1792); 3 A. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 1725 (1907).

[187] McGrain v. Daugherty, 273 U.S. 135, 174–175 (1927).

not question the basic power. "The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste." [188] Justice Harlan summarized the matter in 1959. "The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." [189]

Broad as the power of inquiry is, it is not unlimited. The power of investigation may properly be employed only "in aid of the legislative function." [190] Its outermost boundaries are marked, then, by the outermost boundaries of the power to legislate. In principle, the Court is clear on the limitations, clear "that neither house of Congress possesses a 'general power of making inquiry into the private affairs of the citizen'; that the power actually possessed is limited to inquiries relating to matters of which the particular house 'has jurisdiction' and in respect of which it rightfully may take other action; that if the inquiry relates to 'a matter wherein relief or redress could be had only by a judicial proceeding' it is not within the range of this power, but must be left to the courts, conformably to the constitutional separation of governmental powers; and that for the purpose of determining the essential character of the inquiry recourse must be had to the resolution or order under which it is made." [191]

In practice, much of the litigated dispute has been about the reach of the power to inquire into the activities of private citizens; inquiry into the administration of laws and departmental corruption, while of substantial political consequence, has given rise to fewer judicial precedents.

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[188] Watkins v. United States, 354 U.S. 178, 187 (1957).

[189] Barenblatt v. United States, 360 U.S. 109, 111 (1959). *See also* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503–07 (1975).

[190] Kilbourn v. Thompson, 103 U.S. 168, 189 (1881).

[191] McGrain v. Daugherty, 273 U.S. 135, 170 (1927). The internal quotations are from Kilbourn v. Thompson, 103 U.S. 168, 190, 193 (1881).

Investigations of Conduct of Executive Department

For many years the investigating function of Congress was limited to inquiries into the administration of the Executive Department or of instrumentalities of the Government. Until the administration of Andrew Jackson this power was not seriously challenged.[192] During the controversy over renewal of the charter of the Bank of the United States, John Quincy Adams contended that an unlimited inquiry into the operations of the bank would be beyond the power of the House.[193] Four years later the legislative power of investigation was challenged by the President. A committee appointed by the House of Representatives "with power to send for persons and papers, and with instructions to inquire into the condition of the various executive departments, the ability and integrity with which they have been conducted, . . . "[194] called upon the President and the heads of departments for lists of persons appointed without the consent of the Senate and the amounts paid to them. Resentful of this attempt "to invade the just rights of the Executive Departments," the President refused to comply and the majority of the committee acquiesced.[195] Nevertheless, congressional investigations of Executive Departments have continued to the present day. Shortly before the Civil War, contempt proceedings against a witness who refused to testify in an investigation of John Brown's raid upon the arsenal at Harper's Ferry occasioned a thorough consideration by the Senate of the basis of this power. After a protracted debate, which cut sharply across sectional and party lines, the Senate voted overwhelmingly to imprison the contumacious witness.[196] Notwithstanding this firmly established legislative practice, the Supreme Court took a narrow view of the power in *Kilbourn v. Thompson*.[197] It held that the House of Representatives had overstepped its jurisdiction when it instituted an investigation of losses suffered by the United States as a creditor of Jay Cooke and Company, whose estate was being administered in bankruptcy by a federal court.[198] But nearly half a century later, in *McGrain v.*

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[192] In 1800, Secretary of the Treasury, Oliver Wolcott, Jr., addressed a letter to the House of Representatives advising them of his resignation from office and inviting an investigation of his office. Such an inquiry was made. 10 ANNALS OF CONGRESS 786–788 (1800).

[193] 8 CONG. DEB. 2160 (1832).

[194] 13 CONG. DEB. 1057–1067 (1836).

[195] H. R. REP. NO. 194, 24th Congress, 2d sess., 1, 12, 31 (1837).

[196] CONG. GLOBE, 36th Congress, 1st sess., 1100–1109 (1860).

[197] 103 U.S. 168 (1881).

[198] The Court held that inasmuch as the entire proceedings arising out of the bankruptcy were pending in court, as the authorizing resolution contained no suggestion of contemplated legislation, as in fact no valid legislation could be enacted on the subject, and as the only relief which the United States could seek was judi-

Daugherty,[199] it ratified in sweeping terms, the power of Congress to inquire into the administration of an executive department and to sift charges of malfeasance in such administration.[200]

Investigations of Members of Congress

When either House exercises a judicial function, as in judging of elections or determining whether a member should be expelled, it is clearly entitled to compel the attendance of witnesses to disclose the facts upon which its action must be based. Thus, the Court held that since a House had a right to expel a member for any offense which it deemed incompatible with his trust and duty as a member, it was entitled to investigate such conduct and to summon private individuals to give testimony concerning it.[201] The decision in *Barry v. United States ex rel. Cunningham* [202] sanctioned the exercise of a similar power in investigating a senatorial election.

Investigations in Aid of Legislation

Purpose.—Beginning with the resolution adopted by the House of Representatives in 1827, which vested its Committee on Manufactures "with the power to send for persons and papers with a view to ascertain and report to this House in relation to a revision of the tariff duties on imported goods," [203] the two Houses have asserted the right to collect information from private persons as well as from governmental agencies when necessary to enlighten their judgment on proposed legislation. The first case to review the assertion saw a narrow view of the power taken and the Court held that the purpose of the inquiry was to pry improperly into private affairs without any possibility of legislating on the basis of what might be learned and further that the inquiry overstepped the bounds of legislative jurisdiction and invaded the provinces of the judiciary.[204]

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cial relief in the bankruptcy proceeding, the House had exceeded its powers in authorizing the inquiry. *But see* Hutcheson v. United States, 369 U.S. 599 (1962).

[199] 273 U.S. 135, 177, 178 (1927).

[200] The topic of executive privilege, the claimed right of the President and at least some of his executive branch officers to withhold from Congress information desired by it or by one of its committees, is addressed in Article II, The Presidential Aegis: Demands for Papers. Although the issue has been one of contention between the two branches of Government since Washington's refusal in 1796 to submit certain correspondence to the House of Representatives relating to treaty negotiations, it has only relatively recently become a judicial issue.

[201] *In re* Chapman, 166 U.S. 661 (1897).

[202] 279 U.S. 597 (1929).

[203] 4 CONG. DEB. 862, 868, 888, 889 (1827).

[204] Kilbourn v. Thompson, 103 U.S. 168 (1881).

Subsequent cases, however, have given Congress the benefit of a presumption that its object is legitimate and related to the possible enactment of legislation. Shortly after *Kilbourn*, the Court declared that "it was certainly not necessary that the resolution should declare in advance what the Senate meditated doing when the investigation was concluded" in order that the inquiry be under a lawful exercise of power.[205] Similarly, in *McGrain v. Daugherty*,[206] the investigation was presumed to have been undertaken in good faith to aid the Senate in legislating. Then, in *Sinclair v. United States*,[207] on its facts presenting a close parallel to *Kilbourn*, the Court affirmed the right of the Senate to carry out investigations of fraudulent leases of government property after suit for recovery had been instituted. The president of the lessee corporation had refused to testify on the ground that the questions related to his private affairs and to matters cognizable only in the courts wherein they were pending, asserting that the inquiry was not actually in aid of legislation. The Senate had prudently directed the investigating committee to ascertain what, if any, legislation might be advisable. Conceding "that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits," the Court declared that the authority "to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits." [208]

Although *Sinclair* and *McGrain* involved inquiries into the activities and dealings of private persons, these activities and dealings were in connection with property belonging to the United States Government, so that it could hardly be said that the inquiries concerned the merely personal or private affairs of any individual.[209] But, where the business, and the conduct of individuals are subject to congressional regulation, there exists the power of inquiry,[210] and in practice the areas of any individual's life immune from inquiry are probably fairly limited. "In the decade following World War II, there appeared a new kind of congressional inquiry unknown in prior periods of American history. Principally this was the result of the various investigations into the threat of subversion of the United States Government, but other subjects of congressional interest also

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[205] *In re* Chapman, 166 U.S. 661, 670 (1897).
[206] 273 U.S. 135, 178 (1927).
[207] 279 U.S. 263 (1929).
[208] 279 U.S. at 295.
[209] 279 U.S. at 294.
[210] The first case so holding is ICC v. Brimson, 154 U.S. 447 (1894), which asserts that, because Congress could itself have made the inquiry to appraise its regulatory activities, it could delegate the power of inquiry to the agency to which it had delegated the regulatory function.

contributed to the changed scene. This new phase of legislative inquiry involved a broad-scale intrusion into the lives and affairs of private citizens."[211] Because Congress clearly has the power to legislate to protect the nation and its citizens from subversion, espionage, and sedition,[212] it also has the power to inquire into the existence of the dangers of domestic or foreign-based subversive activities in many areas of American life, including education,[213] labor and industry,[214] and political activity.[215] Because its powers to regulate interstate commerce afford Congress the power to regulate corruption in labor-management relations, congressional committees may inquire into the extent of corruption in labor unions.[216] Because of its powers to legislate to protect the civil rights of its citizens, Congress may investigate organizations which allegedly act to deny those civil rights.[217] It is difficult in fact to conceive of areas into which congressional inquiry might not be carried, which is not the same, of course, as saying that the exercise of the power is unlimited.

One limitation on the power of inquiry that the cases have discussed concerns the contention that congressional investigations often have no legislative purpose but rather are aimed at achieving results through "exposure" of disapproved persons and activities: "We have no doubt," wrote Chief Justice Warren, "that there is no congressional power to expose for the sake of exposure."[218] Although

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[211] Watkins v. United States, 354 U.S. 178, 195 (1957).

[212] *See* Dennis v. United States, 341 U.S. 494 (1951); Barenblatt v. United States, 360 U.S. 109, 127 (1959); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[213] Barenblatt v. United States, 360 U.S. 109, 129–132 (1959); Deutch v. United States, 367 U.S. 456 (1961); *cf.* Sweezy v. New Hampshire, 354 U.S. 234 (1957) (state inquiry).

[214] Watkins v. United States, 354 U.S. 178 (1957); Flaxer v. United States, 358 U.S. 147 (1958); Wilkinson v. United States, 365 U.S. 399 (1961).

[215] McPhaul v. United States, 364 U.S. 372 (1960).

[216] Hutcheson v. United States, 369 U.S. 599 (1962).

[217] Shelton v. United States, 404 F.2d 1292 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969).

[218] Watkins v. United States, 354 U.S. 178, 200 (1957). The Chief Justice, however, noted: "We are not concerned with the power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government. That was the only kind of activity described by Woodrow Wilson in Congressional Government when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' Id. at 303. From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." Id. at 200 n.33.

In his book, Wilson continued, following the sentence quoted by the Chief Justice: "The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration. . . . It would be hard to conceive of there being too much talk about the practical concerns . . . of government." CONGRESSIONAL GOVERNMENT (1885), 303–304. For contrasting views of the reach of this statement, *compare* United States v. Rumely,

some Justices, always in dissent, have attempted to assert limitations in practice based upon this concept, the majority of Justices have adhered to the traditional precept that courts will not inquire into legislators' motives but will look [219] only to the question of power.[220] "So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." [221]

Protection of Witnesses; Pertinency and Related Matters.—A witness appearing before a congressional committee is entitled to require of the committee a demonstration of its authority to inquire into his activities and a showing that the questions asked of him are pertinent to the committee's area of inquiry. A congressional committee possesses only those powers delegated to it by its parent body. The enabling resolution that has given it life also contains the grant and limitations of the committee's power.[222] In *Watkins v. United States*,[223] Chief Justice Warren cautioned that "[b]roadly drafted and loosely worded . . . resolutions can leave tremendous latitude to the discretion of the investigators. The more vague the committee's charter is, the greater becomes the possibility that the committee's specific actions are not in conformity with the will of the parent house of Congress." Speaking directly of the authorizing resolution, which created the House Un-American Activities Committee,[224] the Chief Justice thought it "difficult to imagine a less explicit authorizing resolution." [225] But the far-reaching implications of these remarks were circumscribed by *Barenblatt v. United States*,[226] in which the Court, "[g]ranting the vagueness of the Rule," noted that Congress had long since put upon it a persuasive gloss

345 U.S. 41, 43 (1953), *with* Russell v. United States, 369 U.S. 749, 777–778 (1962) (Justice Douglas dissenting).

[219] Barenblatt v. United States, 360 U.S. 109, 153–162, 166 (1959); Wilkinson v. United States, 365 U.S. 399, 415, 423 (1961); Braden v. United States, 365 U.S. 431, 446 (1961); *but see* DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966) (a state investigative case).

[220] "Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindicative motives are readily attributable to legislative conduct and as readily believed. Courts are not the place for such controversies." Tenney v. Brandhove, 341 U.S. 367, 377–378 (1951). For a statement of the traditional unwillingness to inquire into congressional motives in the judging of legislation, *see* United States v. O'Brien, 391 U.S. 367, 382–386 (1968). But note that in Jenkins v. McKeithen, 395 U.S. 411 (1969), in which the legislation establishing a state crime investigating commission clearly authorized the commission to designate individuals as law violators, due process was violated by denying witnesses the rights existing in adversary criminal proceedings.

[221] Barenblatt v. United States, 360 U.S. 109, 132 (1959).

[222] United States v. Rumely, 345 U.S. 41, 44 (1953).

[223] 354 U.S. 178, 201 (1957).

[224] The Committee has since been abolished.

[225] Watkins v. United States, 354 U.S. 178, 202 (1957).

[226] 360 U.S. 109 (1959).

of legislative history through practice and interpretation, which, read with the enabling resolution, showed that "the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country." [227] "[W]e must conclude that [the Committee's] authority to conduct the inquiry presently under consideration is unassailable, and that . . . the Rule cannot be said to be constitutionally infirm on the score of vagueness." [228]

Because of the usual precision with which authorizing resolutions have generally been drafted, few controversies have arisen about whether a committee has projected its inquiry into an area not sanctioned by the parent body.[229] But in *United States v. Rumely*,[230] the Court held that the House of Representatives, in authorizing a select committee to investigate lobbying activities devoted to the promotion or defeat of legislation, did not thereby intend to empower the committee to probe activities of a lobbyist that were unconnected with his representations directly to Congress but rather designed to influence public opinion by distribution of literature. Consequently the committee was without authority to compel the representative of a private organization to disclose the names of all who had purchased such literature in quantity.[231]

Still another example of lack of proper authority is *Gojack v. United States*,[232] in which the Court reversed a contempt citation because there was no showing that the parent committee had delegated to the subcommittee before whom the witness had appeared the authority to make the inquiry and neither had the full committee specified the area of inquiry.

Watkins v. United States,[233] remains the leading case on pertinency, although it has not the influence on congressional investigations that some hoped and some feared in the wake of its announcement. When questioned by a Subcommittee of the House Un-

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[227] 360 U.S. at 117–18.

[228] 360 U.S. at 122–23. But note that in Stamler v. Willis, 415 F.2d 1365 (7th Cir. 1969), *cert. denied*, 399 U.S. 929 (1970), the court ordered to trial a civil suit contesting the constitutionality of the Rule establishing the Committee on allegations of overbreadth and overbroad application, holding that *Barenblatt* did not foreclose the contention.

[229] *But see* Tobin v. United States, 306 F.2d 270 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962).

[230] 345 U.S. 41 (1953).

[231] The Court intimated that if the authorizing resolution did confer such power upon the committee, the validity of the resolution would be subject to doubt on First Amendment principles. Justices Black and Douglas would have construed the resolution as granting the authority and would have voided it under the First Amendment. 345 U.S. at 48 (concurring opinion).

[232] 384 U.S. 702 (1966).

[233] 354 U.S. 178 (1957).

American Activities Committee, Watkins refused to supply the names of past associates, who, to his knowledge, had terminated their membership in the Communist Party and supported his noncompliance by, *inter alia*, contending that the questions were unrelated to the work of the Committee. Sustaining the witness, the Court emphasized that inasmuch as a witness by his refusal exposes himself to a criminal prosecution for contempt, he is entitled to be informed of the relation of the question to the subject of the investigation with the same precision as the Due Process Clause requires of statutes defining crimes.[234]

For ascertainment of the subject matter of an investigation, the witness might look, noted the Court, to several sources, including (1) the authorizing resolution, (2) the resolution by which the full committee authorized the subcommittee to proceed, (3) the introductory remarks of the chairman or other members, (4) the nature of the proceedings, (5) the chairman's response to the witness when the witness objects to the line of question on grounds of pertinency.[235] Whether a precise delineation of the subject matter of the investigation in but one of these sources would satisfy the requirements of due process was left unresolved, since the Court ruled that in this case all of them were deficient in providing Watkins with the guidance to which he was entitled. The sources had informed Watkins that the questions were asked in a course of investigation of something that ranged from a narrow inquiry into Communist infiltration into the labor movement to a vague and unlimited inquiry into "subversion and subversive propaganda." [236]

By and large, the subsequent cases demonstrated that *Watkins* did not represent a determination by the Justices to restrain broadly the course of congressional investigations, though several contempt citations were reversed on narrow holdings. But with regard to pertinency, the implications of *Watkins* were held in check and, without amending its rules or its authorizing resolution, the Un-American Activities Committee was successful in convincing a majority of the Court that its subsequent investigations were authorized and

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[234] 354 U.S. at 208–09.

[235] 354 U.S. at 209–15.

[236] Id. *See also* Sacher v. United States, 356 U.S. 576 (1958), a *per curiam* reversal of a contempt conviction on the ground that the questions did not relate to a subject "within the subcommittee's scope of inquiry," arising out of a hearing pertaining to a recantation of testimony by a witness in which the inquiry drifted into a discussion of legislation barring Communists from practice at the federal bar, the unanswered questions being asked then; and Flaxer v. United States, 358 U.S. 147 (1958), a reversal for refusal to produce membership lists because of an ambiguity in the committee's ruling on the time of performance; and Scull v. Virginia ex rel. Committee, 359 U.S. 344 (1959), a reversal on a contempt citation before a state legislative investigating committee on pertinency grounds.

that the questions asked of recalcitrant witnesses were pertinent to the inquiries.[237]

Thus, in *Barenblatt v. United States*,[238] the Court concluded that the history of the Un-American Activities Committee's activities, viewed in conjunction with the Rule establishing it, evinced clear investigatory authority to inquire into Communist infiltration in the field of education, an authority with which the witness had shown familiarity. Additionally, the opening statement of the chairman had pinpointed that subject as the nature of the inquiry that day and the opening witness had testified on the subject and had named Barenblatt as a member of the Communist Party at the University of Michigan. Thus, pertinency and the witness' knowledge of the pertinency of the questions asked him was shown. Similarly, in *Wilkinson v. United States*,[239] the Court held that, when the witness was apprised at the hearing that the Committee was empowered to investigate Communist infiltration of the textile industry in the South, that it was gathering information with a view to ascertaining the manner of administration and need to amend various laws directed at subversive activities, that Congress hitherto had enacted many of its recommendations in this field, and that it was possessed of information about his Party membership, he was notified effec-

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[237] Notice should be taken, however, of two cases that, though decided four and five years after *Watkins*, involved persons who were witnesses before the Un-American Activities Committee either shortly prior to or shortly following Watkins' appearance and who were cited for contempt before the Supreme Court decided *Watkins*.

In Deutch v. United States, 367 U.S. 456 (1961), involving an otherwise cooperative witness who had refused to identify certain persons with whom he had been associated at Cornell in Communist Party activities, the Court agreed that Deutch had refused on grounds of moral scruples to answer the questions and had not challenged them as not pertinent to the inquiry, but the majority ruled that the government had failed to establish at trial the pertinency of the questions, thus vitiating the conviction. Justices Frankfurter, Clark, Harlan, and Whittaker dissented, arguing that any argument on pertinency had been waived but in any event thinking it had been established. Id. at 472, 475.

In Russell v. United States, 369 U.S. 749 (1962), the Court struck down contempt convictions for insufficiency of the indictments. Indictments, which merely set forth the offense in the words of the contempt statute, the Court asserted, in alleging that the unanswered questions were pertinent to the subject under inquiry but not identifying the subject in detail, are defective because they do not inform defendants what they must be prepared to meet and do not enable courts to decide whether the facts alleged are sufficient to support convictions. Justice Stewart for the Court noted that the indicia of subject matter under inquiry were varied and contradictory, thus necessitating a precise governmental statement of particulars. Justices Harlan and Clark in dissent contended that it was sufficient for the government to establish pertinency at trial and noted that no objections relating to pertinency had been made at the hearings. Id. at 781, 789–793. *Russell* was cited in the *per curiam* reversals in Grumman v. United States, 370 U.S. 288 (1962), and Silber v. United States, 370 U.S. 717 (1962).

[238] 360 U.S. 109 (1959).

[239] 365 U.S. 399 (1961).

tively that a question about that affiliation was relevant to a valid inquiry. A companion case was held to be controlled by *Wilkinson*,[240] and in both cases the majority rejected the contention that the Committee inquiry was invalid because both Wilkinson and Braden, when they were called, were engaged in organizing activities against the Committee.[241]

Related to the cases discussed in this section are cases requiring that congressional committees observe strictly their own rules. Thus, in *Yellin v. United States*,[242] a contempt conviction was reversed because the Committee had failed to observe its rule providing for a closed session if a majority of the Committee believed that a witness' appearance in public session might unjustly injure his reputation. The Court ruled that the Committee had ignored the rule when it subpoenaed the witness for a public hearing and then in failing to consider as a Committee his request for a closed session.[243]

The Court has blown hot and cold on the issue of a quorum as a prerequisite to a valid contempt citation, and no firm statement of a rule is possible, although it seems probable that no quorum is ordinarily necessary.[244]

Protection of Witnesses; Constitutional Guarantees.—"[T]he Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the

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[240] Braden v. United States, 365 U.S. 431 (1961).

[241] The majority denied that the witness' participation in a lawful and protected course of action, such as petitioning Congress to abolish the Committee, limited the Committee's right of inquiry. "[W]e cannot say that, simply because the petitioner at the moment may have been engaged in lawful conduct, his Communist activities in connection therewith could not be investigated. The subcommittee had reasonable ground to suppose that the petitioner was an active Communist Party member, and that as such he possessed information that would substantially aid it in its legislative investigation. As *Barenblatt* makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the government's overbalancing interest." Wilkinson v. United States, 365 U.S. 399, 414 (1961). In both cases, the dissenters, Chief Justice Warren and Justices Black, Douglas, and Brennan argued that the Committee action was invalid because it was intended to harass persons who had publicly criticized committee activities. Id. at 415, 423, 429.

[242] 374 U.S. 109 (1963).

[243] Failure to follow its own rules was again an issue in Gojack v. United States, 384 U.S. 702 (1966), in which the Court noted that, although a committee rule required the approval of a majority of the Committee before a "major" investigation was initiated, such approval had not been sought before a Subcommittee proceeded.

[244] In Christoffel v. United States, 338 U.S. 84 (1949), the Court held that a witness can be found guilty of perjury only where a quorum of the committee is present at the time the perjury is committed; it is not enough to prove that a quorum was present when the hearing began. But, in United States v. Bryan, 339 U.S. 323 (1950), the Court ruled that a quorum was not required under the statute punishing refusal to honor a valid subpoena issued by an authorized committee.

Constitution on governmental action, more particularly in the context of this case, the relevant limitations of the Bill of Rights."[245] Just as the Constitution places limitations on Congress's power to legislate, so it limits the power to investigate. This section addresses the limitations the Bill of Rights places on the scope and nature of the congressional power to inquire.

The most extensive amount of litigation in this area has involved the privilege against self-incrimination guaranteed against governmental abridgment by the Fifth Amendment. Observance of the privilege by congressional committees has been so uniform that no court has ever held that it must be observed, though dicta are plentiful.[246] Thus, the cases have explored not the issue of the right to rely on the privilege but rather the manner and extent of its application.

There is no prescribed form in which one must plead the privilege. When a witness refused to answer a question about Communist Party affiliations and based his refusal upon the assertion by a prior witness of "the first amendment supplemented by the fifth," the Court held that he had sufficiently invoked the privilege, at least in the absence of committee inquiry seeking to force him to adopt a more precise stand.[247] If the committee suspected that the witness was being purposely vague, in order perhaps to avoid the stigma attached to a forthright claim of the privilege, it should have requested him to state specifically the ground of his refusal to testify. Another witness, who was threatened with prosecution for his Communist activities, could claim the privilege even to some questions the answers to which he might have been able to explain away as unrelated to criminal conduct; if an answer might tend to be incriminatory, the witness is not deprived of the privilege merely because he might have been able to refute inferences of guilt.[248] In still another case, the Court held that the committee had not clearly overruled the claim of privilege and directed an answer.[249]

The privilege against self-incrimination is not available as a defense to an organizational officer who refuses to turn over organization documents and records to an investigating committee.[250]

In *Hutcheson v. United States*,[251] the Court rejected a challenge to a Senate committee inquiry into union corruption on the

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[245] Barenblatt v. United States, 360 U.S. 109, 112 (1959).
[246] 360 U.S. at 126; Watkins v. United States, 354 U.S. 178, 196 (1957); Quinn v. United States, 349 U.S. 155, 161 (1955).
[247] Quinn v. United States, 349 U.S. 155 (1955).
[248] Emspak v. United States, 349 U.S. 190 (1955).
[249] Bart v. United States, 349 U.S. 219 (1955).
[250] McPhaul v. United States, 364 U.S. 372 (1960).
[251] 369 U.S. 599 (1962).

part of a witness who was under indictment in state court on charges relating to the same matters about which the committee sought to interrogate him. The witness did not plead his privilege against self-incrimination but contended that, by questioning him about matters that would aid the state prosecutor, the committee had denied him due process. The plurality opinion of the Court rejected his ground for refusing to answer, noting that, if the committee's public hearings rendered the witness' state trial unfair, then he could properly raise that issue on review of his state conviction.[252]

Claims relating to the First Amendment have been frequently asserted and as frequently denied. It is not that the First Amendment is inapplicable to congressional investigations, it is that, under the prevailing Court interpretation, the First Amendment does not bar all legislative restrictions of the rights guaranteed by it.[253] "[T]he protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." [254]

Thus, the Court has declined to rule that under the circumstances of the cases investigating committees are precluded from making inquiries simply because the subject area was education [255] or because the witnesses at the time they were called were engaged in protected activities such as petitioning Congress to abol-

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[252] Justice Harlan wrote the opinion of the Court which Justices Clark and Stewart joined. Justice Brennan concurred solely because the witness had not claimed the privilege against self-incrimination but he would have voted to reverse the conviction had there been a claim. Chief Justice Warren and Justice Douglas dissented on due process grounds. Justices Black, Frankfurter, and White did not participate. At the time of the decision, the Self-incrimination Clause did not restrain the states through the Fourteenth Amendment, so that it was no violation of the clause for either the Federal Government or the states to compel testimony which would incriminate the witness in the other jurisdiction. *Cf.* United States v. Murdock, 284 U.S. 141 (1931); Knapp v. Schweitzer, 357 U.S. 371 (1958). The Court has since reversed itself, Malloy v. Hogan, 378 U.S. 1 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), thus leaving the vitality of *Hutcheson* doubtful.

[253] The matter is discussed fully in the section on the First Amendment but a good statement of the balancing rule may be found in Younger v. Harris, 401 U.S. 37, 51 (1971), by Justice Black, supposedly an absolutist on the subject: "Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so."

[254] Barenblatt v. United States, 360 U.S. 109, 126 (1959).

[255] Barenblatt v. United States, 360 U.S. 109 (1959).

ish the inquiring committee.[256] However, in an earlier case, the Court intimated that it was taking a narrow view of the committee's authority because a determination that authority existed would raise a serious First Amendment issue.[257] And in a state legislative investigating committee case, the majority of the Court held that an inquiry seeking the membership lists of the National Association for the Advancement of Colored People was so lacking in a "nexus" between the organization and the Communist Party that the inquiry infringed the First Amendment.[258]

Dicta in the Court's opinions acknowledge that the Fourth Amendment guarantees against unreasonable searches and seizures are applicable to congressional committees.[259] The issue would most often arise in the context of subpoenas, inasmuch as that procedure is the usual way by which committees obtain documentary material and inasmuch as Fourth Amendment standards apply to subpoenas as well as to search warrants.[260] But there are no cases in which a holding turns on this issue.[261]

Other constitutional rights of witnesses have been asserted at various times, but without success or even substantial minority support.

Sanctions of the Investigatory Power: Contempt

Explicit judicial recognition of the right of either house of Congress to commit for contempt a witness who ignores its summons or refuses to answer its inquiries dates from *McGrain v. Daugherty*.[262] But the principle there applied had its roots in an early case, *Anderson v. Dunn*,[263] which stated in broad terms the right of either branch of the legislature to attach and punish a person other than a member for contempt of its authority.[264] The right to punish a

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[256] Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

[257] United States v. Rumely, 345 U.S. 41 (1953).

[258] Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). *See also* DeGregory v. Attorney General, 383 U.S. 825 (1966).

[259] Watkins v. United States, 354 U.S. 178, 188 (1957).

[260] *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), and cases cited.

[261] *Cf.* McPhaul v. United States, 364 U.S. 372 (1960).

[262] 273 U.S. 135 (1927).

[263] 19 U.S. (6 Wheat.) 204 (1821).

[264] The contempt consisted of an alleged attempt to bribe a Member of the House for his assistance in passing a claims bill. The case was a civil suit brought by Anderson against the Sergeant at Arms of the House for assault and battery and false imprisonment. *Cf.* Kilbourn v. Thompson, 103 U.S. 168 (1881). The power of a legislative body to punish for contempt one who disrupts legislative business was reaffirmed in Groppi v. Leslie, 404 U.S. 496 (1972), but a unanimous Court there held that due process required a legislative body to give a contemnor notice and an op-

contumacious witness was conceded in *Marshall v. Gordon*,[265] although the Court there held that the implied power to deal with contempt did not extend to the arrest of a person who published matter defamatory of the House.

The cases emphasize that the power to punish for contempt rests upon the right of self-preservation. That is, in the words of Chief Justice White, "the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed" necessitates the contempt power.[266] Thus, in *Jurney v. MacCracken*,[267] the Court turned aside an argument that the Senate had no power to punish a witness who, having been commanded to produce papers, destroyed them after service of the subpoena. The punishment would not be efficacious in obtaining the papers in this particular case, but the power to punish for a past contempt is an appropriate means of vindicating "the established and essential privilege of requiring the production of evidence."[268]

Under the rule laid down by *Anderson v. Dunn*,[269] imprisonment by one of the Houses of Congress could not extend beyond the adjournment of the body which ordered it. Because of this limitation and because contempt trials before the bar of the House charging were time-consuming, in 1857 Congress enacted a statute providing for criminal process in the federal courts with prescribed penalties for contempt of Congress.[270]

The Supreme Court has held that the purpose of this statute is merely supplementary of the power retained by Congress, and all constitutional objections to it were overruled. "We grant that Congress could not divest itself, or either of its Houses, of the essential and inherent power to punish for contempt, in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved."[271]

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portunity to be heard prior to conviction and sentencing. Although this case dealt with a state legislature, there is no question it would apply to Congress as well.

[265] 243 U.S. 521 (1917).

[266] 243 U.S. at 542.

[267] 294 U.S. 125 (1935).

[268] 294 U.S. at 150.

[269] 19 U.S. (6 Wheat.) 204 (1821).

[270] Act of January 24, 1857, 11 Stat. 155. With minor modification, this statute is now 2 U.S.C. § 192.

[271] *In re* Chapman, 166 U.S. 661, 671–672 (1897).

Because Congress has invoked the aid of the federal judicial system in protecting itself against contumacious conduct, the consequence, the Court has asserted numerous times, is that the duty has been conferred upon the federal courts to accord a person prosecuted for his statutory offense every safeguard that the law accords in all other federal criminal cases,[272] and the discussion in previous sections of many reversals of contempt convictions bears witness to the assertion in practice. What constitutional protections ordinarily necessitated by due process requirements, such as notice, right to counsel, confrontation, and the like, prevail in a contempt trial before the bar of one House or the other is an open question.[273]

It has long been settled that the courts may not intervene directly to restrain the carrying out of an investigation or the manner of an investigation, and that a witness who believes the inquiry to be illegal or otherwise invalid in order to raise the issue must place himself in contempt and raise his beliefs as affirmative defenses on his criminal prosecution. This understanding was sharply reinforced when the Court held that the speech-or-debate clause utterly foreclosed judicial interference with the conduct of a congressional investigation, through review of the propriety of subpoenas or otherwise.[274] It is only with regard to the trial of contempts that the courts may review the carrying out of congressional investigations and may impose constitutional and other constraints.

SECTION 2. Clause 1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

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[272] Sinclair v. United States, 279 U.S. 263, 296–297 (1929); Watkins v. United States, 354 U.S. 178, 207 (1957); Sacher v. United States, 356 U.S. 576, 577 (1958); Flaxer v. United States, 358 U.S. 147, 151 (1958); Deutch v. United States, 367 U.S. 456, 471 (1961); 858 v. United States, 369 U.S. 749, 755 (1962). Protesting the Court's reversal of several contempt convictions over a period of years, Justice Clark was moved to suggest that "[t]his continued frustration of the Congress in the use of the judicial process to punish those who are contemptuous of its committees indicates to me that the time may have come for Congress to revert to 'its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House [affected].'" Id. at 781; *Watkins*, 354 U.S. at 225.

[273] *Cf.* Groppi v. Leslie, 404 U.S. 496 (1972).

[274] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

CONGRESSIONAL DISTRICTING

A major innovation in constitutional law in recent years has been the development of a requirement that election districts in each state be structured so that each elected representative represents substantially equal populations. Although this requirement has generally been gleaned from the Equal Protection Clause of the Fourteenth Amendment,[275] in *Wesberry v. Sanders*,[276] the Court held that "construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[277]

Court involvement in this issue developed slowly. In our early history, state congressional delegations were generally elected at-large instead of by districts, and even when Congress required single-member districting[278] and later added a provision for equally populated districts[279] the relief sought by voters was action by the House refusing to seat Members-elect selected under systems not in compliance with the federal laws.[280] The first series of cases did not reach the Supreme Court, in fact, until the states began redistricting through the 1930 Census, and these were resolved without reaching constitutional issues and indeed without resolving the issue whether such voter complaints were justiciable at all.[281] In the late 1940s and the early 1950s, the Court used the "political question" doctrine to decline to adjudicate districting and apportionment suits, a position changed in *Baker v. Carr*.[282]

For the Court in *Wesberry*,[283] Justice Black argued that a reading of the debates of the Constitutional Convention conclusively demonstrated that the Framers had meant, in using the phrase "by the People," to guarantee equality of representation in the election of Members of the House of Representatives.[284] Justice Harlan in dissent argued that the statements on which the majority relied had

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[275] Reynolds v. Sims, 377 U.S. 533 (1964) (legislative apportionment and districting); Hadley v. Junior College Dist., 397 U.S. 50 (1970) (local governmental units).

[276] 376 U.S. 1 (1964). *See also* Martin v. Bush, 376 U.S. 222 (1964).

[277] 376 U.S. at 7–8.

[278] Act of June 25, 1842, 5 Stat. 491.

[279] Act of February 2, 1872, 17 Stat. 28.

[280] The House uniformly refused to grant any such relief. 1 A. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 310 (1907). *See* L. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT 135–138 (1941).

[281] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932); Wood v. Broom, 287 U.S. 1 (1932); Mahan v. Hume, 287 U.S. 575 (1932).

[282] 369 U.S. 186 (1962).

[283] Wesberry v. Sanders, 376 U.S. 1 (1964).

[284] 376 U.S. at 7–18.

uniformly been in the context of the Great Compromise—Senate representation of the states with Members elected by the state legislatures, House representation according to the population of the states, qualified by the guarantee of at least one Member per state and the counting of slaves as three-fifths of persons—and not at all in the context of intrastate districting. Further, he thought the Convention debates clear to the effect that Article I, § 4, had vested exclusive control over state districting practices in Congress, and that the Court action overrode a congressional decision not to require equally populated districts.[285]

The most important issue, of course, was how strict a standard of equality the Court would adhere to. At first, the Justices seemed inclined to some form of *de minimis* rule with a requirement that the State present a principled justification for the deviations from equality which any districting plan presented.[286] But in *Kirkpatrick v. Preisler*,[287] a sharply divided Court announced the rule that a state must make a "good-faith effort to achieve precise mathematical equality." [288] Therefore, "[u]nless population variances among congressional districts are shown to have resulted despite such [good-faith] effort [to achieve precise mathematical equality], the state must justify each variance, no matter how small." [289] The strictness of the test was revealed not only by the phrasing of the test but by the fact that the majority rejected every proffer of a justification which the state had made and which could likely be made. Thus, it was not an adequate justification that deviations resulted from (1) an effort to draw districts to maintain intact areas with distinct economic and social interests,[290] (2) the requirements of legislative compromise,[291] (3) a desire to maintain the integrity of political subdivision lines,[292] (4) the exclusion from total population figures of certain military personnel and students not residents of the areas in which they were found,[293] (5) an attempt to compensate for population shifts

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[285] 376 U.S. at 20–49.

[286] Kirkpatrick v. Preisler, 385 U.S. 450 (1967), and Duddleston v. Grills, 385 U.S. 455 (1967), relying on the rule set out in Swann v. Adams, 385 U.S. 440 (1967), a state legislative case.

[287] 394 U.S. 526 (1969). *See also* Wells v. Rockefeller, 394 U.S. 542 (1969).

[288] Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969).

[289] 394 U.S. at 531.

[290] 394 U.S. at 533. People vote as individuals, Justice Brennan said for the Court, and it is the equality of individual voters that is protected.

[291] Id. Political "practicality" may not interfere with a rule of "practicable" equality.

[292] 394 U.S. at 533–34. The argument is not "legally acceptable."

[293] 394 U.S. at 534–35. Justice Brennan questioned whether anything less than a total population basis was permissible but noted that the legislature in any event had made no consistent application of the rationale.

since the last census,[294] or (6) an effort to achieve geographical compactness.[295]

Illustrating the strictness of the standard, the Court upheld a lower court voiding of a Texas congressional districting plan in which the population difference between the most and least populous districts was 19,275 persons and the average deviation from the ideally populated district was 3,421 persons.[296] Adhering to the principle of strict population equality in a subsequent case, the Court refused to find a plan valid simply because the variations were smaller than the estimated census undercount. Rejecting the plan, the difference in population between the most and least populous districts being 3,674 people, in a state in which the average district population was 526,059 people, the Court opined that, given rapid advances in computer technology, it is now "relatively simple to draw contiguous districts of equal population and at the same time . . . further whatever secondary goals the State has."[297]

Attacks on partisan gerrymandering have proceeded under equal-protection analysis, and, although the Court has held claims of denial of effective representation to be justiciable, the standards are so high that neither voters nor minority parties have yet benefitted from the development.[298]

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[294] 394 U.S. at 535. This justification would be acceptable if an attempt to establish shifts with reasonable accuracy had been made.

[295] 394 U.S. at 536. Justifications based upon "the unaesthetic appearance" of the map will not be accepted.

[296] White v. Weiser, 412 U.S. 783 (1973). The Court did set aside the district court's own plan for districting, instructing that court to adhere more closely to the legislature's own plan insofar as it reflected permissible goals of the legislators, reflecting an ongoing deference to legislatures in this area to the extent possible.

[297] Karcher v. Daggett, 462 U.S. 725, 733 (1983). Illustrating the point about computer-generated plans containing absolute population equality is Hastert v. State Bd. of Elections, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court), in which the court adopted a congressional-districting plan in which 18 of the 20 districts had 571,530 people each and each of the other two had 571,531 people.

[298] The principal case was Davis v. Bandemer, 478 U.S. 109 (1986), a legislative apportionment case, but congressional districting is also covered. *See* Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988) (three-judge court) (adjudicating partisan gerrymandering claim as to congressional districts but deciding against plaintiffs on merits), *aff'd*, 488 U.S. 1024 (1988); Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992) (three-judge court) (same), *aff'd*, 506 U.S. 801 (1992); Vieth v. Jubelirer, 541 U.S. 267 (2004) (same); League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) (same). Additional discussion of this issue appears under Amendment 14, The New Equal Protection, Apportionment and Districting.

ELECTOR QUALIFICATIONS

It was the original constitutional scheme to vest the determination of qualifications for electors in congressional elections [299] solely in the discretion of the states, save only for the express requirement that the states could prescribe no qualifications other than those provided for voters for the more numerous branch of the legislature.[300] This language has never been expressly changed, but the discretion of the states—and not only with regard to the qualifications of congressional electors—has long been circumscribed by express constitutional limitations [301] and by judicial decisions.[302] Further, beyond the limitation of discretion on the part of the states, Congress has assumed the power, with judicial acquiescence, to legislate to provide qualifications at least with regard to some elections.[303] Thus, in the Voting Rights Act of 1965 [304] Congress legislated changes of a limited nature in the literacy laws of some of the States,[305] and in the Voting Rights Act Amendments of 1970 [306] Congress successfully lowered the minimum voting age in federal elections [307] and prescribed residency qualifications for presidential elections,[308] the Court striking down an attempt to lower the minimum voting age for all elections.[309] These developments greatly limited the discretion granted in Article I, § 2, cl. 1, and are more fully dealt with in the treatment of § 5 of the Fourteenth Amendment.

Notwithstanding the vesting of discretion to prescribe voting qualifications in the states, conceptually the right to vote for United States

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[299] The clause refers only to elections to the House of Representatives, of course, and, inasmuch as Senators were originally chosen by state legislatures and presidential electors as the States would provide, it was only with the qualifications for these voters with which the Constitution was originally concerned.

[300] Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1875); Breedlove v. Suttles, 302 U.S. 277, 283 (1937). *See* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 576–585 (1833).

[301] The Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth Amendments limited the States in the setting of qualifications in terms of race, sex, payment of poll taxes, and age.

[302] The Supreme Court's interpretation of the equal protection clause has excluded certain qualifications. *E.g.*, Carrington v. Rash, 380 U.S. 89 (1965); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). The excluded qualifications were in regard to all elections.

[303] The power has been held to exist under § 5 of the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980).

[304] § 4(e), 79 Stat. 437, 439, 42 U.S.C. § 1973b(e), as amended.

[305] Upheld in Katzenbach v. Morgan, 384 U.S. 641 (1966).

[306] Titles 2 and 3, 84 Stat. 314, 42 U.S.C. § 1973bb.

[307] Oregon v. Mitchell, 400 U.S. 112, 119–131, 135–144, 239–281 (1970).

[308] Oregon v. Mitchell, 400 U.S. 112, 134, 147–150, 236–239, 285–292 (1970).

[309] Oregon v. Mitchell, 400 U.S. 112, 119–131, 152–213, 293–296 (1970).

Representatives is derived from the Federal Constitution,[310] and Congress has had the power under Article I, § 4, to legislate to protect that right against both official [311] and private denial.[312]

Clause 2. No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an inhabitant of the State in which he shall be chosen.

QUALIFICATIONS OF MEMBERS OF CONGRESS

When the Qualifications Must Be Possessed

A question much disputed but now seemingly settled is whether a condition of eligibility must exist at the time of the election or whether it is sufficient that eligibility exist when the Member-elect presents himself to take the oath of office. Although the language of the clause expressly makes residency in the state a condition at the time of election, it now appears established in congressional practice that the age and citizenship qualifications need only be met when the Member-elect is to be sworn.[313] Thus, persons elected to either the House of Representatives or the Senate before attaining the required age or term of citizenship have been admitted as soon as they became qualified.[314]

Exclusivity of Constitutional Qualifications

Congressional Additions.—Writing in *The Federalist* with reference to the election of Members of Congress, Hamilton firmly stated that "[t]he qualifications of the persons who may . . . be chosen . . . are defined and fixed in the constitution; and are unalterable by

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[310] "The right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the state in which they are chosen, but has its foundation in the Constitution of the United States." *Ex parte* Yarbrough, 110 U.S. 651, 663 (1884). *See also* Wiley v. Sinkler, 179 U.S. 58, 62 (1900); Swafford v. Templeton, 185 U.S. 487, 492 (1902); United States v. Classic, 313 U.S. 299, 315, 321 (1941).

[311] United States v. Mosley, 238 U.S. 383 (1915).

[312] United States v. Classic, 313 U.S. 299, 315 (1941).

[313] *See* S. REP. NO. 904, 74th Congress, 1st sess. (1935), reprinted in 79 CONG. REC. 9651–9653 (1935).

[314] 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 418 (1907); 79 CONG. REC. 9841–9842 (1935); *cf.* HINDS' PRECEDENTS, *supra* § 429.

the legislature."[315] Until the Civil War, the issue was not raised, the only actions taken by either House conforming to the idea that the qualifications for membership could not be enlarged by statute or practice.[316] But in the passions aroused by the fratricidal conflict, Congress enacted a law requiring its members to take an oath that they had never been disloyal to the National Government.[317] Several persons were refused seats by both Houses because of charges of disloyalty,[318] and thereafter House practice, and Senate practice as well, was erratic.[319] But in *Powell v. McCormack*,[320] it was conclusively established that the qualifications listed in clause 2 are exclusive[321] and that Congress could not add to them by excluding Members-elect not meeting the additional qualifications.[322]

Powell was excluded from the 90th Congress on grounds that he had asserted an unwarranted privilege and immunity from the process of a state court, that he had wrongfully diverted House funds for his own uses, and that he had made false reports on the expenditures of foreign currency.[323] The Court determination that he had been wrongfully excluded proceeded in the main from the Court's

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[315] No. 60 (J. Cooke ed. 1961), 409. *See also* 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 623–627 (1833) (relating to the power of the States to add qualifications).

[316] All the instances appear to be, however, cases in which the contest arose out of a claimed additional state qualification.

[317] Act of July 2, 1862, 12 Stat. 502. Note also the disqualification written into § 3 of the Fourteenth Amendment.

[318] 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 451, 449, 457 (1907).

[319] In 1870, the House excluded a Member-elect who had been re-elected after resigning earlier in the same Congress when expulsion proceedings were instituted against him for selling appointments to the Military Academy. Id. at § 464. A Member-elect was excluded in 1899 because of his practice of polygamy, id. at 474–80, but the Senate refused, after adopting a rule requiring a two-thirds vote, to exclude a Member-elect on those grounds. Id. at §§ 481–483. The House twice excluded a socialist Member-elect in the wake of World War I on allegations of disloyalty. 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 56–58 (1935). *See also* S. REP. NO. 1010, 77th Congress, 2d sess. (1942), and R. Hupman, *Senate Election, Expulsion and Censure Cases From 1789 to 1960*, S. DOC. NO. 71, 87th Congress, 2d sess. (1962), 140 (dealing with the effort to exclude Senator Langer of North Dakota).

[320] 395 U.S. 486 (1969). The Court divided eight to one, Justice Stewart dissenting on the ground that the case was moot. *Powell's* continuing validity was affirmed in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995), both by the Court in its holding that the qualifications set out in the Constitution are exclusive and may not be added to by either Congress or the states, id. at 787–98, and by the dissenters, who would hold that Congress, for different reasons could not add to qualifications, although the states could. Id. at 875–76.

[321] The Court declined to reach the question whether the Constitution in fact does impose other qualifications. 395 U.S. at 520 n.41 (possibly Article I, § 3, cl. 7, disqualifying persons impeached, Article I, § 6, cl. 2, incompatible offices, and § 3 of the Fourteenth Amendment). It is also possible that the oath provision of Article VI, cl. 3, could be considered a qualification. *See* Bond v. Floyd, 385 U.S. 116, 129–131 (1966).

[322] 395 U.S. at 550.

[323] H. REP. NO. 27, 90th Congress, 1st sess. (1967); 395 U.S. at 489–493.

analysis of historical developments, the Convention debates, and textual considerations. This process led the Court to conclude that Congress's power under Article I, § 5 to judge the qualifications of its Members was limited to ascertaining the presence or absence of the standing qualifications prescribed in Article I, § 2, cl. 2, and perhaps in other express provisions of the Constitution.[324] The conclusion followed because the English parliamentary practice and the colonial legislative practice at the time of the drafting of the Constitution, after some earlier deviations, had settled into a policy that exclusion was a power exercisable only when the Member-elect failed to meet a standing qualification,[325] because in the Constitutional Convention the Framers had defeated provisions allowing Congress by statute either to create property qualifications or to create additional qualifications without limitation,[326] and because both Hamilton and Madison in the *Federalist Papers* and Hamilton in the New York ratifying convention had strongly urged that the Constitution prescribed exclusive qualifications for Members of Congress.[327]

Further, the Court observed that the early practice of Congress, with many of the Framers serving, was consistently limited to the view that exclusion could be exercised only with regard to a Member-elect failing to meet a qualification expressly prescribed in the Constitution. Not until the Civil War did contrary precedents appear, and later practice was mixed.[328] Finally, even were the intent of the Framers less clear, said the Court, it would still be compelled to interpret the power to exclude narrowly. "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.' 2 *Elliot's Debates* 257. As Madison pointed out at the Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself. In apparent agreement with this basic philosophy, the Convention adopted his suggestion limiting the power to expel. To allow essentially that same power to be exercised under the guise of judging qualifications, would be to ignore Madison's warning, borne out in the Wilkes case and some of Congress's own post-Civil War exclusion cases, against 'vesting an improper and dangerous power in the Legislature.' 2 Farrand 249."[329] Thus, the Court appears to say, to allow the House to exclude Powell on this basis of qualifications of its own choosing would impinge

[324] Powell v. McCormack, 395 U.S. 486, 518–47 (1969).
[325] 395 U.S. at 522–31.
[326] 395 U.S. at 532–39.
[327] 395 U.S. at 539–41.
[328] 395 U.S. at 541–47.
[329] 395 U.S. at 547–48.

on the interests of his constituents in effective participation in the electoral process, an interest which could be protected by a narrow interpretation of Congressional power.[330]

The result in *Powell* had been foreshadowed when the Court held that the exclusion of a Member-elect by a state legislature because of objections he had uttered to certain national policies constituted a violation of the First Amendment and was void.[331] In the course of that decision, the Court denied state legislators the power to look behind the willingness of any legislator to take the oath to support the Constitution of the United States, prescribed by Article VI, cl. 3, to test his sincerity in taking it.[332] The unanimous Court noted the views of Madison and Hamilton on the exclusivity of the qualifications set out in the Constitution and alluded to Madison's view that the unfettered discretion of the legislative branch to exclude members could be abused in behalf of political, religious or other orthodoxies.[333] The First Amendment holding and the holding with regard to testing the sincerity with which the oath of office is taken is no doubt as applicable to the United States Congress as to state legislatures.

State Additions.—However much Congress may have deviated from the principle that the qualifications listed in the Constitution are exclusive when the issue has been congressional enlargement of those qualifications, it has been uniform in rejecting efforts by the states to enlarge the qualifications. Thus, the House in 1807 seated a Member-elect who was challenged as not being in compliance with a state law imposing a twelve-month residency requirement in the district, rather than the federal requirement of being an inhabitant of the state at the time of election; the state requirement, the House resolved, was unconstitutional.[334] Similarly, both the House and Senate have seated other Members-elect who did not meet additional state qualifications or who suffered particular state disqualifications on eligibility, such as running for Congress while holding particular state offices.

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[330] The protection of the voters' interest in being represented by the person of their choice is thus analogized to their constitutionally secured right to cast a ballot and have it counted in general elections, *Ex parte* Yarbrough, 110 U.S. 651 (1884), and in primary elections, United States v. Classic, 313 U.S. 299 (1941), to cast a ballot undiluted in strength because of unequally populated districts, Wesberry v. Sanders, 376 U.S. 1 (1964), and to cast a vote for candidates of their choice unfettered by onerous restrictions on candidate qualification for the ballot. Williams v. Rhodes, 393 U.S. 23 (1968).

[331] Bond v. Floyd, 385 U.S. 116 (1966).

[332] 385 U.S. at 129–31, 132, 135.

[333] 385 U.S. at 135 n.13.

[334] 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 414 (1907).

The Supreme Court reached the same conclusion as to state power, albeit by a surprisingly close 5–4 vote, in *U.S. Term Limits, Inc. v. Thornton*.[335] Arkansas, along with twenty-two other states, all but two by citizen initiatives, had limited the number of terms that Members of Congress may serve. In striking down the Arkansas term limits, the Court determined that the Constitution's qualifications clauses[336] establish exclusive qualifications for Members that may not be added to either by Congress or the states.[337] Six years later, the Court relied on *Thornton* to invalidate a Missouri law requiring that labels be placed on ballots alongside the names of congressional candidates who had "disregarded voters' instruction on term limits" or declined to pledge support for term limits.[338]

Both majority and dissenting opinions in *Thornton* were richly embellished with disputatious arguments about the text of the Constitution, the history of its drafting and ratification, and the practices of Congress and the states in the nation's early years,[339] and these differences over text, creation, and practice derived from disagreement about the fundamental principle underlying the Constitution's adoption.

In the dissent's view, the Constitution was the result of the resolution of the peoples of the separate states to create the National Government. The conclusion to be drawn from this was that the peoples in the states agreed to surrender only those powers expressly forbidden them and those limited powers that they had delegated to the Federal Government expressly or by necessary implication. They retained all other powers and still retain them. Thus, "[w]here the Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it."[340] The Constitution's silence as to authority to impose additional qualifications meant that this power resides in the states.

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[335] 514 U.S. 779 (1995). The majority was composed of Justice Stevens (writing the opinion of the Court) and Justices Kennedy, Souter, Ginsburg, and Breyer. Dissenting were Justice Thomas (writing the opinion) and Chief Justice Rehnquist and Justices O'Connor and Scalia. Id. at 845.

[336] Article I, § 2, cl. 2, provides that a person may qualify as a Representative if she is at least 25 years old, has been a United States citizen for at least 7 years, and is an inhabitant, at the time of the election, of the state in which she is chosen. The qualifications established for Senators, Article I, § 3, cl. 3, are an age of 30 years, nine years' citizenship, and being an inhabitant of the state at the time of election.

[337] The four-Justice dissent argued that while Congress has no power to increase qualifications, the States do. 514 U.S. at 845.

[338] Cook v. Gralike, 531 U.S. 510 (2001).

[339] *See* Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78 (1995).

[340] 514 U.S. at 848 (Justice Thomas dissenting). *See generally* id. at 846–65.

The majority's views were radically different. After the adoption of the Constitution, the states had two kinds of powers: reserved powers that they had before the founding and that were not surrendered to the Federal Government, and those powers delegated to them by the Constitution. It followed that the states could have no reserved powers with respect to the Federal Government. "As Justice Story recognized, 'the states can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'"[341] The states could not before the founding have possessed powers to legislate respecting the Federal Government, and, because the Constitution did not delegate to the states the power to prescribe qualifications for Members of Congress, the states did not have any such power.[342]

Evidently, the opinions in this case reflect more than a decision on this particular dispute. They rather represent conflicting philosophies within the Court respecting the scope of national power in relation to the states, an issue at the core of many controversies today.

Clause 3. [Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons].[343] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they

[341] 514 U.S. at 802.

[342] 514 U.S. at 798–805. *See also* id. at 838–45 (Justice Kennedy concurring). The Court applied similar reasoning in Cook v. Gralike, 531 U.S. 510, 522–23 (2001), invalidating ballot labels identifying congressional candidates who had not pledged to support term limits. Because congressional offices arise from the Constitution, the Court explained, no authority to regulate these offices could have preceded the Constitution and been reserved to the states, and the ballot labels were not valid exercise of the power granted by Article I, § 4 to regulate the "manner" of holding elections. See discussion under Legislation Protecting Electoral Process, *infra*.

[343] The part of this clause relating to the mode of apportionment of representatives among the several States was changed by the Fourteenth Amendment, § 2 and as to taxes on incomes without apportionment, by the Sixteenth Amendment.

shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut, five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

APPORTIONMENT OF SEATS IN THE HOUSE

The Census Requirement

The Census Clause "reflects several important constitutional determinations: that comparative state political power in the House would reflect comparative population, not comparative wealth; that comparative power would shift every 10 years to reflect population changes; that federal tax authority would rest upon the same base; and that Congress, not the states, would determine the manner of conducting the census."[344] These determinations "all suggest a strong constitutional interest in accuracy."[345]

The language employed—"actual enumeration"—requires an actual count, but gives Congress wide discretion in determining the methodology of that count. The word "enumeration" refers to a counting process without describing the count's methodological details. The word "actual" merely refers to the enumeration to be used for apportioning the Third Congress, and thereby distinguishes "a deliberately taken count" from the conjectural approach that had been used for the First Congress. Finally, the conferral of authority on Congress to "direct" the "manner" of enumeration underscores "the breadth of congressional methodological authority." Thus, the Court held in *Utah v. Evans*, "hot deck imputation," a method used to fill in missing data by imputing to an address the number of persons found at a nearby address or unit of the same type, does not run afoul of the "actual enumeration" requirement.[346] The Court distinguished imputation from statistical sampling, and indicated that its holding was relatively narrow. Imputation was permissible "where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where

[344] Utah v. Evans, 536 U.S. 452, 476 (2002).
[345] Id.
[346] Utah v. Evans, 536 U.S. 452 (2002).

that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the population, and where consequently manipulation of the method is highly unlikely."[347]

Although the Census Clause expressly provides for an enumeration of persons, Congress has expanded the scope of the census by including not only the free persons in the states, but also those in the territories, and by requiring all persons over eighteen years of age to answer an ever-lengthening list of inquiries concerning their personal and economic affairs. This extended scope of the census has received the implied approval of the Supreme Court,[348] and is one of the methods whereby the national legislature exercises its inherent power to obtain the information necessary for intelligent legislative action.

Although taking an enlarged view of its census power, Congress has not always complied with its positive mandate to reapportion representatives among the states after the census is taken.[349] It failed to make such a reapportionment after the census of 1920, being unable to reach agreement for allotting representation without further increasing the size of the House. Ultimately, by the act of June 18, 1929,[350] it provided that the membership of the House of Representatives should henceforth be restricted to 435 members, to be distributed among the States by the so-called "method of major fractions," which had been earlier employed in the apportionment of 1911, and which has now been replaced with the "method of equal proportions." Following the 1990 census, a state that had lost a House seat as a result of the use of this formula sued, alleging a violation of the "one person, one vote" rule derived from Article I, § 2. Exhibiting considerable deference to Congress and a stated appreciation of the difficulties in achieving interstate equalities, the Supreme Court upheld the formula and the resultant apportion-

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[347] *See also* Wisconsin v. City of New York, 517 U.S. 1 (1996), in which the Court held that the decision of the Secretary of Commerce not to conduct a post-enumeration survey and statistical adjustment for an undercount in the 1990 Census was reasonable and within the bounds of discretion conferred by the Constitution and statute; and Franklin v. Massachusetts, 505 U.S. 788 (1992), upholding the practice of the Secretary of Commerce in allocating overseas federal employees and military personnel to the states of last residence. The mandate of an enumeration of "their respective numbers" was complied with, it having been the practice since the first enumeration to allocate persons to the place of their "usual residence," and to construe both this term and the word "inhabitant" broadly to include people temporarily absent.

[348] Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457, 536 (1971) ("Who questions the power to do this?").

[349] For an extensive history of the subject, *see* L. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT (1941).

[350] 46 Stat. 26, 22, as amended by 55 Stat. 761 (1941), 2 U.S.C. § 2a.

ment.[351] The goal of absolute population equality among districts "is realistic and appropriate" within a single state, but the constitutional guarantee of one Representative for each state constrains application to districts in different states, and makes the goal "illusory for the Nation as a whole." [352]

Although requiring the election of Representatives by districts, Congress has left it to the states to draw district boundaries. This has occasioned a number of disputes. In *Ohio ex rel. Davis v. Hildebrant*,[353] a requirement that a redistricting law be submitted to a popular referendum was challenged and sustained. After the reapportionment made pursuant to the 1930 census, deadlocks between the Governor and legislature in several states produced a series of cases in which the right of the Governor to veto a reapportionment bill was questioned. Contrasting this function with other duties committed to state legislatures by the Constitution, the Court decided that it was legislative in character and subject to gubernatorial veto to the same extent as ordinary legislation under the terms of the state constitution.[354]

Clause 4. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

IN GENERAL

The Supreme Court has not interpreted this clause.

Clause 5. The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

IN GENERAL

See analysis of Impeachment under Article II, section 4.

SECTION 3. Clause 1. [The Senate of the United States shall be composed of two Senators from each State, chosen by the leg-

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[351] U.S. Department of Commerce v. Montana, 503 U.S. 442 (1992).

[352] 503 U.S. at 463 ("[T]he need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50").

[353] 241 U.S. 565 (1916).

[354] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932).

islature thereof, for six Years; and each Senator shall have one vote].[355]

Clause 2. Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year,[356] [and if Vacancies happen by Resignation or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies].[357]

IN GENERAL

Clause 1 has been completely superseded by the Seventeenth Amendment, and Clause 2 has been partially superseded.

Clause 3. No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Clause 4. The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

Clause 5. The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

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[355] *See* Seventeenth Amendment.
[356] *See* Seventeenth Amendment.
[357] *See* Seventeenth Amendment.

IN GENERAL

The Supreme Court has not interpreted these clauses.

Clause 6. The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Clause 7. Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

IN GENERAL

See analysis of impeachment under Article II, sec. 4.

SECTION 4. Clause 1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators.

REGULATION BY CONGRESS

By its terms, Art. I, § 4, cl. 1 empowers both Congress and state legislatures to regulate the "times, places and manner of holding elections for Senators and Representatives." Not until 1842, when it passed a law requiring the election of Representatives by districts,[358] did Congress undertake to exercise this power. In subsequent years, Congress expanded on the requirements, successively adding contiguity, compactness, and substantial equality of popula-

[358] 5 Stat. 491 (1842). The requirement was omitted in 1850, 9 Stat. 428, but was adopted again in 1862. 12 Stat. 572.

tion to the districting requirements.[359] However, no challenge to the seating of Members-elect selected in violation of these requirements was ever successful,[360] and Congress deleted the standards from the 1929 apportionment act.[361]

In 1866, Congress was more successful in legislating to remedy a situation under which deadlocks in state legislatures over the election of Senators were creating vacancies in the office. The act required the two houses of each legislature to meet in joint session on a specified day and to meet every day thereafter until a Senator was selected.[362]

The first comprehensive federal statute dealing with elections was adopted in 1870 as a means of enforcing the Fifteenth Amendment's guarantee against racial discrimination in granting suffrage rights.[363] Under the Enforcement Act of 1870, and subsequent laws, false registration, bribery, voting without legal right, making false returns of votes cast, interference in any manner with officers of election, and the neglect by any such officer of any duty required of him by state or federal law were made federal offenses.[364] Provi-

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[359] The 1872 Act, 17 Stat. 28, provided that districts should contain "as nearly as practicable" equal numbers of inhabitants, a provision thereafter retained. In 1901, 31 Stat. 733, a requirement that districts be composed of "compact territory" was added. These provisions were repeated in the next Act, 37 Stat. 13 (1911), there was no apportionment following the 1920 Census, and the permanent 1929 Act omitted the requirements. 46 Stat. 13. *Cf.* Wood v. Broom, 287 U.S. 1 (1932).

[360] The first challenge was made in 1843. The committee appointed to inquire into the matter divided, the majority resolving that Congress had no power to bind the States in regard to their manner of districting, the minority contending to the contrary. H. REP. NO. 60, 28th Congress, 1st sess. (1843). The basis of the majority view was that while Article I, § 4 might give Congress the power to create the districts itself, the clause did not authorize Congress to tell the state legislatures how to do it if the legislatures were left the task of drawing the lines. L. SCHMECKEBIER, CONGRESSIONAL APPORTIONMENT 135–138 (1941). This argument would not appear to be maintainable in light of the language in *Ex parte* Siebold, 100 U.S. 371, 383–86 (1880).

[361] 46 Stat. 13 (1929). In 1967, Congress restored the single-member district requirement. 81 Stat. 581, 2 U.S.C. § 2c.

[362] 14 Stat. 243 (1866). Still another such regulation was the congressional specification of a common day for the election of Representatives in all the states. 17 Stat. 28 (1872), 2 U.S.C. § 7.

[363] Article I, § 4, and the Fifteenth Amendment have had quite different applications. The Court insisted that under the latter, while Congress could legislate to protect the suffrage in all elections, it could do so only against state interference based on race, color, or previous condition of servitude, James v. Bowman, 190 U.S. 127 (1903); United States v. Reese, 92 U.S. 214 (1876), whereas under the former it could also legislate against private interference for whatever motive, but only in federal elections. *Ex parte* Siebold, 100 U.S. 371 (1880); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

[364] The Enforcement Act of May 31, 1870, 16 Stat. 140; The Force Act of February 28, 1871, 16 Stat. 433; The Ku Klux Klan Act of April 20, 1871, 17 Stat. 13. The text of these and other laws and the history of the enactments and subsequent developments are set out in R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947).

sion was made for the appointment by federal judges of persons to attend at places of registration and at elections with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes, and to identify by their signatures the registration of voters and election talley sheets.[365] When the Democratic Party regained control of Congress, these pieces of Reconstruction legislation dealing specifically with elections were repealed,[366] but other statutes prohibiting interference with civil rights generally were retained and these were used in later years. More recently, Congress has enacted, in 1957, 1960, 1964, 1965, 1968, 1970, 1975, 1980, and 1982, legislation to protect the right to vote in all elections, federal, state, and local, through the assignment of federal registrars and poll watchers, suspension of literacy and other tests, and the broad proscription of intimidation and reprisal, whether with or without state action.[367]

Another chapter was begun in 1907 when Congress passed the Tillman Act, prohibiting national banks and corporations from making contributions in federal elections.[368] The Corrupt Practices Act, first enacted in 1910 and replaced by another law in 1925, extended federal regulation of campaign contributions and expenditures in federal elections,[369] and other acts have similarly provided other regulations.[370]

As noted above, although § 2, cl. 1, of this Article vests in the states the responsibility, now limited, to establish voter qualifications for congressional elections, the Court has held that the right to vote for Members of Congress is derived from the Federal Con-

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[365] The constitutionality of sections pertaining to federal elections was sustained in *Ex parte* Siebold, 100 U.S. 371 (1880), and *Ex parte* Yarbrough, 110 U.S. 651 (1884). The legislation pertaining to all elections was struck down as going beyond Congress's power to enforce the Fifteenth Amendment. United States v. Reese, 92 U.S. 214 (1876).

[366] 28 Stat. 144 (1894).

[367] Pub. L. 85–315, Part IV, § 131, 71 Stat. 634, 637 (1957); Pub. L. 86–449, Title III, § 301, Title VI, 601, 74 Stat. 86, 88, 90 (1960); Pub. L. 88–352, Title I, § 101, 78 Stat. 241 (1964); Pub. L. 89–110, 79 Stat. 437 (1965); Pub. L. 90–284, Title I, § 101, 82 Stat. 73 (1968); Pub. L. 91–285, 84 Stat. 314 (1970); Pub. L. 94–73, 89 Stat. 400 (1975); Pub. L. 97–205, 96 Stat. 131 (1982). Most of these statutes are codified in 42 U.S.C. §§ 1971 *et seq*. The penal statutes are in 18 U.S.C. §§ 241–245.

[368] Act of January 26, 1907, 34 Stat. 864, repealed by Pub. L. 94–283, Title II, § 201(a), 90 Stat. 496 (1976). Current law on the subject is codified at 2 U.S.C. § 441b.

[369] Act of February 28, 1925, 43 Stat. 1070, 2 U.S.C. §§ 241–256. Comprehensive regulation is now provided by the Federal Election Campaign Act of 1971, 86 Stat. 3, and the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, as amended, 90 Stat. 475, found in titles 2, 5, 18, and 26 of the U.S. Code. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[370] *E.g.*, the Hatch Act, relating principally to federal employees and state and local governmental employees engaged in programs at least partially financed with federal funds, 5 U.S.C. §§ 7324–7327.

stitution,[371] and that Congress therefore may legislate under this section of the Article to protect the integrity of this right. Congress may protect the right of suffrage against both official and private abridgment.[372] Where a primary election is an integral part of the procedure of choice, the right to vote in that primary election is subject to congressional protection.[373] The right embraces, of course, the opportunity to cast a ballot and to have it counted honestly.[374] Freedom from personal violence and intimidation may be secured.[375] The integrity of the process may be safeguarded against a failure to count ballots lawfully cast[376] or the dilution of their value by the stuffing of the ballot box with fraudulent ballots.[377] But the bribery of voters, although within reach of congressional power under other clauses of the Constitution, has been held not to be an interference with the rights guaranteed by this section to other qualified voters.[378]

To accomplish the ends under this clause, Congress may adopt the statutes of the states and enforce them by its own sanctions.[379] It may punish a state election officer for violating his duty under a state law governing congressional elections.[380] It may, in short, use its power under this clause, combined with the Necessary and Proper Clause, to regulate the times, places, and manner of electing Members of Congress so as to fully safeguard the integrity of the process; it may not, however, under this clause, provide different qualifications for electors than those provided by the states.[381]

REGULATION BY THE STATE LEGISLATURE

By its terms, Article I, Section 4, Clause 1, also contemplates the times, places, and manner of holding elections being "pre-

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[371] United States v. Classic, 313 U.S. 299, 314–15 (1941), and cases cited.

[372] 313 U.S. at 315; Buckley v. Valeo, 424 U.S. 1, 13 n.16 (1976).

[373] United States v. Classic, 313 U.S. 299, 315–321 (1941). The authority of Newberry v. United States, 256 U.S. 232 (1921), to the contrary has been vitiated. *Cf.* United States v. Wurzbach, 280 U.S. 396 (1930).

[374] United States v. Mosley, 238 U.S. 383 (1915); United States v. Saylor, 322 U.S. 385, 387 (1944).

[375] *Ex parte* Yarbrough, 110 U.S. 651 (1884).

[376] United States v. Mosley, 238 U.S. 383 (1915).

[377] United States v. Saylor, 322 U.S. 385 (1944).

[378] United States v. Bathgate, 246 U.S. 220 (1918); United States v. Gradwell, 243 U.S. 476 (1917).

[379] *Ex parte* Siebold, 100 U.S. 371 (1880); *Ex parte* Clarke, 100 U.S. 399 (1880); United States v. Gale, 109 U.S. 65 (1883); *In re* Coy, 127 U.S. 731 (1888).

[380] *Ex parte* Siebold, 100 U.S. 371 (1880).

[381] In Oregon v. Mitchell, 400 U.S. 112 (1970), however, Justice Black grounded his vote to uphold the age reduction in federal elections and the presidential voting residency provision sections of the Voting Rights Act Amendments of 1970 on this clause. Id. at 119–35. Four Justices specifically rejected this construction, id. at 209–12, 288–92, and the other four implicitly rejected it by relying on totally different sections of the Constitution in coming to the same conclusions as did Justice Black.

scribed in each State by the Legislature thereof," subject to alteration by Congress (except as to the place of choosing Senators). However, the Court did not have occasion to address what constitutes regulation by a state "Legislature" for purposes of the Elections Clause until its 2015 decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[382] There, the Court rejected the Arizona legislature's challenge to the validity of the Arizona Independent Redistricting Commission (AIRC) and AIRC's 2012 map of congressional districts.[383] The Commission had been established by a 2000 ballot initiative, which removed redistricting authority from the legislature and vested it in the AIRC.[384] The legislature asserted that this arrangement violated the Elections Clause because the Clause contemplates regulation by a state "Legislature" and "Legislature" means the state's representative assembly.[385]

The Court disagreed and held that Arizona's use of an independent commission to establish congressional districts is permissible because the Elections Clause uses the word "Legislature" to describe "the power that makes laws," a term that is broad enough to encompass the power provided by the Arizona constitution for the people to make laws through ballot initiatives.[386] In so finding, the Court noted that the word "Legislature" has been construed in various ways depending upon the constitutional provision in which it is used, and its meaning depends upon the function that the entity denominated as the "Legislature" is called upon to exercise in a specific context.[387] Here, in the context of the Elections Clause, the Court found that the function of the "Legislature" was lawmaking and that this function could be performed by the people of Arizona via an initiative consistent with state law.[388] The Court also pointed to dictionary definitions from the time of the Framers;[389] the Framers' intent in adopting the Elections Clause;[390] the "harmony" between the initiative process and the Constitution's "conception of the people

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[382] 576 U.S. ___, No. 13–1314, slip op. (2015).

[383] *Id.* at 2–3.

[384] *Id.*

[385] *Id.* at 2.

[386] *Id.* at 18. The Court also found that the use of the commission was permissible under 2 U.S.C. § 2a(c), a statutory provision that the Court construed as safeguarding to "each state full authority to employ in the creation of congressional districts its own laws and regulations." *Id.* at 19.

[387] *Id.* at 18.

[388] *Id.*

[389] *Id.* at 24 (noting that "dictionaries, even those in circulation during the founding era, capaciously define the word 'legislature'" to include as "[t]he power that makes laws" and "the Authority of making laws").

[390] *Id.* at 25 ("The dominant purpose of the Elections Clause . . . was to empower Congress to override state election rules, not to restrict the way States enact legislation. . . . [T]he Clause 'was the Framers' insurance against the possibility that

as the font of governmental power;" [391] and the practical consequences of invalidating the Arizona initiative.[392]

State authority to regulate the times, places, and manner of holding congressional elections has been described by the Court as "embrac[ing] authority to provide a complete code for congressional elections . . . ; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental rights involved." [393] The Court has upheld a variety of state laws designed to ensure that elections—including federal elections—are fair and honest and orderly.[394] But the Court distinguished state laws that go beyond "protection of the integrity and regularity of the election process," and instead operate to disadvantage a particular class of candidates.[395] Term limits, viewed as serving the dual purposes of "disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clause," crossed this line,[396] as did ballot labels identifying candidates who disregarded voters' instructions on term limits or declined to pledge support for them.[397] "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." [398]

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a State would refuse to provide for the election of representatives to the Federal Congress.'").

[391] *Id.* at 30 ("The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power.").

[392] *Id.* at 31, 33 (noting that it would be "perverse" to interpret the term "Legislature" to exclude the initiative, because the initiative is intended to check legislators' ability to determine the boundaries of the districts in which they run, and that a contrary ruling would invalidate a number of other state provisions regarding initiatives and referendums).

[393] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[394] *See*, *e.g.*, Storer v. Brown, 415 U.S. 724 (1974) (restrictions on independent candidacies requiring early commitment prior to party primaries); Roudebush v. Hartke, 405 U.S. 15, 25 (1972) (recount for Senatorial election); and Munro v. Socialist Workers Party, 479 U.S. 189 (1986) (requirement that minor party candidate demonstrate substantial support—1% of votes cast in the primary election—before being placed on ballot for general election).

[395] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 835 (1995).

[396] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

[397] Cook v. Gralike, 531 U.S. 510 (2001).

[398] *Thornton*, 514 U.S. at 833–34.

Clause 2. [The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by law appoint a different Day].[399]

IN GENERAL

This Clause was superseded by the Twentieth Amendment.

SECTION 5. Clause 1. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Clause 2. Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Clause 3. Each House shall keep a Journal of its Proceedings and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Clause 4. Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

POWERS AND DUTIES OF THE HOUSES

Power To Judge Elections

Each House, in judging of elections under this clause, acts as a judicial tribunal, with like power to compel attendance of wit-

[399] See Twentieth Amendment.

nesses. In the exercise of its discretion, it may issue a warrant for the arrest of a witness to procure his testimony, without previous subpoena, if there is good reason to believe that otherwise such witness would not be forthcoming.[400] It may punish perjury committed in testifying before a notary public upon a contested election.[401] The power to judge elections extends to an investigation of expenditures made to influence nominations at a primary election.[402] Refusal to permit a person presenting credentials in due form to take the oath of office does not oust the jurisdiction of the Senate to inquire into the legality of the election.[403] Nor does such refusal unlawfully deprive the state that elected such person of its equal suffrage in the Senate.[404]

"A Quorum To Do Business"

For many years the view prevailed in the House of Representatives that it was necessary for a majority of the members to vote on any proposition submitted to the House in order to satisfy the constitutional requirement for a quorum. It was a common practice for the opposition to break a quorum by refusing to vote. This was changed in 1890, by a ruling made by Speaker Reed and later embodied in Rule XV of the House, that members present in the chamber but not voting would be counted in determining the presence of a quorum.[405] The Supreme Court upheld this rule in *United States v. Ballin*,[406] saying that the capacity of the House to transact business is "created by the mere presence of a majority," and that since the Constitution does not prescribe any method for determining the presence of such majority "it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain the fact."[407] The rules of the Senate provide for the ascertainment of a quorum only by a roll call,[408] but in a few cases it has held that if a quorum is present, a proposition can be determined by the vote of a lesser number of members.[409]

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[400] Barry v. United States ex rel. Cunningham, 279 U.S. 597, 616 (1929).

[401] *In re* Loney, 134 U.S. 372 (1890).

[402] 6 Cannon's Precedents of the House of Representatives §§ 72–74, 180 (1936). *Cf.* Newberry v. United States, 256 U.S. 232, 258 (1921).

[403] Barry v. United States ex rel. Cunningham, 279 U.S. 597, 614 (1929).

[404] 279 U.S. at 615. The existence of this power in both houses of Congress does not prevent a state from conducting a recount of ballots cast in such an election any more than it prevents the initial counting by a state. Roudebush v. Hartke, 405 U.S. 15 (1972).

[405] Hinds' Precedents of the House of Representatives §§ 2895–2905 (1907).

[406] 144 U.S. 1 (1892).

[407] 144 U.S. at 5–6.

[408] Rule V.

[409] 4 Hinds' Precedents of the House of Representatives §§ 2910–2915 (1907); 6 Cannon's Precedents of the House of Representatives §§ 645, 646 (1936).

Rules of Proceedings

In the exercise of their constitutional power to determine their rules of proceedings, the Houses of Congress may not "ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house. . . . The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."[410] If a rule affects private rights, its construction becomes a judicial question. In *United States v. Smith*,[411] the Court held that the Senate's reconsideration of a presidential nominee for chairman of the Federal Power Commission, after it had confirmed him and he had taken the oath of office, was not warranted by its rules and did not deprive the appointee of his title to the office. In *Christoffel v. United States*,[412] a sharply divided Court upset a conviction for perjury in a federal district court of a witness who had denied under oath before a House committee any affiliation with Communist programs. The reversal was on the ground that, because a quorum of the committee, although present at the outset, was not present at the time of the alleged perjury, testimony before it was not before a "competent tribunal" within the sense of the District of Columbia Code.[413] Four Justices, in an opinion by Justice Jackson, dissented, arguing that, under the rules and practices of the House, "a quorum once established is presumed to continue unless and until a point of no quorum is raised" and that the Court was, in effect, invalidating this rule, thereby invalidating at the same time the rule of self-limitation observed by courts "where such an issue is tendered."[414]

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . ."[415] The

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[410] United States v. Ballin, 144 U.S. 1, 5 (1892). The Senate is "a continuing body." McGrain v. Daugherty, 273 U.S. 135, 181–82 (1927). Hence its rules remain in force from Congress to Congress except as they are changed from time to time, whereas those of the House are readopted at the outset of each new Congress.

[411] 286 U.S. 6 (1932).

[412] 338 U.S. 84 (1949).

[413] 338 U.S. at 87–90.

[414] 338 U.S. at 92–95.

[415] Art. II, § 2, cl. 2.

Constitution provides that "Each House may determine the Rules of its Proceedings,"[416] and the Senate has enacted a cloture rule[417] requiring a supermajority vote (60 votes) to close debate on any matter pending before the Senate. Absent the invocation of cloture or some other means of ending debate, matters can remain before the Senate indefinitely. The practice of preventing closure is known as a filibuster. Although no provision of the Constitution expressly requires that the Senate or House act by majority vote in enacting legislation or in exercising their other constitutional powers, the framers of the Constitution were committed to a majority rule as a general principle.[418] These facts have given rise to disagreement as to the constitutionality of the filibuster as applied to judicial nominees—disagreement over whether the "Advice and Consent" of the Senate means the majority of the Senate and not a super-majority. The constitutionality of the filibuster has been challenged in court several times, but those cases have never reached the merits of the issue.[419] More recently, the Senate interpreted its rules to require only a simple majority to invoke cloture on most nominations.[420]

Powers of the Houses Over Members

Congress has authority to make it an offense against the United States for a Member, during his continuance in office, to receive compensation for services before a government department in relation to proceedings in which the United States is interested. Such a statute does not interfere with the legitimate authority of the Senate or House over its own Members.[421] In upholding the power of the Senate to investigate charges that some Senators had been speculating in sugar stocks during the consideration of a tariff bill, the Supreme Court asserted that "the right to expel extends to all cases where the offence is such as in the judgment of the Senate is incon-

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[416] Art. I, § 5, cl. 2.

[417] Rule XXII, par. 2.

[418] *See*, *e.g.*, Federalist No. 58, p. 397 (Cooke ed.; Wesleyan Univ. Press: 1961) (Madison, responding to objections that the Constitution should have required "more than a majority . . . for a quorum, and in particular cases, if not in all, more than a majority of a quorum for a decision," asserted that such requirements would be inconsistent with majority rule, which is "the fundamental principle of free government"); id., No. 22, p. 138–39 (Hamilton observed that "equal suffrage among the States under the Articles of Confederation contradicts that fundamental maxim of republican government which requires that the sense of the majority should prevail").

[419] *See, e.g.*, Common Cause v. Biden, 748 F.3d 1280 (D.C. Cir. 2014); Judicial Watch, Inc. v. United States Senate, 432 F.3d 359 (D.C. Cir. 2005); Page v. Shelby, 995 F. Supp. 23 (D.D.C. 1998). The constitutionality of the filibuster has been a subject of debate for legal scholars. *See, e.g.*, Josh Chafetz & Michael J. Gerhardt, *Debate, Is the Filibuster Constitutional?*, 158 U. PA L. REV. PENNUMBRA 245 (2010).

[420] 159 CONG. REC. S8416–S8418 (daily ed. Nov. 21, 2013).

[421] Burton v. United States, 202 U.S. 344 (1906).

sistent with the trust and duty of a Member."[422] It cited with apparent approval the action of the Senate in expelling William Blount in 1797 for attempting to seduce from his duty an American agent among the Indians and for negotiating for services in behalf of the British Government among the Indians—conduct which was not a "statutable offense" and which was not committed in his official character, nor during the session of Congress nor at the seat of government.[423]

In *Powell v. McCormack*,[424] a suit challenging the exclusion of a Member-elect from the House of Representatives, it was argued that, because the vote to exclude was actually in excess of two-thirds of the Members, it should be treated simply as an expulsion. The Court rejected the argument, noting that House precedents were to the effect that the House had no power to expel for misconduct occurring prior to the Congress in which the expulsion is proposed, as was the case of Mr. Powell's alleged misconduct. The Court based its rejection on its inability to conclude that, if the Members of the House had been voting to expel, they would still have cast an affirmative vote in excess of two-thirds.[425]

Duty To Keep a Journal

The object of the clause requiring the keeping of a Journal is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents."[426] When the Journal of either House is put in evidence for the purpose of determining whether the yeas and nays were ordered, and what the vote was on any particular question, the Journal must be presumed to show the truth, and a statement therein that a quorum was present, though not disclosed by the yeas and nays, is final.[427] But when an enrolled bill, which has been signed by the Speaker of the House and by the President of the Senate, in open session receives the approval of the President and is deposited in the Department of State, its authentication as a bill that has passed Congress is complete and unimpeachable, and it is not competent to show from the Journals of either House that an act

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[422] *In re* Chapman, 166 U.S. 661 (1897).

[423] 166 U.S. at 669–70. *See* 2 J. Story, Commentaries on the Constitution of the United States § 836 (1833).

[424] 395 U.S. 486 (1969).

[425] 395 U.S. at 506–12.

[426] 2 J. Story, Commentaries on the Constitution of the United States § 840 (1833), quoted with approval in Field v. Clark, 143 U.S. 649, 670 (1892).

[427] United States v. Ballin, 144 U.S. 1, 4 (1892).

so authenticated, approved, and deposited, in fact omitted one section actually passed by both Houses of Congress.[428]

SECTION 6. Clause 1. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

COMPENSATION AND IMMUNITIES OF MEMBERS

Congressional Pay

With the surprise ratification of the Twenty-Seventh Amendment,[429] it is now the rule that congressional legislation "varying"—decreasing or increasing—the level of legislators' pay may not take effect until an intervening election has occurred. The only real controversy likely to arise in the interpretation of the new rule is whether pay increases that result from automatic alterations in pay are subject to the same requirement or whether it is only the initial enactment of the automatic device that is covered. That is, from the founding to 1967, congressional pay was determined directly by Congress in specific legislation setting specific rates of pay. In 1967, a law was passed that created a quadrennial commission with the responsibility to propose to the President salary levels for top officials of the Government, including Members of Congress.[430] In 1975, Congress legislated to bring Members of Congress within a separate commission system authorizing the President to recommend annual increases for civil servants to maintain pay comparability with private-sector employees.[431] These devices were attacked by dissent-

[428] Field v. Clark, 143 U.S. 649 (1892); Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911). *See* the dispute in the Court with regard to the application of *Field* in an origination clause dispute. United States v. Munoz-Flores, 495 U.S. 385, 391 n.4 (1990), and id. at 408 (Justice Scalia concurring in the judgment). A parallel rule holds in the case of a duly authenticated official notice to the Secretary of State that a state legislature has ratified a proposed amendment to the Constitution. Leser v. Garnett, 258 U.S. 130, 137 (1922); *see also* Coleman v. Miller, 307 U.S. 433 (1939).

[429] *See* discussion under Twenty-Seventh Amendment, infra.

[430] Pub. L. 90–206, § 225, 81 Stat. 642 (1967), as amended, Pub. L. 95–19, § 401, 91 Stat. 45 (1977), as amended, Pub. L. 99–190, § 135(e), 99 Stat. 1322 (1985).

[431] Pub. L. 94–82, § 204(a), 89 Stat. 421.

ing Members of Congress as violating the mandate of clause 1 that compensation be "ascertained by Law." However, these challenges were rejected.[432] Thereafter, prior to ratification of the Amendment, Congress, in the Ethics Reform Act of 1989,[433] altered both the pay-increase and the cost-of-living-increase provisions of law, making quadrennial pay increases effective only after an intervening congressional election and making cost-of-living increases dependent upon a specific congressional vote. A federal court of appeals panel ruled that the cost-of-living-increase provision did not violate the Twenty-Seventh Amendment, and that a challenge to the quadrennial pay raise provision was not ripe.[434]

Privilege From Arrest

This clause is practically obsolete. It applies only to arrests in civil suits, which were still common in this country at the time the Constitution was adopted.[435] It does not apply to service of process in either civil[436] or criminal cases.[437] Nor does it apply to arrest in any criminal case. The phrase "treason, felony or breach of the peace" is interpreted to withdraw all criminal offenses from the operation of the privilege.[438]

Privilege of Speech or Debate

Members.—This clause represents "the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature."[439] So Justice Harlan explained the significance of the Speech or Debate Clause, the ancestry of which traces back to a clause in the English Bill of Rights of 1689[440] and the history of which traces back almost to

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[432] Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), *aff'd summarily*, 434 U.S. 1028 (1978); Humphrey v. Baker, 848 F.2d 211 (D.C. Cir.), *cert. denied*, 488 U.S. 966 (1988).

[433] Pub. L. 101–194, 103 Stat. 1716, 2 U.S.C. § 31(2), 5 U.S.C. § 5318 note, and 2 U.S.C. §§ 351–363.

[434] Boehner v. Anderson, 30 F.3d 156, 163 (D.C. Cir. 1994).

[435] Long v. Ansell, 293 U.S. 76 (1934).

[436] 293 U.S. at 83.

[437] United States v. Cooper, 4 U.S. (4 Dall.) 341 (C.C. Pa. 1800).

[438] Williamson v. United States, 207 U.S. 425, 446 (1908).

[439] United States v. Johnson, 383 U.S. 169, 178 (1966).

[440] "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c. 2.

the beginning of the development of Parliament as an independent force.[441] "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders."[442] "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators."[443]

The protection of this clause is not limited to words spoken in debate. "Committee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.'"[444] Thus, so long as legislators are "acting in the sphere of legitimate legislative activity," they are "protected not only from the consequence of litigation's results but also from the burden of defending themselves."[445] But the scope of the meaning of "legislative activity" has its limits. "The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[446] Immunity from civil suit, both in law and equity, and from criminal action based on the performance of legislative duties flows from a determination that a challenged act is within the definition of legislative activity, but the Court in the more recent cases appears to have narrowed the concept somewhat.

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[441] United States v. Johnson, 383 U.S. 169, 177–79, 180–83 (1966); Powell v. McCormack, 395 U.S. 486, 502 (1969).

[442] United States v. Johnson, 383 U.S. 169, 178 (1966).

[443] United States v. Brewster, 408 U.S. 501, 507 (1972). This rationale was approvingly quoted from Coffin v. Coffin, 4 Mass. 1, 28 (1808), in Kilbourn v. Thompson, 103 U.S. 168, 203 (1881).

[444] Powell v. McCormack, 395 U.S. 486, 502 (1969), quoting Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

[445] Tenney v. Brandhove, 341 U.S. 367, 376–377 (1972); Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); Powell v. McCormack, 395 U.S. 486, 505 (1969); Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975).

[446] Gravel v. United States, 408 U.S. 606, 625 (1972). The critical nature of the clause is shown by the holding in Davis v. Passman, 442 U.S. 228, 235 n.11 (1979), that when a Member is sued under the Fifth Amendment for employment discrimination on the basis of gender, only the clause could shield such an employment decision, and not the separation of powers doctrine or emanations from it. Whether the clause would be a shield the Court had no occasion to decide and the case was settled on remand without a decision being reached.

In *Kilbourn v. Thompson*,[447] Members of the House of Representatives were held immune in a suit for false imprisonment brought about by a vote of the Members on a resolution charging contempt of one of its committees and under which the plaintiff was arrested and detained, even though the Court found that the contempt was wrongly voted. *Kilbourn* was relied on in *Powell v. McCormack*,[448] in which the plaintiff was not allowed to maintain an action for declaratory judgment against certain Members of the House of Representatives to challenge his exclusion by a vote of the entire House. Because the power of inquiry is so vital to performance of the legislative function, the Court held that the clause precluded suit against the Chairman and Members of a Senate subcommittee and staff personnel, to enjoin enforcement of a subpoena directed to a third party, a bank, to obtain the financial records of the suing organization. The investigation was a proper exercise of Congress's power of inquiry, the subpoena was a legitimate part of the inquiry, and the clause therefore was an absolute bar to judicial review of the subcommittee's actions prior to the possible institution of contempt actions in the courts.[449] And in *Dombrowski v. Eastland*,[450] the Court affirmed the dismissal of an action against the chairman of a Senate committee brought on allegations that he wrongfully conspired with state officials to violate the civil rights of plaintiff.

Through an inquiry into the nature of the "legislative acts" performed by Members and staff, the Court held that the clause did not defeat a suit to enjoin the public dissemination of legislative materials outside the halls of Congress.[451] A committee had conducted an authorized investigation into conditions in the schools of the District of Columbia and had issued a report that the House of Representatives routinely ordered printed. In the report, named students were dealt with in an allegedly defamatory manner, and their parents sued various committee Members and staff and other personnel, including the Superintendent of Documents and the Public Printer, seeking to restrain further publication, dissemination, and distribution of the report until the objectionable material was de-

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[447] 103 U.S. 168 (1881). *But see* Gravel v. United States, 408 U.S. 606, 618–19 (1972).

[448] 395 U.S. 486 (1969). The Court found sufficient the presence of other defendants to enable it to review Powell's exclusion but reserved the question whether in the absence of someone the clause would still preclude suit. Id. at 506 n.26. *See also* Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

[449] Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

[450] 387 U.S. 82 (1967). *But see* the reinterpretation of this case in Gravel v. United States, 408 U.S. 606, 619–20 (1972). *See also* McSurely v. McClellan, 553 F.2d 1277 (D.C. Cir. 1976) (en banc), *cert. dismissed as improvidently granted, sub nom.* McAdams v. McSurely, 438 U.S. 189 (1978).

[451] Doe v. McMillan, 412 U.S. 306 (1973).

leted and also seeking damages. The Court held that the Members of Congress and the staff employees had been properly dismissed from the suit, inasmuch as their actions—conducting the hearings, preparing the report, and authorizing its publication—were protected by the clause. The Superintendent of Documents and the Public Printer were held, however, to have been properly named, because, as congressional employees, they had no broader immunity than Members of Congress would have. At this point, the Court distinguished between those legislative acts, such as voting, speaking on the floor or in committee, issuing reports, which are within the protection of the clause, and those acts which enjoy no such protection. Public dissemination of materials outside the halls of Congress is not protected, the Court held, because it is unnecessary to the performance of official legislative actions. Dissemination of the report within the body was protected, whereas dissemination in normal channels outside it was not.[452]

Bifurcation of the legislative process in this way resulted in holding unprotected the republication by a Member of allegedly defamatory remarks outside the legislative body, here through newsletters and press releases.[453] The clause protects more than speech or debate in either House, the Court affirmed, but in order for the other matters to be covered "they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[454] Press releases and newsletters are "[v]aluable and desirable" in "inform[ing] the public and other Members," but neither are essential to the deliberations of the legislative body nor part of the deliberative process.[455]

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[452] It is difficult to assess the effect of the decision because the Justices in the majority adopted mutually inconsistent stands, 412 U.S. at 325 (concurring opinion), and four Justices dissented. Id. at 331, 332, 338. The case also leaves unresolved the propriety of injunctive relief. *Compare* id. at 330 (Justice Douglas concurring), *with* id. at 343–45 (three dissenters arguing that separation of powers doctrine forbade injunctive relief). *And compare* Davis v. Passman, 442 U.S. 228, 245, 246 n.24 (1979), *with* id. at 250–51 (Chief Justice Burger dissenting).

[453] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[454] 443 U.S. at 126, quoting Gravel v. United States, 408 U.S. 606, 625 (1972).

[455] Hutchinson v. Proxmire, 443 U.S. 111, 130, 132–33 (1979). The Court distinguished between the more important "informing" function of Congress, *i.e.*, its efforts to inform itself in order to exercise its legislative powers, and the less important "informing" function of acquainting the public about its activities. The latter function the Court did not find an integral part of the legislative process. *See also* Doe v. McMillan, 412 U.S. 306, 314–17 (1973). *But compare* id. at 325 (concurring). For consideration of the "informing" function in its different guises in the context of legislative investigations, *see* Watkins v. United States, 354 U.S. 178, 200 (1957);

Parallel developments may be discerned with respect to the application of a general criminal statute to call into question the legislative conduct and motivation of a Member. Thus, in *United States v. Johnson*,[456] the Court voided the conviction of a Member for conspiracy to impair lawful governmental functions, in the course of seeking to divert a governmental inquiry into alleged wrongdoing, by accepting a bribe to make a speech on the floor of the House of Representatives. The speech was charged as part of the conspiracy and extensive evidence concerning it was introduced at a trial. It was this examination into the context of the speech—its authorship, motivation, and content—that the Court found foreclosed by the Speech or Debate Clause.[457]

However, in *United States v. Brewster*,[458] while continuing to assert that the clause "must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch,"[459] the Court substantially reduced the scope of the coverage of the clause. In upholding the validity of an indictment of a Member, which charged that he accepted a bribe to be "influenced in his performance of official acts in respect to his action, vote, and decision" on legislation, the Court drew a distinction between a prosecution that caused an inquiry into legislative acts or the motivation for performance of such acts and a prosecution for taking or agreeing to take money for a promise to act in a certain way. The former is proscribed, the latter is not. "Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch."[460] In other words, it is the fact of having taken a bribe, not the act the bribe is intended to influence, which is the subject of the pros-

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United States v. Rumely, 345 U.S. 41, 43 (1953); Russell v. United States, 369 U.S. 749, 777–78 (1962) (Justice Douglas dissenting).

[456] 383 U.S. 169 (1966).

[457] Reserved was the question whether a prosecution that entailed inquiry into legislative acts or motivation could be founded upon "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U.S. at 185. The question was similarly reserved in United States v. Brewster, 408 U.S. 501, 529 n.18 (1972), although Justices Brennan and Douglas would have answered in the negative. Id. at 529, 540.

[458] 408 U.S. 501 (1972).

[459] 408 U.S. at 516.

[460] 408 U.S. at 526.

ecution, and the Speech or Debate Clause interposes no obstacle to this type of prosecution.[461]

Applying in the criminal context the distinction developed in the civil cases between protected "legislative activity" and unprotected conduct prior to or subsequent to engaging in "legislative activity," the Court in *Gravel v. United States*,[462] held that a grand jury could validly inquire into the processes by which the Member obtained classified government documents and into the arrangements for subsequent private republication of these documents, since neither action involved protected conduct. "While the Speech or Debate Clause recognizes speech, voting and other legislative acts as exempt from liability that might otherwise attach, it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts." [463]

Congressional Employees.—Until recently, the Court distinguished between Members of Congress, who were immune from suit arising out of their legislative activities, and legislative employees who participate in the same activities under the direction of a Member.[464] Thus, in *Kilbourn v. Thompson*,[465] the sergeant at arms of the House was held liable for false imprisonment because he executed the resolution ordering Kilbourn arrested and imprisoned. *Dombrowski v. Eastland* [466] held that a subcommittee counsel might be liable in damages for actions as to which the chairman of the committee was immune from suit. And, in *Powell v. McCormack*,[467] the Court held that the presence of House of Representative employees as defendants in a suit for declaratory judgment gave the fed-

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[461] The holding was reaffirmed in United States v. Helstoski, 442 U.S. 477 (1979). On the other hand, the Court did hold that the protection of the clause is so fundamental that, assuming a Member may waive it, a waiver could be found only after explicit and unequivocal renunciation, rather than by failure to assert it at any particular point. Similarly, Helstoski v. Meanor, 442 U.S. 500 (1979), held that since the clause properly applied is intended to protect a Member from even having to defend himself, he may appeal immediately from a judicial ruling of nonapplicability rather than wait to appeal after conviction.

[462] 408 U.S. 606 (1972).

[463] 408 U.S. at 626.

[464] Language in some of the Court's earlier opinions had indicated that the privilege "is less absolute, although applicable," when a legislative aide is sued, without elaboration of what was meant. Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); Tenney v. Brandhove, 341 U.S. 367, 378 (1951). In Wheeldin v. Wheeler, 373 U.S. 647 (1963), the Court had imposed substantial obstacles to the possibility of recovery in appropriate situations by holding that a federal cause of action was lacking and remitting litigants to state courts and state law grounds. The case is probably no longer viable, however, after Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[465] 103 U.S. 168 (1881).

[466] 387 U.S. 82 (1967).

[467] 395 U.S. 486 (1969).

eral courts jurisdiction to review the propriety of the plaintiff's exclusion from office by vote of the House.

Upon full consideration of the question, however, the Court, in *Gravel v. United States*,[468] accepted a series of contentions urged upon it not only by the individual Senator but by the Senate itself appearing by counsel as amicus: "that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause . . . will inevitably be diminished and frustrated." [469] Therefore, the Court held "that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." [470]

The *Gravel* holding, however, does not so much extend congressional immunity to employees as it narrows the actual immunity available to both aides and Members in some important respects. Thus, the Court said, the legislators in *Kilbourn* were immune because adoption of the resolution was clearly a legislative act but the execution of the resolution—the arrest and detention—was not a legislative act immune from liability, so that the House officer was in fact liable as would have been any Member who had executed it.[471] *Dombrowski* was interpreted as having held that no evidence implicated the Senator involved, whereas the committee counsel had been accused of "conspiring to violate the constitutional rights of private parties. Unlawful conduct of this kind the Speech or Debate Clause simply did not immunize." [472] And *Powell* was interpreted as simply holding that voting to exclude plaintiff, which was all the House defendants had done, was a legislative act immune from Member liability but not from judicial inquiry. "None of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection. . . . [N]o prior case has held that Mem-

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[468] 408 U.S. 606 (1972).
[469] 408 U.S. at 616–17.
[470] 408 U.S. at 618.
[471] 408 U.S. at 618–19.
[472] 408 U.S. at 619–20.

bers of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances." [473]

Clause 2. No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

DISABILITIES OF MEMBERS

Appointment to Executive Office

"The reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the extent of the principle; for his appointment is restricted only 'during the time, for which he was elected'; thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination." [474] As might be expected, there is no judicial interpretation of the language of the clause and indeed it has seldom surfaced as an issue.

In 1909, after having increased the salary of the Secretary of State,[475] Congress reduced it to the former figure so that a Member of the Senate at the time the increase was voted would be eligible for that office.[476] The clause became a subject of discussion in 1937, when Justice Black was appointed to the Court, because Congress had recently increased the amount of pension available to Jus-

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[473] 408 U.S. at 620–21.

[474] 2 J. Story, Commentaries on the Constituiton of the United States § 864 (1833).

[475] 34 Stat. 948 (1907).

[476] 35 Stat. 626 (1909). Congress followed this precedent when the President wished to appoint a Senator as Attorney General and the salary had been increased pursuant to a process under which Congress did not need to vote to approve but could vote to disapprove. The salary was temporarily reduced to its previous level. 87 Stat. 697 (1973). *See also* 89 Stat. 1108 (1975) (reducing the salary of a member of the Federal Maritime Commission in order to qualify a Representative).

tices retiring at seventy and Black's Senate term had still some time to run. The appointment was defended, however, with the argument that, because Black was only fifty-one at the time, he would be ineligible for the "increased emolument" for nineteen years and it was not as to him an increased emolument.[477] In 1969, it was briefly questioned whether a Member of the House of Representatives could be appointed Secretary of Defense because, under a salary bill enacted in the previous Congress, the President would propose a salary increase, including that of cabinet officers, early in the new Congress, which would take effect if Congress did not disapprove it. The Attorney General ruled that, as the clause would not apply if the increase were proposed and approved subsequent to the appointment, it similarly would not apply in a situation in which it was uncertain whether the increase would be approved.[478]

Incompatible Offices

This second part of the second clause elicited little discussion at the Convention and was universally understood to be a safeguard against executive influence on Members of Congress and the prevention of the corruption of the separation of powers.[479] Congress has at various times confronted the issue in regard to seating or expelling persons who have or obtain office in another branch. Thus, it has determined that visitors to academies, regents, directors, and trustees of public institutions, and members of temporary commissions who receive no compensation as members are not officers within the constitutional inhibition.[480] Government contractors and federal officers who resign before presenting their credentials may be seated as Members of Congress.[481]

One of the more recurrent problems which Congress has had with this clause is the compatibility of congressional office with service as an officer of some military organization—militia, reserves, and the like.[482] Members have been unseated for accepting appoint-

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[477] The matter gave rise to a case, *Ex parte* Albert Levitt, 302 U.S. 633 (1937), in which the Court declined to pass upon the validity of Justice Black's appointment. The Court denied the complainant standing, but strangely it did not advert to the fact that it was being asked to assume original jurisdiction contrary to Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[478] 42 Op. Atty. Gen. 381 (Jan. 3, 1969).

[479] THE FEDERALIST, No. 76 (Hamilton) (J. Cooke ed. 1961), 514; 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 866–869 (1833).

[480] 1 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 493 (1907); 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES §§ 63–64 (1936).

[481] Hinds', *supra* §§ 496–499.

[482] *Cf.* RIGHT OF A REPRESENTATIVE IN CONGRESS TO HOLD COMMISSION IN NATIONAL GUARD, H. REP. NO. 885, 64th Cong., 1st sess. (1916).

ment to military office during their terms of congressional office,[483] but there are apparently no instances in which a Member-elect has been excluded for this reason. Because of the difficulty of successfully claiming standing, the issue has never been a litigable matter.[484]

SECTION 7. Clause 1. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Clause 2. Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

Clause 3. Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be nec-

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[483] HINDS', supra §§ 486–492, 494; CANNON'S, supra §§ 60–62.

[484] An effort to sustain standing was rebuffed in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974).

essary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitation prescribed in the Case of a Bill.

THE LEGISLATIVE PROCESS

Revenue Bills

Insertion of this clause was another of the devices sanctioned by the Framers to preserve and enforce the separation of powers.[485] It applies, in the context of the permissibility of Senate amendments to a House-passed bill, to all bills for collecting revenue—revenue decreasing as well as revenue increasing—rather than simply to just those bills that increase revenue.[486]

Only bills to levy taxes in the strict sense of the word are comprehended by the phrase "all bills for raising revenue"; bills for other purposes, which incidentally create revenue, are not included.[487] Thus, a Senate-initiated bill that provided for a monetary "special assessment" to pay into a crime victims fund did not violate the clause, because it was a statute that created and raised revenue to support a particular governmental program and was not a law raising revenue to support Government generally.[488] An act providing a national currency secured by a pledge of bonds of the United States, which, "in the furtherance of that object, and also to meet the expenses attending the execution of the act," imposed a tax on the circulating notes of national banks was held not to be a revenue measure which must originate in the House of Representatives.[489] Neither was a bill that provided that the District of Columbia should raise by taxation and pay to designated railroad companies a speci-

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[485] THE FEDERALIST, No. 58 (J. Cooke ed. 1961), 392–395 (Madison). *See* United States v. Munoz-Flores, 495 U.S. 385, 393–395 (1990).

[486] The issue of coverage is sometimes important, as in the case of the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 324, in which the House passed a bill that provided for a net loss in revenue and the Senate amended the bill to provide a revenue increase of more than $98 billion over three years. Attacks on the law as a violation of the origination clause failed before assertions of political question, standing, and other doctrines. *E.g.*, Texas Ass'n of Concerned Taxpayers v. United States, 772 F.2d 163 (5th Cir. 1985); Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

[487] 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 880 (1833).

[488] United States v. Munoz-Flores, 495 U.S. 385 (1990).

[489] Twin City Bank v. Nebeker, 167 U.S. 196 (1897).

fied sum for the elimination of grade crossings and the construction of a railway station.[490] The substitution of a corporation tax for an inheritance tax,[491] and the addition of a section imposing an excise tax upon the use of foreign-built pleasure yachts,[492] have been held to be within the Senate's constitutional power to propose amendments.

Approval by the President

The President is not restricted to signing a bill on a day when Congress is in session.[493] He may sign within ten days (Sundays excepted) after the bill is presented to him, even if that period extends beyond the date of the final adjournment of Congress.[494] His duty in case of approval of a measure is merely to sign it. He need not write on the bill the word "approved" nor the date. If no date appears on the face of the roll, the Court may ascertain the fact by resort to any source of information capable of furnishing a satisfactory answer.[495] A bill becomes a law on the date of its approval by the President.[496] When no time is fixed by the act it is effective from the date of its approval,[497] which usually is taken to be the first moment of the day, fractions of a day being disregarded.[498]

The Veto Power

The veto provisions, the Supreme Court has told us, serve two functions. On the one hand, they ensure that "the President shall have suitable opportunity to consider the bills presented to him. . . . It is to safeguard the President's opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become law if the adjournment of the Congress prevents their return."[499] At the same time, the sections ensure "that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes."[500] The Court asserted that "[w]e should

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[490] Millard v. Roberts, 202 U.S. 429 (1906).
[491] Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911).
[492] Rainey v. United States, 232 U.S. 310 (1914).
[493] La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899).
[494] Edwards v. United States, 286 U.S. 482 (1932). On one occasion in 1936, delay in presentation of a bill enabled the President to sign it 23 days after the adjournment of Congress. Schmeckebier, *Approval of Bills After Adjournment of Congress*, 33 AM. POL. SCI. REV. 52–53 (1939).
[495] Gardner v. The Collector, 73 U.S. (6 Wall.) 499 (1868).
[496] 73 U.S. at 504. *See also* Burgess v. Salmon, 97 U.S. 381, 383 (1878).
[497] Matthews v. Zane, 20 U.S. (7 Wheat.) 164, 211 (1822).
[498] Lapeyre v. United States, 84 U.S. (17 Wall.) 191, 198 (1873).
[499] Wright v. United States, 302 U.S. 583 (1938).
[500] 302 U.S. at 596.

not adopt a construction which would frustrate either of these purposes."[501]

In one major respect, however, the President's actual desires may be frustrated by the presentation to him of omnibus bills or of bills containing extraneous riders. During the 1980s, on several occasions, Congress lumped all the appropriations for the operation of the government into one gargantuan bill. But the President must sign or veto the entire bill; doing the former may mean he has to accept provisions he would not sign standing alone, and doing the latter may have other adverse consequences. Numerous Presidents from Grant on have unsuccessfully sought by constitutional amendment a "line-item veto" by which individual items in an appropriations bill or a substantive bill could be extracted and vetoed. More recently, beginning in the FDR Administration, it has been debated whether Congress could by statute authorize a form of the line-item veto, but, again, nothing passed.[502]

That the interpretation of the provisions has not been entirely consistent is evident from a review of the only two Supreme Court decisions construing them. In *The Pocket Veto Case*,[503] the Court held that the return of a bill to the Senate, where it originated, had been prevented when the Congress adjourned its first session *sine die* fewer than ten days after presenting the bill to the President. The word "adjournment" was seen to have been used in the Constitution not in the sense of final adjournments but to any occasion on which a house of Congress is not in session. "We think that under the constitutional provision the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed."[504] Because neither House was in session to receive the bill, the President was prevented from returning it. It had been argued to the Court that the return may be validly accomplished to a proper agent of the house of origin for consideration when that body convenes. After first noting that Congress had never

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[501] 302 U.S. at 596.

[502] *See Line Item Veto: Hearing Before the Senate Committee on Rules and Administration*, 99th Cong., 1st sess. (1985), esp. 10–20 (CRS memoranda detailing the issues). Some publicists have even contended, through a strained interpretation of clause 3, actually from its intended purpose to prevent Congress from subverting the veto power by calling a bill by some other name, that the President already possesses the line-item veto, but no President could be brought to test the thesis. *See Pork Barrels and Principles: The Politics of the Presidential Veto* (National Legal Center for the Public Interest, 1988) (essays).

[503] 279 U.S. 655 (1929).

[504] 279 U.S. at 680.

authorized an agent to receive bills during adjournment, the Court opined that "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate." [505]

However, in *Wright v. United States*,[506] the Court held that the President's return of a bill to the Secretary of the Senate on the tenth day after presentment, during a three-day adjournment by the originating House only, was an effective return. In the first place, the Court thought, the pocket veto clause referred only to an adjournment of "the Congress," and here only the Senate, the originating body, had adjourned. The President can return the bill to the originating House if that body be in an intrasession adjournment, because there is no "practical difficulty" in effectuating the return. "The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive the bill." [507] Such a procedure complied with the constitutional provisions. "The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return." [508] The concerns activating the Court in *The Pocket Veto Case* were not present. There was no indefinite period in which a bill was in a state of suspended animation with public uncertainty over the outcome. "When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over." [509]

The tension between the two cases, even though at a certain level of generality they are consistent because of factual differences, has existed without the Supreme Court yet having occasion to review the issue again. But, in *Kennedy v. Sampson*,[510] an appel-

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[505] 279 U.S. at 684.

[506] 302 U.S. 583 (1938).

[507] 302 U.S. at 589–90.

[508] 302 U.S. at 589.

[509] 302 U.S. at 595.

[510] 511 F.2d 430 (D.C. Cir. 1974). The Administration declined to appeal the case to the Supreme Court. The adjournment here was for five days. Subsequently, the President attempted to pocket veto two other bills, one during a 32-day recess and one during the period in which Congress had adjourned sine die from the first to the second session of the 93d Congress. After renewed litigation, the Administration entered its consent to a judgment that both bills had become law, Kennedy v. Jones, 412 F. Supp. 353 (D.D.C., decree entered April 13, 1976), and it was announced that President Ford "will use the return veto rather than the pocket veto during intrasession and intersession recesses and adjournments of the Congress", provided that the House to which the bill must be returned has authorized an officer to receive vetoes during the period it is not in session. President Reagan repudiated this agreement and vetoed a bill during an intersession adjournment. Although the lower court

late court held that a return is not prevented by an intra-session adjournment of any length by one or both Houses of Congress, so long as the originating House arranged for receipt of veto messages. The court stressed that the absence of the evils deemed to bottom the Court's premises in *The Pocket Veto Case*—long delay and public uncertainty—made possible the result.

The two-thirds vote of each House required to pass a bill over a veto means two-thirds of a quorum.[511] After a bill becomes law, of course, the President has no authority to repeal it. Asserting this truism, the Court in *The Confiscation Cases*[512] held that the immunity proclamation issued by the President in 1868 did not require reversal of a decree condemning property seized under the Confiscation Act of 1862.[513]

Presentation of Resolutions

The purpose of clause 3, the Orders, Resolutions, and Votes Clause (ORV Clause), is not readily apparent. For years it was assumed that the Framers inserted the clause to prevent Congress from evading the veto clause by designating as something other than a bill measures intended to take effect as laws.[514] Why a separate clause was needed for this purpose has not been explained. Recent scholarship presents a different possible explanation for the ORV Clause—that it was designed to authorize delegation of lawmaking power to a single House, subject to presentment, veto, and possible two-House veto override.[515] If construed literally, the clause could have bogged down the intermediate stages of the legislative process, and Congress made practical adjustments. At the request of the Senate, the Judiciary Committee in 1897 published a comprehensive report detailing how the clause had been interpreted over the years. Briefly, it was shown that the word "necessary" in the clause had come to refer to the necessity for law-making; that is, any "order, resolution, or vote" must be submitted if it is to have the force of law. But "votes" taken in either House preliminary to the final pas-

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applied Kennedy v. Sampson to strike down the exercise of the power, but the case was mooted prior to Supreme Court review. Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), *vacated and remanded to dismiss sub nom.* Burke v. Barnes, 479 U.S. 361 (1987).

[511] Missouri Pacific Ry. v. Kansas, 248 U.S. 276 (1919).

[512] 87 U.S. (20 Wall.) 92 (1874).

[513] 12 Stat. 589 (1862).

[514] *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937), 301–302, 304–305; 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 889, at 335 (1833).

[515] Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005).

sage of legislation need not be submitted to the other House or to the President, nor must concurrent resolutions merely expressing the views or "sense" of the Congress.[516]

Although the ORV Clause excepts only adjournment resolutions and makes no explicit reference to resolutions proposing constitutional amendments, the practice and understanding, beginning with the Bill of Rights, has been that resolutions proposing constitutional amendments need not be presented to the President for veto or approval. *Hollingsworth v. Virginia*,[517] in which the Court rejected a challenge to the validity of the Eleventh Amendment based on the assertion that it had not been presented to the President, is usually cited for the proposition that presentation of constitutional amendment resolutions is not required.[518]

The Legislative Veto.—Beginning in the 1930s, the concurrent resolution (as well as the simple resolution) was put to a new use—serving as the instrument to terminate powers delegated to the Chief Executive or to disapprove particular exercises of power by him or his agents. The "legislative veto" or "congressional veto" was first developed in context of the delegation to the Executive of power to reorganize governmental agencies,[519] and was really furthered by the necessities of providing for national security and foreign affairs immediately prior to and during World War II.[520] The proliferation of "congressional veto" provisions in legislation over the years raised a series of interrelated constitutional questions.[521] Con-

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[516] S. REP. NO. 1335, 54th Congress, 2d Sess.; 4 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3483 (1907).

[517] 3 U.S. (3 Dall.) 378 (1798).

[518] Although *Hollingsworth* did not necessarily so hold (*see* Tillman, *supra*), the Court has reaffirmed this interpretation. *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) (in *Hollingsworth* "this court settled that the submission of a constitutional amendment did not require the action of the President"); INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (in *Hollingsworth* the Court "held Presidential approval was unnecessary for a proposed constitutional amendment").

[519] Act of June 30, 1932, § 407, 47 Stat. 414.

[520] *See*, *e.g.*, Lend Lease Act of March 11, 1941, 55 Stat. 31; First War Powers Act of December 18, 1941, 55 Stat. 838; Emergency Price Control Act of January 30, 1942, 56 Stat. 23; Stabilization Act of October 2, 1942, 56 Stat. 765; War Labor Disputes Act of June 25, 1943, 57 Stat. 163, all providing that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect.

[521] From 1932 to 1983, by one count, nearly 300 separate provisions giving Congress power to halt or overturn executive action had been passed in nearly 200 acts; substantially more than half of these had been enacted since 1970. A partial listing was included in *The Constitution, Jefferson's Manual and Rules of the House of Representatives*, H. Doc. No. 96–398, 96th Congress, 2d Sess. (1981), 731–922. A more up-to-date listing, in light of the Supreme Court's ruling, is contained in H. Doc. No. 101–256, 101st Cong., 2d sess. (1991), 907–1054. Justice White's dissent in INS v. Chadha, 462 U.S. 919, 968–974, 1003–1013 (1983), describes and lists many kinds of such vetoes. The types of provisions varied widely. Many required congressional

gress until relatively recently had applied the veto provisions to some action taken by the President or another executive officer—such as a reorganization of an agency, the lowering or raising of tariff rates, the disposal of federal property—then began expanding the device to give itself a negative over regulations issued by executive branch agencies, and proposals were made to give Congress a negative over all regulations issued by executive branch independent agencies.[522]

In *INS v. Chadha*,[523] the Court held a one-House congressional veto to be unconstitutional as violating both the bicameralism principles reflected in Art. I, §§ 1 and 7, and the presentment provisions of § 7, cl. 2 and 3. The provision in question was § 244(c)(2) of the Immigration and Nationality Act, which authorized either house of Congress by resolution to veto the decision of the Attorney General to allow a particular deportable alien to remain in the country. The Court's analysis of the presentment issue made clear, however, that two-House veto provisions, despite their compliance with bicameralism, and committee veto provisions suffer the same constitutional infirmity.[524] In the words of dissenting Justice White, the Court in *Chadha* "sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'"[525]

In determining that veto of the Attorney General's decision on suspension of deportation was a legislative action requiring presentment to the President for approval or veto, the Court set forth the

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approval before an executive action took effect, but more commonly they provided for a negative upon executive action, by concurrent resolution of both Houses, by resolution of only one House, or even by a committee of one House.

[522] A bill providing for this failed to receive the two-thirds vote required to pass under suspension of the rules by only three votes in the 94th Congress. H.R. 12048, 94th Congress, 2d sess. *See* H. REP. NO. 94–1014, 94th Congress, 2d sess. (1976), and 122 CONG. REC. 31615–641, 31668. Considered extensively in the 95th and 96th Congresses, similar bills were not adopted. *See Regulatory Reform and Congressional Review of Agency Rules: Hearings Before the Subcommittee on Rules of the House of the House Rules Committee*, 96th Congress, 1st sess. (1979); *Regulatory Reform Legislation: Hearings Before the Senate Committee on Governmental Affairs*, 96th Congress, 1st sess. (1979).

[523] 462 U.S. 919 (1983).

[524] Shortly after deciding *Chadha*, the Court removed any doubts on this score with summary affirmance of an appeals court's invalidation of a two-House veto in Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983). Prior to *Chadha*, an appellate court in AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982), had voided a form of committee veto, a provision prohibiting the availability of certain funds for a particular purpose without the prior approval of the Committees on Appropriations.

[525] *Chadha*, 462 U.S. at 967. Justice Powell concurred separately, asserting that Congress had violated separation of powers principles by assuming a judicial function in determining that a particular individual should be deported. Justice Powell therefore found it unnecessary to express his view on "the broader question of whether legislative vetoes are invalid under the Presentment Clauses." Id. at 959.

general standard. "Whether actions taken by either House are, in law and in fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' [T]he action taken here . . . was essentially legislative," the Court concluded, because "it had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and *Chadha*, all outside the legislative branch." [526]

The other major component of the Court's reasoning in *Chadha* stemmed from its reading of the Constitution as making only "explicit and unambiguous" exceptions to the bicameralism and presentment requirements. Thus the House alone was given power of impeachment, and the Senate alone was given power to convict upon impeachment, to advise and consent to executive appointments, and to advise and consent to treaties; similarly, the Congress may propose a constitutional amendment without the President's approval, and each House is given autonomy over certain "internal matters," *e.g.*, judging the qualifications of its members. By implication then, exercises of legislative power not falling within any of these "narrow, explicit, and separately justified" exceptions must conform to the prescribed procedures: "passage by a majority of both Houses and presentment to the President." [527]

The breadth of the Court's ruling in *Chadha* was evidenced in its 1986 decision in *Bowsher v. Synar*.[528] Among that case's rationales for holding the Deficit Control Act unconstitutional was that Congress had, in effect, retained control over executive action in a manner resembling a congressional veto. "[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." [529] Congress had offended this principle by retaining removal authority over the Comptroller General, charged with executing important aspects of the Budget Act.

That *Chadha* does not spell the end of some forms of the legislative veto is evident from events since 1983, which have seen the enactment of various devices, such as "report and wait" provisions and requirements for various consultative steps before action may

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[526] 462 U.S. at 952 (citation omitted).

[527] 462 U.S. at 955–56.

[528] 478 U.S. 714 (1986). *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[529] Bowsher v. Synar, 478 U.S. 714, 733 (1986). This position was developed at greater length in the concurring opinion of Justice Stevens. Id. at 736.

be undertaken. But the decision has stymied the efforts in Congress to confine the discretion it confers through delegation by giving it a method of reviewing and if necessary voiding actions and rules promulgated after delegations.

The Line Item Veto.—For more than a century, United States Presidents had sought the authority to strike out of appropriations bills particular items—to veto "line items" of money bills and sometimes legislative measures as well. Finally, in 1996, Congress approved and the President signed the Line Item Veto Act.[530] The law empowered the President, within five days of signing a bill, to "cancel in whole" spending items and targeted, defined tax benefits. In acting on this authority, the President was to determine that the cancellation of each item would "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest."[531] In *Clinton v. City of New York*,[532] the Court held the Act unconstitutional because it did not comply with the Presentment Clause.

Although Congress in passing the Act considered itself to have been delegating power,[533] and although the dissenting Justices would have upheld the Act as a valid delegation,[534] the Court instead analyzed the statute under the Presentment Clause. In the Court's view, the two bills from which the President subsequently struck items became law the moment the President signed them. His cancellations thus amended and in part repealed the two federal laws. Under its most immediate precedent, the Court continued, statutory repeals must conform to the Presentment Clause's "single, finely wrought and exhaustively considered, procedure" for enacting or repealing a law.[535] In no respect did the procedures in the Act comply with that clause, and in no way could they. The President was acting in a legislative capacity, altering a law in the manner prescribed, and legislation must, in the way Congress acted, be bicameral and be presented to the President after Congress acted. Nothing in the Constitution authorized the President to amend or repeal a statute unilaterally, and the Court could construe both constitutional silence and the historical practice over 200 years as "an express prohibition" of the President's action.[536]

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[530] Pub. L. 104–130, 110 Stat. 1200, codified in part at 2 U.S.C. §§ 691–92.

[531] Id. at § 691(a)(A).

[532] 524 U.S. 417(1998).

[533] E.g., H.R. CONF. REP. NO. 104–491, 104th Cong., 2d Sess. 15 (1996) (stating that the proposed law "delegates limited authority to the President").

[534] 524 U.S. at 453 (Justice Scalia concurring in part and dissenting in part); id. at 469 (Justice Breyer dissenting).

[535] 524 U.S. at 438–39 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

[536] 524 U.S. at 439.

SECTION 8. Clause 1. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

POWER TO TAX AND SPEND

Kinds of Taxes Permitted

By the terms of the Constitution, the power of Congress to levy taxes is subject to but one exception and two qualifications. Articles exported from any State may not be taxed at all. Direct taxes must be levied by the rule of apportionment and indirect taxes by the rule of uniformity. The Court has emphasized the sweeping character of this power by saying from time to time that it "reaches every subject,"[537] that it is "exhaustive"[538] or that it "embraces every conceivable power of taxation."[539] Despite these generalizations, the power has been at times substantially curtailed by judicial decision with respect to the subject matter of taxation, the manner in which taxes are imposed, and the objects for which they may be levied.

Decline of the Forbidden Subject Matter Test.—The Supreme Court has restored to Congress the power to tax most of the subject matter which had previously been withdrawn from its reach by judicial decision. The holding of *Evans v. Gore*[540] and *Miles v. Graham*[541] that the inclusion of the salaries received by federal judges in measuring the liability for a nondiscriminatory income tax violated the constitutional mandate that the compensation of such judges should not be diminished during their continuance in office was repudiated in *O'Malley v. Woodrough*.[542] The specific ruling of *Collector v. Day*[543] that the salary of a state officer is immune to federal income taxation also has been overruled.[544] But the principle under-

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[537] *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867).
[538] Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916).
[539] 240 U.S. at 12.
[540] 253 U.S. 245 (1920).
[541] 268 U.S. 501 (1925).
[542] 307 U.S. 277 (1939).
[543] 78 U.S. (11 Wall.) 113 (1871).
[544] Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939). Collector v. Day was decided in 1871 while the country was still in the throes of Reconstruction. As noted by Chief Justice Stone in a footnote to his opinion in Helvering v. Gerhardt, 304 U.S. 405, 414 n.4 (1938), the Court had not determined how far the Civil War Amendments had broadened the federal power at the expense of the states, but the

lying that decision—that Congress may not lay a tax that would impair the sovereignty of the states—is still recognized as retaining some vitality.[545]

Federal Taxation of State Interests.—In 1903 a succession tax upon a bequest to a municipality for public purposes was upheld on the ground that the tax was payable out of the estate before distribution to the legatee. Looking to form and not to substance, in disregard of the mandate of *Brown v. Maryland*,[546] a closely divided Court declined to "regard it as a tax upon the municipality, though it might operate incidentally to reduce the bequest by the amount of the tax."[547] When South Carolina embarked upon the business of dispensing alcoholic beverages, its agents were held to be subject to the national internal revenue tax, the ground of the holding being that in 1787 such a business was not regarded as one of the ordinary functions of government.[548]

Another decision marking a clear departure from the logic of *Collector v. Day* was *Flint v. Stone Tracy Co.*,[549] in which the Court sustained an act of Congress taxing the privilege of doing business as a corporation, the tax being measured by the income. The argument that the tax imposed an unconstitutional burden on the exercise by a state of its reserved power to create corporate franchises

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fact that the taxing power had recently been used with destructive effect upon notes issued by the state banks, Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869), suggested the possibility of similar attacks upon the existence of the states themselves. Two years later, the Court took the logical step of holding that the federal income tax could not be imposed on income received by a municipal corporation from its investments. United States v. Railroad Co., 84 U.S. (17 Wall.) 322 (1873). A far-reaching extension of private immunity was granted in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), where interest received by a private investor on state or municipal bonds was held to be exempt from federal taxation. (Though relegated to virtual desuetude, *Pollock* was not expressly overruled until South Carolina v. Baker, 485 U.S. 505 (1988)). As the apprehension of this era subsided, the doctrine of these cases was pushed into the background. It never received the same wide application as did McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), in curbing the power of the states to tax operations or instrumentalities of the Federal Government. Only once since the turn of the century has the national taxing power been further narrowed in the name of dual federalism. In 1931 the Court held that a federal excise tax was inapplicable to the manufacture and sale to a municipal corporation of equipment for its police force. Indian Motorcycle v. United States, 283 U.S. 570 (1931). Justices Stone and Brandeis dissented from this decision, and it is doubtful whether it would be followed today. *Cf.* Massachusetts v. United States, 435 U.S. 444 (1978).

[545] At least, if the various opinions in New York v. United States, 326 U.S. 572 (1946), retain force, and they may in view of (a later) New York v. United States, 505 U.S. 144 (1992), a Commerce Clause case rather than a tax case.

[546] 25 U.S. (12 Wheat.) 419, 444 (1827).

[547] Snyder v. Bettman, 190 U.S. 249, 254 (1903).

[548] South Carolina v. United States, 199 U.S. 437 (1905). *See also* Ohio v. Helvering, 292 U.S. 360 (1934).

[549] 220 U.S. 107 (1911).

was rejected, partly because of the principle of national supremacy, and partly on the ground that the corporate franchises were private property. This case also qualified *Pollock v. Farmers' Loan & Trust Co.* to the extent that it allowed interest on state bonds to be included in measuring the tax on the corporation.

Subsequent cases have sustained an estate tax on the net estate of a decedent, including state bonds,[550] excise taxes on the transportation of merchandise in performance of a contract to sell and deliver it to a county,[551] on the importation of scientific apparatus by a state university,[552] on admissions to athletic contests sponsored by a state institution, the net proceeds of which were used to further its educational program,[553] and on admissions to recreational facilities operated on a nonprofit basis by a municipal corporation.[554] Income derived by independent engineering contractors from the performance of state functions,[555] the compensation of trustees appointed to manage a street railway taken over and operated by a state,[556] profits derived from the sale of state bonds,[557] or from oil produced by lessees of state lands,[558] have all been held to be subject to federal taxation despite a possible economic burden on the state.

In finally overruling *Pollock*, the Court stated that *Pollock* had "merely represented one application of the more general rule that neither the federal nor the state governments could tax income an individual directly derived from *any* contract with another government."[559] That rule, the Court observed, had already been rejected in numerous decisions involving intergovernmental immunity. "We see no constitutional reason for treating persons who receive interest on government bonds differently than persons who receive income from other types of contracts with the government, and no tenable rationale for distinguishing the costs imposed on States by a tax on state bond interest from the costs imposed by a tax on the income from any other state contract."[560]

Scope of State Immunity From Federal Taxation.— Although there have been sharp differences of opinion among mem-

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[550] Greiner v. Lewellyn, 258 U.S. 384 (1922).
[551] Wheeler Lumber Co. v. United States, 281 U.S. 572 (1930).
[552] Board of Trustees v. United States, 289 U.S. 48 (1933).
[553] Allen v. Regents, 304 U.S. 439 (1938).
[554] Wilmette Park Dist. v. Campbell, 338 U.S. 411 (1949).
[555] Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926).
[556] Helvering v. Powers, 293 U.S. 214 (1934).
[557] Willcuts v. Bunn, 282 U.S. 216 (1931).
[558] Helvering v. Producers Corp., 303 U.S. 376 (1938), overruling Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932).
[559] South Carolina v. Baker, 485 U.S. 505, 517 (1988).
[560] 485 U.S. at 524–25.

bers of the Supreme Court in cases dealing with the tax immunity of state functions and instrumentalities, the Court has stated that "all agree that not all of the former immunity is gone." [561] Twice, the Court has made an effort to express its new point of view in a statement of general principles by which the right to such immunity shall be determined. However, the failure to muster a majority to concur with any single opinion in the latter case leaves the question very much in doubt. In *Helvering v. Gerhardt*,[562] where, without overruling *Collector v. Day*, it narrowed the immunity of salaries of state officers from federal income taxation, the Court announced "two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function. The one, dependent upon the nature of the function being performed by the state or in its behalf, excludes from the immunity activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury. . . . The other principle, exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government; even though the function be thought important enough to demand immunity from a tax upon the state itself, it is not necessarily protected from a tax which well may be substantially or entirely absorbed by private persons." [563]

The second attempt to formulate a general doctrine was made in *New York v. United States*,[564] where, on review of a judgment affirming the right of the United States to tax the sale of mineral waters taken from property owned and operated by the State of New York, the Court reconsidered the right of Congress to tax business enterprises carried on by the states. Justice Frankfurter, speaking for himself and Justice Rutledge, made the question of discrimination *vel non* against state activities the test of the validity of such a tax. They found "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter." [565] In a concurring opinion in which Justices Reed, Murphy, and Burton joined, Chief Justice Stone rejected the criterion of discrimination. He repeated what he had said in an earlier

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[561] New York v. United States, 326 U.S. 572, 584 (1946) (concurring opinion of Justice Rutledge).

[562] 304 U.S. 405 (1938).

[563] 304 U.S. at 419–20.

[564] 326 U.S. 572 (1946).

[565] 326 U.S. at 584.

case to the effect that "the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it." [566] Justices Douglas and Black dissented in an opinion written by the former on the ground that the decision disregarded the Tenth Amendment, placed "the sovereign States on the same plane as private citizens," and made them "pay the Federal Government for the privilege of exercising powers of sovereignty guaranteed them by the Constitution." [567] In a later case dealing with state immunity the Court sustained the tax on the second ground mentioned in *Helvering v. Gerhardt*—that the burden of the tax was borne by private persons—and did not consider whether the function was one which the Federal Government might have taxed if the municipality had borne the burden of the exaction.[568]

Articulation of the current approach may be found in *South Carolina v. Baker*.[569] The rules are "essentially the same" for federal immunity from state taxation and for state immunity from federal taxation, except that some state activities may be subject to direct federal taxation, while states may "never" tax the United States directly. Either government may tax private parties doing business with the other government, "even though the financial burden falls on the [other government], as long as the tax does not discriminate against the [other government] or those with which it deals." [570] Thus, "the issue whether a nondiscriminatory federal tax might nonetheless violate state tax immunity does not even arise unless the Federal Government seeks to collect the tax directly from a State." [571]

Uniformity Requirement.—Whether a tax is to be apportioned among the states according to the census taken pursuant to Article I, § 2, or imposed uniformly throughout the United States depends upon its classification as direct or indirect.[572] The rule of uniformity for indirect taxes is easy to obey. It requires only that the subject matter of a levy be taxed at the same rate wherever found in the United States; or, as it is sometimes phrased, the uni-

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[566] 326 U.S. at 589–90.
[567] 326 U.S. at 596.
[568] Wilmette Park Dist. v. Campbell, 338 U.S. 411 (1949). *Cf.* Massachusetts v. United States, 435 U.S. 444 (1978).
[569] 485 U.S. 505 (1988).
[570] 485 U.S. at 523.
[571] 485 U.S. at 524 n.14.
[572] *See also* Article I, § 9, cl. 4.

formity required is "geographical," not "intrinsic."[573] Even the geographical limitation is a loose one, at least if one follows *United States v. Ptasynski*,[574] in which the Court upheld an exemption from a crude-oil windfall-profits tax of "Alaskan oil," defined geographically to include oil produced in Alaska (or elsewhere) north of the Arctic Circle. What is prohibited, the Court said, is favoritism to particular states in the absence of valid bases of classification. Because Congress could have achieved the same result, allowing for severe climactic difficulties, through a classification tailored to the "disproportionate costs and difficulties . . . associated with extracting oil from this region,"[575] the fact that Congress described the exemption in geographic terms did not condemn the provision.

The clause accordingly places no obstacle in the way of legislative classification for the purpose of taxation, nor in the way of what is called progressive taxation.[576] A taxing statute does not fail of the prescribed uniformity because its operation and incidence may be affected by differences in state laws.[577] A federal estate tax law that permitted deduction for a like tax paid to a state was not rendered invalid by the fact that one state levied no such tax.[578] The term "United States" in this clause refers only to the states of the Union, the District of Columbia, and incorporated territories. Congress is not bound by the rule of uniformity in framing tax measures for unincorporated territories.[579] Indeed, in *Binns v. United States*,[580] the Court sustained license taxes imposed by Congress but applicable only in Alaska, where the proceeds, although paid into the general fund of the Treasury, did not in fact equal the total cost of maintaining the territorial government.

PURPOSES OF TAXATION

Regulation by Taxation

Congress has broad discretion in methods of taxation, and may, under the Necessary and Proper Clause, regulate business within

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[573] LaBelle Iron Works v. United States, 256 U.S. 377 (1921); Brushaber v. Union Pac. R.R. Co., 240 U.S. 1 (1916); *Head Money Cases*, 112 U.S. 580 (1884).

[574] 462 U.S. 74 (1983).

[575] 462 U.S. at 85.

[576] Knowlton v. Moore, 178 U.S. 41 (1900).

[577] Fernandez v. Wiener, 326 U.S. 340 (1945); Riggs v. Del Drago, 317 U.S. 95 (1942); Phillips v. Commissioner, 283 U.S. 589 (1931); Poe v. Seaborn, 282 U.S. 101, 117 (1930).

[578] Florida v. Mellon, 273 U.S. 12 (1927).

[579] Downes v. Bidwell, 182 U.S. 244 (1901).

[580] 194 U.S. 486 (1904). The Court recognized that Alaska was an incorporated territory but took the position that the situation in substance was the same as if the taxes had been directly imposed by a territorial legislature for the support of the local government.

a state in order to tax it more effectively. For instance, the Court has sustained regulations regarding the packaging of taxed articles such as tobacco[581] and oleomargarine,[582] which were ostensibly designed to prevent fraud in the collection of the tax. It has also upheld measures taxing drugs[583] and firearms,[584] which prescribed rigorous restrictions under which such articles could be sold or transferred, and imposed heavy penalties upon persons dealing with them in any other way. These regulations were sustained as conducive to the efficient collection of the tax though they clearly transcended in some respects this ground of justification.[585]

Even where a tax is coupled with regulations that have no possible relation to the efficient collection of the tax, and no other purpose appears on the face of the statute, the Court has refused to inquire into the motives of the lawmakers and has sustained the tax despite its prohibitive proportions.[586] "It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle applies even though the revenue obtained is obviously negligible . . . or the revenue purpose of the tax may be secondary. . . . Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate. As was pointed out in *Magnano Co. v. Hamilton*, 292 U.S. 40, 47 (1934): 'From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment.'"[587]

In some cases, however, the structure of a taxation scheme is such as to suggest that the Congress actually intends to regulate under a separate constitutional authority. As long as such separate authority is available to Congress, the imposition of a tax as a pen-

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[581] Felsenheld v. United States, 186 U.S. 126 (1902).

[582] *In re* Kollock, 165 U.S. 526 (1897).

[583] United States v. Doremus, 249 U.S. 86 (1919). *Cf.* Nigro v. United States, 276 U.S. 332 (1928).

[584] Sonzinsky v. United States, 300 U.S. 506 (1937).

[585] Without casting doubt on the ability of Congress to regulate or punish through its taxing power, the Court has overruled *Kahriger*, *Lewis*, *Doremus*, *Sonzinsky*, and similar cases on the ground that the statutory scheme compelled self-incrimination through registration. Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Leary v. United States, 395 U.S. 6 (1969).

[586] McCray v. United States, 195 U.S. 27 (1904).

[587] United States v. Sanchez, 340 U.S. 42, 45 (1950). *See also* Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937).

alty for such regulation is valid.[588] On the other hand, where Congress had levied a heavy tax upon liquor dealers who operated in violation of state law, the Court held that this tax was unenforceable after the repeal of the Eighteenth Amendment, because the National Government had no power to impose an additional penalty for infractions of state law.[589]

Discerning whether Congress, in passing a regulation that purports to be under the taxing authority, intends to exercise a separate constitutional authority, requires evaluation of a number of factors.[590] Under the *Child Labor Tax Case*,[591] decided in 1922, the Court, which had previously rejected a federal prohibition of child labor laws as being outside of the Commerce Clause,[592] also rejected a tax on companies using such labor. First, the Court noted that the law in question set forth a specific and detailed regulatory scheme—including the ages, industry, and number of hours allowed—establishing when employment of underage youth would incur taxation. Second, the taxation in question functioned as a penalty, in that it was set at one-tenth of net income per year, regardless of the nature or degree of the infraction. Third, the tax had a scienter requirement, so that the employer had to know that the child was below a specified age in order to incur taxation. Fourth, the statute made the businesses subject to inspection by officers of the Secretary of Labor, positions not traditionally charged with the enforcement and collection of taxes.

More recently, in *National Federation of Independent Business (NFIB) v. Sebelius*,[593] the Court upheld as an exercise of the taxing authority a requirement under the Patient Protection and Affordable Care Act (ACA)[594] that mandates certain individuals to maintain a minimum level of health insurance. Failure to purchase health insurance may subject a person to a monetary penalty, administered through the tax code. Chief Justice Roberts, in a majority holding,[595] used a functional approach in evaluating the authority for the requirement, so that the use of the term "penalty" in the ACA[596] to describe the enforcement mechanism for the individual mandate

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[588] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393 (1940). *See also Head Money Cases*, 112 U.S. 580, 596 (1884).

[589] United States v. Constantine, 296 U.S. 287 (1935).

[590] Hill v. Wallace, 259 U.S. 44 (1922); Helwig v. United States, 188 U.S. 605 (1903).

[591] Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922).

[592] Hammer v. Dagenhart, 247 U.S. 251 (1918).

[593] 567 U.S. ___, No. 11–393, slip op. (2012).

[594] Pub. L. 111–148, as amended.

[595] For this portion of the opinion, Justice Roberts was joined by Justices Ginsburg, Breyer, Sotomayor and Kagan.

[596] 26 U.S.C. §§ 5000A(c), (g)(1).

was found not to be determinative. The Court also found that the latter three factors identified in the *Child Labor Tax Case* (penal intent, scienter, enforcement by regulatory agency) were not present with respect to the individual mandate. Unlike the child labor taxation scheme, the tax level under the ACA is established based on traditional tax variables such as taxable income, number of dependents and joint filing status; there is no requirement of a knowing violation; and the tax is collected by the Internal Revenue Service.

The majority, however, did not appear to have addressed the first *Child Labor Case* factor: whether the ACA set forth a specific and detailed course of conduct and imposed an exaction on those who transgress its standard. The Court did note that the law did not bear characteristics of a regulatory penalty, as the cost of the tax was far outweighed by the cost of obtaining health insurance, making the payment of the tax a reasonable financial decision.[597] Still, the majority's discussion suggests that, for constitutional purposes, the prominence of regulatory motivations for tax provisions may become less important than the nature of the exactions imposed and the manner in which they are administered.

In those areas where activities are subject to both taxation and regulation, the taxing authority is not limited from reaching activities otherwise prohibited. For instance, Congress may tax an activity, such as the business of accepting wagers,[598] regardless of whether it is permitted or prohibited by the laws of the United States [599] or by those of a state.[600] However, Congress's authority to regulate using the taxing power "reaches only existing subjects." [601] Thus, so-called federal "licenses," so far as they relate to topics outside Congress's constitutional authority, merely express, "the purpose of the government not to interfere . . . with the trade nominally licensed, if the required taxes are paid." In those instance, whether the "licensed" trade shall be permitted at all is a question that remains a decision by the state.[602]

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[597] 567 U.S. ___, No. 11–393, slip op. at 35–36 (2012).

[598] United States v. Kahriger, 345 U.S. 22 (1953). Dissenting, Justice Frankfurter maintained that this was not a bona fide tax, but was essentially an effort to check, if not stamp out, professional gambling, an activity left to the responsibility of the States. Justices Jackson and Douglas noted partial agreement with this conclusion. *See also* Lewis v. United States, 348 U.S. 419 (1955).

[599] United States v. Yuginovich, 256 U.S. 450 (1921).

[600] United States v. Constantine, 296 U.S. 287, 293 (1935).

[601] *License Tax Cases*, 72 U.S. (5 Wall.) 462, 471 (1867).

[602] *License Tax Cases*, 72 U.S. at 471 (1867).

Promotion of Business: Protective Tariff

The earliest examples of taxes levied with a view to promoting desired economic objectives in addition to raising revenue were, of course, import duties. The second statute adopted by the first Congress was a tariff act reciting that "it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandise imported." [603] After being debated for nearly a century and a half, the constitutionality of protective tariffs was finally settled by the Supreme Court's unanimous decision in *J. W. Hampton, Jr. & Co. v. United States*, which rejected a contention "that the only power of Congress in the levying of customs duties is to create revenue, and that it is unconstitutional to frame the customs duties with any other view than that of revenue raising." [604]

Chief Justice Taft, writing for the Court in *Hampton*, observed that the first Congress in 1789 had enacted a protective tariff. "In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions. . . . The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection, since the revenue law of 1789, are matters of history. . . . Whatever we may think of the wisdom of a protection policy, we cannot hold it unconstitutional. So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes cannot invalidate Congressional action." [605]

SPENDING FOR THE GENERAL WELFARE

Scope of the Power

The grant of power to "provide . . . for the general welfare" raises a two-fold question: how may Congress provide for "the general welfare" and what is "the general welfare" that it is authorized to promote? The first half of this question was answered by Thomas Jefferson in his opinion on the Bank as follows: "[T]he laying of taxes is the power, and the general welfare the purpose for which the power

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[603] 1 Stat. 24 (1789).
[604] 276 U.S. 394, 411 (1928).
[605] 276 U.S. at 412.

is to be exercised. They [Congress] are not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts or provide for the welfare of the Union. In like manner, they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose."[606] The clause, in short, is not an independent grant of power, but a qualification of the taxing power. Although a broader view has been occasionally asserted,[607] Congress has not acted upon it and the Court has had no occasion to adjudicate the point.

With respect to the meaning of "the general welfare" the pages of *The Federalist* itself disclose a sharp divergence of views between its two principal authors. Hamilton adopted the literal, broad meaning of the clause;[608] Madison contended that the powers of taxation and appropriation of the proposed government should be regarded as merely instrumental to its remaining powers; in other words, as little more than a power of self-support.[609] From early times, Congress has acted upon Hamilton's interpretation. Appropriations for subsidies[610] and for an ever-increasing variety of "internal improvements"[611] constructed by the Federal Government, had their beginnings in the administrations of Washington and Jefferson.[612] Since 1914, federal grants-in-aid, which are sums of money apportioned among the states for particular uses, often conditioned upon the duplication of the sums by the recipient state, and upon observance of stipulated restrictions as to their use, have become commonplace.

The scope of the national spending power came before the Supreme Court at least five times prior to 1936, but the Court disposed of four of the suits without construing the "general welfare" clause. In the *Pacific Railway Cases*[613] and *Smith v. Kansas City*

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606 3 WRITINGS OF THOMAS JEFFERSON 147–149 (Library Edition, 1904).

607 *See* W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

608 THE FEDERALIST, Nos. 30 and 34 (J. Cooke ed. 1961) 187–193, 209–215.

609 Id. at No. 41, 268–78.

610 1 Stat. 229 (1792).

611 2 Stat. 357 (1806).

612 In an advisory opinion, which it rendered for President Monroe at his request on the power of Congress to appropriate funds for public improvements, the Court answered that such appropriations might be properly made under the war and postal powers. *See* Albertsworth, *Advisory Functions in the Supreme Court*, 23 GEO. L. J. 643, 644–647 (1935). Monroe himself ultimately adopted the broadest view of the spending power, from which, however, he carefully excluded any element of regulatory or police power. *See* his *Views of the President of the United States on the Subject of Internal Improvements*, of May 4, 1822, 2 MESSAGES AND PAPERS OF THE PRESIDENTS 713–752 (Richardson ed., 1906).

613 California v. Pacific R.R., 127 U.S. 1 (188).

Title & Trust Co.,[614] it affirmed the power of Congress to construct internal improvements, and to charter and purchase the capital stock of federal land banks, by reference to its powers over commerce, post roads, and fiscal operations, and to its war powers. Decisions on the merits were withheld in two other cases, *Massachusetts v. Mellon* and *Frothingham v. Mellon*,[615] on the ground that neither a state nor an individual citizen is entitled to a remedy in the courts against an alleged unconstitutional appropriation of national funds. In *United States v. Gettysburg Electric Ry.*,[616] however, the Court invoked "the great power of taxation to be exercised for the common defence and general welfare"[617] to sustain the right of the Federal Government to acquire land within a state for use as a national park.

Finally, in *United States v. Butler*,[618] the Court gave its unqualified endorsement to Hamilton's views on the taxing power. Justice Roberts wrote for the Court: "Since the foundation of the Nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the

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[614] 255 U.S. 180 (1921).

[615] 262 U.S. 447 (1923). *See also* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938). These cases were limited by Flast v. Cohen, 392 U.S. 83 (1968).

[616] 160 U.S. 668 (1896).

[617] 160 U.S. at 681.

[618] 297 U.S. 1 (1936). *See also* Cleveland v. United States, 323 U.S. 329 (1945).

clause which confers it, and not in those of § 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." [619]

By and large, it is for Congress to determine what constitutes the "general welfare." The Court accords great deference to Congress's decision that a spending program advances the general welfare,[620] and has even questioned whether the restriction is judicially enforceable.[621] Dispute, such as it is, turns on the conditioning of funds.

As with its other powers, Congress may enact legislation "necessary and proper" to effectuate its purposes in taxing and spending. In upholding a law making it a crime to bribe state and local officials who administer programs that receive federal funds, the Court declared that Congress has authority "to see to it that taxpayer dollars . . . are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." [622] Congress's failure to require proof of a direct connection between the bribery and the federal funds was permissible, the Court concluded, because "corruption does not have to be that limited to affect the federal interest. Money is fungible, bribed officials are untrustworthy stewards of federal funds, and corrupt contractors do not deliver dollar-for-dollar value." [623]

Social Security Act Cases.—Although the Court in *Butler* held that the spending power is not limited by the specific grants of power contained in Article I, § 8, the Court found, nevertheless, that the spending power was qualified by the Tenth Amendment, and on this ground ruled that Congress could not use moneys raised by taxation to "purchase compliance" with regulations "of matters of state concern with respect to which Congress has no authority to interfere." [624] Within little more than a year this decision was narrowed

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[619] United States v. Butler, 297 U.S. 1, 65–66 (1936). So settled had the issue become that 1970s attacks on federal grants-in-aid omitted any challenge on the broad level and relied on specific prohibitions, *i.e.*, the religion clauses of the First Amendment. Flast v. Cohen, 392 U.S. 83 (1968); Tilton v. Richardson, 403 U.S. 672 (1971).

[620] Id. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640, 645 (1937)).

[621] Buckley v. Valeo, 424 U.S. 1, 90–91 (1976); South Dakota v. Dole, 483 U.S. 203, 207 n.2 (1987).

[622] Sabri v. United States, 541 U.S. 600, 605 (2004).

[623] 541 U.S. at 606.

[624] United States v. Butler, 297 U.S. 1, 70 (1936). Justice Stone, speaking for himself and two other Justices, dissented on the ground that Congress was entitled when spending the national revenues for the general welfare to see to it that the

by *Steward Machine Co. v. Davis*,[625] which sustained the tax imposed on employers to provide unemployment benefits, and the credit allowed for similar taxes paid to a state. To the argument that the tax and credit in combination were "weapons of coercion, destroying or impairing the autonomy of the states," the Court replied that relief of unemployment was a legitimate object of federal expenditure under the "general welfare" clause, that the Social Security Act represented a legitimate attempt to solve the problem by the cooperation of state and Federal Governments, and that the credit allowed for state taxes bore a reasonable relation "to the fiscal need subserved by the tax in its normal operation," [626] because state unemployment compensation payments would relieve the burden for direct relief borne by the national treasury. The Court reserved judgment as to the validity of a tax "if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power." [627]

Conditional Grants-in-Aid.—It was not until 1947 that the right of Congress to impose conditions upon grants-in-aid over the objection of a state was squarely presented.[628] The Court upheld Congress's power to do so in *Oklahoma v. Civil Service Commission*.[629] The state objected to the enforcement of a provision of the Hatch Act that reduced its allotment of federal highway funds because of its failure to remove from office a member of the State Highway Commission found to have taken an active part in party politics while in office. The Court denied relief on the ground that, "[w]hile the United States is not concerned with, and has no power to regulate local political activities as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed. . . . The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have

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country got its money's worth, and that the challenged provisions served that end. United States v. Butler, 297 U.S. 1, 84–86 (1936).

[625] 301 U.S. 548 (1937).

[626] 301 U.S. at 586, 591.

[627] 301 U.S. at 590. *See also* Buckley v. Valeo, 424 U.S. 1, 90–92 (1976); Fullilove v. Klutznick, 448 U.S. 448, 473–475 (1980); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).

[628] In Steward Machine Company v. Davis, it was a taxpayer who complained of the invasion of state sovereignty, and the Court put great emphasis on the fact that the state was a willing partner in the plan of cooperation embodied in the Social Security Act. 301 U.S. 548, 589, 590 (1937).

[629] 330 U.S. 127 (1947).

effect upon certain activities within the state, it has never been thought that such effect made the federal act invalid." [630]

The general principle is firmly established. "Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy." [631]

The Court has set forth several standards purporting to channel Congress's discretion in attaching grant conditions.[632] To date only one statute, discussed below, has been struck down as violating these standards, although several statutes have been interpreted so as to conform to the guiding principles. First, the conditions, like the spending itself, must advance the general welfare, but the determination of what constitutes the general welfare rests largely if not wholly with Congress.[633] Second, because a grant is "much in the nature of a contract" offer that the states may accept or reject,[634] Congress must set out the conditions unambiguously, so that the states may make an informed decision.[635] Third, the Court continues to state that the conditions must be related to the federal interest for which the funds are expended,[636] but it has never

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[630] 330 U.S. 127, 143 (1947). This is not to say that Congress may police the effectiveness of its spending only by means of attaching conditions to grants; Congress may also rely on criminal sanctions to penalize graft and corruption that may impede its purposes in spending programs. Sabri v. United States, 541 U.S. 600 (2004).

[631] Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (Chief Justice Burger's opinion for the Court cited five cases to document the assertion: California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974); Lau v. Nichols, 414 U.S. 563 (1974); Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947); Helvering v. Davis, 301 U.S. 619 (1937); and Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

[632] *See* South Dakota v. Dole, 483 U.S. 203, 207–12 (1987).

[633] 483 U.S. at 207 (1987). *See* discussion under Scope of the Power, *supra*.

[634] Barnes v. Gorman, 536 U.S. 181, 186 (2002) (holding that neither the Americans With Disabilities Act of 1990 nor section 504 of the Rehabilitation Act of 1973 subjected states to punitive damages in private actions).

[635] South Dakota v. Dole, 483 U.S. at 207. The requirement appeared in Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). *See also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (Rehabilitation Act does not clearly signal states that participation in programs funded by Act constitutes waiver of immunity from suit in federal court); Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (no private right of action was created by the Family Educational Rights and Privacy Act); Arlington Central School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (because Individuals with Disabilities Education Act, which was enacted pursuant to the Spending Clause, does not furnish clear notice to states that prevailing parents may recover fees for services rendered by experts in IDEA actions, it does not authorize recovery of such fees).

[636] South Dakota v. Dole, 483 U.S. at 207–08. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958).

found a spending condition deficient under this part of the test.[637] Fourth, the power to condition funds may not be used to induce the states to engage in activities that would themselves be unconstitutional.[638] Fifth, the Court has suggested that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion."[639] Certain federalism restraints on other federal powers seem not to be relevant to spending conditions.[640]

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA),[641] which established a comprehensive health care system for the United States. As part of this new system, the Act expanded which persons were eligible for Medicaid, which is financed jointly by the federal and state governments. Failure of a state to implement such expansion could, in theory, have resulted in the withholding of all Medicaid reimbursements, including payments for persons previously covered by the Medicaid program. In *National Federation of Independent Business (NFIB) v. Sebelius*,[642] seven Justices (in two separate opinions) held that the requirement that states either comply with the requirements of the Medicaid expansion under the ACA or lose all Medicaid funds violated the Tenth Amendment.[643] The Court held, however, that withholding of just the funds associated with that expansion raised no significant constitutional concerns, essentially making the Medicaid expansion voluntary.

Chief Justice Roberts' controlling opinion[644] in *NFIB* held that the ACA Medicaid expansion created a "new" and "independent" pro-

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[637] The relationship in South Dakota v. Dole, 483 U.S. at 208–09, in which Congress conditioned access to certain highway funds on establishing a 21-years-of-age drinking qualification was that the purpose of both funds and condition was safe interstate travel. The federal interest in Oklahoma v. Civil Service Comm'n, 330 U.S. 127, 143 (1947), as we have noted, was assuring proper administration of federal highway funds.

[638] South Dakota v. Dole, 483 U.S. at 210–11.

[639] Steward Machine Co. v. Davis, 301 U.S. 548, 589–90 (1937); South Dakota v. Dole, 483 U.S. 203, 211–12. *See* North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), *aff'd* 435 U.S. 962 (1978).

[640] South Dakota v. Dole, 483 U.S. at 210 (referring to the Tenth Amendment: "the 'independent constitutional bar' limitation on the spending power is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly").

[641] Pub. L. 111–148, as amended.

[642] 567 U.S. ___, No. 11–393, slip op. (2012).

[643] Chief Justice Robert's opinion was joined by Justices Breyer and Kagan on this point, while Justices Scalia, Kennedy, Thomas and Alito made a similar point in a joint dissenting opinion. The authoring Justices of the two opinions, however, did not join in either the reasoning or judgment of the other opinion.

[644] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed

gram.[645] As Congress's power to direct state activities under the Spending Clause is in the nature of a contract, Justice Robert's opinion suggests that the only changes that could be made to Medicaid would be those that could be reasonably anticipated by the states as they entered the original program, when only four categories of persons in financial need were covered: the disabled, the blind, the elderly, and needy families with dependent children. The Medicaid expansion arguably changed the nature of the program by requiring recipient states, as part of a universal health care system, to meet the health care needs of the entire nonelderly population with income below 133% of the poverty level.[646] Thus, the Medicaid expansion "accomplishe[d] a shift in kind, not merely degree."[647]

Once Justice Roberts established that the Medicaid expansion was a "new" and "independent" program, he then turned to whether withdrawal of existing Medicaid funds for failure to implement the expansion was coercive. Justice Roberts noted that the threatened loss of Medicaid funds was "over 10 percent of most State's total revenue," which he characterized as a form of "economic dragooning" which put a "gun to the head" of the states.[648] Justice Roberts contrasted this amount with the amount of federal transportation funds threatened to be withheld from South Dakota in *Dole*, which he characterized as less than half of one percent of South Dakota's budget. How courts are to consider grant withdrawals between 10 percent and one-half of 1 percent, however, is not addressed by the

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as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (citation omitted). Justice Roberts opinion is arguably narrower than the dissent, because, as discussed below, his opinion found a constitutional violation based on the presence of both a "new" "independent" program and a coercive loss of funds, while the dissenting opinion would have found the coercive loss of funds sufficient. *NFIB*, 567 U.S. ___, slip op. at 38–42 (Justices Scalia, Kennedy, Thomas and Alito dissenting).

[645] 567 U.S. ___, slip op. at 50, 53–54. It might be argued that the Roberts' opinion, with its emphasis on "new" and "independent" programs, is implicitly addressing the "relatedness" inquiry of South Dakota v. Dole. Justice Roberts' opinion, however, does not explicitly discuss the issue, and an argument can be made that there is a significant difference between the two inquiries. As noted, the "relatedness inquiry" in *Dole* was identified as a limitation on the Spending Clause, while the *NFIB* discussion of "new" and "independent programs" emphasized the concerns of the Tenth Amendment. Second, under *Dole*, the "relatedness" and "coercion" inquiries appear to be disjunctive, in that failure to comply with either of these factors would mean that the statute was unconstitutional. Under *NFIB*, however, the "new" and "independent" program inquiry and the "coercion" inquiry appear to be conjunctive, so that a grant condition must apparently fail both tests to be found unconstitutional.

[646] Justice Roberts also noted that Congress created a separate funding provision to cover the costs of providing services to any person made newly eligible by the expansion, and mandated that newly eligible persons would receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package.

[647] 567 U.S. ___, slip op. at 53.

[648] 567 U.S. ___, slip op. at 10, 51–52.

Roberts' opinion, and Justice Roberts declined to speculate where such a line would be drawn.

If a state accepts federal funds on conditions and then fails to follow the requirements, the usual remedy is federal administrative action to terminate the funding and to recoup funds the state has already received.[649] Although the Court has allowed beneficiaries of conditional grant programs to sue to compel states to comply with the federal conditions,[650] more recently the Court has required that any such susceptibility to suit be clearly spelled out so that states will be informed of potential consequences of accepting aid. Finally, it should be noted that Congress has enacted a range of laws forbidding discrimination in federal assistance programs,[651] and some of these laws are enforceable against the states.[652]

Earmarked Funds.—The appropriation of the proceeds of a tax to a specific use does not affect the validity of the exaction, if the general welfare is advanced and no other constitutional provision is violated. Thus a processing tax on coconut oil was sustained despite the fact that the tax collected upon oil of Philippine production was segregated and paid into the Philippine Treasury.[653] In *Helvering v. Davis*,[654] the excise tax on employers—the proceeds of which were not earmarked in any way, although intended to provide funds for payments to retired workers—was upheld under the "general welfare" clause, the Tenth Amendment's being found inapplicable.

Debts of the United States.—The power to pay the debts of the United States is broad enough to include claims of citizens arising on obligations of right and justice.[655] The Court sustained an act of Congress which set apart for the use of the Philippine Islands, the revenue from a processing tax on coconut oil of Philip-

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[649] Bell v. New Jersey, 461 U.S. 773 (1983); Bennett v. New Jersey, 470 U.S. 632 (1985); Bennett v. Kentucky Dep't of Education, 470 U.S. 656 (1985).

[650] *E.g.*, King v. Smith, 392 U.S. 309 (1968); Rosado v. Wyman, 397 U.S. 397 (1970); Lau v. Nichols, 414 U.S. 563 (1974); Miller v. Youakim, 440 U.S. 125 (1979). Suits may be brought under 42 U.S.C. § 1983, *see* Maine v. Thiboutot, 448 U.S. 1 (1980), although in some instances the statutory conferral of rights may be too imprecise or vague for judicial enforcement. *Compare* Suter v. Artist M., 503 U.S. 347 (1992), *with* Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418 (1987).

[651] *E.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681; Title V of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

[652] Here the principal constraint is the Eleventh Amendment. *See*, *e.g.*, Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (Americans with Disabilities Act of 1990 exceeds congressional power to enforce the Fourteenth Amendment, and violates the Eleventh Amendment, by subjecting states to suits brought by state employees in federal courts to collect money damages).

[653] Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937).

[654] 301 U.S. 619 (1937).

[655] United States v. Realty Co., 163 U.S. 427 (1896); Pope v. United States, 323 U.S. 1, 9 (1944).

pine production, as being in pursuance of a moral obligation to protect and promote the welfare of the people of the Islands.[656] Curiously enough, this power was first invoked to assist the United States to collect a debt due to it. In *United States v. Fisher*,[657] the Supreme Court sustained a statute that gave the Federal Government priority in the distribution of the estates of its insolvent debtors. The debtor in that case was the endorser of a foreign bill of exchange that apparently had been purchased by the United States. Invoking the Necessary and Proper Clause, Chief Justice Marshall deduced the power to collect a debt from the power to pay its obligations by the following reasoning: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe." [658]

Clause 2. The Congress shall have Power * * * To borrow Money on the credit of the United States.

BORROWING POWER

The original draft of the Constitution reported to the convention by its Committee of Detail empowered Congress "To borrow money and emit bills on the credit of the United States." [659] When this section was reached in the debates, Gouverneur Morris moved to strike out the clause "and emit bills on the credit of the United States." Madison suggested that it might be sufficient "to prohibit the making them a tender." After a spirited exchange of views on the subject of paper money, the convention voted, nine states to two, to delete the words "and emit bills." [660] Nevertheless, in 1870, the Court relied in part upon this clause in holding that Congress had authority to issue treasury notes and to make them legal tender in satisfaction of antecedent debts.[661]

When it borrows money "on the credit of the United States," Congress creates a binding obligation to pay the debt as stipulated and cannot thereafter vary the terms of its agreement. A law purporting to abrogate a clause in government bonds calling for payment in gold coin was held to contravene this clause, although the

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[656] Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937).

[657] 6 U.S. (2 Cr.) 358 (1805).

[658] 6 U.S. at 396.

[659] 2 M. Farrand, The Records of the Federal Convention of 1787 144, 308–309 (rev. ed. 1937).

[660] Id. at 310.

[661] Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871), overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

creditor was denied a remedy in the absence of a showing of actual damage.[662]

Clause 3. The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

POWER TO REGULATE COMMERCE

Purposes Served by the Grant

The Commerce Clause serves a two-fold purpose: it is the direct source of the most important powers that the Federal Government exercises in peacetime, and, except for the due process and equal protection clauses of the Fourteenth Amendment, it is the most important limitation imposed by the Constitution on the exercise of state power. The latter, restrictive operation of the clause was long the more important one from the point of view of the constitutional lawyer. Of the approximately 1400 cases that reached the Supreme Court under the clause prior to 1900, the overwhelming proportion stemmed from state legislation.[663] The result was that, generally, the guiding lines in construction of the clause were initially laid down in the context of curbing state power rather than in that of its operation as a source of national power. The consequence of this historical progression was that the word "commerce" came to dominate the clause while the word "regulate" remained in the background. The so-called "constitutional revolution" of the 1930s, however, brought the latter word to its present prominence.

Definition of Terms

Commerce.—The etymology of the word "commerce"[664] carries the primary meaning of traffic, of transporting goods across state lines for sale. This possibly narrow constitutional conception was rejected by Chief Justice Marshall in *Gibbons v. Ogden*,[665] which remains one of the seminal cases dealing with the Constitution. The case arose because of a monopoly granted by the New York legislature on the operation of steam-propelled vessels on its waters, a monopoly challenged by Gibbons, who transported passengers from New Jersey to New York pursuant to privileges granted by an act

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[662] Perry v. United States, 294 U.S. 330, 351 (1935). *See also* Lynch v. United States, 292 U.S. 571 (1934).

[663] E. Prentice & J. Egan, The Commerce Clause of the Federal Constitution 14 (1898).

[664] OED: "com– together, with, + merx, merci- merchandise, ware."

[665] 22 U.S. (9 Wheat.) 1 (1824).

of Congress.[666] The New York monopoly was not in conflict with the congressional regulation of commerce, argued the monopolists, because the vessels carried only passengers between the two states and were thus not engaged in traffic, in "commerce" in the constitutional sense.

"The subject to be regulated is commerce," the Chief Justice wrote. "The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse."[667] The term, therefore, included navigation, a conclusion that Marshall also supported by appeal to general understanding, to the prohibition in Article I, § 9, against any preference being given "by any regulation of commerce or revenue, to the ports of one State over those of another," and to the admitted and demonstrated power of Congress to impose embargoes.[668]

Marshall qualified the word "intercourse" with the word "commercial," thus retaining the element of monetary transactions.[669] But, today, "commerce" in the constitutional sense, and hence "interstate commerce," covers every species of movement of persons and things, whether for profit or not, across state lines,[670] every species of communication, every species of transmission of intelligence, whether for commercial purposes or otherwise,[671] every species of commercial negotiation that will involve sooner or later an act of transportation of persons or things, or the flow of services or power, across state lines.[672]

There was a long period in the Court's history when a majority of the Justices, seeking to curb the regulatory powers of the Federal Government by various means, held that certain things were not encompassed by the Commerce Clause because they were nei-

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[666] Act of February 18, 1793, 1 Stat. 305, entitled "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."

[667] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).

[668] 22 U.S. at 190–94.

[669] 22 U.S. at 193.

[670] As we will see, however, in many later formulations the crossing of state lines is no longer the *sine qua non*; wholly intrastate transactions with substantial effects on interstate commerce may suffice.

[671] *E.g.*, United States v. Simpson, 252 U.S. 465 (1920); Caminetti v. United States, 242 U.S. 470 (1917).

[672] "Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 549–50 (1944).

ther interstate commerce nor bore a sufficient nexus to interstate commerce. Thus, at one time, the Court held that mining or manufacturing, even when the product would move in interstate commerce, was not reachable under the Commerce Clause;[673] it held insurance transactions carried on across state lines not to be commerce,[674] and that exhibitions of baseball between professional teams that travel from state to state were not in commerce.[675] Similarly, it held that the Commerce Clause was not applicable to the making of contracts for the insertion of advertisements in periodicals in another state[676] or to the making of contracts for personal services to be rendered in another state.[677]

Later decisions either have overturned or have undermined all of these holdings. The gathering of news by a press association and its transmission to client newspapers are interstate commerce.[678] The activities of Group Health Association, Inc., which serves only its own members, are "trade" and capable of becoming interstate commerce;[679] the business of insurance when transacted between an insurer and an insured in different states is interstate commerce.[680] But most important of all there was the development of,

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[673] Kidd v. Pearson, 128 U.S. 1 (1888); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923); United States v. E. C. Knight Co., 156 U.S. 1 (1895); *see also* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[674] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869); *see also* the cases to this effect cited in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 543–545, 567–568, 578 (1944).

[675] Federal Baseball League v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). When called on to reconsider its decision, the Court declined, noting that Congress had not seen fit to bring the business under the antitrust laws by legislation having prospective effect and that the business had developed under the understanding that it was not subject to these laws, a reversal of which would have retroactive effect. Toolson v. New York Yankees, 346 U.S. 356 (1953). In Flood v. Kuhn, 407 U.S. 258 (1972), the Court recognized these decisions as aberrations, but it thought the doctrine entitled to the benefits of *stare decisis*, as Congress was free to change it at any time. The same considerations not being present, the Court has held that businesses conducted on a multistate basis, but built around local exhibitions, are in commerce and subject to, *inter alia*, the antitrust laws, in the instance of professional football, Radovich v. National Football League, 352 U.S. 445 (1957), professional boxing, United States v. International Boxing Club, 348 U.S. 236 (1955), and legitimate theatrical productions. United States v. Shubert, 348 U.S. 222 (1955).

[676] Blumenstock Bros. v. Curtis Pub. Co., 252 U.S. 436 (1920).

[677] Williams v. Fears, 179 U.S. 270 (1900). *See also* Diamond Glue Co. v. United States Glue Co., 187 U.S. 611 (1903); Browning v. City of Waycross, 233 U.S. 16 (1914); General Railway Signal Co. v. Virginia, 246 U.S. 500 (1918). *But see* York Manufacturing Co. v. Colley, 247 U.S. 21 (1918).

[678] Associated Press v. United States, 326 U.S. 1 (1945).

[679] American Medical Ass'n v. United States, 317 U.S. 519 (1943). *Cf.* United States v. Oregon Medical Society, 343 U.S. 326 (1952).

[680] United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

or more accurately the return to,[681] the rationales by which manufacturing,[682] mining,[683] business transactions,[684] and the like, which are antecedent to or subsequent to a move across state lines, are conceived to be part of an integrated commercial whole and therefore subject to the reach of the commerce power.

Among the Several States.—Continuing in *Gibbons v. Ogden*, Chief Justice Marshall observed that the phrase "among the several States" was "not one which would probably have been selected to indicate the completely interior traffic of a state." It must therefore have been selected to exclude "the exclusively internal commerce of a state." Although, of course, the phrase "may very properly be restricted to that commerce which concerns more states than one," it is obvious that "[c]ommerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior." The Chief Justice then succinctly stated the rule, which, though restricted in some periods, continues to govern the interpretation of the clause. "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." [685]

Recognition of an "exclusively internal" commerce of a state, or "intrastate commerce" in today's terms, was regarded as setting out an area of state concern that Congress was precluded from reaching.[686] Although these cases seemingly visualized Congress's power arising only when there was an actual crossing of state boundaries, this view ignored Marshall's equation of intrastate commerce that affects other states or with which it is necessary to interfere in order to effectuate congressional power with those actions which

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[681] "It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824). *See also* id. at 195–196.

[682] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[683] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). *See also* Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 275–283 (1981); Mulford v. Smith, 307 U.S. 38 (1939) (agricultural production).

[684] Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923).

[685] 22 U.S. (9 Wheat.) 1, 194, 195 (1824).

[686] New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); *License Cases*, 46 U.S. (5 How.) 504 (1847); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849); Patterson v. Kentucky, 97 U.S. 501 (1879); *Trade-Mark Cases*, 100 U.S. 82 (1879); Kidd v. Pearson, 128 U.S. 1 (1888); Illinois Central R.R. v. McKendree, 203 U.S. 514 (1906); Keller v. United States, 213 U.S. 138 (1909); Hammer v. Dagenhart, 247 U.S. 251 (1918); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923).

are purely interstate. This equation came back into its own, both with the Court's stress on the "current of commerce" bringing each element in the current within Congress's regulatory power,[687] with the emphasis on the interrelationships of industrial production to interstate commerce[688] but especially with the emphasis that even minor transactions have an effect on interstate commerce[689] and that the cumulative effect of many minor transactions with no separate effect on interstate commerce, when they are viewed as a class, may be sufficient to merit congressional regulation.[690] "Commerce among the states must, of necessity, be commerce with[in] the states. . . . The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states."[691]

Regulate.— "We are now arrived at the inquiry—what is this power?" continued the Chief Justice. "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the ex-

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[687] Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923).

[688] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[689] NLRB v. Fainblatt, 306 U.S. 601 (1939); Kirschbaum v. Walling, 316 U.S. 517 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963); Katzenbach v. McClung, 379 U.S. 294 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 241–243 (1980); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

[690] United States v. Darby, 312 U.S. 100 (1941); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); Perez v. United States, 402 U.S. 146 (1971); Russell v. United States, 471 U.S. 858 (1985); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991).

[691] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824). Commerce "among the several States" does not comprise commerce of the District of Columbia nor of the territories of the United States. Congress's power over their commerce is an incident of its general power over them. Stoutenburgh v. Hennick, 129 U.S. 141 (1889); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932); *In re* Bryant, 4 Fed. Cas. 514 (No. 2067) (D. Oreg. 1865). Transportation between two points in the same state, when a part of the route is a loop outside the state, is interstate commerce. Hanley v. Kansas City Southern Ry. Co., 187 U.S. 617 (1903); Western Union Tel. Co. v. Speight, 254 U.S. 17 (1920). But such a deviation cannot be solely for the purpose of evading a tax or regulation in order to be exempt from the state's reach. Greyhound Lines v. Mealey, 334 U.S. 653, 660 (1948); Eichholz v. Public Service Comm'n, 306 U.S. 268, 274 (1939). Red cap services performed at a transfer point within the state of departure but in conjunction with an interstate trip are reachable. New York, N.H. & H. R.R. v. Nothnagle, 346 U.S. 128 (1953).

ercise of the power as are found in the constitution of the United States."[692]

Of course, the power to regulate commerce is the power to prescribe conditions and rules for the carrying-on of commercial transactions, the keeping-free of channels of commerce, the regulating of prices and terms of sale. Even if the clause granted only this power, the scope would be wide, but it extends to include many more purposes than these. "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this, it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce."[693] Thus, in upholding a federal statute prohibiting the shipment in interstate commerce of goods made with child labor, not because the goods were intrinsically harmful but in order to extirpate child labor, the Court said: "It is no objection to the assertion of the power to regulate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."[694]

The power has been exercised to enforce majority conceptions of morality,[695] to ban racial discrimination in public accommodations,[696] and to protect the public against evils both natural and contrived by people.[697] The power to regulate interstate commerce is, therefore, rightly regarded as the most potent grant of authority in section 8.

Necessary and Proper Clause.—All grants of power to Congress in § 8, as elsewhere, must be read in conjunction with the Necessary and Proper Clause, § 8, cl. 18, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers." Chief Justice Marshall alluded to the power thus enhanced by this clause when he said that the regulatory power did not extend "to those internal con-

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[692] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196–197 (1824).

[693] Brooks v. United States, 267 U.S. 432, 436–37 (1925).

[694] United States v. Darby, 312 U.S. 100, 114 (1941).

[695] *E.g.*, Caminetti v. United States, 242 U.S. 470 (1917) (transportation of female across state line for noncommercial sexual purposes); Cleveland v. United States, 329 U.S. 14 (1946) (transportation of plural wives across state lines by Mormons); United States v. Simpson, 252 U.S. 465 (1920) (transportation of five quarts of whiskey across state line for personal consumption).

[696] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969).

[697] *E.g.*, Reid v. Colorado, 187 U.S. 137 (1902) (transportation of diseased livestock across state line); Perez v. United States, 402 U.S. 146 (1971) (prohibition of all loansharking).

cerns [of a state] . . . with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."[698] There are numerous cases permitting Congress to reach "purely" intrastate activities on the theory, combined with the previously mentioned emphasis on the cumulative effect of minor transactions, that it is necessary to regulate them in order that the regulation of interstate activities might be fully effectuated.[699] In other cases, the clause may not have been directly cited, but the dictates of Chief Justice Marshall have been used to justify more expansive applications of the commerce power.[700]

Federalism Limits on Exercise of Commerce Power.—As is recounted below, prior to reconsideration of the federal commerce power in the 1930s, the Court in effect followed a doctrine of "dual federalism," under which Congress's power to regulate much activity depended on whether it had a "direct" rather than an "indirect" effect on interstate commerce.[701] When the restrictive interpretation was swept away during and after the New Deal, the question of federalism limits respecting congressional regulation of private activities became moot. However, in a number of instances the states engaged in commercial activities that would be regulated by federal legislation if the enterprise were privately owned, and the Court easily sustained application of federal law to these state proprietary activities.[702] However, as Congress began to extend regulation to state governmental activities, the judicial response was inconsistent and wavering.[703] Although the Court may shift again to constrain federal power on federalism grounds, at the present time the rule is that Congress lacks authority under the Commerce Clause to regulate the states as states in some circumstances, namely, when

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[698] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

[699] *E.g.*, Houston & Texas Ry. v. United States, 234 U.S. 342 (1914) (necessary for ICC to regulate rates of an intrastate train in order to effectuate its rate setting for a competing interstate train); Wisconsin R.R. Comm'n v. Chicago, B. & Q. R.R., 257 U.S. 563 (1922) (same); Southern Ry. v. United States, 222 U.S. 20 (1911) (upholding requirement of same safety equipment on intrastate as interstate trains). *See also* Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Gonzales v. Raich, 545 U.S. 1 (2005).

[700] *See*, *e.g.*, United States v. Darby, 312 U.S. 100, 115–16 (1941).

[701] *E.g.*, United States v. E. C. Knight Co., 156 U.S. 1 (1895); Hammer v. Dagenhart, 247 U.S. 251 (1918). Of course, there existed much of this time a parallel doctrine under which federal power was not so limited. *E.g.*, Houston & Texas Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914).

[702] *E.g.*, California v. United States, 320 U.S. 577 (1944); California v. Taylor, 353 U.S. 553 (1957).

[703] For example, federal regulation of the wages and hours of certain state and local governmental employees has alternatively been upheld and invalidated. *See* Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled in* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled in* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

the federal statutory provisions "commandeer" a state's legislative or executive authority in order to implement a regulatory program.[704]

Illegal Commerce

That Congress's protective power over interstate commerce reaches all kinds of obstructions and impediments was made clear in *United States v. Ferger*.[705] The defendants had been indicted for issuing a false bill of lading to cover a fictitious shipment in interstate commerce. Before the Court they argued that, because there could be no commerce in a fraudulent bill of lading, Congress had no power to exercise criminal jurisdiction over them. Chief Justice White wrote: "But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce . . . and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves." [706] Much of Congress's criminal legislation is based simply on the crossing of a state line as creating federal jurisdiction.[707]

Interstate Versus Foreign Commerce

There are certain dicta urging or suggesting that Congress's power to regulate interstate commerce restrictively is less than its analogous power over foreign commerce, the argument being that whereas the latter is a branch of the Nation's unlimited power over foreign relations, the former was conferred upon the National Government

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[704] New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997). For elaboration, *see* the discussions under the Supremacy Clause and under the Tenth Amendment.

[705] 250 U.S. 199 (1919).

[706] 250 U.S. at 203.

[707] *E.g.*, Hoke v. United States, 227 U.S. 308 (1913) (transportation of women for purposes of prostitution); Gooch v. United States, 297 U.S. 124 (1936) (kidnaping); Brooks v. United States, 267 U.S. 432 (1925) (stolen autos). For example, in Scarborough v. United States, 431 U.S. 563 (1977), the Court upheld a conviction for possession of a firearm by a felon upon a mere showing that the gun had sometime previously traveled in interstate commerce, and Barrett v. United States, 423 U.S. 212 (1976), upheld a conviction for receipt of a firearm on the same showing. The Court does require Congress in these cases to speak plainly in order to reach such activity, inasmuch as historic state police powers are involved. United States v. Bass, 404 U.S. 336 (1971).

primarily in order to protect freedom of commerce from state interference. The four dissenting Justices in the *Lottery Case* endorsed this view in the following words: "[T]he power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case, would not be necessary or proper in the other." [708]

Twelve years later, Chief Justice White, speaking for the Court, expressed the same view: "In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand." [709]

But dicta to the contrary are much more numerous and span a far longer period of time. Thus Chief Justice Taney wrote in 1847: "The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it." [710] And nearly fifty years later, Justice Field, speaking for the Court, said: "The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations." [711] Today it is firmly established that the power to regulate commerce, whether with foreign nations or among the several states, comprises the power to restrain or prohibit it at all times for the welfare of the public, provided only that the specific limitations imposed upon Congress's pow-

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[708] Lottery Case (Champion v. Ames), 188 U.S. 321, 373 (1903).

[709] Brolan v. United States, 236 U.S. 216, 222 (1915). The most recent dicta to this effect appears in Japan Line v. County of Los Angeles, 441 U.S. 434, 448–51 (1979), a "dormant" commerce clause case involving state taxation with an impact on foreign commerce. In context, the distinction seems unexceptionable, but the language extends beyond context.

[710] *License Cases*, 46 U.S. (5 How.) 504, 578 (1847).

[711] Pittsburg & Southern Coal Co. v. Bates, 156 U.S. 577, 587 (1895).

ers, as by the Due Process Clause of the Fifth Amendment, are not transgressed.[712]

Instruments of Commerce

The applicability of Congress's power to the agents and instruments of commerce is implied in Marshall's opinion in *Gibbons v. Ogden*,[713] where the waters of the State of New York in their quality as highways of interstate and foreign transportation were held to be governed by the overriding power of Congress. Likewise, the same opinion recognizes that in "the progress of things," new and other instruments of commerce will make their appearance. When the Licensing Act of 1793 was passed, the only craft to which it could apply were sailing vessels, but it and the power by which it was enacted were, Marshall asserted, indifferent to the "principle" by which vessels were moved. Its provisions therefore reached steam vessels as well. A little over half a century later the principle embodied in this holding was given its classic expression in the opinion of Chief Justice Waite in the case of the *Pensacola Telegraph Co. v. Western Union Telegraph Co.*,[714] a case closely paralleling *Gibbons v. Ogden* in other respects also. "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation." [715]

The Radio Act of 1927 [716] whereby "all forms of interstate and foreign radio transmissions within the United States, its Territo-

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[712] United States v. Carolene Products Co., 304 U.S. 144, 147–148 (1938).

[713] 22 U.S. (9 Wheat.) 1, 217, 221 (1824).

[714] 96 U.S. 1 (1878). *See also* Western Union Telegraph Co. v. Texas, 105 U.S. 460 (1882).

[715] 96 U.S. at 9. "Commerce embraces appliances necessarily employed in carrying on transportation by land and water." Railroad Co. v. Fuller, 84 U.S. (17 Wall.) 560, 568 (1873).

[716] Act of March 28, 1927, 45 Stat. 373, superseded by the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. §§ 151 *et seq*.

ries and possessions" were brought under national control, affords another illustration. Because of the doctrine thus stated, the measure met no serious constitutional challenge either on the floors of Congress or in the Courts.[717]

Congressional Regulation of Waterways

Navigation.—In *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[718] the Court granted an injunction requiring that a bridge erected over the Ohio River under a charter from the State of Virginia either be altered so as to admit of free navigation of the river or else be entirely abated. The decision was justified on the basis both of the Commerce Clause and of a compact between Virginia and Kentucky, under which both these states had agreed to keep the Ohio River "free and common to the citizens of the United States." The injunction was promptly rendered inoperative by an act of Congress declaring the bridge to be "a lawful structure" and requiring all vessels navigating the Ohio to be so regulated as not to interfere with it.[719] This act the Court sustained as within Congress's power under the Commerce Clause, saying: "So far . . . as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of Congress, they are to be regarded as modified by this subsequent legislation; and, although it still may be an obstruction in fact, [it] is not so in the contemplation of law. . . . [Congress] having in the exercise of this power, regulated the navigation consistent with its preservation and continuation, the authority to maintain it would seem to be complete. That authority combines the concurrent powers of both governments, State and federal, which, if not sufficient, certainly none can be found in our system of government."[720] In short, it is Congress, and not the Court, which is authorized by the Constitution to regulate commerce.[721]

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[717] "No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communication." Chief Justice Hughes speaking for the Court in Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 279 (1933). *See also* Fisher's Blend Station v. Tax Comm'n, 297 U.S. 650, 654–55 (1936).

[718] 54 U.S. (13 How.) 518 (1852).

[719] Ch. 111, § 6, 10 Stat 112 (1852).

[720] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430 (1856). "It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject." Transportation Co. v. Parkersburg, 107 U.S. 691, 701 (1883). *See also* Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946); Robertson v. California, 328 U.S. 440 (1946).

[721] *But see In re* Debs, 158 U.S. 564 (1895), in which the Court held that in the absence of legislative authorization the Executive had power to seek and federal courts to grant injunctive relief to remove obstructions to interstate commerce and the free flow of the mail.

The law and doctrine of the earlier cases with respect to the fostering and protection of navigation are well summed up in a frequently cited passage from the Court's opinion in *Gilman v. Philadelphia*.[722] "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all requisite legislation by Congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the States before the adoption of the national Constitution, and which have always existed in the Parliament in England."[723]

Thus, Congress was within its powers in vesting the Secretary of War with power to determine whether a structure of any nature in or over a navigable stream is an obstruction to navigation and to order its abatement if he so finds.[724] Nor is the United States required to compensate the owners of such structures for their loss, since they were always subject to the servitude represented by Congress's powers over commerce, and the same is true of the property of riparian owners that is damaged.[725] And while it was formerly held that lands adjoining nonnavigable streams were not subject to

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[722] 70 U.S. (3 Wall.) 713 (1866).

[723] 70 U.S. at 724–25.

[724] Union Bridge Co. v. United States, 204 U.S. 364 (1907). *See also* Monongahela Bridge Co. v. United States, 216 U.S. 177 (1910); Wisconsin v. Illinois, 278 U.S. 367 (1929). The United States may seek injunctive or declaratory relief requiring the removal of obstructions to commerce by those negligently responsible for them or it may itself remove the obstructions and proceed against the responsible party for costs. United States v. Republic Steel Corp., 362 U.S. 482 (1960); Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967). Congress's power in this area is newly demonstrated by legislation aimed at pollution and environmental degradation. In confirming the title of the states to certain waters under the Submerged Lands Act, 67 Stat. 29 (1953), 43 U.S.C. §§ 1301 *et seq*., Congress was careful to retain authority over the waters for purposes of commerce, navigation, and the like. United States v. Rands, 389 U.S. 121, 127 (1967).

[725] Gibson v. United States, 166 U.S. 269 (1897). *See also* Bridge Co. v. United States, 105 U.S. 470 (1882); United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899); United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); Seattle v. Oregon & W.R.R., 255 U.S. 56, 63 (1921); Economy Light Co. v. United States, 256 U.S. 113 (1921); United States v. River Rouge Co., 269 U.S. 411, 419 (1926); Ford & Son v. Little Falls Co., 280 U.S. 369 (1930); United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Rands, 389 U.S. 121 (1967).

the above mentioned servitude,[726] this rule has been impaired by recent decisions;[727] and at any rate it would not apply as to a stream rendered navigable by improvements.[728]

In exercising its power to foster and protect navigation, Congress legislates primarily on things external to the act of navigation. But that act itself and the instruments by which it is accomplished are also subject to Congress's power if and when they enter into or form a part of "commerce among the several States." When does this happen? Words quoted above from the Court's opinion in the *Gilman* case answered this question to some extent; but the decisive answer to it was returned five years later in the case of *The Daniel Ball*.[729] Here the question at issue was whether an act of Congress, passed in 1838 and amended in 1852, which required that steam vessels engaged in transporting passengers or merchandise upon the "bays, lakes, rivers, or other navigable waters of the United States," applied to the case of a vessel that navigated only the waters of the Grand River, a stream lying entirely in the State of Michigan. The Court ruled: "In this case it is admitted that the steamer was engaged in shipping and transporting down Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; . . . So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced."[730]

Counsel had suggested that if the vessel was in commerce because it was part of a stream of commerce then all transportation within a State was commerce. Turning to this point, the Court added: "We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in

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[726] United States v. Cress, 243 U.S. 316 (1917).

[727] United States v. Chicago, M., St. P. & P. R.R., 312 U.S. 592, 597 (1941); United States v. Willow River Power Co., 324 U.S. 499 (1945).

[728] United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899).

[729] 77 U.S. (10 Wall.) 557 (1871).

[730] 77 U.S. at 565.

commerce between the States, when the agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter." [731] In short, it was admitted, inferentially, that the principle of the decision would apply to land transportation, but the actual demonstration of the fact still awaited some years.[732]

Hydroelectric Power; Flood Control.—As a consequence, in part, of its power to forbid or remove obstructions to navigation in the navigable waters of the United States, Congress has acquired the right to develop hydroelectric power and the ancillary right to sell it to all takers. By a long-standing doctrine of constitutional law, the states possess dominion over the beds of all navigable streams within their borders,[733] but because of the servitude that Congress's power to regulate commerce imposes upon such streams, the states, without the assent of Congress, practically are unable to use their prerogative for power-development purposes. Sensing no doubt that controlling power to this end must be attributed to some government in the United States and that "in such matters there can

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[731] 77 U.S. at 566. "The regulation of commerce implies as much control, as far-reaching power, over an artificial as over a natural highway." Justice Brewer for the Court in Monongahela Navigation Co. v. United States, 148 U.S. 312, 342 (1893).

[732] Congress had the right to confer upon the Interstate Commerce Commission the power to regulate interstate ferry rates, N.Y. Central R.R. v. Hudson County, 227 U.S. 248 (1913), and to authorize the Commission to govern the towing of vessels between points in the same state but partly through waters of an adjoining state. Cornell Steamboat Co. v. United States, 321 U.S. 634 (1944). Congress's power over navigation extends to persons furnishing wharfage, dock, warehouse, and other terminal facilities to a common carrier by water. Hence an order of the United States Maritime Commission banning certain allegedly "unreasonable practices" by terminals in the Port of San Francisco, and prescribing schedules of maximum free time periods and of minimum charges was constitutional. California v. United States, 320 U.S. 577 (1944). The same power also comprises regulation of the registry enrollment, license, and nationality of ships and vessels, the method of recording bills of sale and mortgages thereon, the rights and duties of seamen, the limitations of the responsibility of shipowners for the negligence and misconduct of their captains and crews, and many other things of a character truly maritime. *See The Lottawanna*, 88 U.S. (21 Wall.) 558, 577 (1875); Providence & N.Y. S.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 589 (1883); *The Hamilton*, 207 U.S. 398 (1907); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943).

[733] Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Shively v. Bowlby, 152 U.S. 1 (1894).

be no divided empire," [734] the Court held in *United States v. Chandler-Dunbar Co.*,[735] that in constructing works for the improvement of the navigability of a stream, Congress was entitled, as part of a general plan, to authorize the lease or sale of such excess water power as might result from the conservation of the flow of the stream. "If the primary purpose is legitimate," it said, "we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by State governments." [736]

Since the *Chandler-Dunbar* case, the Court has come, in effect, to hold that it will sustain any act of Congress that purports to be for the improvement of navigation whatever other purposes it may also embody, nor does the stream involved have to be one "navigable in its natural state." Such, at least, seems to be the sum of its holdings in *Arizona v. California*,[737] and *United States v. Appalachian Power Co.*[738] In the former, the Court, speaking through Justice Brandeis, said that it was not free to inquire into the motives "which induced members of Congress to enact the Boulder Canyon Project Act," adding: "As the river is navigable and the means which the Act provides are not unrelated to the control of navigation . . . the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this Court to determine. . . . And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of congressional power." [739]

And, in the *Appalachian Power* case, the Court, abandoning previous holdings laying down the doctrine that to be subject to Congress's power to regulate commerce a stream must be "navigable in fact," said: "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken," provided there must be a "balance between cost and need at a time when the improvement would be useful. . . . Nor is it necessary that the improvements should be actually completed or even authorized. The power of Congress over commerce is not to

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[734] Green Bay & Miss. Canal Co. v. Patten Paper Co., 172 U.S. 58, 80 (1898).

[735] 229 U.S. 53 (1913).

[736] 229 U.S. at 73, citing Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., 142 U.S. 254 (1891).

[737] 283 U.S. 423 (1931).

[738] 311 U.S. 377 (1940).

[739] 283 U.S. at 455–56. *See also* United States v. Twin City Power Co., 350 U.S. 222, 224 (1956).

be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic. . . . Nor is it necessary for navigability that the use should be continuous. . . . Even absence of use over long periods of years, because of changed conditions, . . . does not affect the navigability of rivers in the constitutional sense."[740]

Furthermore, the Court defined the purposes for which Congress may regulate navigation in the broadest terms. "It cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . That authority is as broad as the needs of commerce. . . . Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control."[741] These views the Court has since reiterated.[742] Nor is it by virtue of Congress's power over navigation alone that the National Government may develop water power. Its war powers and powers of expenditure in furtherance of the common defense and the general welfare supplement its powers over commerce in this respect.[743]

Congressional Regulation of Land Transportation

Federal Stimulation of Land Transportation.—The settlement of the interior of the country led Congress to seek to facilitate access by first encouraging the construction of highways. In successive acts, it authorized construction of the Cumberland and the National Road from the Potomac across the Alleghenies to the Ohio, reserving certain public lands and revenues from land sales for construction of public roads to new states granted statehood.[744] Acquisition and settlement of California stimulated interest in railway lines to the west, but it was not until the Civil War that Congress voted aid in the construction of a line from the Missouri River to the Pacific; four years later, it chartered the Union Pacific Company.[745]

The litigation growing out of these and subsequent activities settled several propositions. First, Congress may provide highways and railways for interstate transportation;[746] second, it may charter private corporations for that purpose; third, it may vest such corpora-

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[740] 311 U.S. at 407, 409–10.
[741] 311 U.S. at 426.
[742] Oklahoma v. Atkinson Co., 313 U.S. 508, 523–33 (1941).
[743] Ashwander v. TVA, 297 U.S. 288 (1936).
[744] *Cf.* Indiana v. United States, 148 U.S. 148 (1893).
[745] 12 Stat. 489 (1862); 13 Stat. 356 (1864); 14 Stat. 79 (1866).
[746] The result then as well as now might have followed from Congress's power of spending, independently of the Commerce Clause, as well as from its war and postal powers, which were also invoked by the Court in this connection.

tions with the power of eminent domain in the states; and fourth, it may exempt their franchises from state taxation.[747]

Federal Regulation of Land Transportation.—Congressional regulation of railroads may be said to have begun in 1866. By the Garfield Act, Congress authorized all railroad companies operating by steam to interconnect with each other "so as to form continuous lines for the transportation of passengers, freight, troops, governmental supplies, and mails, to their destination."[748] An act of the same year provided federal chartering and protection from conflicting state regulations to companies formed to construct and operate telegraph lines.[749] Another act regulated the transportation by railroad of livestock so as to preserve the health and safety of the animals.[750]

Congress's entry into the rate regulation field was preceded by state attempts to curb the abuses of the rail lines in the Middle West, which culminated in the "Granger Movement." Because the businesses were locally owned, the Court at first upheld state laws as not constituting a burden on interstate commerce;[751] but after the various business panics of the 1870s and 1880s drove numerous small companies into bankruptcy and led to consolidation, there emerged great interstate systems. Thus in 1886, the Court held that a state may not set charges for carriage even within its own boundaries of goods brought from without the state or destined to points outside it; that power was exclusively with Congress.[752] In the following year, Congress passed the original Interstate Commerce Act.[753] A Commission was authorized to pass upon the "reasonableness" of all rates by railroads for the transportation of goods or persons in interstate commerce and to order the discontinuance of all charges found to be "unreasonable." In *ICC v. Brimson*,[754] the Court upheld

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[747] Thomson v. Pacific R.R., 76 U.S. (9 Wall.) 579 (1870); California v. Pacific R.R. Co. (Pacific Ry. Cases), 127 U.S. 1 (1888); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890); Luxton v. North River Bridge Co., 153 U.S. 525 (1894).

[748] 14 Stat. 66 (1866).

[749] 14 Stat. 221 (1866).

[750] 17 Stat. 353 (1873).

[751] Munn v. Illinois, 94 U.S. 113 (1877); Chicago B. & Q. R. Co. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877); Pickard v. Pullman Southern Car Co., 117 U.S. 34 (1886).

[752] Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557 (1886). A variety of state regulations have been struck down on the burdening-of-commerce rationale. *E.g.*, Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945) (train length); Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926) (locomotive accessories); Pennsylvania R.R. v. Public Service Comm'n, 250 U.S. 566 (1919). But the Court has largely exempted regulations with a safety purpose, even a questionable one. Brotherhood of Firemen v. Chicago, R.I. & P. R.R., 393 U.S. 129 (1968).

[753] 24 Stat. 379 (1887).

[754] 154 U.S. 447, 470 (1894).

the Act as "necessary and proper" for the enforcement of the Commerce Clause and also sustained the Commission's power to go to court to secure compliance with its orders. Later decisions circumscribed somewhat the ICC's power.[755]

Expansion of the Commission's authority came in the Hepburn Act of 1906[756] and the Mann-Elkins Act of 1910.[757] By the former, the Commission was explicitly empowered, after a full hearing on a complaint, "to determine and prescribe just and reasonable" maximum rates; by the latter, it was authorized to set rates on its own initiative and empowered to suspend any increase in rates by a carrier until it reviewed the change. At the same time, the Commission's jurisdiction was extended to telegraphs, telephones, and cables.[758] By the Motor Carrier Act of 1935,[759] the ICC was authorized to regulate the transportation of persons and property by motor vehicle common carriers.

The modern powers of the Commission were largely defined by the Transportation Acts of 1920[760] and 1940.[761] The jurisdiction of the Commission covers not only the characteristics of the rail, motor, and water carriers in commerce among the states but also the issuance of securities by them and all consolidations of existing companies or lines.[762] Further, the Commission was charged with regulating so as to foster and promote the meeting of the transportation needs of the country. Thus, from a regulatory exercise originally begun as a method of restraint there has emerged a policy of encouraging a consistent national transportation policy.[763]

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[755] ICC v. Alabama Midland Ry., 168 U.S. 144 (1897); Cincinnati, N.O. & Texas Pacific Ry. v. ICC, 162 U.S. 184 (1896).

[756] 34 Stat. 584.

[757] 36 Stat. 539.

[758] These regulatory powers are now vested, of course, in the Federal Communications Commission.

[759] 49 Stat. 543 (1935).

[760] 41 Stat. 474.

[761] 54 Stat. 898, U.S.C. §§ 1 *et seq*. The two acts were "intended . . . to provide a completely integrated interstate regulatory system over motor, railroad, and water carriers." United States v. Pennsylvania R.R., 323 U.S. 612, 618–19 (1945). The ICC's powers include authority to determine the reasonableness of a joint through international rate covering transportation in the United States and abroad and to order the domestic carriers to pay reparations in the amount by which the rate is unreasonable. Canada Packers v. Atchison, T. & S. F. Ry., 385 U.S. 182 (1966), and cases cited.

[762] Disputes between the ICC and other government agencies over mergers have occupied a good deal of the Court's time. *Cf.* United States v. ICC, 396 U.S. 491 (1970). *See also* County of Marin v. United States, 356 U.S. 412 (1958); McLean Trucking Co. v. United States, 321 U.S. 67 (1944); *Penn-Central Merger & N & W Inclusion Cases*, 389 U.S. 486 (1968).

[763] Among the various provisions of the Interstate Commerce Act which have been upheld are: a section penalizing shippers for obtaining transportation at less than published rates, Armour Packing Co. v. United States, 209 U.S. 56 (1908); a

Federal Regulation of Intrastate Rates (The Shreveport Doctrine).—Although its statutory jurisdiction did not apply to intrastate rate systems, the Commission early asserted the right to pass on rates, which, though in effect on intrastate lines, gave these lines competitive advantages over interstate lines the rates of which the Commission had set. This power the Supreme Court upheld in a case involving a line operating wholly intrastate in Texas but which paralleled within Texas an interstate line operating between Louisiana and Texas; the Texas rate body had fixed the rates of the intrastate line substantially lower than the rate fixed by the ICC on the interstate line. "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the States and not the Nation, would be supreme in the national field." [764]

The same holding was applied in a subsequent case in which the Court upheld the Commission's action in annulling intrastate passenger rates it found to be unduly low in comparison with the rates the Commission had established for interstate travel, thus tending to thwart, in deference to a local interest, the general purpose of the act to maintain an efficient transportation service for the benefit of the country at large.[765]

Federal Protection of Labor in Interstate Rail Transportation.—Federal entry into the field of protective labor legislation and the protection of organization efforts of workers began in connection with the railroads. The Safety Appliance Act of 1893,[766] applying only to cars and locomotives engaged in moving interstate

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section construed as prohibiting the hauling of commodities in which the carrier had at the time of haul a proprietary interest, United States v. Delaware & Hudson Co., 213 U.S. 366 (1909); a section abrogating life passes, Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911); a section authorizing the ICC to regulate the entire bookkeeping system of interstate carriers, including intrastate accounts, ICC v. Goodrich Transit Co., 224 U.S. 194 (1912); a clause affecting the charging of rates different for long and short hauls. *Intermountain Rate Cases*, 234 U.S. 476 (1914).

[764] Houston & Texas Ry. v. United States, 234 U.S. 342, 351–352 (1914). *See also*, American Express Co. v. Caldwell, 244 U.S. 617 (1917); Pacific Tel. & Tel. Co. v. Tax Comm'n, 297 U.S. 403 (1936); Weiss v. United States, 308 U.S. 321 (1939); Bethlehem Steel Co. v. State Board, 330 U.S. 767 (1947); United States v. Walsh, 331 U.S. 432 (1947).

[765] Wisconsin R.R. Comm'n v. Chicago, B. & Q. R. Co., 257 U.S. 563 (1922). *Cf.* Colorado v. United States, 271 U.S. 153 (1926), upholding an ICC order directing abandonment of an intrastate branch of an interstate railroad. *But see* North Carolina v. United States, 325 U.S. 507 (1945), setting aside an ICC disallowance of intrastate rates set by a state commission as unsupported by the evidence and findings.

[766] 27 Stat. 531, 45 U.S.C. §§ 1–7.

traffic, was amended in 1903 so as to embrace much of the intrastate rail systems on which there was any connection with interstate commerce.[767] The Court sustained this extension in language much like that it would use in the *Shreveport* case three years later.[768] These laws were followed by the Hours of Service Act of 1907,[769] which prescribed maximum hours of employment for rail workers in interstate or foreign commerce. The Court sustained the regulation as a reasonable means of protecting workers and the public from the hazards which could develop from long, tiring hours of labor.[770]

Most far-reaching of these regulatory measures were the Federal Employers Liability Acts of 1906[771] and 1908.[772] These laws were intended to modify the common-law rules with regard to the liability of employers for injuries suffered by their employees in the course of their employment and under which employers were generally not liable. Rejecting the argument that regulation of such relationships between employers and employees was a reserved state power, the Court adopted the argument of the United States that Congress was empowered to do anything it might deem appropriate to save interstate commerce from interruption or burdening. Inasmuch as the labor of employees was necessary for the function of commerce, Congress could certainly act to ameliorate conditions that made labor less efficient, less economical, and less reliable. Assurance of compensation for injuries growing out of negligence in the course of employment was such a permissible regulation.[773]

Legislation and litigation dealing with the organizational rights of rail employees are dealt with elsewhere.[774]

Regulation of Other Agents of Carriage and Communications.—In 1914, the Court affirmed the power of Congress to regulate the transportation of oil and gas in pipelines from one State to

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[767] 32 Stat. 943, 45 U.S.C. §§ 8–10.

[768] Southern Ry. v. United States, 222 U.S. 20 (1911). *See also* Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916); United States v. California, 297 U.S. 175 (1936); United States v. Seaboard Air Line R.R., 361 U.S. 78 (1959).

[769] 34 Stat. 1415, 45 U.S.C. §§ 61–64.

[770] Baltimore & Ohio R.R. v. ICC, 221 U.S. 612 (1911).

[771] 34 Stat. 232, held unconstitutional in part in the *Employers' Liability Cases*, 207 U.S. 463 (1908).

[772] 35 Stat. 65, 45 U.S.C. §§ 51–60.

[773] The *Second Employers' Liability Cases*, 223 U.S. 1 (1912). For a longer period, a Court majority reviewed a surprising large number of FELA cases, almost uniformly expanding the scope of recovery under the statute. *Cf.* Rogers v. Missouri Pacific R.R., 352 U.S. 500 (1957). This practice was criticized both within and without the Court, *cf.* Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting); Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 96–98 (1959), and has been discontinued.

[774] *See* discussion under Railroad Retirement Act and National Labor Relations Act, *infra*.

another and held that this power applied to the transportation even though the oil or gas was the property of the lines.[775] Subsequently, the Court struck down state regulation of rates of electric current generated within that state and sold to a distributor in another State as a burden on interstate commerce.[776] Proceeding on the assumption that the ruling meant the Federal Government had the power, Congress in the Federal Power Act of 1935 conferred on the Federal Power Commission authority to regulate the wholesale distribution of electricity in interstate commerce[777] and three years later vested the FPC with like authority over natural gas moving in interstate commerce.[778] Thereafter, the Court sustained the power of the Commission to set the prices at which gas originating in one state and transported into another should be sold to distributors wholesale in the latter state.[779] "The sale of natural gas originating in the State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress . . . . The authority of Congress to regulate the prices of commodities in interstate commerce is at least as great under the Fifth Amendment as is that of the States under the Fourteenth to regulate the prices of commodities in intrastate commerce."[780]

Other acts regulating commerce and communication originating in this period have evoked no basic constitutional challenge. These include the Federal Communications Act of 1934, providing for the regulation of interstate and foreign communication by wire and ra-

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[775] The *Pipe Line Cases*, 234 U.S. 548 (1914). *See also* State Comm'n v. Wichita Gas Co., 290 U.S. 561 (1934); Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265 (1921); United Fuel Gas Co. v. Hallanan, 257 U.S. 277 (1921); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Missouri ex rel. Barrett v. Kansas Gas Co., 265 U.S. 298 (1924).

[776] Public Utilities Comm'n v. Attleboro Co., 273 U.S. 83 (1927). *See also* Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932); Pennsylvania Power Co. v. FPC, 343 U.S. 414 (1952).

[777] 49 Stat. 863, 16 U.S.C. §§ 791a–825u.

[778] 52 Stat. 821, 15 U.S.C. §§ 717–717w.

[779] FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942).

[780] 315 U.S. at 582. Sales to distributors by a wholesaler of natural gas delivered to it from out-of-state sources are subject to FPC jurisdiction. Colorado-Wyoming Co. v. FPC, 324 U.S. 626 (1945). *See also* Illinois Gas Co. v. Public Service Co., 314 U.S. 498 (1942); FPC v. East Ohio Gas Co., 338 U.S. 464 (1950). In Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954), the Court ruled that an independent company engaged in one state in production, gathering, and processing of natural gas, which it thereafter sells in the same state to pipelines that transport and sell the gas in other states is subject to FPC jurisdiction. *See also* California v. Lo-Vaca Gathering Co., 379 U.S. 366 (1965).

dio,[781] and the Civil Aeronautics Act of 1938, providing for the regulation of all phases of airborne commerce, foreign and interstate.[782]

Congressional Regulation of Commerce as Traffic

The Sherman Act: Sugar Trust Case.—Congress's chief effort to regulate commerce in the primary sense of "traffic" is embodied in the Sherman Antitrust Act of 1890, the opening section of which declares "every contract, combination in the form of trust or otherwise," or "conspiracy in restraint of trade and commerce among the several States, or with foreign nations" to be "illegal," while the second section makes it a misdemeanor for anybody to "monopolize or attempt to monopolize any part of such commerce."[783] The act was passed to curb the growing tendency to form industrial combinations, and the first case to reach the Court under it was the famous *Sugar Trust Case, United States v. E. C. Knight Co.*[784] Here the government asked for the cancellation of certain agreements, whereby the American Sugar Refining Company, had "acquired," it was conceded, "nearly complete control of the manufacture of refined sugar in the United States."

The question of the validity of the Act was not expressly discussed by the Court but was subordinated to that of its proper construction. The Court, in pursuance of doctrines of constitutional law then dominant with it, turned the Act from its intended purpose and destroyed its effectiveness for several years, as that of the Interstate Commerce Act was being contemporaneously impaired. The following passage early in Chief Justice Fuller's opinion for the Court sets forth the conception of the federal system that controlled the decision: "It is vital that the independence of the commercial power and of the police power, and the delimination between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more

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[781] 48 Stat. 1064, 47 U.S.C. §§ 151 *et seq*. *Cf.* United States v. Southwestern Cable Co., 392 U.S. 157 (1968), on the regulation of community antenna television systems (CATV).

[782] 52 Stat. 973, as amended. The CAB has now been abolished and its functions are exercised by the Federal Aviation Administration, 49 U.S.C. § 106, as part of the Department of Transportation.

[783] 26 Stat. 209 (1890); 15 U.S.C. §§ 1–7.

[784] 156 U.S. 1 (1895).

serious consequences by resort to expedients of even doubtful constitutionality." [785]

In short, what was needed, the Court felt, was a hard and fast line between the two spheres of power, and, in a series of propositions, it endeavored to lay down such a line: (1) production is always local, and under the exclusive domain of the states; (2) commerce among the states does not begin until goods "commence their final movement from their State of origin to that of their destination;" (3) the sale of a product is merely an incident of its production and, while capable of "bringing the operation of commerce into play," affects it only incidentally; (4) such restraint as would reach commerce, as above defined, in consequence of combinations to control production "in all its forms," would be "indirect, however inevitable and whatever its extent," and as such beyond the purview of the Act.[786] Applying this reasoning to the case before it, the Court proceeded: "The object [of the combination] was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function."

"Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." [787]

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[785] 156 U.S. at 13.

[786] 156 U.S. at 13–16.

[787] 156 U.S. at 17. The doctrine of the case boiled down to the proposition that commerce was transportation only, a doctrine Justice Harlan undertook to refute in his notable dissenting opinion. "Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations." 156 U.S. at 22. "Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and

Sherman Act Revived.—Four years later came *Addyston Pipe and Steel Co. v. United States*,[788] in which the Antitrust Act was successfully applied to an industrial combination for the first time. The agreements in the case, the parties to which were manufacturing concerns, effected a division of territory among them, and so involved, it was held, a "direct" restraint on the distribution and hence of the transportation of the products of the contracting firms. The holding, however, did not question the doctrine of the earlier case, which in fact continued substantially undisturbed until 1905, when *Swift & Co. v. United States*[789] was decided.

The "Current of Commerce" Concept: The Swift Case.—Defendants in *Swift* were some thirty firms engaged in Chicago and other cities in the business of buying livestock in their stockyards, in converting it at their packing houses into fresh meat, and in the sale and shipment of such fresh meat to purchasers in other states. The charge against them was that they had entered into a combination to refrain from bidding against each other in the local markets, to fix the prices at which they would sell, to restrict shipments of meat, and to do other forbidden acts. The case was appealed to the Supreme Court on defendants' contention that certain of the acts complained of were not acts of interstate commerce and so did not fall within a valid reading of the Sherman Act. The Court, however, sustained the government on the ground that the "scheme as a whole" came within the act, and that the local activities alleged were simply part and parcel of this general scheme.[790]

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selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. McCulloch v. Maryland, 4 Wheat. 316, 405." 156 U.S. at 33.

[788] 175 U.S. 211 (1899).

[789] 196 U.S. 375 (1905). The Sherman Act was applied to break up combinations of interstate carriers in United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898); and Northern Securities Co. v. United States, 193 U.S. 197 (1904).

In Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 229–39 (1948), Justice Rutledge, for the Court, critically reviewed the jurisprudence of the limitations on the Act and the deconstruction of the judicial constraints. In recent years, the Court's decisions have permitted the reach of the Sherman Act to expand along with the expanding notions of congressional power. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974); Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738 (1976); McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232 (1980); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991). The Court, however, does insist that plaintiffs alleging that an intrastate activity violates the Act prove the relationship to interstate commerce set forth in the Act. *Gulf Oil Corp*, 419 U.S. at 194–99.

[790] Swift & Co. v. United States, 196 U.S. 375, 396 (1905).

Referring to the purchase of livestock at the stockyards, the Court, speaking by Justice Holmes, said: "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce." [791] Likewise the sales alleged of fresh meat at the slaughtering places fell within the general design. Even if they imported a technical passing of title at the slaughtering places, they also imported that the sales were to persons in other states, and that shipments to such states were part of the transaction.[792] Thus, sales of the type that in the *Sugar Trust* case were thrust to one side as immaterial from the point of view of the law, because they enabled the manufacturer "to fulfill its function," were here treated as merged in an interstate commerce stream.

Thus, the concept of commerce as *trade*, that is, as *traffic*, again entered the constitutional law picture, with the result that conditions directly affecting interstate trade could not be dismissed on the ground that they affected interstate commerce, in the sense of interstate *transportation*, only "indirectly." Lastly, the Court added these significant words: "But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States." [793] That is to say, the line that confines state power from one side does not always confine national power from the other. Even though the line accurately divides the subject matter of the complementary spheres, national power is always entitled to take on the additional extension that is requisite to guarantee its effective exercise and is furthermore supreme.

The Danbury Hatters Case.—In this respect, the *Swift* case only states what the *Shreveport* case was later to declare more explicitly, and the same may be said of an ensuing series of cases in which combinations of employees engaged in such intrastate activities as manufacturing, mining, building, construction, and the distribution of poultry were subjected to the penalties of the Sherman

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[791] 196 U.S. at 398–99.
[792] 196 U.S. at 399–401.
[793] 196 U.S. at 400.

Act because of the effect or intended effect of their activities on interstate commerce.[794]

Stockyards and Grain Futures Acts.—In 1921, Congress passed the Packers and Stockyards Act,[795] whereby the business of commission men and livestock dealers in the chief stockyards of the country was brought under national supervision, and in the year following it passed the Grain Futures Act,[796] whereby exchanges dealing in grain futures were subjected to control. The decisions of the Court sustaining these measures both built directly upon the *Swift* case.

In *Stafford v. Wallace*,[797] which involved the former act, Chief Justice Taft, speaking for the Court, said: "The object to be secured by the act is the free and unburdened flow of livestock from the ranges and farms of the West and Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market."[798] The stockyards, therefore, were "not a place of rest or final destination." They were "but a throat through which the current flows," and the sales there were not "merely local transactions. . . . [T]hey do not stop the flow . . . but, on the contrary, [are] indispensable to its continuity."[799]

In *Chicago Board of Trade v. Olsen*,[800] involving the Grain Futures Act, the same course of reasoning was repeated. Speaking of *Swift*, Chief Justice Taft remarked: "That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of a great interstate movement,

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[794] Loewe v. Lawlor (The Danbury Hatters Case), 208 U.S. 274 (1908); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Coronado Co. v. United Mine Workers, 268 U.S. 295 (1925); United States v. Bruins, 272 U.S. 549 (1926); Bedford Co. v. Stone Cutters Ass'n, 274 U.S. 37 (1927); Local 167 v. United States, 291 U.S. 293 (1934); Allen Bradley Co. v. Union, 325 U.S. 797 (1945); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); United States v. Green, 350 U.S. 415 (1956); Callanan v. United States, 364 U.S. 587 (1961).

[795] 42 Stat. 159, 7 U.S.C. §§ 171–183, 191–195, 201–203.

[796] 42 Stat. 998 (1922), 7 U.S.C. §§ 1–9, 10a–17.

[797] 258 U.S. 495 (1922).

[798] 258 U.S. at 514.

[799] 258 U.S. at 515–16. *See also* Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); Minnesota v. Blasius, 290 U.S. 1 (1933).

[800] 262 U.S. 1 (1923).

which taken alone are intrastate, to characterize the movement as such." [801]

Of special significance, however, is the part of the opinion devoted to showing the relation between future sales and cash sales, and hence the effect of the former upon the interstate grain trade. The test, said the Chief Justice, was furnished by the question of price. "The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it." [802] Thus, a practice that demonstrably affects prices would also affect interstate trade "directly," and so, even though local in itself, would fall within the regulatory power of Congress. In the following passage, indeed, Chief Justice Taft whittled down, in both cases, the "direct-indirect" formula to the vanishing point: "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger to meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent." [803]

It was in reliance on the doctrine of these cases that Congress first set to work to combat the Depression in 1933 and the years immediately following. But, in fact, much of its legislation at this time marked a wide advance upon the measures just passed in review. They did not stop with regulating traffic among the states and the instrumentalities thereof; they also attempted to govern production and industrial relations in the field of production. Confronted with this expansive exercise of Congress's power, the Court again deemed itself called upon to define a limit to the commerce power that would save to the states their historical sphere, and especially their customary monopoly of legislative power in relation to industry and labor management.

Securities and Exchange Commission.—Not all antidepression legislation, however, was of this new approach. The Securities Exchange Act of 1934 [804] and the Public Utility Company Act ("Wheeler-Rayburn Act") of 1935 [805] were not. The former created the Securities and Exchange Commission and authorized it to lay down regulations designed to keep dealing in securities honest and

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[801] 262 U.S. at 35.
[802] 262 U.S. at 40.
[803] 262 U.S. at 37, quoting Stafford v. Wallace, 258 U.S. 495, 521 (1922).
[804] 48 Stat. 881, 15 U.S.C. §§ 77b *et seq*.
[805] 49 Stat. 803, 15 U.S.C. §§ 79–79z–6.

aboveboard and closed the channels of interstate commerce and the mails to dealers refusing to register under the act. The latter required the companies governed by it to register with the Securities and Exchange Commission and to inform it concerning their business, organization, and financial structure, all on pain of being prohibited use of the facilities of interstate commerce and the mails; while, by § 11, the so-called "death sentence" clause, the same act closed the channels of interstate communication after a certain date to certain types of public utility companies whose operations, Congress found, were calculated chiefly to exploit the investing and consuming public. All these provisions have been sustained,[806] with the Court relying principally on *Gibbons v. Ogden*.

Congressional Regulation of Production and Industrial Relations: Antidepression Legislation

In the words of Chief Justice Hughes, spoken in a case decided a few days after President Franklin D. Roosevelt's first inauguration, the problem then confronting the new Administration was clearly set forth. "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry." [807]

National Industrial Recovery Act.—The initial effort of Congress to deal with this situation was embodied in the National Industrial Recovery Act of June 16, 1933.[808] The opening section of the Act asserted the existence of "a national emergency productive of widespread unemployment and disorganization of industry which" burdened "interstate and foreign commerce," affected "the public welfare," and undermined "the standards of living of the American people." To affect the removal of these conditions the President was authorized, upon the application of industrial or trade groups, to approve "codes of fair competition," or to prescribe the same in cases where such applications were not duly forthcoming. Among other things such codes, of which eventually more than 700 were promulgated, were required to lay down rules of fair dealing with customers and to furnish labor certain guarantees respecting hours, wages and collective bargaining. For the time being, business and industry were to be cartelized on a national scale.

In *A. L. A. Schechter Poultry Corp. v. United States*,[809] one of these codes, the Live Poultry Code, was pronounced unconstitu-

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[806] Electric Bond Co. v. SEC, 303 U.S. 419 (1938); North American Co. v. SEC, 327 U.S. 686 (1946); American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

[807] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 372 (1933).

[808] 48 Stat. 195.

[809] 295 U.S. 495 (1935).

tional. Although it was conceded that practically all poultry handled by the Schechters came from outside the State, and hence via interstate commerce, the Court held, nevertheless, that once the chickens came to rest in the Schechter's wholesale market, interstate commerce in them ceased. The act, however, also purported to govern business activities which "affected" interstate commerce. This, Chief Justice Hughes held, must be taken to mean "directly" affect such commerce: "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, . . . there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."[810] In short, the case was governed by the ideology of the *Sugar Trust* case, which was not mentioned in the Court's opinion.[811]

Agricultural Adjustment Act.—Congress's second attempt to combat the Depression was the Agricultural Adjustment Act of 1933.[812] As is pointed out elsewhere, the measure was set aside as an attempt to regulate production, a subject held to be "prohibited" to the United States by the Tenth Amendment.[813]

Bituminous Coal Conservation Act.—The third measure to be disallowed was the Guffey-Snyder Bituminous Coal Conservation Act of 1935.[814] The statute created machinery for the regulation of the price of soft coal, both that sold in interstate commerce and that sold "locally," and other machinery for the regulation of hours of labor and wages in the mines. The clauses of the act deal-

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[810] 295 U.S. at 548. *See also* id. at 546.

[811] In United States v. Sullivan, 332 U.S. 689 (1948), the Court interpreted the Federal Food, Drug, and Cosmetic Act of 1938 as applying to the sale by a retailer of drugs purchased from his wholesaler within the State nine months after their interstate shipment had been completed. The Court, speaking by Justice Black, cited United States v. Walsh, 331 U.S. 432 (1947); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Darby, 312 U.S. 100 (1941). Justice Frankfurter dissented on the basis of FTC v. Bunte Bros., 312 U.S. 349 (1941). It is apparent that the *Schechter* case has been thoroughly repudiated so far as the distinction between "direct" and "indirect" effects is concerned. *Cf.* Perez v. United States, 402 U.S. 146 (1971). *See also* McDermott v. Wisconsin, 228 U.S. 115 (1913), which preceded *Schechter* by more than two decades.

The NIRA, however, was found to have several other constitutional infirmities besides its disregard, as illustrated by the Live Poultry Code, of the "fundamental" distinction between "direct" and "indirect" effects, namely, the delegation of standardless legislative power, the absence of any administrative procedural safeguards, the absence of judicial review, and the dominant role played by private groups in the general scheme of regulation.

[812] 48 Stat. 31.

[813] United States v. Butler, 297 U.S. 1, 63–64, 68 (1936).

[814] 49 Stat. 991.

ing with these two different matters were declared by the act itself to be separable so that the invalidity of the one set would not affect the validity of the other, but this strategy was ineffectual. A majority of the Court, speaking by Justice Sutherland, held that the act constituted one connected scheme of regulation, which, because it invaded the reserved powers of the states over conditions of employment in productive industry, violated the Constitution.[815] Justice Sutherland's opinion set out from Chief Justice Hughes' assertion in the *Schechter* case of the "fundamental" character of the distinction between "direct" and "indirect" effects, that is to say, from the doctrine of the *Sugar Trust* case. It then proceeded: "Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But . . . the conclusive answer is that the evils are all local evils over which the Federal Government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character." [816]

Railroad Retirement Act.—Still pursuing the idea of protecting commerce and the labor engaged in it concurrently, Congress, by the Railroad Retirement Act of June 27, 1934,[817] ordered the compulsory retirement of superannuated employees of interstate carriers, and provided that they be paid pensions out of a fund comprising compulsory contributions from the carriers and their present and future employees. In *Railroad Retirement Bd. v. Alton R.R.*,[818] however, a closely divided Court held this legislation to be in excess of Congress's power to regulate commerce and contrary to the Due Process Clause of the Fifth Amendment. Justice Roberts wrote for the majority: "We feel bound to hold that a pension plan thus

[815] Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[816] 298 U.S. at 308–09.
[817] 48 Stat. 1283.
[818] 295 U.S. 330 (1935).

imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation."[819]

Chief Justice Hughes, speaking for the dissenters, contended, on the contrary, that "the morale of the employees [had] an important bearing upon the efficiency of the transportation service." He added: "The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction based upon abundant experience. The expression of that conviction in law is regulation. When expressed in the government of interstate carriers, with respect to their employees likewise engaged in interstate commerce, it is a regulation of that commerce. As such, so far as the subject matter is concerned, the commerce clause should be held applicable."[820] Under subsequent legislation, an excise is levied on interstate carriers and their employees, while by separate but parallel legislation a fund is created in the Treasury out of which pensions are paid along the lines of the original plan. The constitutionality of this scheme appears to be taken for granted in *Railroad Retirement Board v. Duquesne Warehouse Co.*[821]

National Labor Relations Act.—The case in which the Court reduced the distinction between "direct" and "indirect" effects to the vanishing point and thereby placed Congress in the position to regulate productive industry and labor relations in these industries was *NLRB v. Jones & Laughlin Steel Corporation*.[822] Here the statute

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[819] 295 U.S. at 374.

[820] 295 U.S. at 379, 384.

[821] 326 U.S. 446 (1946). Indeed, in a case decided in June 1948, Justice Rutledge, speaking for a majority of the Court, listed the *Alton* case as one "foredoomed to reversal," though the formal reversal has never taken place. *See* Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 230 (1948). *Cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976).

[822] 301 U.S. 1 (1937). A major political event had intervened between this decision and those described in the preceding pages. President Roosevelt, angered at the Court's invalidation of much of his depression program, proposed a "reorganization" of the Court by which he would have been enabled to name one new Justice for each Justice on the Court who was more than 70 years old, in the name of "judicial efficiency." The plan was defeated in the Senate, in part, perhaps, because in such cases as *Jones & Laughlin* a Court majority began to demonstrate sufficient

involved was the National Labor Relations Act of 1935,[823] which declared the right of workers to organize, forbade unlawful employer interference with this right, established procedures by which workers could choose exclusive bargaining representatives with which employers were required to bargain, and created a board to oversee all these processes.[824]

The Court, speaking through Chief Justice Hughes, upheld the Act and found the corporation to be subject to the Act. "The close and intimate effect," he said, "which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local." Nor will it do to say that such effect is "indirect." Considering defendant's "far-flung activities," the effect of strife between it and its employees "would be immediate and [it] might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be main-

"judicial efficiency." *See* Leuchtenberg, *The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan*, 1966 SUP. CT. REV. 347 (P. Kurland ed.); Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 YALE L. J. 791 (1952); 2 M. PUSEY, CHARLES EVANS HUGHES 759–765 (1951).

[823] 49 Stat. 449, as amended, 29 U.S.C. §§ 151 *et seq*.

[824] The NLRA was enacted against the backdrop of depression, although obviously it went far beyond being a mere antidepression measure, and Congress could find precedent in railway labor legislation. In 1898, Congress passed the Erdman Act, 30 Stat. 424, which attempted to influence the unionization of railroad workers and facilitate negotiations with employers through mediation. The statute fell largely into disuse because the railroads refused to mediate. Additionally, in Adair v. United States, 208 U.S. 161 (1908), the Court struck down a section of the law outlawing "yellow-dog contracts," by which employers exacted promises of workers to quit or not to join unions as a condition of employment. The Court held the section not to be a regulation of commerce, there being no connection between an employee's membership in a union and the carrying on of interstate commerce. *Cf.* Coppage v. Kansas, 236 U.S. 1 (1915).

In Wilson v. New, 243 U.S. 332 (1917), the Court did uphold a congressional settlement of a threatened rail strike through the enactment of an eight-hour day and a time-and-a-half for overtime for all interstate railway employees. The national emergency confronting the Nation was cited by the Court, but with the implication that the power existed in more normal times, suggesting that Congress's powers were not as limited as some judicial decisions had indicated.

Congress's enactment of the Railway Labor Act in 1926, 44 Stat. 577, as amended, 45 U.S.C. §§ 151 *et seq.*, was sustained by a Court decision admitting the connection between interstate commerce and union membership as a substantial one. Texas & N.L.R. Co. v. Brotherhood of Railway Clerks, 281 U.S. 548 (1930). A subsequent decision sustained the application of the Act to "back shop" employees of an interstate carrier who engaged in making heavy repairs on locomotives and cars withdrawn from service for long periods, the Court finding that the activities of these employees were related to interstate commerce. Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

tained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience."[825]

While the Act was thus held to be within the constitutional powers of Congress in relation to a productive concern because the interruption of its business by strike "might be catastrophic," the decision was forthwith held to apply also to two minor concerns,[826] and in a later case the Court stated specifically that the smallness of the volume of commerce affected in any particular case is not a material consideration.[827] Subsequently, the act was declared to be applicable to a local retail auto dealer on the ground that he was an integral part of the manufacturer's national distribution system,[828] to a labor dispute arising during alteration of a county courthouse because one-half of the cost—$225,000—was attributable to materials shipped from out-of-state,[829] and to a dispute involving a retail distributor of fuel oil, all of whose sales were local, but who obtained the oil from a wholesaler who imported it from another state.[830]

Indeed, "[t]his Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."[831] Thus, the Board has formulated jurisdictional standards which assume the requisite effect on interstate commerce from a prescribed dollar volume of business and these standards have been implicitly approved by the Court.[832]

Fair Labor Standards Act.—In 1938, Congress enacted the Fair Labor Standards Act. The measure prohibited not only the shipment in interstate commerce of goods manufactured by employees whose wages are less than the prescribed maximum but also the employment of workmen in the production of goods for such com-

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[825] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38, 41–42 (1937).

[826] NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937).

[827] NLRB v. Fainblatt, 306 U.S. 601, 606 (1939).

[828] Howell Chevrolet Co. v. NLRB, 346 U.S. 482 (1953).

[829] Journeymen Plumbers' Union v. County of Door, 359 U.S. 354 (1959).

[830] NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963).

[831] 371 U.S. at 226. *See also* Guss v. Utah Labor Bd., 353 U.S. 1, 3 (1957); NLRB v. Fainblatt, 306 U.S. 601, 607 (1939).

[832] NLRB v. Reliance Fuel Oil Co., 371 U.S. 224, 225 n.2 (1963); Liner v. Jafco, 375 U.S. 301, 303 n.2 (1964).

merce at other than the prescribed wages and hours. Interstate commerce was defined by the act to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

It was further provided that "for the purposes of this act an employee shall be deemed to have been engaged in the production of goods [that is, for interstate commerce] if such employee was employed . . . in any process or occupation directly essential to the production thereof in any State."[833] Sustaining an indictment under the act, a unanimous Court, speaking through Chief Justice Stone, said: "The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows."[834] In support of the decision, the Court invoked Chief Justice Marshall's reading of the Necessary and Proper Clause in *McCulloch v. Maryland* and his reading of the Commerce Clause in *Gibbons v. Ogden*.[835] Objections purporting to be based on the Tenth Amendment were met from the same point of view: "Our conclusion is unaffected by the Tenth Amendment which provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new National Government might seek to exercise powers not granted, and that the States might not be able to exercise fully their reserved powers."[836]

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[833] 52 Stat. 1060, as amended, 63 Stat. 910 (1949). The 1949 amendment substituted the phrase "in any process or occupation directly essential to the production thereof in any State" for the original phrase "in any process or occupation necessary to the production thereof in any State." In Mitchell v. H.B. Zachry Co., 362 U.S. 310, 317 (1960), the Court noted that the change "manifests the view of Congress that on occasion courts . . . had found activities to be covered, which . . . [Congress now] deemed too remote from commerce or too incidental to it." The 1961 amendments to the Act, 75 Stat. 65, departed from previous practices of extending coverage to employees individually connected to interstate commerce to cover all employees of any "enterprise" engaged in commerce or production of commerce; thus, there was an expansion of employees covered but not, of course, of employers, 29 U.S.C. §§ 201 *et seq*. *See* 29 U.S.C. §§ 203(r), 203(s), 206(a), 207(a).

[834] United States v. Darby, 312 U.S. 100, 115 (1941).

[835] 312 U.S. at 113, 114, 118.

[836] 312 U.S. at 123–24.

Subsequent decisions of the Court took a very broad view of which employees should be covered by the Act,[837] and in 1949 Congress to some degree narrowed the permissible range of coverage and disapproved some of the Court's decisions.[838] But, in 1961,[839] with extensions in 1966,[840] Congress itself expanded by several million persons the coverage of the Act, introducing the "enterprise" concept by which all employees in a business producing anything in commerce or affecting commerce were brought within the protection of the minimum wage-maximum hours standards.[841] The "enterprise concept" was sustained by the Court in *Maryland v. Wirtz*.[842] Justice Harlan for a unanimous Court on this issue found the extension entirely proper on the basis of two theories: one, a business' competitive position in commerce is determined in part by all its significant labor costs, and not just those costs attributable to its employees engaged in production in interstate commerce, and, two, labor peace and thus smooth functioning of interstate commerce was facilitated by the termination of substandard labor conditions affecting all employees and not just those actually engaged in interstate commerce.[843]

Agricultural Marketing Agreement Act.—After its initial frustrations, Congress returned to the task of bolstering agriculture by passing the Agricultural Marketing Agreement Act of June 3, 1937,[844] authorizing the Secretary of Agriculture to fix the minimum prices of certain agricultural products, when the handling of such products occurs "in the current of interstate or foreign commerce or . . . directly burdens, obstructs or affects interstate or foreign com-

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[837] *E.g.*, Kirschbaum v. Walling, 316 U.S. 517 (1942) (operating and maintenance employees of building, part of which was rented to business producing goods for interstate commerce); Walton v. Southern Package Corp., 320 U.S. 540 (1944) (night watchman in a plant the substantial portion of the production of which was shipped in interstate commerce); Armour & Co. v. Wantock, 323 U.S. 126 (1944) (employees on stand-by auxiliary fire-fighting service of an employer engaged in interstate commerce); Borden Co. v. Borella, 325 U.S. 679 (1945) (maintenance employees in building housing company's central offices where management was located though the production of interstate commerce was elsewhere); Martino v. Michigan Window Cleaning Co., 327 U.S. 173 (1946) (employees of a window-cleaning company the principal business of which was performed on windows of industrial plants producing goods for interstate commerce); Mitchell v. Lublin, McGaughy & Associates, 358 U.S. 207 (1959) (nonprofessional employees of architectural firm working on plans for construction of air bases, bus terminals, and radio facilities).

[838] *Cf.* Mitchell v. H.B. Zachry Co., 362 U.S. 310, 316–318 (1960).

[839] 75 Stat. 65.

[840] 80 Stat. 830.

[841] 29 U.S.C. §§ 203(r), 203(s).

[842] 392 U.S. 183 (1968).

[843] Another aspect of this case was overruled in National League of Cities v. Usery, 426 U.S. 833 (1976), which itself was overruled in Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985).

[844] 50 Stat. 246, 7 U.S.C. §§ 601 *et seq*.

merce in such commodity or product thereof." In *United States v. Wrightwood Dairy Co.*,[845] the Court sustained an order of the Secretary of Agriculture fixing the minimum prices to be paid to producers of milk in the Chicago "marketing area." The dairy company demurred to the regulation on the ground it applied to milk produced and sold intrastate. Sustaining the order, the Court said: "Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce . . . and it possesses every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the States. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. . . . It follows that no form of State activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." [846]

In *Wickard v. Filburn*,[847] the Court sustained a still deeper penetration by Congress into the field of production. As amended by the act of 1941, the Agricultural Adjustment Act of 1938 [848] regulated production even when not intended for commerce but wholly for consumption on the producer's farm. Sustaining this extension of the act, the Court pointed out that the effect of the statute was to support the market. "It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Homegrown wheat in this sense competes with wheat in commerce. The

[845] 315 U.S. 110 (1942). The Court had previously upheld other legislation that regulated agricultural production through limitations on sales in or affecting interstate commerce. Currin v. Wallace, 306 U.S. 1 (1939); Mulford v. Smith, 307 U.S. 38 (1939).

[846] 315 U.S. at 118–19.

[847] 317 U.S. 111 (1942).

[848] 52 Stat. 31, 7 U.S.C. §§ 612c, 1281–1282 *et seq*.

stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices." [849] And, it elsewhere stated "that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce. . . . The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible." [850]

Acts of Congress Prohibiting Commerce

Foreign Commerce: Jefferson's Embargo.—"Jefferson's Embargo" of 1807–1808, which cut all trade with Europe, was attacked on the ground that the power to regulate commerce was the power to preserve it, not the power to destroy it. This argument was rejected by Judge Davis of the United States District Court for Massachusetts in the following words: "A national sovereignty is created [by the Constitution]. Not an unlimited sovereignty, but a sovereignty, as to the objects surrendered and specified, limited only by the qualification and restrictions, expressed in the Constitution. Commerce is one of those objects. The care, protection, management and control, of this great national concern, is, in my opinion, vested by the Constitution, in the Congress of the United States;

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[849] 317 U.S. at 128–29.

[850] 317 U.S. at 120, 123–24. In United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939), the Court sustained an order under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, regulating the price of milk in certain instances. Justice Reed wrote for the majority of the Court: "The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the federal power to regulate inspection of the whole. Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent upon them. Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the state of production. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales." Id. at 568–69.

and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions, expressed in that instrument, and by the treaty making power of the President and Senate. . . . Power to regulate, it is said, cannot be understood to give a power to annihilate. To this it may be replied, that the acts under consideration, though of very ample extent, do not operate as a prohibition of all foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the National Government, to whom the subject appears to be committed? . . . The term does not necessarily include shipping or navigation; much less does it include the fisheries. Yet it never has contended, that they are not the proper objects of national regulation; and several acts of Congress have been made respecting them. . . . [Furthermore] if it be admitted that national regulations relative to commerce, may apply it as an instrument, and are not necessarily confined to its direct aid and advancement, the sphere of legislative discretion is, of course, more widely extended; and, in time of war, or of great impending peril, it must take a still more expanded range."

"Congress has power to declare war. It, of course, has power to prepare for war; and the time, the manner, and the measure, in the application of constitutional means, seem to be left to its wisdom and discretion. . . . Under the Confederation, . . . we find an express reservation to the State legislatures of the power to pass prohibitory commercial laws, and, as respects exportations, without any limitations. Some of them exercised this power. . . . Unless Congress, by the Constitution, possess the power in question, it still exists in the State legislatures—but this has never been claimed or pretended, since the adoption of the Federal Constitution; and the exercise of such a power by the States, would be manifestly inconsistent with the power, vested by the people in Congress, 'to regulate commerce.' Hence I infer, that the power, reserved to the States by the articles of Confederation, is surrendered to Congress, by the Constitution; unless we suppose, that, by some strange process, it has been merged or extinguished, and now exists no where."[851]

Foreign Commerce: Protective Tariffs.—Tariff laws have customarily contained prohibitory provisions, and such provisions have been sustained by the Court under Congress's revenue powers and under its power to regulate foreign commerce. For the Court in *Board*

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[851] United States v. The William, 28 Fed. Cas. 614, 620–623 (No. 16,700) (D. Mass. 1808). *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 191 (1824); United States v. Marigold, 50 U.S. (9 How.) 560 (1850).

of Trustees v. United States,[852] in 1933, Chief Justice Hughes said: "The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can be said to have a vested right to carry on foreign commerce with the United States. . . . It is true that the taxing power is a distinct power; that it is distinct from the power to regulate commerce. . . . It is also true that the taxing power embraces the power to lay duties. Art. I, § 8, par. 1. But because the taxing power is a distinct power and embraces the power to lay duties, it does not follow that duties may not be imposed in the exercise of the power to regulate commerce. The contrary is well established. *Gibbons v. Ogden*, *supra*, p. 202. 'Under the power to regulate foreign commerce Congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property.' *Groves v. Slaughter*, 15 Pet. 449, 505. The laying of duties is 'a common means of executing the power.' 2 Story on the Constitution, 1088." [853]

Foreign Commerce: Banned Articles.—The forerunners of more recent acts excluding objectionable commodities from interstate commerce are the laws forbidding the importation of like commodities from abroad. Congress has exercised this power since 1842, when it forbade the importation of obscene literature or pictures from abroad.[854] Six years, later it passed an act "to prevent the importation of spurious and adulterated drugs" and to provide a system of inspection to make the prohibition effective.[855] Such legislation guarding against the importation of noxiously adulterated foods, drugs, or liquor has been on the statute books ever since. In 1887, the importation by Chinese nationals of opium was prohibited,[856] and subsequent statutes passed in 1909 and 1914 made it unlawful for anyone to import it.[857] In 1897, Congress forbade the importation of any tea "inferior in purity, quality, and fitness for consumption" as compared with a legal standard.[858] The Act was sustained in 1904, in *Buttfield v. Stranahan*.[859] In *"The Abby Dodge"* an act excluding sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico or Straits of Florida was sustained but

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[852] 289 U.S. 48 (1933).
[853] 289 U.S. at 57, 58.
[854] Ch. 270, § 28, 5 Stat. 566.
[855] 9 Stat. 237 (1848).
[856] 24 Stat. 409.
[857] 35 Stat. 614; 38 Stat. 275.
[858] 29 Stat. 605.
[859] 192 U.S. 470 (1904).

construed as not applying to sponges taken from the territorial water of a state.[860]

In *Weber v. Freed*,[861] the Court upheld an act prohibiting the importation and interstate transportation of prize-fight films or of pictorial representation of prize fights. Chief Justice White grounded his opinion for a unanimous Court on the complete and total control over foreign commerce possessed by Congress, in contrast implicitly to its lesser power over interstate commerce.[862] And, in *Brolan v. United States*,[863] the Court rejected as wholly inappropriate citation of cases dealing with interstate commerce on the question of Congress's power to prohibit foreign commerce. It has been earlier noted, however, that the purported distinction is one that the Court both previously to and subsequent to these opinions has rejected.

Interstate Commerce: Power to Prohibit Questioned.—The question whether Congress's power to regulate commerce "among the several States" embraced the power to prohibit it furnished the topic of one of the most protracted debates in the entire history of the Constitution's interpretation, a debate the final resolution of which in favor of congressional power is an event of first importance for the future of American federalism. The issue was as early as 1841 brought forward by Henry Clay, in an argument before the Court in which he raised the specter of an act of Congress forbidding the interstate slave trade.[864] The debate was concluded ninety-nine years later by the decision in *United States v. Darby*,[865] which sustained the Fair Labor Standards Act.[866]

Interstate Commerce: National Prohibitions and State Police Power.—The earliest acts prohibiting commerce were in the nature of quarantine regulations and usually dealt solely with interstate transportation. In 1884, the exportation or shipment in interstate commerce of livestock having any infectious disease was

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[860] 223 U.S. 166 (1912); *cf.* United States v. California, 332 U.S. 19 (1947).
[861] 239 U.S. 325 (1915).
[862] 239 U.S. at 329.
[863] 236 U.S. 216 (1915).
[864] Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 488–89 (1841).
[865] 312 U.S. 100 (1941).
[866] The judicial history of the argument may be examined in the majority and dissenting opinions in Hammer v. Dagenhart, 247 U.S. 251 (1918), a five-to-four decision, in which the majority held Congress not to be empowered to ban from the channels of interstate commerce goods made with child labor, since Congress's power was to prescribe the rule by which commerce was to be carried on and not to prohibit it, except with regard to those things the character of which—diseased cattle, lottery tickets—was inherently evil. With the majority opinion, *compare* Justice Stone's unanimous opinion in United States v. Darby, 312 U.S. 100, 112–24 (1941), overruling Hammer v. Dagenhart. *See also* Corwin, *The Power of Congress to Prohibit Commerce*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 103 (1938).

forbidden.[867] In 1903, power was conferred upon the Secretary of Agriculture to establish regulations to prevent the spread of such diseases through foreign or interstate commerce.[868] In 1905, the same official was authorized to lay an absolute embargo or quarantine upon all shipments of cattle from one state to another when the public necessity might demand it.[869] A statute passed in 1905 forbade the transportation in foreign and interstate commerce and the mails of certain varieties of moths, plant lice, and other insect pests injurious to plant crops, trees, and other vegetation.[870] In 1912, a similar exclusion of diseased nursery stock was decreed,[871] while by the same act and again by an act of 1917,[872] the Secretary of Agriculture was invested with powers of quarantine on interstate commerce for the protection of plant life from disease similar to those above described for the prevention of the spread of animal disease. Although the Supreme Court originally held federal quarantine regulations of this sort to be constitutionally inapplicable to intrastate shipments of livestock, on the ground that federal authority extends only to foreign and interstate commerce,[873] this view has today been abandoned.

The Lottery Case.—The first case to come before the Court in which the issues discussed above were canvassed at all thoroughly was *Champion v. Ames*,[874] involving the act of 1895 "for the suppression of lotteries."[875] An earlier act excluding lottery tickets from the mails had been upheld in the case *In re Rapier*,[876] on the proposition that Congress clearly had the power to see that the very facilities furnished by it were not put to bad use. But in the case of commerce, the facilities are not ordinarily furnished by the National Government, and the right to engage in foreign and interstate commerce comes from the Constitution itself or is anterior to it.

How difficult the Court found the question produced by the act of 1895, forbidding any person to bring within the United States or to cause to be "carried from one State to another" any lottery ticket, or an equivalent thereof, "for the purpose of disposing of the same," was shown by the fact that the case was argued three times before

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[867] 23 Stat. 31.
[868] 32 Stat. 791.
[869] 33 Stat. 1264.
[870] 33 Stat. 1269.
[871] 37 Stat. 315.
[872] 39 Stat. 1165.
[873] Illinois Central R.R. v. McKendree, 203 U.S. 514 (1906). *See also* United States v. DeWitt, 76 U.S. (9 Wall.) 41 (1870).
[874] Lottery Case (Champion v. Ames), 188 U.S. 321 (1903).
[875] 28 Stat. 963.
[876] 143 U.S. 110 (1892).

the Court and the fact that the Court's decision finally sustaining the act was a five-to-four decision. The opinion of the Court, on the other hand, prepared by Justice Harlan, marked an almost unqualified triumph at the time for the view that Congress's power to regulate commerce among the States included the power to prohibit it, especially to supplement and support state legislation enacted under the police power. Early in the opinion, extensive quotation is made from Chief Justice Marshall's opinion in *Gibbons v. Ogden*,[877] with special stress upon the definition there given of the phrase "to regulate." Justice Johnson's assertion on the same occasion is also given: "The power of a sovereign State over commerce, . . . amounts to nothing more than a power to limit and restrain it at pleasure." Further along is quoted with evident approval Justice Bradley's statement in *Brown v. Houston*,[878] that "[t]he power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."

Following the wake of the *Lottery Case*, Congress repeatedly brought its prohibitory powers over interstate commerce and communications to the support of certain local policies of the states in the exercise of their reserved powers, thereby aiding them in the repression of a variety of acts and deeds objectionable to public morality. The conception of the Federal System on which the Court based its validation of this legislation was stated by it in 1913 in sustaining the Mann "White Slave" Act in the following words: "Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction . . . but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material, and moral."[879] At the same time, the Court made it plain that in prohibiting commerce among the states, Congress was equally free to support state legislative policy or to devise a policy of its own. "Congress," it said, "may exercise this authority in aid of the policy of the State, if it sees fit to do so. It is equally clear that the policy of Congress acting independently of the States may induce legislation without reference to the particular policy or law of any given State. Acting within the authority conferred by the Constitution it is for Congress to determine what legislation will attain its

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[877] 22 U.S. (9 Wheat.) 1, 227 (1824).
[878] 114 U.S. 622, 630 (1885).
[879] Hoke v. United States, 227 U.S. 308, 322 (1913).

purpose. The control of Congress over interstate commerce is not to be limited by State laws."[880]

In *Brooks v. United States*,[881] the Court sustained the National Motor Vehicle Theft Act[882] as a measure protective of owners of automobiles; that is, of interests in "the State of origin." The statute was designed to repress automobile motor thefts, notwithstanding that such thefts antedate the interstate transportation of the article stolen. Speaking for the Court, Chief Justice Taft, at the outset, stated the general proposition that "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin." Noting "the radical change in transportation" brought about by the automobile, and the rise of "[e]laborately organized conspiracies for the theft of automobiles . . . and their sale or other disposition" in another jurisdiction from the owner's, the Court concluded that such activity "is a gross misuse of interstate commerce. Congress may properly punish such interstate transportation by anyone with knowledge of the theft, because of its harmful result and its defeat of the property rights of those whose machines against their will are taken into other jurisdictions." The fact that stolen vehicles were "harmless" and did not spread harm to persons in other states on this occasion was not deemed to present any obstacle to the exercise of the regulatory power of Congress.[883]

The Darby Case.—In sustaining the Fair Labor Standards Act[884] in 1941,[885] the Court expressly overruled *Hammer v. Dagenhart*.[886] "The distinction on which the [latter case] . . . was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . . The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the States of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. . . . The conclusion is inescap-

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[880] United States v. Hill, 248 U.S. 420, 425 (1919).
[881] 267 U.S. 432 (1925).
[882] 41 Stat. 324 (1919), 18 U.S.C., §§ 2311–2313.
[883] 267 U.S. at 436–39. *See also* Kentucky Whip & Collar Co. v. Ill. Cent. R.R., 299 U.S. 334 (1937).
[884] 29 U.S.C. §§ 201–219.
[885] United States v. Darby, 312 U.S. 100 (1941).
[886] 247 U.S. 251 (1918).

able that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled." [887]

The Commerce Clause as a Source of National Police Power

The Court has several times expressly noted that Congress's exercise of power under the Commerce Clause is akin to the police power exercised by the states.[888] It should follow, therefore, that Congress may achieve results unrelated to purely commercial aspects of commerce, and this result in fact has often been accomplished. Paralleling and contributing to this movement is the virtual disappearance of the distinction between interstate and intrastate commerce.

Is There an Intrastate Barrier to Congress's Commerce Power?.—Not only has there been legislative advancement and judicial acquiescence in Commerce Clause jurisprudence, but the melding of the Nation into one economic union has been more than a little responsible for the reach of Congress's power. "The volume of interstate commerce and the range of commonly accepted objects of government regulation have . . . expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress's commerce power." [889]

Congress's commerce power has been characterized as having three, or sometimes four, interrelated principles of decision, some old, some of recent vintage. The Court in 1995 described "three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress's commerce authority includes the power to regulate those activities having a

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[887] 312 U.S. at 116–17.

[888] *E.g.*, Brooks v. United States, 267 U.S. 432, 436–437 (1925); United States v. Darby, 312 U.S. 100, 114 (1941). *See* Cushman, *The National Police Power Under the Commerce Clause*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 62 (1938).

[889] New York v. United States, 505 U.S. 144, 158 (1992).

substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." [890]

An example of the first category, regulating to protect the channels and instrumentalities of interstate commerce, is *Pierce County v. Guillen*,[891] in which the Court upheld a prohibition on the use in state or federal court proceedings of highway data required to be collected by states on the basis that "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement . . . would result in more diligent efforts [by states] to collect the relevant information."

Under the second category, which attaches to instrumentalities [892] and persons crossing of state lines, Congress has validly legislated to protect interstate travelers from harm, to prevent such travelers from being deterred in the exercise of interstate traveling, and to prevent them from being burdened. Many of the 1964 public accommodations law applications have been premised on the point that larger establishments do serve interstate travelers and that even small stores, restaurants, and the like may serve interstate travelers, and, therefore, it is permissible to regulate them to prevent or deter racial discrimination.[893]

Commerce regulation under this second category is not limited to persons who cross state lines but can also extend to an object that will or has crossed state lines, and the regulation of a purely intrastate activity may be premised on the presence of such object. Thus, the public accommodations law reached small establishments that served food and other items that had been purchased from interstate channels.[894] Congress has validly penalized convicted felons, who had no other connection to interstate commerce, for possession or receipt of firearms, which had been previously transported in interstate commerce independently of any activity by the two felons.[895]

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[890] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

[891] 537 U.S. 129, 147 (2003).

[892] Examples of laws addressing instrumentalities of commerce include prohibitions on the destruction of an aircraft, 18 U.S.C. § 32, or on theft from interstate shipments. *Accord* Perez v. United States, 402 U.S. 146, 150 (1971).

[893] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969).

[894] Katzenbach v. McClung, 379 U.S. 294, 298, 300–02 (1964); Daniel v. Paul, 395 U.S. 298, 305 (1969).

[895] Scarborough v. United States, 431 U.S. 563 (1977); Barrett v. United States, 423 U.S. 212 (1976). However, because such laws reach far into the traditional police powers of the states, the Court insists Congress clearly speak to its intent to cover such local activities. United States v. Bass, 404 U.S. 336 (1971). *See also* Rewis v. United States, 401 U.S. 808 (1971); United States v. Enmons, 410 U.S. 396 (1973). A similar tenet of construction has appeared in the Court's recent treatment of fed-

This reach is not of recent origin. In *United States v. Sullivan*,[896] the Court sustained a conviction of misbranding under the Federal Food, Drug and Cosmetic Act. Sullivan, a Columbus, Georgia druggist, had bought a properly labeled 1000-tablet bottle of sulfathiazole from an Atlanta wholesaler. The bottle had been shipped to the Atlanta wholesaler by a Chicago supplier six months earlier. Three months after Sullivan received the bottle, he made two retail sales of 12 tablets each, placing the tablets in boxes not labeled in strict accordance with the law. Upholding the conviction, the Court concluded that there was no question of "the constitutional power of Congress under the Commerce Clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce." [897]

Under the third category, Congress's power reaches not only transactions or actions that occasion the crossing of state or national boundaries but extends as well to activities that, though local, "affect" commerce; this power derives from the Commerce Clause enhanced by the Necessary and Proper Clause. The seminal case, of course, is *Wickard v. Filburn*,[898] sustaining federal regulation of a crop of wheat grown on a farm and intended solely for home consumption. The premise was that if it were never marketed, it supplied a need otherwise to be satisfied only in the market, and that if prices rose it might be induced onto the market. "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." [899] Coverage under federal labor and wage-and-hour laws after the 1930s showed the reality of this doctrine.[900]

In upholding federal regulation of strip mining, the Court demonstrated the breadth of the "affects" standard. One case dealt with statutory provisions designed to preserve "prime farmland." The trial court had determined that the amount of such land disturbed annu-

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eral prosecutions of state officers for official corruption under criminal laws of general applicability. *E.g.*, McDonnell v. United States, 579 U.S. ___, No. 15–474, slip op. at 24 (2016) (narrowly interpreting the term "official act" to avoid a construction of the Hobbs Act and federal honest-services fraud statute that would "raise[] significant federalism concerns" by intruding on a state's "prerogative to regulate the permissible scope of interactions between state officials and their constituents."); McCormick v. United States, 500 U.S. 257 (1991); McNally v. United States, 483 U.S. 350 (1987). Congress has overturned the latter case. 102 Stat. 4508, § 7603, 18 U.S.C. § 1346.

[896] 332 U.S. 689 (1948).

[897] 332 U.S. at 698–99.

[898] 317 U.S. 111 (1942).

[899] Fry v. United States, 421 U.S. 542, 547 (1975).

[900] *See* Maryland v. Wirtz, 392 U.S. 183, 188–93 (1968).

ally amounted to 0.006% of the total prime farmland acreage in the Nation and, thus, that the impact on commerce was "infinitesimal" or "trivial." Disagreeing, the Court said: "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[901] Moreover, "[t]he pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce."[902]

In a companion case, the Court reiterated that "[t]he denomination of an activity as a 'local' or 'intrastate' activity does not resolve the question whether Congress may regulate it under the Commerce Clause. As previously noted, the commerce power 'extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.'"[903] Judicial review is narrow. Congress's determination of an "effect" must be deferred to if it is rational, and Congress must have acted reasonably in choosing the means.[904]

Fourth, a still more potent engine of regulation has been the expansion of the class-of-activities standard, which began in the "affecting" cases. In *Perez v. United States*,[905] the Court sustained the application of a federal "loan-sharking" law to a local culprit. The Court held that, although individual loan-sharking activities might be intrastate in nature, still it was within Congress's power to determine that the activity was within a class the activities of which did affect interstate commerce, thus affording Congress the opportunity to regulate the entire class. Although the *Perez* Court and the congressional findings emphasized that loan-sharking was generally part of organized crime operating on a national scale and that loan-sharking was commonly used to finance organized crime's na-

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[901] Hodel v. Indiana, 452 U.S. 314, 323–24 (1981).

[902] 452 U.S. at 324.

[903] Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981) (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

[904] 452 U.S. at 276, 277. The scope of review is restated in Preseault v. ICC, 494 U.S. 1, 17 (1990). Then-Justice Rehnquist, concurring in the two *Hodel* cases, objected that the Court was making it appear that no constitutional limits existed under the Commerce Clause, whereas in fact it was necessary that a regulated activity must have a *substantial* effect on interstate commerce, not just *some* effect. He thought it a close case that the statutory provisions here met those tests. 452 U.S. at 307–13.

[905] 402 U.S. 146 (1971).

tional operations, subsequent cases do not depend upon a defensible assumption of relatedness in the class.

Thus, the Court applied the federal arson statute to the attempted "torching" of a defendant's two-unit apartment building. The Court merely pointed to the fact that the rental of real estate "unquestionably" affects interstate commerce and that "the local rental of an apartment unit is merely an element of a much broader commercial market in real estate." [906] The apparent test of whether aggregation of local activity can be said to affect commerce was made clear next in an antitrust context.[907]

In a case allowing the continuation of an antitrust suit challenging a hospital's exclusion of a surgeon from practice in the hospital, the Court observed that in order to establish the required jurisdictional nexus with commerce, the appropriate focus is not on the actual effects of the conspiracy but instead is on the possible consequences for the affected market if the conspiracy is successful. The required nexus in this case was sufficient because competitive significance is to be measured by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which the surgeon was being excluded.[908]

Requirement that Regulation be Economic.—In *United States v. Lopez* [909] the Court, for the first time in almost sixty years,[910] invalidated a federal law as exceeding Congress's authority under the Commerce Clause. The statute made it a federal offense to possess a firearm within 1,000 feet of a school.[911] The Court reviewed the doctrinal development of the Commerce Clause, especially the effects and aggregation tests, and reaffirmed that it is the Court's responsibility to decide whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate com-

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[906] Russell v. United States, 471 U.S. 858, 862 (1985). In a later case the Court avoided the constitutional issue by holding the statute inapplicable to the arson of an owner-occupied private residence.

[907] Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991). *See also* Jones v. United States, 529 U.S. 848 (2000) (an owner-occupied building is not "used" in interstate commerce within the meaning of the federal arson statute).

[908] 500 U.S. at 330–32. The decision was 5-to-4, with the dissenters of the view that, although Congress could reach the activity, it had not done so.

[909] 514 U.S. 549 (1995). The Court was divided 5-to-4, with Chief Justice Rehnquist writing the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, with dissents by Justices Stevens, Souter, Breyer, and Ginsburg.

[910] Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down regulation of mining industry as outside of Commerce Clause).

[911] 18 U.S.C. § 922(q)(1)(A). Congress subsequently amended the section to make the offense jurisdictionally to turn on possession of "a firearm that has moved in or that otherwise affects interstate or foreign commerce." Pub. L. 104–208, 110 Stat. 3009–370.

merce when a law is challenged.[912] As noted previously, the Court evaluation started with a consideration of whether the legislation fell within the three broad categories of activity that Congress may regulate or protect under its commerce power: (1) use of the channels of interstate commerce, (2) the use of instrumentalities of interstate commerce, or (3) activities that substantially affect interstate commerce.[913]

Clearly, the Court said, the criminalized activity did not implicate the first two categories.[914] As for the third, the Court found an insufficient connection. First, a wide variety of regulations of "intrastate economic activity" has been sustained where an activity substantially affects interstate commerce. But the statute being challenged, the Court continued, was a criminal law that had nothing to do with "commerce" or with "any sort of economic enterprise." Therefore, it could not be sustained under precedents "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[915] The provision did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[916] The existence of such a section, the Court implied, would have saved the constitutionality of the provision by requiring a showing of some connection to commerce in each particular case.

Finally, the Court rejected the arguments of the government and of the dissent that there existed a sufficient connection between the offense and interstate commerce.[917] At base, the Court's concern was that accepting the attenuated connection arguments presented would result in the evisceration of federalism. "Under the theories that the government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[918]

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[912] 514 U.S. at 556–57, 559.

[913] 514 U.S. at 558–59. For an example of regulation of persons or things in interstate commerce, see Reno v. London, 528 U.S. 141 (2000) (information about motor vehicles and owners, regulated pursuant to the Driver's Privacy Protection Act, and sold by states and others, is an article of commerce)

[914] 514 U.S. at 559.

[915] 514 U.S. at 559–61.

[916] 514 U.S. at 561.

[917] 514 U.S. at 563–68.

[918] 514 U.S. at 564.

Whether *Lopez* bespoke a Court determination to police more closely Congress's exercise of its commerce power, so that it would be a noteworthy case,[919] or whether it was rather a "warning shot" across the bow of Congress, urging more restraint in the exercise of power or more care in the drafting of laws, was not immediately clear. The Court's decision five years later in *United States v. Morrison*,[920] however, suggests that stricter scrutiny of Congress's commerce power exercises is the chosen path, at least for legislation that falls outside the area of economic regulation.[921] The Court will no longer defer, via rational basis review, to every congressional finding of substantial effects on interstate commerce, but instead will examine the nature of the asserted nexus to commerce, and will also consider whether a holding of constitutionality is consistent with its view of the commerce power as being a limited power that cannot be allowed to displace all exercise of state police powers.

In *Morrison* the Court applied *Lopez* principles to invalidate a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. Gender-motivated crimes of violence "are not, in any sense of the phrase, economic activity," [922] the Court explained, and there was allegedly no precedent for upholding commerce-power regulation of intrastate activity that was not economic in nature. The provision, like the invalidated provision of the Gun-Free School Zones Act, contained no jurisdictional element tying the regulated violence to interstate commerce. Unlike the Gun-Free School Zones Act, the VAWA did contain "numerous" congressional findings about the serious effects of gender-motivated crimes,[923] but the Court rejected reliance on these findings. "The existence of congressional findings is not suf-

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[919] "Not every epochal case has come in epochal trappings." 514 U.S. at 615 (Justice Souter dissenting) (wondering whether the case is only a misapplication of established standards or is a veering in a new direction).

[920] 529 U.S. 598 (2000). Once again, the Justices were split 5–4, with Chief Justice Rehnquist's opinion of the Court being joined by Justices O'Connor, Scalia, Kennedy, and Thomas, and with Justices Souter, Stevens, Ginsburg, and Breyer dissenting.

[921] For an expansive interpretation in the area of economic regulation, decided during the same Term as *Lopez*, see Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995). *Lopez* did not "purport to announce a new rule governing Congress's Commerce Clause power over concededly economic activity." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 58 (2003).

[922] 529 U.S. at 613.

[923] Dissenting Justice Souter pointed to a "mountain of data" assembled by Congress to show the effects of domestic violence on interstate commerce. 529 U.S. at 628–30. The Court has evidenced a similar willingness to look behind congressional findings purporting to justify exercise of enforcement power under section 5 of the Fourteenth Amendment. See discussion under "enforcement," infra. In *Morrison* itself, the Court determined that congressional findings were insufficient to justify the VAWA as an exercise of Fourteenth Amendment power. 529 U.S. at 619–20.

ficient, by itself, to sustain the constitutionality of Commerce Clause legislation. . . . [The issue of constitutionality] is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court." [924]

The problem with the VAWA findings was that they "relied heavily" on the reasoning rejected in Lopez—the "but-for causal chain from the initial occurrence of crime . . . to every attenuated effect upon interstate commerce." As the Court had explained in *Lopez*, acceptance of this reasoning would eliminate the distinction between what is truly national and what is truly local, and would allow Congress to regulate virtually any activity, and basically any crime.[925] Accordingly, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Resurrecting the dual federalism dichotomy, the Court could find "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." [926]

Yet, the ultimate impact of these cases on Congress's power over commerce may be limited. In *Gonzales v. Raich*,[927] the Court reaffirmed an expansive application of *Wickard v. Filburn*, and signaled that its jurisprudence is unlikely to threaten the enforcement of broad regulatory schemes based on the Commerce Clause. In *Raich*, the Court considered whether the cultivation, distribution, or possession of marijuana for personal medical purposes pursuant to the California Compassionate Use Act of 1996 could be prosecuted under the federal Controlled Substances Act (CSA).[928] The respondents argued that this class of activities should be considered as separate and distinct from the drug-trafficking that was the focus of the CSA, and that regulation of this limited noncommercial use of marijuana should be evaluated separately.

In *Raich*, the Court declined the invitation to apply *Lopez* and *Morrison* to select applications of a statute, holding that the Court would defer to Congress if there was a rational basis to believe that regulation of home-consumed marijuana would affect the market for

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[924] 529 U.S. at 614.

[925] 529 U.S. at 615–16. Applying the principle of constitutional doubt, the Court in Jones v. United States, 529 U.S. 848 (2000), interpreted the federal arson statute as inapplicable to the arson of a private, owner-occupied residence. Were the statute interpreted to apply to such residences, the Court noted, "hardly a building in the land would fall outside [its] domain," and the statute's validity under *Lopez* would be squarely raised. 529 U.S. at 857.

[926] 529 U.S. at 618.

[927] 545 U.S. 1 (2005).

[928] 84 Stat. 1242, 21 U.S.C. §§ 801 *et seq*.

marijuana generally. The Court found that there was a "rational basis" to believe that diversion of medicinal marijuana into the illegal market would depress the price on the latter market.[929] The Court also had little trouble finding that, even in application to medicinal marijuana, the CSA was an economic regulation. Noting that the definition of "economics" includes "the production, distribution, and consumption of commodities," [930] the Court found that prohibiting the intrastate possession or manufacture of an article of commerce is a rational and commonly used means of regulating commerce in that product.[931]

The Court's decision also contained an intertwined but potentially separate argument that Congress had ample authority under the Necessary and Proper Clause to regulate the intrastate manufacture and possession of controlled substances, because failure to regulate these activities would undercut the ability of the government to enforce the CSA generally.[932] The Court quoted language from *Lopez* that appears to authorize the regulation of such activities on the basis that they are an essential part of a regulatory scheme.[933] Justice Scalia, in concurrence, suggested that this latter category of activities could be regulated under the Necessary and Proper Clause regardless of whether the activity in question was economic or whether it substantially affected interstate commerce.[934]

Activity Versus Inactivity.—In *National Federation of Independent Business (NFIB) v. Sebelius*,[935] the Court held that Congress did not have the authority under the Commerce Clause to impose a requirement compelling certain individuals to maintain a minimum level of health insurance (although, as discussed previ-

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[929] 545 U.S. at 19.

[930] 545 U.S. at 25, quoting Webster's Third New International Dictionary 720 (1966).

[931] *See also* Taylor v. United States, 579 U.S. ___, No. 14–6166, slip op. at 3 (2016) (rejecting the argument that the government, in prosecuting a defendant under the Hobbs Act for robbing drug dealers, must prove the interstate nature of the drug activity). The *Taylor* Court viewed this result as following necessarily from the Court's earlier decision in *Raich*, because the Hobbs Act imposes criminal penalties on robberies that affect "all . . . commerce over which the United States has jurisdiction," 18 U.S.C. § 1951(b)(3) (2012), and *Raich* established the precedent that the market for marijuana, "including its intrastate aspects," is "commerce over which the United States has jurisdiction." *Taylor*, slip op. at 6–7. *Taylor* was, however, expressly "limited to cases in which a defendant targets drug dealers for the purpose of stealing drugs or drug proceeds." *Id.* at 9. The Court did not purport to resolve what federal prosecutors must prove in Hobbs Act robbery cases "where some other type of business or victim is targeted." *Id.*

[932] 545 U.S. at 18, 22.

[933] 545 U.S. at 23–25.

[934] 545 U.S. at 34–35 (Scalia, J., concurring).

[935] 567 U.S. ___, No. 11–393, slip op. (2012).

ously, the Court found such power to exist under the taxing power). Under this "individual mandate," failure to purchase health insurance may subject a person to a monetary penalty, administered through the tax code.[936] By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces healthy individuals into the insurance risk pool, thus allowing insurers to subsidize the costs of covering the unhealthy individuals they are now required to accept.

Chief Justice Roberts, in a controlling opinion,[937] suggested that Congress's authority to regulate interstate commerce presupposes the existence of a commercial activity to regulate. Further, his opinion noted that the commerce power had been uniformly described in previous cases as involving the regulation of an "activity."[938] The individual mandate, on the other hand, compels an individual to become active in commerce on the theory that the individual's inactivity affects interstate commerce. Justice Roberts suggested that regulation of individuals because they are doing nothing would result in an unprecedented expansion of congressional authority with few discernable limitations. While recognizing that most people are likely to seek health care at some point in their lives, Justice Roberts noted that there was no precedent for the argument that individuals who might engage in a commercial activity in the future could, on that basis, be regulated today.[939] The Chief Justice similarly rejected the argument that the Necessary and Proper Clause could provide this additional authority. Rather than serving as a "incidental" adjunct to the Commerce Clause, reliance on the Necessary and Proper Clause in this instance would, according to the Chief Justice, create a substantial expansion of federal authority to regulate persons not otherwise subject to such regulation.[940]

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[936] Patient Protection and Affordable Care Act (ACA), Pub. L. 111–148, as amended. This mandate was necessitated by the Act's "guaranteed-issue" and "community-rating" provisions, under which insurance companies are prohibited from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals. Id. at §§ 300gg, 300gg–1, 300gg–3, 300gg–4. As these requirements provide an incentive for individuals to delay purchasing health insurance until they become sick, this would impose new costs on insurers, leading them to significantly increase premiums on everyone.

[937] Although no other Justice joined Chief Justice Robert's opinion, four dissenting Justices reached similar conclusions regarding the Commerce Clause and the Necessary and Proper Clause. *NFIB*, No. 11–393, slip op. at 4–16 (joint opinion of Scalia, Kennedy, Thomas and Alito, dissenting).

[938] *See, e.g., Lopez*, 514 U.S. at 573 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained").

[939] *NFIB*, No. 11–393, slip op. at 20, 26.

[940] *NFIB*, No. 11–393, slip op. at 30.

Civil Rights.—It had been generally established some time ago that Congress had power under the Commerce Clause to prohibit racial discrimination in the use of the channels of commerce.[941] The power under the clause to forbid discrimination within the states was firmly and unanimously sustained by the Court when Congress in 1964 enacted a comprehensive measure outlawing discrimination because of race or color in access to public accommodations with a requisite connection to interstate commerce.[942] Hotels and motels were declared covered—that is, declared to "affect commerce"—if they provided lodging to transient guests; restaurants, cafeterias, and the like, were covered only if they served or offered to serve interstate travelers or if a substantial portion of the food which they served had moved in commerce.[943] The Court sustained the Act as applied to a downtown Atlanta motel that did serve interstate travelers,[944] to an out-of-the-way restaurant in Birmingham that catered to a local clientele but that had spent 46 percent of its previous year's out-go on meat from a local supplier who had procured it from out-of-state,[945] and to a rural amusement area operating a snack bar and other facilities, which advertised in a manner likely to attract an interstate clientele and that served food a substantial portion of which came from outside the state.[946]

Writing for the Court in *Heart of Atlanta Motel* and *McClung*, Justice Clark denied that Congress was disabled from regulating the operations of motels or restaurants because those operations may be, or may appear to be, "local" in character. "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." [947]

But, it was objected, Congress is regulating on the basis of moral judgments and not to facilitate commercial intercourse. "That Congress [may legislate] . . . against moral wrongs . . . rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disrup-

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[941] Boynton v. Virginia, 364 U.S. 454 (1960); Henderson v. United States, 339 U.S. 816 (1950); Mitchell v. United States, 313 U.S. 80 (1941); Morgan v. Virginia, 328 U.S. 373 (1946).

[942] Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a *et seq*.

[943] 42 U.S.C. § 2000a(b).

[944] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

[945] Katzenbach v. McClung, 379 U.S. 294 (1964).

[946] Daniel v. Paul, 395 U.S. 298 (1969).

[947] Heart of Atlanta Motel v. United States, 379 U.S. 241, 258 (1964); Katzenbach v. McClung, 379 U.S. 294, 301–04 (1964).

tive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong."[948] The evidence did, in fact, noted the Justice, support Congress's conclusion that racial discrimination impeded interstate travel by more than 20 million black citizens, which was an impairment Congress could legislate to remove.[949]

The Commerce Clause basis for civil rights legislation prohibiting private discrimination was important because of the understanding that Congress's power to act under the Fourteenth and Fifteenth Amendments was limited to official discrimination.[950] The Court's subsequent determination that Congress is not necessarily so limited in its power reduces greatly the importance of the Commerce Clause in this area.[951]

Criminal Law.—Federal criminal jurisdiction based on the commerce power, and frequently combined with the postal power, has historically been an auxiliary criminal jurisdiction. That is, Congress has made federal crimes of acts that constitute state crimes on the basis of some contact, however tangential, with a matter subject to congressional regulation even though the federal interest in the acts may be minimal.[952] Examples of this type of federal criminal statute abound, including the Mann Act designed to outlaw interstate white slavery,[953] the Dyer Act punishing interstate transportation of stolen automobiles,[954] and the Lindbergh Law punishing interstate transportation of kidnapped persons.[955] But, just as in other areas, Congress has passed beyond a proscription of the use of interstate facilities in the commission of a crime, it has in the

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[948] Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964).

[949] 379 U.S. at 252–53; Katzenbach v. McClung, 379 U.S. 294, 299–301 (1964).

[950] *Civil Rights Cases*, 109 U.S. 3 (1883); United States v. Reese, 92 U.S. 214 (1876); Collins v. Hardyman, 341 U.S. 651 (1951).

[951] The Fair Housing Act (Title VIIII of the Civil Rights Act of 1968), 82 Stat. 73, 81, 42 U.S.C. §§ 3601 *et seq*., was based on the Commerce Clause, but, in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court held that legislation that prohibited discrimination in housing could be based on the Thirteenth Amendment and made operative against private parties. Similarly, the Court has concluded that, although § 1 of the Fourteenth Amendment is judicially enforceable only against "state action," Congress is not so limited under its enforcement authorization of § 5. United States v. Guest, 383 U.S. 745, 761, 774 (1966) (concurring opinions); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[952] *E.g.*, Barrett v. United States, 423 U.S. 212 (1976); Scarborough v. United States, 431 U.S. 563 (1977); Lewis v. United States, 445 U.S. 55 (1980); McElroy v. United States, 455 U.S. 642 (1982).

[953] 18 U.S.C. § 2421.

[954] 18 U.S.C. § 2312.

[955] 18 U.S.C. § 1201.

criminal law area expanded the scope of its jurisdiction. Typical of this expansion is a statute making it a federal offense to "in any way or degree obstruct . . . delay . . . or affect . . . commerce . . . by robbery or extortion . . . ."[956] Nonetheless, "Congress cannot punish felonies generally" and may enact only those criminal laws that are connected to one of its constitutionally enumerated powers, such as the commerce power.[957] As a consequence, "most federal offenses include . . . a jurisdictional" element that ties the underlying offense to one of Congress's constitutional powers.[958]

The most far-reaching measure the Court has sustained is the "loan-sharking" prohibition of the Consumer Credit Protection Act.[959] The title affirmatively finds that extortionate credit transactions affect interstate commerce because loan sharks are in a class largely controlled by organized crime with a substantially adverse effect on interstate commerce. Upholding the statute, the Court found that though individual loan-sharking activities may be intrastate in nature, still it is within Congress's power to determine that it was within a class the activities of which did affect interstate commerce, thus affording Congress power to regulate the entire class.[960]

THE COMMERCE CLAUSE AS A RESTRAINT ON STATE POWERS

Doctrinal Background

The grant of power to Congress over commerce, unlike that of power to levy customs duties, the power to raise armies, and some others, is unaccompanied by correlative restrictions on state power.[961] This circumstance does not, however, of itself signify that the states were expected to participate in the power thus granted Congress, subject only to the operation of the Supremacy Clause. As Hamilton pointed out in *The Federalist*,[962] while some of the powers that

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[956] 18 U.S.C. § 1951. *See also* 18 U.S.C. § 1952.

[957] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821).

[958] *See* Luna Torres v. Lynch, 578 U.S. ___, No. 14–1096, slip op. at 4.

[959] Title II, 82 Stat. 159 (1968), 18 U.S.C. §§ 891 *et seq*.

[960] Perez v. United States, 402 U.S. 146 (1971). Taylor v. United States, 579 U.S. ___, No. 14–6166, slip op. at 3 (2016); Russell v. United States, 471 U.S. 858, 862 (1985).

[961] Thus, by Article I, § 10, cl. 2, States are denied the power to "lay any Imposts or Duties on Imports or Exports" except by the consent of Congress. The clause applies only to goods imported from or exported to another country, not from or to another State, Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869), which prevents its application to interstate commerce, although Chief Justice Marshall thought to the contrary, Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827), and the contrary has been strongly argued. W. Crosskey, Politics and the Constitution in the History of the United States 295–323 (1953).

[962] The Federalist No. 32 (J. Cooke ed. 1961), 199–203. Note that in connection with the discussion that follows, Hamilton avowed that the taxing power of the States,

are vested in the National Government admit of their "concurrent" exercise by the states, others are of their very nature "exclusive," and hence render the notion of a like power in the states "contradictory and repugnant." As an example of the latter kind of power, Hamilton mentioned the power of Congress to pass a uniform naturalization law. Was the same principle expected to apply to the power over foreign and interstate commerce?

Unquestionably, one of the great advantages anticipated from the grant to Congress of power over commerce was that state interferences with trade, which had become a source of sharp discontent under the Articles of Confederation, would thereby be brought to an end. As Webster stated in his argument for appellant in *Gibbons v. Ogden*: "The prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law."[963] In other words, the constitutional grant was itself a regulation of commerce in the interest of uniformity.[964]

That the Commerce Clause, unimplemented by congressional legislation, took from the states any and all power over foreign and interstate commerce was by no means conceded and was, indeed, counterintuitive, considering the extent of state regulation that existed before the Constitution.[965] Moreover, legislation by Congress that regulated any particular phase of commerce would raise the

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save for imposts or duties on imports or exports, "remains undiminished." Id. at 201. The States "retain [the taxing] authority in the most absolute and unqualified sense[.]" Id. at 199.

[963] 22 U.S. (9 Wheat.) 1, 11 (1824). Justice Johnson's assertion, concurring, was to the same effect. Id. at 226. Late in life, James Madison stated that the power had been granted Congress mainly as "a negative and preventive provision against injustice among the States." 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14–15 (1865).

[964] It was evident from THE FEDERALIST that the principal aim of the Commerce Clause was the protection of the national market from the oppressive power of individual States acting to stifle or curb commerce. Id. at No. 7, 39–41 (Hamilton); No. 11, 65–73 (Hamilton); No. 22, 135–137 (Hamilton); No. 42, 283–284 (Madison); No. 53, 362–364 (Madison). *See* H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 533 (1949). For a comprehensive history of the adoption of the Commerce Clause, which does not indicate a definitive answer to the question posed, *see* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941). Professor Abel discovered only nine references in the Convention records to the Commerce Clause, all directed to the dangers of interstate rivalry and retaliation. Id. at 470–71 & nn. 169–75.

[965] The strongest suggestion of exclusivity found in the Convention debates is a remark by Madison. "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' These terms are vague but seem to exclude this power of the States." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 625 (rev. ed. 1937). However, the statement is recorded during debate on the clause, Art. I, § 10, cl. 3, prohibiting states from laying tonnage duties. That the Convention adopted this clause, when tonnage duties would

question whether the states were entitled to fill the remaining gaps, if not by virtue of a "concurrent" power over interstate and foreign commerce, then by virtue of "that immense mass of legislation" as Marshall termed it, "which embraces everything within the territory of a State, not surrendered to the general government" [966]—in a word, the "police power."

The text and drafting record of the Commerce Clause fails, therefore to settle the question of what power is left to the states to adopt legislation regulating foreign or interstate commerce in greater or lesser measure. To be sure, in cases of flat conflict between an act or acts of Congress that regulate such commerce and a state legislative act or acts, from whatever state power ensuing, the act of Congress is today recognized, and was recognized by Marshall, as enjoying an unquestionable supremacy.[967] But suppose, first, that Congress has passed no act, or second, that its legislation does not clearly cover the ground traversed by previously enacted state legislation. What rules then apply? Since *Gibbons v. Ogden*, both of these situations have confronted the Court, especially as regards interstate commerce, hundreds of times, and in meeting them the Court has, first, determined that it has power to decide when state power is validly exercised, and, second, it has coined or given currency to numerous formulas, some of which still guide, even when they do not govern, its judgment.[968]

Thus, it has been judicially established that the Commerce Clause is not only a "positive" grant of power to Congress, but is also a "negative" constraint upon the states. This aspect of the Commerce Clause, sometimes called the "dormant" commerce clause, means that the courts may measure state legislation against Commerce Clause values even in the absence of congressional regulation, *i.e.*, when Congress's exercise of its power is dormant.

Webster, in *Gibbons*, argued that a state grant of a monopoly to operate steamships between New York and New Jersey not only

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certainly be one facet of regulating interstate and foreign commerce, casts doubt on the assumption that the commerce power itself was intended to be exclusive.

[966] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203 (1824).

[967] 22 U.S. at 210–11.

[968] The writings detailing the history are voluminous. *See*, *e.g.*, F. Frankfurter, The Commerce Clause Under Marshall, Taney, and White (1937); B. Gavit, The Commerce Clause of the United States Constitution (1932) (usefully containing appendices cataloguing every Commerce Clause decision of the Supreme Court to that time); Sholleys, *The Negative Implications of the Commerce Clause*, 3 U. Chi. L. Rev. 556 (1936). Among the recent writings, *see* Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 Wayne L. Rev. 885 (1985) (a disputed conceptualization arguing the Court followed a consistent line over the years), and articles cited, id. at 887 n.4.

contravened federal navigation laws but violated the Commerce Clause as well, because that clause conferred an *exclusive* power upon Congress to make the rules for national commerce, although he conceded that the grant to regulate interstate commerce was so broad as to reach much that the states had formerly had jurisdiction over, the courts must be reasonable in interpretation.[969] But, because he thought the state law was in conflict with the federal legislation, Chief Justice Marshall was not compelled to pass on Webster's arguments, although in dicta he indicated his considerable sympathy with them and suggested that the power to regulate commerce between the states might be an exclusively federal power.[970]

Chief Justice Marshall originated the concept of the "dormant commerce clause" in *Willson v. Black Bird Creek Marsh Co.*,[971] although in dicta. Attacked before the Court was a state law authorizing the building of a dam across a navigable creek, and it was claimed the law was in conflict with the federal power to regulate interstate commerce. Rejecting the challenge, Marshall said that the state act could not be "considered as repugnant to the [federal] power to regulate commerce in its dormant state . . . ."

Returning to the subject in *Cooley v. Board of Wardens of Port of Philadelphia*,[972] the Court, upholding a state law that required ships to engage a local pilot when entering or leaving the port of Philadelphia, enunciated a doctrine of *partial* federal exclusivity. According to Justice Curtis' opinion, the state act was valid on the basis of a distinction between those subjects of commerce that "imperatively demand a single uniform rule" operating throughout the country and those that "as imperatively" demand "that diversity which alone can meet the local necessities of navigation," that is to say, of commerce. As to the former, the Court held Congress's power to be "exclusive"; as to the latter, it held that the states enjoyed a power

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[969] 22 U.S. (9 Wheat.) at 13–14, 16.

[970] 22 U.S. at 17–18, 209. In Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 193–96 (1819), Chief Justice Marshall denied that the grant of the bankruptcy power to Congress was exclusive. *See also* Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820) (militia).

[971] 27 U.S. (2 Pet.) 245, 252 (1829).

[972] 53 U.S. (12 How.) 299 (1851). The issue of exclusive federal power and the separate issue of the dormant commerce clause was present in the *License Cases*, 46 U.S. (5 How.) 504 (1847), and the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), but, despite the fact that much ink was shed in multiple opinions discussing the questions, nothing definitive emerged. Chief Justice Taney, in contrast to Marshall, viewed the clause only as a grant of power to Congress, containing no constraint upon the states, and the Court's role was to void state laws in contravention of federal legislation. 46 U.S. (5 How.) at 573; 48 U.S. (7 How.) at 464.

of "concurrent legislation."[973] The Philadelphia pilotage requirement was of the latter kind.

Thus, the contention that the federal power to regulate interstate commerce was exclusive of state power yielded to a rule of partial exclusivity. Among the welter of such cases, the first actually to strike down a state law solely[974] on Commerce Clause grounds was the *State Freight Tax Case*.[975] The question before the Court was the validity of a nondiscriminatory statute that required every company transporting freight within the state, with certain exceptions, to pay a tax at specified rates on each ton of freight carried. Opining that a tax upon freight, or any other article of commerce, transported from state to state is a regulation of commerce among the states and, further, that the transportation of merchandise or passengers through a state or from state to state was a subject that required uniform regulation, the Court held the tax in issue to be repugnant to the Commerce Clause.

Whether exclusive or partially exclusive, however, the Commerce Clause as a restraint upon state exercises of power, absent congressional action, received no sustained justification or explanation; the clause, of course, empowers Congress, not the courts, to regulate commerce among the states. Often, as in *Cooley* and in later cases, the Court stated or implied that the rule was imposed by the Commerce Clause.[976] In *Welton v. Missouri*,[977] the Court at-

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[973] 48 U.S. at 317–20. Although Chief Justice Taney had formerly taken the strong position that Congress's power over commerce was not exclusive, he acquiesced silently in the *Cooley* opinion. For a modern discussion of *Cooley*, *see* Goldstein v. California, 412 U.S. 546, 552–60 (1973), in which, in the context of the Copyright Clause, the Court, approving *Cooley* for Commerce Clause purposes, refused to find the Copyright Clause either fully or partially exclusive.

[974] Just a few years earlier, the Court, in an opinion that merged Commerce Clause and Import-Export Clause analyses, had seemed to suggest that it was a discriminatory tax or law that violates the Commerce Clause and not simply a tax on interstate commerce. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).

[975] Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232 (1873). For cases in which the Commerce Clause basis was intermixed with other express or implied powers, *see* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31 (1867); Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868). Chief Justice Marshall, in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 488–89 (1827), indicated, in dicta, that a state tax might violate the Commerce Clause.

[976] "Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States." Leisy v. Hardin, 135 U.S. 100, 108–09 (1890). The Commerce Clause "remains in the Constitution as a grant of power to Congress . . . and as a diminution *pro tanto* of absolute state sovereignty over the same subject matter." Carter v. Virginia, 321 U.S. 131, 137 (1944). The Commerce Clause, the Court has said, "does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the mean-

tempted to suggest a somewhat different justification. The case involved a challenge to a state statute that required a "peddler's" license for merchants selling goods that came from other states, but that required no license if the goods were produced in the state. Declaring that uniformity of commercial regulation is necessary to protect articles of commerce from hostile legislation and that the power asserted by the state belonged exclusively to Congress, the Court observed that "[t]he fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject . . . is equivalent to a declaration that inter-State commerce shall be free and untrammelled." [978]

It has been evidently of little importance to the Court to explain. "Whether or not this long recognized distribution of power between the national and state governments is predicated upon the implications of the commerce clause itself . . . or upon the presumed intention of Congress, where Congress has not spoken . . . the result is the same." [979] Thus, "[f]or a hundred years it has been accepted constitutional doctrine . . . that . . . where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." [980]

Two other justifications can be found throughout the Court's decisions, but they do not explain why the Court is empowered under a grant of power to Congress to police state regulatory and taxing

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ing it has given these great silences of the Constitution." H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534–35 (1949). Subsequently, the Court stated that the Commerce Clause "has long been recognized as a *self-executing limitation* on the power of the States to enact laws imposing substantial burdens on such commerce.'" Dennis v. Higgins, 498 U.S. 439, 447 (1991) (quoting South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984) (emphasis added)).

[977] 91 U.S. 275 (1876).

[978] 91 U.S. at 282. In Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31, 33 (1867), the Court suggested that congressional silence with regard to matters of "local" concern may in some circumstances signify a willingness that the states regulate. These principles were further explained by Chief Justice Stone, writing for the Court in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 479 n.1 (1939). "The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority." The fullest development of the "silence" rationale was not by the Court but by a renowned academic, Professor Dowling. *Interstate Commerce and State Power*, 29 VA. L. REV. 1 (1940); *Interstate Commerce and State Power: Revisited Version*, 47 COLUM. L. REV. 546 (1947).

[979] Southern Pacific Co. v. Arizona, 325 U.S. 761, 768 (1945).

[980] 325 U.S. at 769. *See also* California v. Zook, 336 U.S. 725, 728 (1949).

decisions. For example, in *Welton v. Missouri*,[981] the statute under review, as the Court observed several times, was clearly discriminatory as between in-state and interstate commerce, but that point was not sharply drawn as the constitutional fault of the law. That the Commerce Clause had been motivated by the Framers' apprehensions about state protectionism has been frequently noted.[982] A later theme has been that the Framers desired to create a national area of free trade, so that unreasonable burdens on interstate commerce violate the clause in and of themselves.[983]

Nonetheless, the power of the Court is established and is freely exercised. No reservations can be discerned in the opinions for the Court.[984] Individual Justices, to be sure, have urged renunciation of the power and remission to Congress for relief sought by litigants,[985] but that has not been the course followed.

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[981] 91 U.S. 275, 277, 278, 279, 280, 281, 282 (1876).

[982] 91 U.S. at 280–81; Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 446 (1827) (Chief Justice Marshall); Guy v. City of Baltimore, 100 U.S. 434, 440 (1879); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 550, 552 (1935); Maryland v. Louisiana, 451 U.S. 725, 754 (1981).

[983] *E.g.*, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 440 (1939); McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330–31 (1944); Freeman v. Hewit, 329 U.S. 249, 252, 256 (1946); H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538, 539 (1949); Dennis v. Higgins, 498 U.S. 439, 447–50 (1991). "[W]e have steadfastly adhered to the central tenet that the Commerce Clause 'by its own force created an area of trade free from interference by the States.'" American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 280 (1987) (quoting Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328 (1977)).

[984] *E.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Natural Resources Dep't, 504 U.S. 353, 359 (1992); Quill Corp. v. North Dakota, 504 U.S. 298 (1992); Wyoming v. Oklahoma, 502 U.S. 437, 455 (1992). Indeed, the Court, in Dennis v. Higgins, 498 U.S. 439, 447–50 (1991), broadened its construction of the clause, holding that it confers a "right" upon individuals and companies to engage in interstate trade. With respect to the *exercise* of the power, the Court has recognized Congress's greater expertise to act and noted its hesitancy to impose uniformity on state taxation. Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978). *Cf. Quill Corp.*, 504 U.S. at 318.

[985] In McCarroll v. Dixie Lines, 309 U.S. 176, 183 (1940), Justice Black, for himself and Justices Frankfurter and Douglas, dissented, taking precisely this view. *See also* Adams Mfg. Co. v. Storen, 304 U.S. 307, 316 (1938) (Justice Black dissenting in part); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 442 (1939) (Justice Black dissenting); Southern Pacific Co. v. Arizona, 325 U.S. 761, 784 (1945) (Justice Black dissenting); id. at 795 (Justice Douglas dissenting). Justices Douglas and Frankfurter subsequently wrote and joined opinions applying the dormant commerce clause. In Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954), the Court rejected the urging that it uphold all not-patently discriminatory taxes and let Congress deal with conflicts. More recently, Justice Scalia has taken the view that, as a matter of original intent, a "dormant" or "negative" commerce power cannot be justified in either taxation or regulation cases, but, yielding to the force of precedent, he will vote to strike down state actions that discriminate against interstate commerce or that are governed by the Court's precedents, without extending any of those precedents. CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 94 (1987) (concurring); Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259 (1987) (concurring in part and dissenting in part); Bendix Autolite Corp. v. Midwesco

The State Proprietary Activity (Market Participant) Exception.—In a case of first impression, the Court held that a Maryland bounty scheme by which the state paid scrap processors for each "hulk" automobile destroyed is "the kind of action with which the Commerce Clause is not concerned."[986] As first enacted, the bounty plan did not distinguish between in-state and out-of-state processors, but it was amended in a manner that substantially disadvantaged out-of-state processors. The Court held "that entry by the State itself into the market itself as a purchaser, in effect, of a potential article of interstate commerce [does not] create[ ] a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State."[987]

Affirming and extending this precedent, the Court held that a state operating a cement plant could in times of shortage (and presumably at any time) confine the sale of cement by the plant to residents of the state.[988] "[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[989] It is yet unclear how far this concept of the state as market participant rather than market regulator will be extended.[990]

Congressional Authorization of Otherwise Impermissible State Action.—The Supreme Court has heeded the lesson that was administered to it by the Act of Congress of August 31, 1852,[991] which

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Enterprises, Inc., 486 U.S. 888 (1988) (concurring in judgment); American Trucking Assn's v. Smith, 496 U.S. 167 (1990) (concurring); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 78 (1993) (Justice Scalia concurring) (reiterating view); Oklahoma Tax Comm'n v. Jefferson Lines, Inc.., 514 U.S. 175, 200–01 (1995) (Justice Scalia, with Justice Thomas joining) (same). Justice Thomas has written an extensive opinion rejecting both the historical and jurisprudential basis of the dormant commerce clause and expressing a preference for reliance on the imports-exports clause. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609 (1997) (dissenting; joined by Justice Scalia entirely and by Chief Justice Rehnquist as to the Commerce Clause but not the Imports-Exports Clause).

[986] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 805 (1976).

[987] 426 U.S. at 808.

[988] Reeves, Inc. v. Stake, 447 U.S. 429 (1980).

[989] 447 U.S. at 436–37; *see also* McBurney v. Young, 569 U.S. ___, No. 12–17, slip op. at 14 (2013) (to the extent that the Virginia Freedom of Information Act created a market for public documents in Virginia, the Commonwealth was the sole manufacturer of the product, and therefore did not offend the Commerce Clause when it limited access to those documents under the Act to citizens of the Commonwealth).

[990] *See also* White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) (city may favor its own residents in construction projects paid for with city funds); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (illustrating the deep divisions in the Court respecting the scope of the exception).

[991] Ch. 111, 10 Stat. 112, § 6.

pronounced the Wheeling Bridge "a lawful structure," thereby setting aside the Court's determination to the contrary earlier the same year.[992] The lesson, subsequently observed the Court, is that "[i]t is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce."[993] Similarly, when in the late 1880s and the early 1890s statewide prohibition laws began making their appearance, Congress again authorized state laws that the Court had held to violate the dormant commerce clause.

The Court applied the "original package" doctrine to interstate commerce in intoxicants, which the Court denominated "legitimate articles of commerce."[994] Although it held that a state was entitled to prohibit the manufacture and sale of intoxicants within its boundaries,[995] it contemporaneously laid down the rule, in *Bowman v. Chicago & Northwestern Ry. Co.*,[996] that, so long as Congress remained silent in the matter, a state lacked the power, even as part and parcel of a program of statewide prohibition of the traffic in intoxicants, to prevent the importation of liquor from a sister state. This holding was soon followed by another to the effect that, so long as Congress remained silent, a state had no power to prevent the sale in the original package of liquors introduced from another state.[997] Congress soon attempted to overcome the effect of the latter decision by enacting the Wilson Act,[998] which empowered states to regulate imported liquor on the same terms as domestically produced liquor, but the Court interpreted the law narrowly as subjecting imported liquor to local authority only after its resale.[999] Congress did

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[992] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852), statute sustained in Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856). The latter decision seemed facially contrary to a dictum of Justice Curtis in Cooley v. Board of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299, 318 (1851), *and cf.* Tyler Pipe Indus., Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 263 n.4 (1987) (Justice Scalia concurring in part and dissenting in part), but if indeed the Court is interpreting the silence of Congress as a bar to action under the dormant commerce clause, then when Congress speaks it is enacting a regulatory authorization for the states to act.

[993] Transportation Co. v. Parkersburg, 107 U.S. 691, 701 (1883).

[994] The Court had developed the "original package" doctrine to restrict application of a state tax on imports from a foreign country in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827). Although Chief Justice Marshall had indicated in dictum in *Brown* that the same rule would apply to imports from sister states, the Court had refused to follow that dictum in Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).

[995] Mugler v. Kansas, 123 U.S. 623 (1887). Relying on the distinction between manufacture and commerce, the Court soon applied this ruling to authorize states to prohibit manufacture of liquor for an out-of-state market. Kidd v. Pearson, 128 U.S. 1 (1888).

[996] 125 U.S. 465 (1888).

[997] Leisy v. Hardin, 135 U.S. 100 (1890).

[998] Ch. 728, 26 Stat. 313 (1890), upheld in *In re* Rahrer, 140 U.S. 545 (1891).

[999] Rhodes v. Iowa, 170 U.S. 412 (1898).

not fully nullify the *Bowman* case until 1913, when enactment of the Webb-Kenyon Act [1000] clearly authorized states to regulate direct shipments for personal use.

National Prohibition, imposed by the Eighteenth Amendment, temporarily mooted these conflicts, but they reemerged with repeal of Prohibition by the Twenty-first Amendment. Section 2 of the Twenty-first Amendment prohibits "the importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof." Initially the Court interpreted this language to authorize states to discriminate against imported liquor in favor of that produced in-state, but the modern Court has rejected this interpretation, holding instead that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." [1001]

Less than a year after the ruling in *United States v. South-Eastern Underwriters Ass'n* [1002] that insurance transactions across state lines constituted interstate commerce, thereby establishing their immunity from discriminatory state taxation, Congress passed the McCarran-Ferguson Act,[1003] authorizing state regulation and taxation of the insurance business. In *Prudential Ins. Co. v. Benjamin*,[1004] the Court sustained a South Carolina statute that imposed on foreign insurance companies, as a condition of their doing business in the state, an annual tax of three percent of premiums from business done in South Carolina, while imposing no similar tax on local corporations. "Obviously," said Justice Rutledge for the Court, "Congress's purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects." [1005]

[1000] Ch. 90, 37 Stat. 699 (1913), sustained in Clark-Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917). *See also* Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964).

[1001] Granholm v. Heald, 544 U.S. 460, 487 (2005). *See also* Bacchus Imports Ltd. v. Dias, 468 U.S. 263 (1984); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. The Beer Institute, 491 U.S. 324 (1989), and the analysis of section 2 under Discrimination Between Domestic and Imported Products.

[1002] 322 U.S. 533 (1944).

[1003] 59 Stat. 33, 15 U.S.C. §§ 1011–15.

[1004] 328 U.S. 408 (1946).

[1005] 328 U.S. at 429–30.

Justice Rutledge continued: "The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. . . . This broad authority Congress may exercise alone, subject to those limitations, or in conjunction with coordinated action by the states, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective." [1006]

Thus, it is now well-established that "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." [1007] But the Court requires congressional intent to permit otherwise impermissible state actions to "be unmistakably clear." [1008] The fact that federal statutes and regulations had restricted commerce in timber harvested from national forest lands in Alaska was, therefore, "insufficient indicium" that Congress intended to authorize the state to apply a similar policy for timber harvested from state lands. The rule requiring clear congressional approval for state burdens on com-

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[1006] 328 U.S. at 434–35. The Act restored state taxing and regulatory powers over the insurance business to their scope prior to *South-Eastern Underwriters*. Discriminatory state taxation otherwise cognizable under the Commerce Clause must, therefore, be challenged under other provisions of the Constitution. *See* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981). An equal protection challenge was successful in Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), invalidating a discriminatory tax and stating that a favoring of local industries "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Id. at 878. In Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 176–78 (1985), the Court declined to follow *Ward* where state statutes did not, as in *Ward*, favor local corporations at the expense of out-of-state corporations, but instead "favor[ed] out-of-state corporations domiciled within the New England region over out-of-state corporations from other parts of the country." The Court noted that the statutes in *Northeast Bancorp* were concerned with "preserv[ing] a close relationship between those in the community who need credit and those who provide credit," and with protecting "the independence of local banking institutions"; they did not, like the statutes in *Ward*, discriminate against "nonresident corporations solely because they were nonresidents."

[1007] Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 174 (1985) (interpreting a provision of the Bank Holding Company Act, 12 U.S.C. § 1842(d), permitting regional interstate bank acquisitions expressly approved by the state in which the acquired bank is located, as authorizing state laws that allow only banks within the particular region to acquire an in-state bank, on a reciprocal basis, since what the states could do entirely they can do in part).

[1008] South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 90 (1984).

merce was said to be necessary in order to strengthen the likelihood that decisions favoring one section of the country over another are in fact "collective decisions" made by Congress rather than unilateral choices imposed on unrepresented out-of-state interests by individual states.[1009] And Congress must be plain as well when the issue is not whether it has exempted a state action from the Commerce Clause but whether it has taken the less direct form of reduction in the level of scrutiny.[1010]

State Taxation and Regulation: The Old Law

In 1959, the Supreme Court acknowledged that, with respect to the taxing power of the states in light of the negative (or "dormant") commerce clause, "some three hundred full-dress opinions" as of that year had not resulted in "consistent or reconcilable" doctrine but rather in something more resembling a "quagmire."[1011] Although many of the principles still applicable in constitutional law may be found in the older cases, the Court has worked a revolution in this area, though at different times for taxation and for regulation. Thus, in this section we summarize the "old" law and then deal more fully with the "modern" law of the negative commerce clause.

[1009] 467 U.S. at 92. *See also* Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003) (authorization of state laws regulating milk solids does not authorize milk pricing and pooling laws). Earlier cases had required express statutory sanction of state burdens on commerce but under circumstances arguably less suggestive of congressional approval. *E.g.*, Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 958–60 (1982) (congressional deference to state water law in 37 statutes and numerous interstate compacts did not indicate congressional sanction for *invalid* state laws imposing a burden on commerce); New England Power Co. v. New Hampshire, 455 U.S. 331, 341 (1982) (disclaimer in Federal Power Act of intent to deprive a State of "lawful authority" over interstate transmissions held not to evince a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause"). *But see* White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) (Congress held to have sanctioned municipality's favoritism of city residents through funding statute under which construction funds were received).

[1010] Maine v. Taylor, 477 U.S. 131 (1986) (holding that Lacey Act's reinforcement of state bans on importation of fish and wildlife neither authorizes state law otherwise invalid under the Clause nor shifts analysis from the presumption of invalidity for discriminatory laws to the balancing test for state laws that burden commerce only incidentally).

[1011] Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959) (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344 (1954)). Justice Frankfurter was similarly skeptical of definitive statements. "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." Freeman v. Hewit, 329 U.S. 249, 251–52 (1946). The comments in all three cases dealt with taxation, but they could just as well have included regulation.

General Considerations.—The task of drawing the line between state power and the commercial interest has proved a comparatively simple one in the field of foreign commerce, the two things being in great part territorially distinct.[1012] With "commerce among the States" affairs are very different. Interstate commerce is conducted in the interior of the country, by persons and corporations that are ordinarily engaged also in local business; its usual incidents are acts that, if unconnected with commerce among the states, would fall within the state's powers of police and taxation, while the things it deals in and the instruments by which it is carried on comprise the most ordinary subject matter of state power. In this field, the Court consequently has been unable to rely upon sweeping solutions. To the contrary, its judgments have often been fluctuating and tentative, even contradictory, and this is particularly the case with respect to the infringement of interstate commerce by the state taxing power.[1013]

Taxation.—The leading case dealing with the relation of the states' taxing power to interstate commerce—the case in which the Court first struck down a state tax as violating the Commerce Clause—was the *State Freight Tax Case*.[1014] Before the Court was the validity of a Pennsylvania statute that required every company transporting freight within the state, with certain exceptions, to pay a tax at specified rates on each ton of freight carried by it. The Court's reasoning was forthright. Transportation of freight constitutes commerce.[1015] A tax upon freight transported from one state to another effects a regulation of interstate commerce.[1016] Under the *Cooley* doctrine, whenever the subject of a regulation of commerce is in its nature of national interest or admits of one uniform system or plan of regulation, that subject is within the exclusive regulating control of Congress.[1017] Transportation of passengers or merchandise through a state, or from one state to another, is of this nature.[1018] Hence, a state law imposing a tax upon freight, taken up within the state and transported out of it or taken up outside the state and transported into it, violates the Commerce Clause.[1019]

[1012] *See* J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION: CASES AND MATERIALS (8th ed. 2005), ch. 5.

[1013] In addition to the sources previously cited, *see* J. HELLERSTEIN & W. HELLERSTEIN (8th ed.), ch. 5, *supra*. For a succinct description of the history, *see* Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37 (1987).

[1014] Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232 (1873).

[1015] 82 U.S. at 275.

[1016] 82 U.S. at 275–76, 279.

[1017] 82 U.S. at 279–80.

[1018] 82 U.S. at 280.

[1019] 82 U.S. at 281–82.

The principle thus asserted, that a state may not tax interstate commerce, confronted the principle that a state may tax all purely domestic business within its borders and all property "within its jurisdiction." Inasmuch as most large concerns prosecute both an interstate and a domestic business, while the instrumentalities of interstate commerce and the pecuniary returns from such commerce are ordinarily property within the jurisdiction of some state or other, the task before the Court was to determine where to draw the line between the immunity claimed by interstate business, on the one hand, and the prerogatives claimed by local power on the other. In the *State Tax on Railway Gross Receipts Case*,[1020] decided the same day as the *State Freight Tax Case*, the issue was a tax upon gross receipts of all railroads chartered by the state, part of the receipts having been derived from interstate transportation of the same freight that had been held immune from tax in the first case. If the latter tax were regarded as a tax on interstate commerce, it too would fall. But to the Court, the tax on gross receipts of an interstate transportation company was not a tax on commerce. "[I]t is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." [1021] A gross receipts tax upon a railroad company, which concededly affected commerce, was not a regulation "directly. Very manifestly it is a tax upon the railroad company. . . . That its ultimate effect may be to increase the cost of transportation must be admitted. . . . Still it is not a tax upon transportation, or upon commerce. . . ." [1022]

Insofar as it drew a distinction between these two cases, the Court did so in part on the basis of *Cooley*, that some subjects embraced within the meaning of commerce demand uniform, national regulation, whereas other similar subjects permit of diversity of treatment, until Congress acts; and in part on the basis of a concept of a "direct" tax on interstate commerce, which was impermissible, and an "indirect" tax, which was permissible until Congress acted.[1023] Confusingly, the two concepts were sometimes conflated and sometimes treated separately. In any event, the Court itself was clear that interstate commerce could not be taxed at all, even if the tax

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[1020] Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 284 (1872).

[1021] 82 U.S. at 293.

[1022] 82 U.S. at 294. This case was overruled 14 years later, when the Court voided substantially the same tax in Philadelphia Steamship Co. v. Pennsylvania, 122 U.S. 326 (1887).

[1023] *See* The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 398–412 (1913) (reviewing and summarizing at length both taxation and regulation cases). *See also* Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U.S. 298, 307 (1924).

was a nondiscriminatory levy applied alike to local commerce.[1024] "Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it . . . ; or upon persons or property in transit in interstate commerce." [1025] However, some taxes imposed only an "indirect" burden and were sustained; property taxes and taxes in lieu of property taxes applied to all businesses, including instrumentalities of interstate commerce, were sustained.[1026] A good rule of thumb in these cases is that taxation was sustained if the tax was imposed on some local, rather than an interstate, activity or if the tax was exacted before interstate movement had begun or after it had ended.

An independent basis for invalidation was that the tax was discriminatory, that its impact was intentionally or unintentionally felt by interstate commerce and not by local, perhaps in pursuit of parochial interests. Many of the early cases actually involving discriminatory taxation were decided on the basis of the impermissibility of taxing interstate commerce at all, but the category was soon clearly delineated as a separate ground (and one of the most important today).[1027]

Following the Great Depression and under the leadership of Justice, and later Chief Justice, Stone, the Court attempted to move away from the principle that interstate commerce may not be taxed and reliance on the direct-indirect distinction. Instead, a state or local levy would be voided only if in the opinion of the Court it created a risk of multiple taxation for interstate commerce not felt by local commerce.[1028] It became much more important to the validity of a tax that it be apportioned to an interstate company's activities within the taxing state, so as to reduce the risk of multiple taxation.[1029] But, just as the Court had achieved constancy in the area of regulation, it reverted to the older doctrines in the taxation area

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[1024] Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497 (1887); Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

[1025] The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 400–401 (1913).

[1026] The *Delaware R.R. Tax*, 85 U.S. (18 Wall.) 206, 232 (1873). *See* Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U.S. 439 (1894); Postal Telegraph Cable Co. v. Adams, 155 U.S. 688 (1895). *See* cases cited in J. HELLERSTEIN & W. HELLERSTEIN (8th ed.), *supra*, at 195 *et seq*.

[1027] *E.g.*, Welton v. Missouri, 91 U.S. 275 (1875); Robbins v. Shelby County Taxing District, 120 U.S. 489 (1887); Darnell & Son Co. v. City of Memphis, 208 U.S. 113 (1908); Bethlehem Motors Co. v. Flynt, 256 U.S. 421 (1921).

[1028] Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); International Harvester Co. v. Evatt, 329 U.S. 416 (1947).

[1029] *E.g.*, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947); Central Greyhound Lines

and reiterated that interstate commerce may not be taxed at all, even by a properly apportioned levy, and reasserted the direct-indirect distinction.[1030] The stage was set, following a series of cases in which through formalistic reasoning the states were permitted to evade the Court's precedents,[1031] for the formulation of a more realistic doctrine.

Regulation.—Much more diverse were the cases dealing with regulation by the state and local governments. Taxation was one thing, the myriad approaches and purposes of regulations another. Generally speaking, if the state action was perceived by the Court to be a regulation of interstate commerce itself, it was deemed to impose a "direct" burden on interstate commerce and impermissible. If the Court saw it as something other than a regulation of interstate commerce, it was considered only to "affect" interstate commerce or to impose only an "indirect" burden on it in the proper exercise of the police powers of the states.[1032] But the distinction between "direct" and "indirect" burdens was often perceptible only to the Court.[1033]

A corporation's status as a foreign entity did not immunize it from state requirements, conditioning its admission to do a local business, to obtain a local license, and to furnish relevant information as well as to pay a reasonable fee.[1034] But no registration was permitted of an out-of-state corporation, the business of which in

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v. Mealey, 334 U.S. 653 (1948). Notice the Court's distinguishing of *Central Greyhound* in Oklahoma Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 188–91 (1995).

[1030] Freeman v. Hewit, 329 U.S. 249 (1946); Spector Motor Serv. v. O'Connor, 340 U.S. 602 (1951).

[1031] Thus, the states carefully phrased tax laws so as to impose on interstate companies not a license tax for doing business in the state, which was not permitted, Railway Express Agency v. Virginia, 347 U.S. 359 (1954), but as a franchise tax on intangible property or the privilege of doing business in a corporate form, which was permissible. Railway Express Agency v. Virginia, 358 U.S. 434 (1959); Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975). Also, the Court increasingly found the tax to be imposed on a local activity in instances it would previously have seen to be an interstate activity. *E.g.*, Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948); General Motors Corp. v. Washington, 377 U.S. 436 (1964); Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975).

[1032] Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 924–925 (1985). In addition to the sources already cited, *see* the Court's summaries in The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 398–412 (1913), and Southern Pacific Co. v. Arizona, 325 U.S. 761, 766–70 (1945). In the latter case, Chief Justice Stone was reconceptualizing the standards under the clause, but the summary represents a faithful recitation of the law.

[1033] *See* Di Santo v. Pennsylvania, 273 U.S. 34 (1927) (Justice Stone dissenting). The dissent was the precursor to Chief Justice Stone's reformulation of the standard in 1945. *DiSanto* was overruled in California v. Thompson, 313 U.S. 109 (1941).

[1034] Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926); Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944).

the host state was purely interstate in character.[1035] Neither did the Court permit a state to exclude from its courts a corporation engaging solely in interstate commerce because of a failure to register and to qualify to do business in that state.[1036]

Interstate transportation brought forth hundreds of cases. State regulation of trains operating across state lines resulted in divergent rulings. It was early held improper for states to prescribe charges for transportation of persons and freight on the basis that the regulation must be uniform and thus could not be left to the states.[1037] The Court deemed "reasonable" and therefore constitutional many state regulations requiring a fair and adequate service for its inhabitants by railway companies conducting interstate service within its borders, as long as there was no unnecessary burden on commerce.[1038] A marked tolerance for a class of regulations that arguably furthered public safety was long exhibited by the Court,[1039] even in instances in which the safety connection was tenuous.[1040] Of particular controversy were "full-crew" laws, represented as safety measures, that were attacked by the companies as "feather-bedding" rules.[1041]

[1035] Crutcher v. Kentucky, 141 U.S. 47 (1891); International Textbook Co. v. Pigg, 217 U.S. 91 (1910).

[1036] Dahnke-Walker Co. v. Bondurant, 257 U.S. 282 (1921); Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974). *But see* Eli Lilly & Co. v. Sav-on Drugs, 366 U.S. 276 (1961).

[1037] Wabash, S. L. & P. Ry. v. Illinois, 118 U.S. 557 (1886). The power of the states generally to set rates had been approved in Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877), and Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877). After the *Wabash* decision, states retained power to set rates for passengers and freight taken up and put down within their borders. Wisconsin R.R. Comm'n v. Chicago, B. & Q. R.R., 257 U.S. 563 (1922).

[1038] Generally, the Court drew the line at regulations that provided for adequate service, not any and all service. Thus, one class of cases dealt with requirements that trains stop at designated cities and towns. The regulations were upheld in such cases as Gladson v. Minnesota, 166 U.S. 427 (1897), and Lake Shore & Mich. South. Ry. v. Ohio, 173 U.S. 285 (1899), and invalidated in Illinois Cent. R.R. v. Illinois, 163 U.S. 142 (1896). *See* Chicago, B. & Q. R.R. v. Wisconsin R.R. Comm'n, 237 U.S. 220, 226 (1915); St. Louis & S. F. Ry. v. Public Service Comm'n, 254 U.S. 535, 536–537 (1921). The cases were extremely fact-specific.

[1039] *E.g.*, Smith v. Alabama, 124 U.S. 465 (1888) (required locomotive engineers to be examined and licensed by the state, until Congress should deem otherwise); New York, N.H. & H. R.R. v. New York, 165 U.S. 628 (1897) (forbidding heating of passenger cars by stoves); Chicago, R.I. & P. Ry. v. Arkansas, 219 U.S. 453 (1911) (requiring three brakemen on freight trains of more than 25 cars).

[1040] *E.g.*, Terminal Ass'n v. Trainmen, 318 U.S. 1 (1943) (requiring railroad to provide caboose cars for its employees); Hennington v. Georgia, 163 U.S. 299 (1896) (forbidding freight trains to run on Sundays). *But see* Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917) (voiding as too onerous on interstate transportation a law requiring trains to come to almost a complete stop at all grade crossings, when there were 124 highway crossings at grade in 123 miles, doubling the running time).

[1041] Four cases over a lengthy period sustained the laws. Chicago, R.I. & Pac. Ry. Co. v. Arkansas, 219 U.S. 453 (1911); St. Louis, I. Mt. & So. Ry. v. Arkansas, 240

Similarly, motor vehicle regulations have met mixed fates. Basically, it has always been recognized that states, in the interest of public safety and conservation of public highways, may enact and enforce comprehensive licensing and regulation of motor vehicles using its facilities.[1042] Indeed, states were permitted to regulate many of the local activities of interstate firms and thus the interstate operations, in pursuit of these interests.[1043] Here, too, safety concerns became overriding objects of deference, even in doubtful cases.[1044] In regard to navigation, which had given rise to *Gibbons v. Ogden* and *Cooley*, the Court generally upheld much state regulation on the basis that the activities were local and did not demand uniform rules.[1045]

As a general rule, although the Court during this time did not permit states to regulate a purely interstate activity or prescribe prices for purely interstate transactions,[1046] it did sustain a great deal of price and other regulation imposed prior to or subsequent to the travel in interstate commerce of goods produced for such commerce or received from such commerce. For example, decisions late in the period upheld state price-fixing schemes applied to goods intended for interstate commerce.[1047]

U.S. 518 (1916); Missouri Pacific R.R. v. Norwood, 283 U.S. 249 (1931); Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P. R.R., 382 U.S. 423 (1966). In the latter case, the Court noted the extensive and conflicting record with regard to safety, but it then ruled that with the issue in so much doubt it was peculiarly a legislative choice.

[1042] Hendrick v. Maryland, 235 U.S. 610 (1915); Kane v. New Jersey, 242 U.S. 160 (1916).

[1043] *E.g.*, Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933) (state could deny an interstate firm a necessary certificate of convenience to operate as a common carrier on the basis that the route was overcrowded); Welch Co. v. New Hampshire, 306 U.S. 79 (1939) (maximum hours for drivers of motor vehicles); Eichholz v. Public Service Comm'n, 306 U.S. 268 (1939) (reasonable regulations of traffic). *But compare* Michigan Comm'n v. Duke, 266 U.S. 570 (1925) (state may not impose common-carrier responsibilities on business operating between states that did not assume them); Buck v. Kuykendall, 267 U.S. 307 (1925) (denial of certificate of convenience under circumstances was a ban on competition).

[1044] *E.g.*, Mauer v. Hamilton, 309 U.S. 598 (1940) (ban on operation of any motor vehicle carrying any other vehicle above the head of the operator). By far, the example of the greatest deference is South Carolina Highway. Dep't v. Barnwell Bros., 303 U.S. 177 (1938), in which the Court upheld, in a surprising Stone opinion, truck weight and width restrictions prescribed by practically no other state (in terms of the width, no other).

[1045] *E.g.*, Transportation Co. v. City of Chicago, 99 U.S. 635 (1879); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888). *See* Kelly v. Washington, 302 U.S. 1 (1937) (upholding state inspection and regulation of tugs operating in navigable waters, in absence of federal law).

[1046] *E.g.*, Western Union Tel Co. v. Foster, 247 U.S. 105 (1918); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); State Comm'n v. Wichita Gas Co., 290 U.S. 561 (1934).

[1047] Milk Control Board v. Eisenberg Co., 306 U.S. 346 (1939) (milk); Parker v. Brown, 317 U.S. 341 (1943) (raisins).

However, the states always had an obligation to act nondiscriminatorily. Just as in the taxing area, regulation that was parochially oriented, to protect local producers or industries, for instance, was not evaluated under ordinary standards but subjected to practically *per se* invalidation. The mirror image of *Welton v. Missouri*,[1048] the tax case, was *Minnesota v. Barber*,[1049] in which the Court invalidated a facially neutral law that in its practical effect discriminated against interstate commerce and in favor of local commerce. The law required fresh meat sold in the state to have been inspected by its own inspectors with 24 hours of slaughter. Thus, meat slaughtered in other states was excluded from the Minnesota market. The principle of the case has a long pedigree of application.[1050] State protectionist regulation on behalf of local milk producers has occasioned judicial censure. Thus, in *Baldwin v. G.A.F. Seelig.*,[1051] the Court had before it a complex state price-fixing scheme for milk, in which the state, in order to keep the price of milk artificially high within the state, required milk dealers buying out-of-state to pay producers, wherever they were, what the dealers had to pay within the state, and, thus, in-state producers were protected. And, in *H. P. Hood & Sons, Inc. v. Du Mond*,[1052] the Court struck down a state refusal to grant an out-of-state milk distributor a license to operate a milk receiving station within the state on the basis that the additional diversion of local milk to the other state would impair the supply for the in-state market. A state may not bar an interstate market to protect local interests.[1053]

[1048] 91 U.S. 275 (1875).

[1049] 136 U.S. 313 (1890).

[1050] *E.g.*, Brimmer v. Rebman, 138 U.S. 78 (1891) (law requiring postslaughter inspection in each county of meat transported over 100 miles from the place of slaughter); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (city ordinance preventing selling of milk as pasteurized unless it had been processed and bottled at an approved plant within a radius of five miles from the central square of Madison). As the latter case demonstrates, it is constitutionally irrelevant that other Wisconsin producers were also disadvantaged by the law. For a modern application of the principle of these cases, *see* Fort Gratiot Sanitary Landfill v. Michigan Nat. Res. Dep't, 504 U.S. 353 (1992) (forbidding landfills from accepting out-of-county wastes). *See also* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 391 (1994) (discrimination against interstate commerce not preserved because local businesses also suffer).

[1051] 294 U.S. 511 (1935). *See also* Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964). With regard to products originating within the state, the Court had no difficulty with price fixing. Nebbia v. New York, 291 U.S. 502 (1934).

[1052] 336 U.S. 525 (1949). For the most recent case in this saga, *see* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

[1053] And the Court does not permit a state to combat discrimination against its own products by admitting only products (here, again, milk) from states that have reciprocity agreements with it to protect its own dealers. Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976).

State Taxation and Regulation: The Modern Law

General Considerations.—Transition from the old law to the modern standard occurred relatively smoothly in the field of regulation,[1054] but in the area of taxation the passage was choppy and often witnessed retreats and advances.[1055] In any event, both taxation and regulation now are evaluated under a judicial balancing formula comparing the burden on interstate commerce with the importance of the state interest, save for discriminatory state action that cannot be justified at all.

Taxation.—During the 1940s and 1950s, there was conflict within the Court between the view that interstate commerce could not be taxed at all, at least "directly," and the view that the negative commerce clause protected against the risk of double taxation.[1056] In *Northwestern States Portland Cement Co. v. Minnesota*,[1057] the Court reasserted the principle expressed earlier in *Western Live Stock*, that the Framers did not intend to immunize interstate commerce from its just share of the state tax burden even though it increased the cost of doing business.[1058] *Northwestern States* held that a state could constitutionally impose a nondiscriminatory, fairly apportioned net income tax on an out-of-state corporation engaged exclusively in interstate commerce in the taxing state. "For the first time outside the context of property taxation, the Court explicitly recognized that an exclusively interstate business could be subjected to the states' taxing powers."[1059] Thus, in *Northwestern States*, foreign corporations that maintained a sales office and employed sales staff in the taxing state for solicitation of orders for their merchandise that, upon acceptance of the orders at their home office in another jurisdiction, were shipped to customers in the taxing state, were held liable to pay the latter's income tax on that portion of the net in-

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[1054] Formulation of a balancing test was achieved in Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945), and was thereafter maintained more or less consistently. The Court's current phrasing of the test was in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[1055] Indeed, scholars dispute just when the modern standard was firmly adopted. The conventional view is that it was articulated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), but there also seems little doubt that the foundation of the present law was laid in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

[1056] *Compare* Freeman v. Hewit, 329 U.S. 249, 252–256 (1946), *with* Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 258, 260 (1938).

[1057] 358 U.S. 450 (1959).

[1058] 358 U.S. at 461–62. *See* Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). For recent reiterations of the principle, *see* Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 310 n.5 (1992) (citing cases).

[1059] Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37, 54 (1987).

come of their interstate business as was attributable to such solicitation.

Yet, the following years saw inconsistent rulings that turned almost completely upon the use of or failure to use "magic words" by legislative drafters. That is, it was constitutional for the states to tax a corporation's net income, properly apportioned to the taxing state, as in *Northwestern States*, but no state could levy a tax on a foreign corporation for the privilege of doing business in the state, both taxes alike in all respects.[1060] In *Complete Auto Transit, Inc. v. Brady*,[1061] the Court overruled the cases embodying the distinction and articulated a standard that has governed the cases since. The tax in *Brady* was imposed on the privilege of doing business as applied to a corporation engaged in interstate transportation services in the taxing state; it was measured by the corporation's gross receipts from the service. The appropriate concern, the Court wrote, was to pay attention to "economic realities" and to "address the problems with which the commerce clause is concerned." [1062] The standard, a set of four factors that was distilled from precedent but newly applied, was firmly set out. A tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." [1063] All subsequent cases have been decided in this framework.

Nexus.—"The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities. The Due Process Clause demands that there exist some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, as well as a rational relationship between the tax and the values connected with

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[1060] Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951). The attenuated nature of the purported distinction was evidenced in Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975), in which the Court sustained a nondiscriminatory, fairly apportioned franchise tax that was measured by the taxpayer's capital stock, imposed on a pipeline company doing an exclusively interstate business in the taxing state, on the basis that it was a tax imposed on the privilege of conducting business in the corporate form.

[1061] 430 U.S. 274 (1977).

[1062] 430 U.S. at 279, 288. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 443 (1980)).

[1063] 430 U.S. at 279. The rationale of these four parts of the test is set out in Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 312–13 (1992). A recent application of the four-part *Complete Auto Transit* test is Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

the taxing State. The Commerce Clause forbids the States to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation." [1064] "The broad inquiry subsumed in both constitutional requirements is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state—that is, whether the state has given anything for which it can ask return." [1065]

The question of the presence of a substantial nexus often arises when a state imposes on out-of-state vendors an obligation to collect use taxes on goods sold in the taxing state, and a determinative factor is whether the vendor is physically present in the state. The Court has sustained such an imposition on mail order sellers with retail outlets, solicitors, or property within the taxing state,[1066] but it has denied the power to a state to tax a seller whose "only connection with customers in the State is by common carrier or the United States mail." [1067] The validity of general business taxes on interstate enterprises may also be determined by the nexus stan-

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[1064] Meadwestvaco Corp. v. Illinois Dept. of Revenue, 128 S. Ct. 1498, 1505 (2008) (citations and internal quotation marks omitted). "[T]he due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. . . . In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 312 (1992).

[1065] 128 S. Ct. at 1505 (internal quotation marks omitted). It had been thought, prior to the decision in Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298, 305 (1992), that the tests for nexus under the Commerce Clause and the Due Process Clause were identical, but the Court in that case, although stating that the two tests "are closely related" (citing National Bellas Hess, Inc. v. Dept. of Revenue of Illinois, 386 U.S. 753, 756 (1967)), held that they "differ fundamentally" and found a state tax to satisfy the Due Process Clause but to violate the Commerce Clause. *Compare Quill* at 325–28 (Justice White concurring in part and dissenting in part). However, the requirement for "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" probably survives the bifurcation of the tests in *Quill*. National Bellas Hess, Inc. v. Dept. of Revenue of Illinois, 386 U.S. 753, 756 (1967) (Commerce Clause), quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954) (Due Process Clause).

[1066] Scripto v. Carson, 362 U.S. 207 (1960); National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977). In *Scripto*, the vendor's agents that were in the state imposing the tax were independent contractors, rather than employees, but this distinction was irrelevant. *See also* Tyler Pipe Indus. v. Washington State Dept. of Revenue, 483 U.S. 232, 249–50 (1987) (reaffirming *Scripto* on this point). *See also* D. H. Holmes Co. v. McNamara, 486 U.S. 24 (1988) (upholding imposition of use tax on catalogs, printed outside state at direction of an in-state corporation and shipped to prospective customers within the state).

[1067] National Bellas Hess, Inc. v. Dept. of Revenue of Illinois, 386 U.S. 753, 758 (1967), reaffirmed with respect to the Commerce Clause in Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298 (1992).

dard. However, again, only a minimal contact is necessary.[1068] Thus, maintenance of one full-time employee within the state (plus occasional visits by non-resident engineers) to make possible the realization and continuance of contractual relations seemed to the Court to make almost frivolous a claim of lack of sufficient nexus.[1069] The application of a state business-and-occupation tax on the gross receipts from a large wholesale volume of pipe and drainage products in the state was sustained, even though the company maintained no office, owned no property, and had no employees in the state, its marketing activities being carried out by an in-state independent contractor.[1070] The Court also upheld a state's application of a use tax to aviation fuel stored temporarily in the state prior to loading on aircraft for consumption in interstate flights.[1071]

When "there is no dispute that the taxpayer has done some business in the taxing State, the inquiry shifts from whether the State may tax to what it may tax. To answer that question, [the Court has] developed the unitary business principle. Under that principle, a State need not isolate the intrastate income-producing activities from the rest of the business but may tax an apportioned sum of the corporation's multistate business if the business is unitary. The court must determine whether intrastate and extrastate activities formed part of a single unitary business, or whether the out-of-state values that the State seeks to tax derive[d] from unrelated business activity which constitutes a discrete business enterprise. . . . If the value the State wishe[s] to tax derive[s] from a 'unitary business' operated within and without the State, the State [may] tax an apportioned share of the value of that business instead of isolating the value attributable to the operation of the business within the State. Conversely, if the value the State wished to tax derived from a discrete business enterprise, then the State could not tax even an apportioned share of that value." [1072] But, even when

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[1068] Reacting to *Northwestern States*, Congress enacted Pub. L. 86–272, 15 U.S.C. § 381, providing that mere solicitation by a company acting outside the state did not support imposition of a state income tax on a company's proceeds. *See* Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275 (1972).

[1069] Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560 (1975). *See also* General Motors Corp. v. Washington, 377 U.S. 436 (1964).

[1070] Tyler Pipe Indus. v. Dept. of Revenue, 483 U.S. 232, 249–51 (1987). The Court agreed with the state court's holding that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." Id. at 250.

[1071] United Air Lines v. Mahin, 410 U.S. 623 (1973).

[1072] Meadwestvaco Corp. v. Illinois Dept. of Revenue, 128 S. Ct. 1498, 1505–06 (2008) (citations and internal quotation marks omitted). The holding of this case was that the concept of "operational function," which the Court had introduced in prior cases, was "not intended to modify the unitary business principle by adding a

there is a unitary business, "[t]he Due Process and Commerce Clauses of the Constitution do not allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there is a 'minimal connection' or 'nexus' between the interstate activities and the taxing State and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" [1073]

Apportionment.—This requirement is of long standing,[1074] but its importance has broadened as the scope of the states' taxing powers has enlarged. It is concerned with what formulas the states must use to claim a share of a multistate business' tax base for the taxing state, when the business carries on a single integrated enterprise both within and without the state. A state may not exact from interstate commerce more than the state's fair share. Avoidance of multiple taxation, or the risk of multiple taxation, is the test of an apportionment formula. Generally speaking, this factor has been seen as both a Commerce Clause and a due process requisite,[1075] although, as one recent Court decision notes, some tax measures that are permissible under the Due Process Clause nonetheless could run afoul of the Commerce Clause.[1076] The Court has declined to im-

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new ground for apportionment." Id. at 1507–08. In other words, the Court declined to adopt a basis upon which a state could tax a non-unitary business.

[1073] Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159, 165–66 (1983) (internal quotation marks omitted). *See also* ASARCO Inc. v. Id. State Tax Comm'n, 458 U.S. 307, 316–17 (1982); Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U.S. 58 (2000) (interest deduction not properly apportioned between unitary and nonunitary business).

[1074] *E.g.*, Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 26 (1891); Maine v. Grand Trunk Ry., 142 U.S. 217, 278 (1891).

[1075] *See* Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992); Tyler Pipe Indus. v. Dep't of Revenue, 483 U.S. 232, 251 (1987); Container Corp. of Amer. v. Franchise Tax Bd., 463 U.S. 159 (1983); F. W. Woolworth Co. v. N.M. Tax. & Revenue Dep't, 458 U.S. 354 (1982); ASARCO Inc. v. Id. State Tax Comm'n, 458 U.S. 307 (1982); Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425 (1980); Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978). *Cf.* Am. Trucking Ass'ns Inc. v. Scheiner, 483 U.S. 266 (1987).

[1076] Comptroller of the Treasury of Md. v. Wynne, 575 U.S. ___, No. 13–485, slip op. at 13 (2015) ("The Due Process Clause allows a State to tax '*all* the income of its residents, even income earned outside the taxing jurisdiction.' But 'while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause.") (internal citations omitted). The challenge in *Wynne* was brought by Maryland residents, whose worldwide income three dissenting Justices would have seen as subject to Maryland taxation based on their domicile in the state, even though it resulted in the double taxation of income earned in other states. *Id.* at 2 (Ginsburg, J., dissenting) ("For at least a century, 'domicile' has been recognized as a secure ground for taxation of residents' worldwide income."). However, the majority took a different view, holding that Maryland's taxing scheme was unconstitutional under the dormant Commerce Clause because it did not provide a full credit for taxes paid to other states on income earned from interstate activities. *Id.* at 21–25 (majority opinion).

pose any particular formula on the states, reasoning that to do so would be to require the Court to engage in "extensive judicial lawmaking," for which it was ill-suited and for which Congress had ample power and ability to legislate.[1077]

"Instead," the Court wrote, "we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute. . . . The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity." [1078]

In *Goldberg v. Sweet*, the Court upheld as properly apportioned a state tax on the gross charge of any telephone call originated or terminated in the state and charged to an in-state service address, regardless of where the telephone call was billed or paid.[1079] A complex state tax imposed on trucks displays the operation of the test. Thus, a state registration tax met the internal consistency test because every state honored every other states', and a motor fuel tax similarly was sustained because it was apportioned to mileage traveled in the state, whereas lump-sum annual taxes, an axle tax and an identification marker fee, being unapportioned flat taxes imposed for the use of the state's roads, were voided, under the internal consistency test, because if every state imposed them, then the burden on interstate commerce would be great.[1080] Similarly, the Court held that Maryland's personal income tax scheme—which taxed Maryland residents on their worldwide income and nonresidents on income earned in the state and did not offer Maryland residents a full credit for income taxes they paid to other states—"fails the internal consistency test." [1081] The Court did so because, if every state adopted the same approach, taxpayers who "earn[] income inter-

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[1077] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278–80 (1978).

[1078] Goldberg v. Sweet, 488 U.S. 252, 261, 262 (1989) (citations omitted).

[1079] 488 U.S. 252 (1989). The tax law provided a credit for any taxpayer who was taxed by another state on the same call. Actual multiple taxation could thus be avoided, the risks of other multiple taxation was small, and it was impracticable to keep track of the taxable transactions.

[1080] American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).

[1081] Comptroller of the Treasury of Md. v. Wynne, 575 U.S. ___, No. 13–485, slip op. at 22 (2015). The Court in *Wynne* expressly declined to distinguish between taxes on gross receipts and taxes on net income or between taxes on individuals and taxes

state" would be taxed twice on a portion of that income, while those who earned income solely within their state of residence would be taxed only once.[1082]

Deference to state taxing authority was evident in a case in which the Court sustained a state sales tax on the price of a bus ticket for travel that originated in the state but terminated in another state. The tax was unapportioned to reflect the intrastate travel and the interstate travel.[1083] The tax in this case was different from the tax upheld in *Central Greyhound*, the Court held. The previous tax constituted a levy on gross receipts, payable by the seller, whereas the present tax was a sales tax, also assessed on gross receipts, but payable by the buyer. The Oklahoma tax, the Court continued, was internally consistent, because if every state imposed a tax on ticket sales within the state for travel originating there, no sale would be subject to more than one tax. The tax was also externally consistent, the Court held, because it was a tax on the sale of a service that took place in the state, not a tax on the travel.[1084]

However, the Court found discriminatory and thus invalid a state intangibles tax on a fraction of the value of corporate stock owned by state residents inversely proportional to the state's exposure to the state income tax.[1085]

Discrimination.—The "fundamental principle" governing this factor is simple. "'No State may, consistent with the Commerce Clause, impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"[1086] That is, a tax that by its terms or operation imposes greater bur-

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on corporations. *Id.* at 7, 9. The Court also noted that Maryland could "cure the problem with its current system" by granting a full credit for taxes paid to other states, but the Court did "not foreclose the possibility" that Maryland could comply with the Commerce Clause in some other way. *Id.* at 25.

[1082] *Id.* at 22–23.

[1083] Indeed, there seemed to be a precedent squarely on point: Central Greyhound Lines v. Mealey, 334 U.S. 653 (1948). The Court in that case struck down a state statute that failed to apportion its taxation of interstate bus ticket sales to reflect the distance traveled within the state.

[1084] Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995). Indeed, the Court analogized the tax to that in Goldberg v. Sweet, 488 U.S. 252 (1989), a tax on interstate telephone services that originated in or terminated in the state and that were billed to an in-state address.

[1085] Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). The state had defended on the basis that the tax was a "compensatory" one designed to make interstate commerce bear a burden already borne by intrastate commerce. The Court recognized the legitimacy of the defense, but it found the tax to meet none of the three criteria for classification as a valid compensatory tax. Id. at 333–44. *See also* South Central Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) (tax not justified as compensatory).

[1086] Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959)). The principle, as we have observed above, is a long-standing one under the Commerce Clause. *E.g.*, Welton v. Missouri, 91 U.S. 275 (1876).

dens on out-of-state goods or activities than on competing in-state goods or activities will be struck down as discriminatory under the Commerce Clause.[1087] In *Armco, Inc. v. Hardesty*,[1088] the Court voided as discriminatory the imposition on an out-of-state wholesaler of a state tax that was levied on manufacturing and wholesaling but that relieved manufacturers subject to the manufacturing tax of liability for paying the wholesaling tax. Even though the former tax was higher than the latter, the Court found that the imposition discriminated against the interstate wholesaler.[1089] A state excise tax on wholesale liquor sales, which exempted sales of specified local products, was held to violate the Commerce Clause.[1090] A state statute that granted a tax credit for ethanol fuel if the ethanol was produced in the state, or if it was produced in another state that granted a similar credit to the state's ethanol fuel, was found discriminatory in violation of the clause.[1091] The Court reached the same conclusion as to Maryland's personal income tax scheme, previously noted, which taxed Maryland residents on their worldwide income and nonresidents on income earned in the state and did not offer Maryland residents a full credit for income taxes they paid to other states, finding the scheme "inherently discriminatory." [1092]

[1087] Maryland v. Louisiana, 451 U.S. 725, 753–760 (1981). *But see* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617–619 (1981). *See also* Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994) (surcharge on in-state disposal of solid wastes that discriminates against companies disposing of waste generated in other states invalid).

[1088] 467 U.S. 638 (1984).

[1089] The Court applied the "internal consistency" test here too, in order to determine the existence of discrimination. 467 U.S. at 644–45. Thus, the wholesaler did not have to demonstrate it had paid a like tax to another state, only that if other states imposed like taxes it would be subject to discriminatory taxation. *See also* Tyler Pipe Industries v. Dept. of Revenue, 483 U.S. 232 (1987); American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987); Amerada Hess Corp. v. Director, New Jersey Taxation Div., 490 U.S. 66 (1989); Kraft Gen. Foods v. Iowa Dep't of Revenue, 505 U.S. 71 (1992).

[1090] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

[1091] New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988). *Compare* Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) (state intangibles tax on a fraction of the value of corporate stock owned by in-state residents inversely proportional to the corporation's exposure to the state income tax violated dormant commerce clause), *with* General Motors Corp. v. Tracy, 519 U.S. 278 (1997) (state imposition of sales and use tax on all sales of natural gas except sales by regulated public utilities, all of which were in-state companies, but covering all other sellers that were out-of-state companies did not violate dormant commerce clause because regulated and unregulated companies were not similarly situated).

[1092] Comptroller of the Treasury of Md. v. Wynne, 575 U.S. ___, No. 13–485, slip op. at 23 (2015) ("[T]he internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme is inherently discriminatory and operates as a tariff."). In so doing, the Court noted that Maryland could "cure the problem with its current system" by granting a full credit for taxes paid to other states, but it did "not foreclose the possibility" that Maryland could comply with the Commerce Clause in some other way. *Id.* at 25.

Expanding, although neither unexpectedly nor exceptionally, its dormant commerce jurisprudence, the Court in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,[1093] applied its nondiscrimination element of the doctrine to invalidate the state's charitable property tax exemption statute, which applied to nonprofit firms performing benevolent and charitable functions, but which excluded entities serving primarily out-of-state residents. The claimant here operated a church camp for children, most of whom resided out-of-state. The discriminatory tax would easily have fallen had it been applied to profit-making firms, and the Court saw no reason to make an exception for nonprofits. The tax scheme was designed to encourage entities to care for local populations and to discourage attention to out-of-state individuals and groups. "For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory. Entities in both categories are major participants in interstate markets. And, although the summer camp involved in this case may have a relatively insignificant impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant." [1094]

Benefit Relationship.—Although, in all the modern cases, the Court has stated that a necessary factor to sustain state taxes having an interstate impact is that the levy be fairly related to benefits provided by the taxing state, it has declined to be drawn into any consideration of the amount of the tax or the value of the benefits bestowed. The test rather is whether, as a matter of the first factor, the business has the requisite nexus with the state; if it does, then the tax meets the fourth factor simply because the business has enjoyed the opportunities and protections that the state has afforded it.[1095]

Regulation.—The modern standard of Commerce Clause review of state regulation of, or having an impact on, interstate com-

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[1093] 520 U.S. 564 (1997). The decision was 5-to-4 with a strong dissent by Justice Scalia, id. at 595, and a philosophical departure by Justice Thomas. Id. at 609.

[1094] 520 U.S. at 586.

[1095] Commonwealth Edison Co. v. Montana, 453 U.S. 609, 620–29 (1981). Two state taxes imposing flat rates on truckers, because they did not vary directly with miles traveled or with some other proxy for value obtained from the state, were found to violate this standard in American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 291 (1987). *But see* American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n, 545 U.S. 429 (2005), upholding imposition of a flat annual fee on all trucks engaged in intrastate hauling (including trucks engaged in interstate hauling that "top off" loads with intrastate pickups and deliveries) and concluding that levying the fee on a per-truck rather than per-mile basis was permissible in view of the objectives of defraying costs of administering various size, weight, safety, and insurance requirements.

merce was adopted in *Southern Pacific Co. v. Arizona*,[1096] although it was presaged in a series of opinions, mostly dissents, by Chief Justice Stone.[1097] *Southern Pacific* tested the validity of a state train-length law, justified as a safety measure. Revising a hundred years of doctrine, the Chief Justice wrote that whether a state or local regulation was valid depended upon a "reconciliation of the conflicting claims of state and national power [that] is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved." [1098] Save in those few cases in which Congress has acted, "this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests." [1099]

That the test to be applied was a balancing one, the Chief Justice made clear at length, stating that, in order to determine whether the challenged regulation was permissible, "matters for ultimate determination are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference." [1100]

The test today continues to be the Stone articulation, although the more frequently quoted encapsulation of it is from *Pike v. Bruce Church, Inc.*: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." [1101]

Obviously, the test requires "evenhanded[ness]." *Discrimination* in regulation is another matter altogether. When on its face or in its effect a regulation betrays "economic protectionism"—an in-

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[1096] 325 U.S. 761 (1945).

[1097] *E.g.*, DiSanto v. Pennsylvania, 273 U.S. 34, 43 (1927) (dissenting); California v. Thompson, 313 U.S. 109 (1941); Duckworth v. Arkansas, 314 U.S. 390 (1941); Parker v. Brown, 317 U.S. 341, 362–68 (1943) (alternative holding).

[1098] Southern Pacific Co. v. Arizona, 325 U.S. 761, 768–69 (1941).

[1099] 325 U.S. at 769.

[1100] 325 U.S. at 770–71.

[1101] 397 U.S. 137, 142 (1970) (citation omitted).

tent to benefit in-state economic interests at the expense of out-of-state interests—then no balancing is required. "When a state statute clearly discriminates against interstate commerce, it will be struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism, ... Indeed, when the state statute amounts to simple economic protectionism, a 'virtually *per se* rule of invalidity' has applied."[1102] Thus, an Oklahoma law that required coal-fired electric utilities in the state, producing power for sale in the state, to burn a mixture of coal containing at least 10% Oklahoma-mined coal was invalidated at the behest of a state that had previously provided virtually 100% of the coal used by the Oklahoma utilities.[1103] Similarly, the Court invalidated a state law that permitted interdiction of export of hydroelectric power from the state to neighboring states, when in the opinion of regulatory authorities the energy was required for use in the state; a state may not prefer its own citizens over out-of-state residents in access to resources within the state.[1104]

States may certainly promote local economic interests and favor local consumers, but they may not do so by adversely regulating out-of-state producers or consumers. In *Hunt v. Washington State Apple Advertising Comm'n*,[1105] the Court confronted a North Caro-

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[1102] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)). *See also* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986). In Maine v. Taylor, 477 U.S. 131 (1986), the Court upheld a protectionist law, finding a valid justification aside from economic protectionism. The state barred the importation of out-of-state baitfish, and the Court credited lower-court findings that legitimate ecological concerns existed about the possible presence of parasites and nonnative species in baitfish shipments.

[1103] Wyoming v. Oklahoma, 502 U.S. 437 (1992). *See also* Maryland v. Louisiana, 451 U.S. 725 (1981) (a tax case, invalidating a state first-use tax, which, because of exceptions and credits, imposed a tax only on natural gas moving out-of-state, because of impermissible discrimination).

[1104] New England Power Co. v. New Hampshire, 455 U.S. 331 (1982). *See also* Hughes v. Oklahoma, 441 U.S. 322 (1979) (voiding a ban on transporting minnows caught in the state for sale outside the state); Sporhase v. Nebraska, 458 U.S. 941 (1982) (invalidating a ban on the withdrawal of ground water from any well in the state intended for use in another state). These cases largely eviscerated a line of older cases recognizing a strong state interest in protection of animals and resources. *See* Geer v. Connecticut, 161 U.S. 519 (1896). *New England Power* had rather old antecedents. *E.g.*, West v. Kansas Gas Co., 221 U.S. 229 (1911); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

[1105] 432 U.S. 333 (1977). Other cases in which a state was attempting to promote and enhance local products and businesses include Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (state required producer of high-quality cantaloupes to pack them in the state, rather than in an adjacent state at considerably less expense, in order that the produce be identified with the producing state); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (state banned export of shrimp from state until hulls and heads were removed and processed, in order to favor canning and manufacture within the state).

lina requirement that closed containers of apples offered for sale or shipped into North Carolina carry no grade other than the applicable U.S. grade. Washington State mandated that all apples produced in and shipped in interstate commerce pass a much more rigorous inspection than that mandated by the United States. The inability to display the recognized state grade in North Carolina impeded marketing of Washington apples. The Court obviously suspected that the impact was intended, but, rather than strike down the state requirement as purposeful, it held that the regulation had the practical effect of discriminating, and, as no defense based on possible consumer protection could be presented, the Court invalidated the state law.[1106] State actions to promote local products and producers, of everything from milk[1107] to alcohol,[1108] may not be achieved through protectionism.

Even garbage transportation and disposition is covered by the negative commerce clause. A New Jersey statute that banned the importation of most solid or liquid wastes that originated outside the state was struck down as "an obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites"; the state could not justify the statute as a quarantine law designed to protect the public health because New Jersey left its landfills open to domestic waste.[1109] Further extending the application of the negative commerce clause to waste disposal,[1110] the Court, in *C & A Carbone, Inc. v. Town of*

[1106] That discriminatory effects will result in invalidation, as well as purposeful discrimination, is also drawn from Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[1107] *E.g.*, H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949). *See also* Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 (1976) (state effort to combat discrimination by other states against its milk through reciprocity provisions). In West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994), the Court held invalidly discriminatory against interstate commerce a state milk pricing order, which imposed an assessment on all milk sold by dealers to in-state retailers, the entire assessment being distributed to in-state dairy farmers despite the fact that about two-thirds of the assessed milk was produced out of state. The avowed purpose and undisputed effect of the provision was to enable higher-cost in-state dairy farmers to compete with lower-cost dairy farmers in other states.

[1108] Healy v. Beer Institute, Inc., 491 U.S. 324 (1989); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986). *See also* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (a tax case). *But cf.* Pharmaceutical Research and Mfrs. of America v. Walsh, 538 U.S. 644 (2003) (state prescription drug program providing rebates to participating companies does not regulate prices of out-of-state transactions and does not favor in-state over out-of-state companies).

[1109] City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978), *reaffirmed and applied* in Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992), and Fort Gratiot Sanitary Landfill v. Michigan Natural Resources Dept., 504 U.S. 353 (1992).

[1110] *See also* Oregon Waste Systems, Inc. v. Department of Envtl. Quality, 511 U.S. 93 (1994) (discriminatory tax).

Clarkstown,[1111] invalidated as discriminating against interstate commerce a local "flow control" ordinance that required all solid waste within the town to be processed at a designated transfer station before leaving the municipality. Underlying the restriction was the town's decision to have a solid waste transfer station built by a private contractor, rather than with public funds. To make the arrangement appealing to the contractor, the town guaranteed it a minimum waste flow, which the town ensured by requiring that all solid waste generated within the town be processed at the contractor's station.

The Court saw the ordinance as a form of economic protectionism, in that it "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility."[1112] The Court found that the town could not "justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment. To do so would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other states."[1113] The Court also found that the town's goal of "revenue generation is not a local interest that can justify discrimination against interstate commerce. Otherwise States could impose discriminatory taxes against solid waste originating outside the State."[1114] Moreover, the town had other means to raise revenue, such as subsidizing the facility through general taxes or municipal bonds.[1115] The Court did not deal with—indeed, did not notice—the fact that the local law conferred a governmentally granted monopoly—an exclusive franchise, indistinguishable from a host of local monopolies at the state and local level.[1116]

In *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*,[1117] the Court declined to apply *Carbone* where haulers were required to bring waste to facilities owned and operated by a state-created public benefit corporation instead of to a *private* processing facility, as was the case in *Carbone*. The Court

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[1111] 511 U.S. 383 (1994).

[1112] 511 U.S. at 392. The Court added: "Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate state interest." Id.

[1113] 511 U.S. at 393.

[1114] 511 U.S. at 393–94.

[1115] 511 U.S. at 394.

[1116] *See The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 149–59 (1994). Weight was given to this consideration by Justice O'Connor, 511 U.S. at 401 (concurring) (local law an excessive burden on interstate commerce), and by Justice Souter, id. at 410 (dissenting).

[1117] 550 U.S. 330 (2007).

found this difference constitutionally significant because "[d]isposing of trash has been a traditional government activity for years, and laws that favor the government in such areas—but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause. Applying the Commerce Clause test reserved for regulations that do not discriminate against interstate commerce, we uphold these ordinances because any incidental burden they may have on interstate commerce does not outweigh the benefits they confer . . . ." [1118]

In *Department of Revenue of Kentucky v. Davis*,[1119] the Court considered a challenge to the long-standing state practice of issuing bonds for public purposes while exempting interest on the bonds from state taxation.[1120] In *Davis*, a challenge was brought against Kentucky for such a tax exemption because it applied only to government bonds that Kentucky issued, and not to government bonds issued by other states. The Court, however, recognizing the long pedigree of such taxation schemes, applied the logic of *United Haulers Ass'n, Inc.*, noting that the issuance of debt securities to pay for public projects is a "quintessentially public function," and that Kentucky's differential tax scheme should not be treated like one that discriminated between privately issued bonds.[1121] In what may portend a significant change in dormant commerce clause doctrine, however, the Court declined to evaluate the governmental benefits of Kentucky's tax scheme versus the economic burdens it imposed, hold-

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[1118] 550 U.S. at 334. The Commerce Clause test referred to is the test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). "Under the *Pike* test, we will uphold a nondiscriminatory statute . . . 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'" Id. at 1797 (quoting *Pike*, 397 U.S. at 142). The fact that a state is seeking to protect itself from economic or other difficulties, is not, by itself, sufficient to justify barriers to interstate commerce. Edwards v. California, 314 U.S. 160 (1941) (striking down California effort to bar "Okies"—persons fleeing the Great Plains dust bowl during the Depression). *Cf.* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (without tying it to any particular provision of Constitution, Court finds a protected right of interstate movement). The right of travel is now an aspect of equal protection jurisprudence.

[1119] 128 S. Ct. 1801 (2008).

[1120] This exemption from state taxes is also generally made available to bonds issued by local governmental entities within a state.

[1121] 128 S. Ct. at 1810–11. The Court noted that "[t]here is no forbidden discrimination because Kentucky, as a public entity, does not have to treat itself as being 'substantially similar' to the other bond issuers in the market." Id. at 1811. Three members of the Court would have also found this taxation scheme constitutional under the "market participant" doctrine, despite the argument that the state, in this instance, was acting as a market regulator, not as a market participant. Id. at 1812–14 (Justice Souter, joined by Justices Stevens and Breyer).

ing that, at least in this instance, the "Judicial Branch is not institutionally suited to draw reliable conclusions." [1122]

Drawing the line between regulations that are facially discriminatory and regulations that necessitate balancing is not an easy task. Not every claim of unconstitutional protectionism has been sustained. Thus, in *Minnesota v. Clover Leaf Creamery Co.*,[1123] the Court upheld a state law banning the retail sale of milk products in plastic, nonreturnable containers but permitting sales in other nonreturnable, nonrefillable containers, such as paperboard cartons. The Court found no discrimination against interstate commerce, because both in-state and out-of-state interests could not use plastic containers, and it refused to credit a lower, state-court finding that the measure was intended to benefit the local pulpwood industry. In *Exxon Corp. v. Governor of Maryland*,[1124] the Court upheld a statute that prohibited producers or refiners of petroleum products from operating retail service stations in Maryland. The statute did not on its face discriminate against out-of-state companies, but, as there were no producers or refiners in Maryland, "the burden of the divestiture requirements" fell solely on such companies.[1125] The Court found, however, that "this fact does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level," [1126] as the statute does not "distinguish between in-state and out-of-state companies in the retail market." [1127]

Still a model example of balancing is Chief Justice Stone's opinion in *Southern Pacific Co. v. Arizona*.[1128] At issue was the validity of Arizona's law barring the operation within the state of trains of more than 14 passenger cars (no other state had a figure this low) or 70 freight cars (only one other state had a cap this low). First, the Court observed that the law substantially burdened interstate commerce. Enforcement of the law in Arizona, while train lengths

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[1122] 128 S. Ct. at 1817.
[1123] 449 U.S. 456, 470–74 (1981).
[1124] 437 U.S. 117 (1978).
[1125] 437 U.S. at 125.
[1126] 437 U.S. at 125.
[1127] 437 U.S. at 126.
[1128] 325 U.S. 761 (1945). Interestingly, Justice Stone had written the opinion for the Court in South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938), in which, in a similar case involving regulation of interstate transportation and proffered safety reasons, he had eschewed balancing and deferred overwhelmingly to the state legislature. *Barnwell Bros*. involved a state law that prohibited use on state highways of trucks that were over 90 inches wide or that had a gross weight over 20,000 pounds, with from 85% to 90% of the Nation's trucks exceeding these limits. This deference and refusal to evaluate evidence resurfaced in a case involving an attack on railroad "full-crew" laws. Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P. Railroad Co., 393 U.S. 129 (1968).

went unregulated or were regulated by varying standards in other states, meant that interstate trains of a length lawful in other states had to be broken up before entering Arizona. As it was not practicable to break up trains at the border, that act had to be done at yards quite removed, with the result that the Arizona limitation controlled train lengths as far east as El Paso, Texas, and as far west as Los Angeles. Nearly 95 percent of the rail traffic in Arizona was interstate. The other alternative was to operate in other states with the lowest cap, Arizona's, with the result that Arizona's law controlled the railroads' operations over a wide area.[1129] If other states began regulating at different lengths, as they would be permitted to do, the burden on the railroads would burgeon. Moreover, the additional number of trains needed to comply with the cap just within Arizona was costly, and delays were occasioned by the need to break up and remake lengthy trains.[1130]

Conversely, the Court found that, as a safety measure, the state cap had "at most slight and dubious advantage, if any, over unregulated train lengths." That is, although there were safety problems with longer trains, the shorter trains mandated by state law required increases in the numbers of trains and train operations and a consequent increase in accidents generally more severe than those attributable to longer trains. In short, the evidence did not show that the cap lessened rather than increased the danger of accidents.[1131]

Conflicting state regulations appeared in *Bibb v. Navajo Freight Lines.*[1132] There, Illinois required the use of contour mudguards on trucks and trailers operating on the state's highways, while adjacent Arkansas required the use of straight mudguards and banned contoured ones. At least 45 states authorized straight mudguards. The Court sifted the evidence and found it conflicting on the comparative safety advantages of contoured and straight mudguards. But, admitting that if that were all that was involved the Court would have to sustain the costs and burdens of outfitting with the required mudguards, the Court invalidated the Illinois law, because of the massive burden on interstate commerce occasioned by the necessity of truckers to shift cargoes to differently designed vehicles at the state's borders.

[1129] The concern about the impact of one state's regulation upon the laws of other states is in part a reflection of the *Cooley* national uniformity interest and partly a hesitation about the autonomy of other states. *E.g.*, CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 88–89 (1987); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 583–84 (1986).

[1130] Southern Pacific Co. v. Arizona, 325 U.S. 761, 771–75 (1945).

[1131] 325 U.S. at 775–79, 781–84.

[1132] 359 U.S. 520 (1959).

Arguably, the Court in more recent years has continued to stiffen the scrutiny with which it reviews state regulation of interstate carriers purportedly for safety reasons.[1133] Difficulty attends any evaluation of the possible developing approach, because the Court has spoken with several voices. A close reading, however, indicates that, although the Court is most reluctant to invalidate regulations that touch upon safety and that if safety justifications are not illusory it will not second-guess legislative judgments, the Court nonetheless will not accept, without more, state assertions of safety motivations. "Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." Rather, the asserted safety purpose must be weighed against the degree of interference with interstate commerce. "This 'weighing' . . . requires . . . a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." [1134]

Balancing has been used in other than transportation-industry cases. Indeed, the modern restatement of the standard was in such a case.[1135] There, the state required cantaloupes grown in the state to be packed there, rather than in an adjacent state, so that in-state packers' names would be associated with a superior product. Promotion of a local industry was legitimate, the Court, said, but it did not justify the substantial expense the company would have to incur to comply. State efforts to protect local markets, concerns, or consumers against outside companies have largely been unsuccessful. Thus, a state law that prohibited ownership of local investment-advisory businesses by out-of-state banks, bank holding companies, and trust companies was invalidated.[1136] The Court plainly thought the statute was protectionist, but instead of voiding it for that reason it held that the legitimate interests the state might have did not justify the burdens placed on out-of-state companies and that the state could pursue the accomplishment of legitimate ends through some intermediate form of regulation. In *Edgar v. MITE Corp.*,[1137] an Illinois regulation of take-over attempts of companies that had specified business contacts with the state, as applied to an at-

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[1133] Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).

[1134] Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670–71 (1981), (quoting Raymond Motor Transp. v. Rice, 434 U.S. 429, 441, 443 (1978)). Both cases invalidated state prohibitions of the use of 65-foot single-trailer trucks on state highways.

[1135] Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

[1136] Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980).

[1137] 457 U.S. 624 (1982) (plurality opinion).

tempted take-over of a Delaware corporation with its principal place of business in Connecticut, was found to constitute an undue burden, with special emphasis upon the extraterritorial effect of the law and the dangers of disuniformity. These problems were found lacking in the next case, in which the state statute regulated the manner in which purchasers of corporations chartered within the state and with a specified percentage of in-state shareholders could proceed with their take-over efforts. The Court emphasized that the state was regulating only its own corporations, which it was empowered to do, and no matter how many other states adopted such laws there would be no conflict. The burdens on interstate commerce, and the Court was not that clear that the effects of the law were burdensome in the appropriate context, were justified by the state's interests in regulating its corporations and resident shareholders.[1138]

In other areas, although the Court repeats balancing language, it has not applied it with any appreciable bite,[1139] but in most respects the state regulations involved are at most problematic in the context of the concerns of the Commerce Clause.

Foreign Commerce and State Powers

State taxation and regulation of commerce from abroad are also subject to negative commerce clause constraints. In the seminal case of *Brown v. Maryland*,[1140] in the course of striking down a state statute requiring "all importers of foreign articles or commodities," preparatory to selling the goods, to take out a license, Chief Justice Marshall developed a lengthy exegesis explaining why the law was void under both the Import-Export Clause[1141] and the Commerce Clause. According to the Chief Justice, an inseparable part of the right to import was the right to sell, and a tax on the sale of an article is a tax on the article itself. Thus, the taxing power of the states did not extend in any form to imports from abroad so long as they remain "the property of the importer, in his warehouse, in the original form or package" in which they were imported. This is the famous "original package" doctrine. Only when the importer parts with his importations, mixes them into his gen-

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[1138] CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987).

[1139] *E.g.*, Northwest Central Pipeline Corp. v. Kansas Corp. Comm'n, 489 U.S. 493, 525–26 (1989); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 472–74 (1981); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127–28 (1978). *But see* Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988).

[1140] 25 U.S. (12 Wheat.) 419 (1827).

[1141] Article I, § 10, cl. 2. This aspect of the doctrine of the case was considerably expanded in Low v. Austin, 80 U.S. (13 Wall.) 29 (1872), and subsequent cases, to bar states from levying nondiscriminatory, *ad valorem* property taxes upon goods that are no longer in import transit. This line of cases was overruled in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

eral property by breaking up the packages, may the state treat them as taxable property.

Obviously, to the extent that the Import-Export Clause was construed to impose a complete ban on taxation of imports so long as they were in their original packages, there was little occasion to develop a Commerce Clause analysis that would have reached only discriminatory taxes or taxes upon goods in transit.[1142] In other respects, however, the Court has applied the foreign commerce aspect of the clause more stringently against state taxation.

Thus, in *Japan Line, Ltd. v. County of Los Angeles,*[1143] the Court held that, in addition to satisfying the four requirements that govern the permissibility of state taxation of interstate commerce,[1144] "When a State seeks to tax the instrumentalities of foreign commerce, two additional considerations . . . come into play. The first is the enhanced risk of multiple taxation. . . . Second, a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." [1145] Multiple taxation is to be avoided with respect to interstate commerce by apportionment so that no jurisdiction may tax all the property of a multistate business, and the rule of apportionment is enforced by the Supreme Court with jurisdiction over all the states. However, the Court is unable to enforce such a rule against another country, and the country of the domicile of the business may impose a tax on full value. Uniformity could be frustrated by disputes over multiple taxation, and trade disputes could result.

Applying both these concerns, the Court invalidated a state tax, a nondiscriminatory, *ad valorem* property tax, on foreign-owned instrumentalities, *i.e.*, cargo containers, of international commerce. The containers were used exclusively in international commerce and were based in Japan, which did in fact tax them on full value. Thus, there was the actuality, not only the risk, of multiple taxation. National

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[1142] *See*, *e.g.*, Halliburton Oil Well Co. v. Reily, 373 U.S. 64 (1963); Minnesota v. Blasius, 290 U.S. 1 (1933). After the holding in *Michelin Tire*, the two clauses are now congruent. The Court has observed that the two clauses are animated by the same policies. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449–50 n.14 (1979).

[1143] 441 U.S. 434 (1979).

[1144] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). A state tax failed to pass the nondiscrimination standard in Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance, 505 U.S. 71 (1992). Iowa imposed an income tax on a unitary business operating throughout the United States and in several foreign countries. It taxed the dividends that a corporation received from its foreign subsidiaries, but not the dividends it received from its domestic subsidiaries. Therefore, there was a facial distinction between foreign and domestic commerce.

[1145] 441 U.S. at 446, 448. *See also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993) (sustaining state sales tax as applied to lease of containers delivered within the state and used in foreign commerce).

uniformity was endangered, because, although California taxed the Japanese containers, Japan did not tax American containers, and disputes resulted.[1146]

On the other hand, the Court has upheld a state tax on all aviation fuel sold within the state as applied to a foreign airline operating charters to and from the United States. The Court found the *Complete Auto* standards met, and it similarly decided that the two standards specifically raised in foreign commerce cases were not violated. First, there was no danger of double taxation because the tax was imposed upon a discrete transaction—the sale of fuel—that occurred within only one jurisdiction. Second, the one-voice standard was satisfied, because the United States had never entered into any compact with a foreign nation precluding such state taxation, having only signed agreements with others, which had no force of law, aspiring to eliminate taxation that constituted impediments to air travel.[1147] Also, a state unitary-tax scheme that used a worldwide-combined reporting formula was upheld as applied to the taxing of the income of a domestic-based corporate group with extensive foreign operations.[1148]

Extending *Container Corp.*, the Court in *Barclays Bank v. Franchise Tax Bd. of California*,[1149] upheld the state's worldwide-combined reporting method of determining the corporate franchise tax owed by unitary multinational corporations, as applied to a foreign corporation. The Court determined that the tax easily satisfied three of the four-part *Complete Auto* test—nexus, apportionment, and relation to state's services—and concluded that the nondiscrimination principle—perhaps violated by the letter of the law—could be met by the discretion accorded state officials. As for the two additional factors, as outlined in *Japan Lines*, the Court pronounced itself satisfied. Multiple taxation was not the inevitable result of the tax, and that risk would not be avoided by the use of any reasonable alternative. The tax, it was found, did not impair federal uniformity or prevent the Federal Government from speaking with one voice in international trade, in view of the fact that Congress had rejected proposals that would have preempted

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[1146] 441 U.S. at 451–57. For income taxes, the test is more lenient, accepting not only the risk but the actuality of some double taxation as something simply inherent in accounting devices. Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 187–192 (1983).

[1147] Wardair Canada v. Florida Dep't of Revenue, 477 U.S. 1, 10 (1986).

[1148] Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983). The validity of the formula as applied to domestic corporations with foreign parents or to foreign corporations with foreign parents or foreign subsidiaries, so that some of the income earned abroad would be taxed within the taxing state, is a question of some considerable dispute.

[1149] 512 U.S. 298 (1994).

California's practice.[1150] The result of the case, perhaps intended, is that foreign corporations have less protection under the negative commerce clause.[1151]

The power to regulate foreign commerce was always broader than the states' power to tax it, an exercise of the "police power" recognized by Chief Justice Marshall in *Brown v. Maryland*.[1152] That this power was constrained by notions of the national interest and preemption principles was evidenced in the cases striking down state efforts to curb and regulate the actions of shippers bringing persons into their ports.[1153] On the other hand, quarantine legislation to protect the states' residents from disease and other hazards was commonly upheld though it regulated international commerce.[1154] A state game-season law applied to criminalize the possession of a dead grouse imported from Russia was upheld because of the practical necessities of enforcement of domestic law.[1155]

Nowadays, state regulation of foreign commerce is likely to be judged by the extra factors set out in *Japan Line*.[1156] Thus, the application of a state civil rights law to a corporation transporting passengers outside the state to an island in a foreign province was sustained in an opinion emphasizing that, because of the particularistic geographic situation the foreign commerce involved was more conceptual than actual, there was only a remote hazard of conflict between state law and the law of the other country and little if any prospect of burdening foreign commerce.

[1150] Reliance could not be placed on Executive statements, the Court explained, because "the Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" 512 U.S. at 329. "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting." Id. at 330. Dissenting Justice Scalia noted that, although the Court's ruling correctly restored preemptive power to Congress, "it permits the authority to be exercised by silence. Id. at 332."

[1151] *The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 139–49 (1993).

[1152] 25 U.S. (12 Wheat.) 419, 443–44 (1827).

[1153] New York City v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding reporting requirements imposed on ships' masters), *overruled by* Henderson v. Mayor of New York, 92 U.S. 259 (1876); *Passenger Cases*, 48 U.S. (7 How.) 283 (1849)(1849); Chy Lung v. Freeman, 92 U.S. 275 (1876).

[1154] Campagnie Francaise De Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902); Louisiana v. Texas, 176 U.S. 1 (1900); Morgan v. Louisiana, 118 U.S. 455 (1886).

[1155] New York ex rel. Silz v. Hesterberg, 211 U.S. 31 (1908).

[1156] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 456 n.20 (1979) (construing Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948)).

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

In *Gibbons v. Ogden*,[1157] the Court, speaking by Chief Justice Marshall, held that New York legislation that excluded from the navigable waters of that state steam vessels enrolled and licensed under an act of Congress to engage in the coasting trade was in conflict with the federal law and hence void.[1158] The result, said the Chief Justice, was required by the Supremacy Clause, which proclaims that statutes and treaties as well as the Constitution itself supersede state laws that "interfere with, or are contrary to" their dictates. "In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." [1159]

Since the turn of the 20th century, federal legislation, primarily but not exclusively under the Commerce Clause, has penetrated deeper and deeper into areas once occupied by the regulatory power of the states. One result is that state laws on subjects about which Congress has legislated have been more and more frequently attacked as being incompatible with the acts of Congress and hence invalid under the supremacy clause.[1160]

"The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end

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[1157] 22 U.S. (9 Wheat.) 1 (1824).

[1158] A modern application of Gibbons v. Ogden is Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), in which the Court, relying on the present version of the licensing statute used by Chief Justice Marshall, struck down state laws curtailing the operations of federally licensed vessels. In the course of the *Douglas* opinion, the Court observed that, "[a]lthough it is true that the Court's view in *Gibbons* of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators, its provisions have been repeatedly reenacted in substantially the same form. We can safely assume that Congress was aware of the holding, as well as the criticism, of a case so renowned as *Gibbons*. We have no doubt that Congress has ratified the statutory interpretation of *Gibbons* and its progeny." Id. at 278–79.

[1159] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824). *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). Although preemption is basically constitutional in nature, deriving its forcefulness from the Supremacy Clause, it is much more like statutory decisionmaking, in that it depends upon an interpretation of an act of Congress in determining whether a state law is ousted. *E.g.*, Douglas v. Seacoast Products, Inc., 431 U.S. 265, 271–72 (1977). *See also* Swift & Co. v. Wickham, 382 U.S. 111 (1965). "Any such pre-emption or conflict claim is of course grounded in the Supremacy Clause of the Constitution: if a state measure conflicts with a federal requirement, the state provision must give way. The basic question involved in these cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." Id. at 120.

[1160] Cases considered under this heading are overwhelmingly about federal legislation based on the Commerce Clause, but the principles enunciated are identical whatever source of power Congress uses. Therefore, cases arising under legislation based on other powers are cited and treated interchangeably.

in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." [1161] As Justice Black once explained in a much quoted exposition of the matter: "There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [1162]

Before setting out in their various forms the standards and canons to which the Court formally adheres, one must still recognize the highly subjective nature of their application. As an astute observer long ago observed, "the use or non-use of particular tests, as well as their content, is influenced more by judicial reaction to the desirability of the state legislation brought into question than by metaphorical sign-language of 'occupation of the field.' And it would seem that this is largely unavoidable. The Court, in order to determine an unexpressed congressional intent, has undertaken the task of making the independent judgment of social values that Congress has failed to make. In making this determination, the Court's evaluation of the desirability of overlapping regulatory schemes or overlapping criminal sanctions cannot but be a substantial factor." [1163]

[1161] Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274, 285–86 (1971).

[1162] Hines v. Davidowitz, 312 U.S. 52, 67 (1941). This case arose under the immigration power of clause 4.

[1163] Cramton, *Pennsylvania v. Nelson: A Case Study in Federal Preemption*, 26 U. CHI. L. REV. 85, 87–88 (1956). "The [Court] appears to use essentially the same reasoning process in a case nominally hinging on preemption as it has in past cases in which the question was whether the state law regulated or burdened interstate commerce. [The] Court has adopted the same weighing of interests approach in preemption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the preemption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market. On the other hand, when the Court has been satisfied that valid local interests, such as those in safety or in the reputable operation of local business, outweigh the restrictive effect on interstate commerce, the Court has rejected the preemption argument and allowed

Preemption Standards.—Until roughly the New Deal, as recited above, the Supreme Court applied a doctrine of "dual federalism," under which the Federal Government and the states were separate sovereigns, each preeminent in its own fields but lacking authority in the other's. This conception affected preemption cases, with the Court taking the view, largely, that any congressional regulation of a subject effectively preempted the field and ousted the states.[1164] Thus, when Congress entered the field of railroad regulation, the result was invalidation of many previously enacted state measures. Even here, however, safety measures tended to survive, and health and safety legislation in other areas was protected from the effects of federal regulatory actions.

In the 1940s, the Court began to develop modern standards, still recited and relied on, for determining when preemption occurred.[1165] All modern cases recite some variation of the basic standards. "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone. To discern Congress's intent we examine the explicit statutory language and the structure and purpose of the statute." [1166] Congress's intent to supplant state authority in a particular field may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." [1167] Because preemption cases, when the statute contains no express provision, theoretically turn on statutory construction, generalizations about them can carry one only so far. Each case must construe a different federal statute with a distinct legislative history. If the statute and the legislative history are silent or unclear, the Supreme Court has developed general criteria which it purports to use in determining the preemptive reach.

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state regulation to stand." Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 217 (1959) (quoted approvingly as a "thoughtful student comment" in G. GUNTHER, CONSTITUTIONAL LAW 297 (12th ed. 1991)).

[1164] *E.g.*, Charleston & W. Car. Ry. v. Varnville Co., 237 U.S. 597, 604 (1915). *But see* Corn Products Refining Co. v. Eddy, 249 U.S. 427, 438 (1919).

[1165] *E.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941); Cloverleaf Butter v. Patterson, 315 U.S. 148 (1942); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); California v. Zook, 336 U.S. 725 (1949).

[1166] Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992) (internal quotation marks and case citations omitted). Conversely, a *state's* intentions with regard to its own law "is relevant only as it may relate to 'the scope of the state law that Congress understood would survive'" the preemptive effect of federal law or "the nature of the effect of state law on" on the subject matter Congress is regulating. Gobeille v. Liberty Mut. Ins. Co., 577 U.S. ___, No. 14–181, slip op. at 11 (2016) (internal quotations omitted).

[1167] Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); FMC Corp. v. Holliday, 498 U.S. 52 (1990); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604–605 (1991).

"Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, . . . and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [1168] However, "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matters permits no other conclusion, or that the Congress has unmistakably so ordained." [1169] At the same time, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." [1170]

In the final analysis, "the generalities" that may be drawn from the cases do not decide them. Rather, "the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances." [1171]

[1168] Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (internal quotation marks and case citations omitted). The same or similar language is used throughout the preemption cases. *E.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); *id.* at 532–33 (Justice Blackmun concurring and dissenting); *id.* at 545 (Justice Scalia concurring and dissenting); Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604–05 (1991); English v. General Electric Co., 496 U.S. 72, 78–80 (1990); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Comm'n, 461 U.S. 190, 203–04 (1983); Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[1169] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963); Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981). Where Congress legislates in a field traditionally occupied by the States, courts should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm., 461 U.S. 190, 206 (1983) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Nonetheless, this assumption may go only so far. *See, e.g.*, Pliva, Inc. v. Mensing, 564 U.S. ___, No. 09–993, slip op. at 15 (2011) (Thomas, J., plurality opinion) ("[T]he text of the Clause—that federal law shall be supreme, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding'—plainly contemplates conflict pre-emption by describing federal law as effectively repealing contrary state law.").

[1170] Free v. Bland, 369 U.S. 663 (1962).

[1171] Union Brokerage Co. v. Jensen, 322 U.S. 202, 211 (1944) (per Justice Frankfurter).

The Standards Applied.—As might be expected from the *caveat* just quoted, any overview of the Court's preemption decisions can only make the field seem tangled, and to some extent it is. But some threads may be extracted.

Express Preemption. Of course, it is possible for Congress to write preemptive language that clearly and cleanly prescribes or does not prescribe displacement of state laws in an area.[1172] Provisions governing preemption can be relatively interpretation free.[1173] For example, a prohibition of state taxes on carriage of air passengers "or on the gross receipts derived therefrom" was held to preempt a state tax on airlines, described by the state as a personal property tax, but based on a percentage of the airline's gross income. "The manner in which the state legislature has described and categorized [the tax] cannot mask the fact that the purpose and effect of the provision are to impose a levy upon the gross receipts of airlines." [1174]

But, more often than not, express preemptive language may be ambiguous or at least not free from conflicting interpretation. Thus, the Court was divided with respect to whether a provision of the Airline Deregulation Act proscribing the states from having and enforcing laws "relating to rates, routes, or services of any air car-

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[1172] Regulations as well as statutes can preempt. Agency regulations, when Congress has expressly or implied empowered these bodies to preempt, are "the supreme law of the land" and can displace state law. *E.g.*, Smiley v. Citibank, 517 U.S. 735 (1996); City of New York v. FCC, 486 U.S. 57, 63–64 (1988); Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982). Federal common law, *i.e.*, law applied by the courts in the absence of explicit statutory directive, and respecting uniquely federal interests, can also displace state law. *See* Boyle v. United Technologies Corp., 487 U.S. 500 (1988) (Supreme Court promulgated common-law rule creating government-contractor defense in tort liability suits, despite Congress's having considered and failed to enact bills doing precisely this); Westfall v. Erwin, 484 U.S. 292 (1988) (civil liability of federal officials for actions taken in the course of their duty). Finally, ordinances of local governments are subject to preemption under the same standards as state law. Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707 (1985).

[1173] Thus, § 408 of the Federal Meat Inspection Act, as amended by the Wholesome Meat Act, 21 U.S.C. § 678, provides that "[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any state . . . ." *See* Jones v. Rath Packing Co., 430 U.S. 519, 528–32 (1977). *See also* National Meat Ass'n v. Harris, 565 U.S. ___, No. 10–224, slip op. (2012) (broad preemption of all state laws on slaughterhouse activities regardless of conflict with federal law). Similarly, much state action is saved by the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), which states that "[n]othing in this chapter shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder." For examples of other express preemptive provisions, *see* Norfolk & Western Ry. v. American Train Dispatchers' Ass'n, 499 U.S. 117 (1991); Exxon Corp. v. Hunt, 475 U.S. 355 (1986). *See also* Department of Treasury v. Fabe, 508 U.S. 491 (1993).

[1174] Aloha Airlines v. Director of Taxation, 464 U.S. 7, 13–14 (1983).

rier" applied to displace state consumer-protection laws regulating airline fare advertising.[1175] Delimiting the scope of an exception in an express preemption provision can also present challenges. For example, the Immigration Control and Reform Act of 1986 (IRCA), which imposed the first comprehensive federal sanctions against employing aliens not authorized to work in the United States, preempted "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ unauthorized aliens." [1176] In *Chamber of Commerce of the United States v. Whiting*, a majority of the Court adopted a straightforward "plain meaning" approach to uphold a 2007 Arizona law that called for the suspension or revocation of the business licenses (including articles of incorporation and like documents) of Arizona employers found to have knowingly hired an unauthorized alien.[1177] By contrast, two dissenting opinions were troubled that the Arizona sanction was far more severe than that authorized for similar violations under either federal law or state laws in force prior to IRCA. The dissents interpreted IRCA's "licensing and similar laws" language narrowly to cover only businesses that primarily recruit or refer workers for employment, or businesses that have been found by federal authorities to have violated federal sanctions, respectively.[1178]

At issue in *AT&T Mobility, LLC v. Concepcion* [1179] was a savings provision of the Federal Arbitration Act (FAA) that made arbi-

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[1175] Morales v. TWA, 504 U.S. 374 (1992). The section, 49 U.S.C. § 1305(a)(1), was held to preempt state rules on advertising. *See also* American Airlines, Inc. v. Wolens, 513 U.S. 219 (1995); Nw, Inc. v. Ginsberg, 572 U.S. ___, No. 12–462, slip op. (2014) (holding that the Airline Deregulation Act's preemption provision applied to state common law claims, including an airline customer's claim for breach of the implied covenant of good faith and fair dealing). *But see* Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. ___, No. 12–52, slip op. (2013) (provision of Federal Aviation Administration Authorization Act of 1994 preempting state law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property" held not to preempt state laws on the disposal of towed vehicles by towing companies).

[1176] 8 U.S.C. § 1324a(h)(2).

[1177] 563 U.S. 582 (2011). The *Whiting* majority notably began its analysis of whether the challenged Arizona statute was preempted by federal law with a statement that "[w]hen a federal law contains an express preemption clause, we 'focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent.'" *Id.* at 594. Subsequently, in writing for the majority in *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*, Justice Thomas cited this language from *Whiting* in support of the proposition that no presumption against preemption is to be applied when a congressional enactment includes an express preemption clause. *See* 579 U.S. ___, No. 15–233, slip op. at 9 (2016) (declining to apply a presumption against preemption in finding that the federal Bankruptcy Code preempts a Puerto Rico bankruptcy law).

[1178] *Whiting*, 563 U.S. at 612 (Breyer, J., dissenting); *id.* at 631 (Sotomayor, J., dissenting).

[1179] 563 U.S. ___, No. 09–893, slip op. (2011).

tration provisions in contracts "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [1180] An arbitration provision in their cellular telephone contract forbade plaintiffs from seeking arbitration of an allegedly fraudulent practice by AT&T on a class basis. The Court closely divided over whether the FAA saving clause made this anti-class arbitration provision attackable under California law against class action waivers in consumer contracts, or whether the savings clause looked solely to grounds for revoking the cellular contract that had nothing to do with the arbitration provision.[1181] Another case focused on a preemption clause that preempted certain laws of "a State [or] political subdivision of a State" regulating motor carriers, but excepted "[State] safely regulatory authority." The Court interpreted the exception to allow a safety regulation adopted by a city: "[a]bsent a clear statement to the contrary, Congress's reference to the 'regulatory authority of a State' should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts." [1182]

Perhaps the broadest preemption section ever enacted, § 514 of the Employment Retirement Income Security Act of 1974 (ERISA), is so constructed that the Court has been moved to comment that the provisions "are not a model of legislative drafting." [1183] The section declares that the statute shall "supersede any and all State laws insofar as they now or hereafter relate to any employee benefit plan," but saves to the States the power to enforce "any law . . . which regulates insurance, banking, or securities," except that an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts.[1184] Interpretation of the provisions has resulted in contentious and divided Court opinions.[1185]

[1180] 9 U.S.C. § 2.

[1181] Writing for the Court, Justice Scalia held, *inter alia*, that the saving clause was not intended to open arbitration provisions themselves to possible scrutiny. 563 U.S. ___, No. 09–893, slip op. (2011). The four dissenting Justices interpreted the saving clause as allowing use of the California law to attack the anti-class arbitration contract provision. Id. (Breyer, J. dissenting).

[1182] City of Columbus v. Ours Garage and Wrecker Serv., 536 U.S. 424, 429 (2002).

[1183] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985), repeated in FMC Corp. v. Holliday, 498 U.S. 52, 58 (1991).

[1184] 29 U.S.C. §§ 1144(a), 1144(b)(2)(A), 1144(b)(2)(B). The Court has described this section as a "virtually unique pre-emption provision." Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n.26 (1983). *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138–139 (1990); *see also* id. at 142–45 (describing and applying another preemption provision of ERISA).

[1185] Gobeille v. Liberty Mut. Ins. Co., 577 U.S. ___, No. 14–181, slip op. at 9 (2016) (holding that ERISA—with its extensive reporting, disclosure, and recordkeep-

Also illustrative of the judicial difficulty with ambiguous preemption language are the fractured opinions in *Cipollone*, in which the Court had to decide whether sections of the Federal Cigarette Labeling and Advertising Act, enacted in 1965 and 1969, preempted state common-law actions against a cigarette company for the alleged harm visited on a smoker.[1186] The 1965 provision barred the requirement of any "statement" relating to smoking health, other

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ing requirements that are "central to, and an essential part of," its uniform plan administration system—preempted a Vermont law requiring certain entities, including health insurers, to report health care related information to a state agency); Aetna Health, Inc. v. Davila, 542 U.S. 200 (2004) (suit brought against HMO under state health care liability act for failure to exercise ordinary care when denying benefits is preempted); Boggs v. Boggs, 520 U.S. 833 (1997) (decided not on the basis of the express preemption language but instead by implied preemption analysis); De Buono v. NYSA–ILA Med. & Clinical Servs. Fund, 520 U.S. 806 (1997); Cal. Div. of Labor Standards Enf't v. Dillingham Constr., Inc., 519 U.S. 316 (1997); N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) (no preemption of statute that required hospitals to collect surcharges from patients covered by a commercial insurer but not from patients covered by Blue Cross/Blue Shield plan); John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86 (1993) (ERISA's fiduciary standards, not conflicting state insurance laws, apply to insurance company's handling of general account assets derived from participating group annuity contract); District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125 (1992) (law requiring employers to provide health insurance coverage, equivalent to existing coverage, for workers receiving workers' compensation benefits); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) (ERISA preempts state common-law claim of wrongful discharge to prevent employee attaining benefits under plan covered by ERISA); FMC Corp. v. Holliday, 498 U.S. 52 (1990) (provision of state motor-vehicle financial-responsibility law barring subrogation and reimbursement from claimant's tort recovery for benefits received from a self-insured health-care plan preempted by ERISA); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (state law requiring employers to provide a one-time severance payment to employees in the event of a plant closing held not preempted by 5–4 vote); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (state law mandating that certain minimum mental-health-care benefits be provided to those insured under general health-insurance policy or employee health-care plan is a law "which regulates insurance" and is not preempted); Shaw v. Delta Air Lines, 463 U.S. 85 (1983) (state law forbidding discrimination in employee benefit plans on the basis of pregnancy not preempted, because of another saving provision in ERISA, and provision requiring employers to pay sick-leave benefits to employees unable to work because of pregnancy not preempted under construction of coverage sections, but both laws "relate to" employee benefit plans); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) (state law prohibiting plans from reducing benefits by amount of workers' compensation awards "relates to" employee benefit plan and is preempted).

[1186] Cipollone v. Liggett Group, 505 U.S. 504 (1992). The decision relied on two controversial rules of construction. First, the courts should interpret narrowly provisions that purport to preempt state police-power regulations, and, second, that when a law has express preemption language courts should look only to that language and presume that when the preemptive reach of a law is defined Congress did not intend to go beyond that reach, so that field and conflict preemption will not be found. Id. at 517; and id. at 532–33 (Justice Blackmun concurring and dissenting). Both parts of this canon are departures from established law. Narrow construction when state police powers are involved has hitherto related to *implied* preemption, not *express* preemption, and courts generally have applied ordinary-meaning construction to such statutory language; further, courts have not precluded the finding of conflict

than what the federal law imposed, and the 1969 provision barred the imposition of any "requirement or prohibition based on smoking and health" by any "State law." It was, thus, a fair question whether common-law claims, based on design defect, failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud, were preempted or whether only positive state enactments came within the scope of the clauses. Two groups of Justices concluded that the 1965 section reached only positive state law and did not preempt common-law actions;[1187] different alignments of Justices concluded that the 1969 provisions did reach common-law claims, as well as positive enactments, and did preempt some of the claims insofar as they in fact constituted a requirement or prohibition based on smoking health.[1188]

Little clarification of the confusing *Cipollone* decision and opinions resulted in the cases following, although it does seem evident that the attempted distinction limiting courts to the particular language of preemption when Congress has spoken has not prevailed. At issue in *Medtronic, Inc. v. Lohr*[1189] was the Medical Device Amendments (MDA) of 1976, which prohibited states from adopting or continuing in effect "with respect to a [medical] device" any "requirement" that is "different from, or in addition to" the applicable federal requirement and that relates to the safety or effectiveness of the device.[1190] The issue was whether a common-law tort obligation imposed a "requirement" that was different from or in addition to any federal requirement. The device, a pacemaker lead, had come on the market not pursuant to the rigorous FDA test but rather as determined by the FDA to be "substantially equivalent" to a device previously on the market, a situation of some import to at least some of the Justices.

Unanimously, the Court determined that a defective design claim was not preempted and that the MDA did not prevent states from providing a damages remedy for violation of common-law duties that paralleled federal requirements. But the Justices split 4–1–4 with

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preemption, though perhaps field preemption, because of the existence of some express preemptive language. *See* id. at 546–48 (Justice Scalia concurring and dissenting).

[1187] 505 U.S. at 518–19 (opinion of the court), 533–34 (Justice Blackmun concurring).

[1188] 505 U.S. at 520–30 (plurality opinion), 535–43 (Justice Blackmun concurring and dissenting), 548–50 (Justice Scalia concurring and dissenting).

[1189] 518 U.S. 470 (1996). *See also* CSX Transportation, Inc. v. Easterwood, 507 U.S. 658 (1993) (under Federal Railroad Safety Act, a state common-law claim alleging negligence for operating a train at excessive speed is preempted, but a second claim alleging negligence for failure to maintain adequate warning devices at a grade crossing is not preempted); Norfolk So. Ry. v. Shanklin, 529 U.S. 344 (2000) (applying *Easterwood*).

[1190] 21 U.S.C. § 350k(a).

respect to preemption of various claims relating to manufacturing and labeling. FDA regulations, which a majority deferred to, limited preemption to situations in which a particular state requirement threatens to interfere with a specific federal interest. Moreover, the common-law standards were not specifically developed to govern medical devices and their generality removed them from the category of requirements "with respect to" specific devices. However, five Justices did agree that common-law requirements could be, just as statutory provisions, "requirements" that were preempted, though they did not agree on the application of that view.[1191]

Following *Cipollone*, the Court observed that, although it "need not go beyond" the statutory preemption language, it did need to "identify the domain expressly pre-empted" by the language, so that "our interpretation of that language does not occur in a contextual vacuum." That is, it must be informed by two presumptions about the nature of preemption: the presumption that Congress does not cavalierly preempt common-law causes of action and the principle that Congress's purpose is the ultimate touchstone.[1192]

The Court continued to struggle with application of express preemption language to state common-law tort actions in *Geier v. American Honda Motor Co.*[1193] The National Traffic and Motor Vehicle Safety Act contained both a preemption clause, prohibiting states from applying "any safety standard" different from an applicable federal standard, and a "saving clause," providing that "compliance with" a federal safety standard "does not exempt any person from any liability under common law." The Court determined that the express preemption clause was inapplicable, because the saving clause implied that some number of state common law actions would be saved. However, despite the saving clause, the Court ruled that a common law tort action seeking damages for failure to equip a car with a front seat airbag, in addition to a seat belt, was preempted. According to the Court, allowing the suit would frustrate the purpose of a Federal Motor Vehicle Safety Standard that specifically

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[1191] The dissent, by Justice O'Connor and three others, would have held preempted the latter claims, 518 U.S. at 509, whereas Justice Breyer thought that common-law claims would sometimes be preempted, but not here. Id. at 503 (concurring).

[1192] 518 U.S. at 484–85. *See also* id. at 508 (Justice Breyer concurring); Freightliner Corp. v. Myrick, 514 U.S. 280, 288–89 (1995); Barnett Bank v. Nelson, 517 U.S. 25, 31 (1996); California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc., 519 U.S. 316, 334 (1997) (Justice Scalia concurring); Boggs v. Boggs, 520 U.S. 833 (1997) (using "stands as an obstacle" preemption analysis in an ERISA case, having express preemptive language, but declining to decide when implied preemption may be used despite express language), and id. at 854 (Justice Breyer dissenting) (analyzing the preemption issue under both express and implied standards).

[1193] 529 U.S. 861 (2000).

had intended to give manufacturers a choice among a variety of "passive restraint" systems for the applicable model year.[1194] The Court's holding makes clear, contrary to the suggestion in *Cipollone*, that existence of express preemption language does not foreclose the alternative operation of conflict (in this case "frustration of purpose") preemption.[1195]

Field Preemption. Where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," [1196] states are ousted from the field. Still a paradigmatic example of field preemption is *Hines v. Davidowitz*,[1197] in which the Court held that a new federal law requiring the registration of all aliens in the country precluded enforcement of a pre-existing state law mandating registration of aliens within the state.[1198] Adverting to the supremacy of national power in foreign relations and the sensitivity of the relationship between the regulation of aliens and the conduct of foreign affairs, the Court had little difficulty declaring the entire field to have been occupied by federal law.[1199] Similarly, in *Pennsylvania v. Nelson*,[1200] the Court

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[1194] The Court focused on the word "exempt" to give the saving clause a narrow application—as "simply bar[ring] a special kind of defense, . . . that compliance with a federal safety standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one." 529 U.S. at 869. *But cf.* Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) (interpreting preemption language and saving clause in Federal Boat Safety Act as not precluding a state common law tort action).

[1195] *Compare* Williamson v. Mazda Motor of America, Inc., 562 U.S. ___, No. 08–1314, slip op. (2011) (applying same statute as *Geir*, and later version of same regulation, no conflict preemption found of common law suit based on rear seat belt type, because giving manufacturers a choice on the type of rear seat belt to install was not a "significant objective" of the statute or regulation). For a decision applying express preemption language to a variety of state common law claims, see Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005) (interpreting FIFRA, the federal law governing pesticides).

[1196] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The case also is the source of the oft-quoted maxim that when Congress legislates in a field traditionally occupied by the states, courts should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Id.

[1197] 312 U.S. 52 (1941).

[1198] In Arizona v. United States, the Court struck down state penalties for violating federal alien registration requirements, emphasizing that "[w]here Congress occupies an entire field, . . . even complementary state regulation is impermissible." 567 U.S. ___, No. 11–182, slip op. at 10 (2012) The same case also struck down on preemption grounds state sanctions on unauthorized aliens who work or seek employment, id. at 12–15, and authority for state officers to make warrantless arrests based on possible deportability under federal immigration law. Id. By contrast, a regime of state immigration status checks with federal authorities was found not to be preempted on its face because the regime was supported by federal law facilitating federal-state cooperation in immigration enforcement.

[1199] The Court also said that courts must look to see whether under the circumstances of a particular case, the state law "stands as an obstacle to the accomplish-

invalidated as preempted a state law punishing sedition against the National Government. The Court enunciated a three-part test: (1) the pervasiveness of federal regulation, (2) federal occupation of the field as necessitated by the need for national uniformity, and (3) the danger of conflict between state and federal administration.[1201]

Rice itself held that a federal system of regulating the operations of warehouses and the rates they charged completely occupied the field and ousted state regulation.[1202]

Field preemption analysis often involves delimiting the subject of federal regulation and determining whether a federal law has regulated part of the field, however defined, or the whole area, so that state law cannot even supplement the federal.[1203] Illustrative of this point is the Court's holding that the Atomic Energy Act's preemption of the safety aspects of nuclear power did not invalidate a state law conditioning construction of nuclear power plants on a finding by a state agency that adequate storage and disposal facilities were available to treat nuclear wastes, because "economic" regulation of power generation has traditionally been left to the states—an arrangement maintained by the Act—and because the state law could be justified as an economic rather than a safety regulation.[1204]

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ment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. That standard is obviously drawn from conflict preemption, for the two standards are frequently intermixed. *See* AT&T Mobility, LLC v. Concepcion, 563 U.S. ___, No. 09–893, slip op. at 9–18 (2011) (Scalia, J.). Nonetheless, not all state regulation is precluded. De Canas v. Bica, 424 U.S. 351 (1976) (upholding a state law penalizing the employment of an illegal alien, the case arising before enactment of the federal law doing the same thing).

[1200] 350 U.S. 497 (1956).

[1201] 350 U.S. at 502–05. Obviously, there is a noticeable blending into conflict preemption.

[1202] Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[1203] *See* Kurns v. Railroad Friction Products Corp., 565 U.S. ___, No. 10–879, slip op. (2012) (state suit by the estate of maintenance engineer alleging manufacturer's defective design of locomotive components and failure to warn of accompanying dangers held preempted by the Locomotive Inspection Act; the subject of the Act held to be the regulation of locomotive equipment generally, including its manufacture, and not limited to regulating activities of locomotive operators or regulating locomotives while in use for transporation). *Compare* Campbell v. Hussey, 368 U.S. 297 (1961) (state law requiring tobacco of a certain type to be marked by white tags, ousted by federal regulation that occupied the field and left no room for supplementation), *with* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (state law setting minimum oil content for avocados certified as mature by federal regulation is complementary to federal law, because federal standard was a minimum one, the field having not been occupied). One should be wary of assuming that a state law that has dual purposes and impacts will not, just for the duality, be held to be preempted. *See* Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992); Perez v. Campbell, 402 U.S. 637 (1971) (under Bankruptcy Clause).

[1204] Pacific Gas & Elec. Co. v. Energy Resources Comm'n, 461 U.S. 190 (1983). Neither does the same reservation of exclusive authority to regulate nuclear safety

A city's effort to enforce stiff penalties for ship pollution that resulted from boilers approved by the Federal Government was held not preempted, the field of boiler safety, but not boiler pollution, having been occupied by federal regulation.[1205] A state liability scheme imposing cleanup costs and strict, no-fault liability on shore facilities and ships for any oil-spill damage was held to complement a federal law concerned solely with recovery of actual cleanup costs incurred by the Federal Government and which textually presupposed federal-state cooperation.[1206] On the other hand, a comprehensive regulation of the design, size, and movement of oil tankers in Puget Sound was found, save in one respect, to be either expressly or implicitly preempted by federal law and regulations. Critical to the determination was the Court's conclusion that Congress, without actually saying so, had intended to mandate exclusive standards and a single federal decisionmaker for safety purposes in vessel regulation.[1207] Also, a closely divided Court voided a city ordinance placing an 11 p.m. to 7 a.m. curfew on jet flights from the city airport where, despite the absence of preemptive language in federal law, federal regulation of aircraft noise was of such a pervasive nature as to leave no room for state or local regulation.[1208]

The Court has, however, recognized that when a federal statute preempts a narrow field, leaving states to regulate outside of that field, state laws whose "target" is beyond the field of federal regulation are not necessarily displaced by field preemption principles,[1209] and such state laws may "incidentally" affect the preempted field.[1210] In *Oneok v. Learjet*, gas pipeline companies and

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preempt imposition of punitive damages under state tort law, even if based upon the jury's conclusion that a nuclear licensee failed to follow adequate safety precautions. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). *See also* English v. General Electric Co., 496 U.S. 72 (1990) (employee's state-law claim for intentional infliction of emotional distress for her nuclear-plant employer's actions retaliating for her whistleblowing is not preempted as relating to nuclear safety).

[1205] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

[1206] Askew v. American Waterways Operators, 411 U.S. 325 (1973).

[1207] Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). United States v. Locke, 529 U.S. 89 (2000) (applying *Ray*). *See also* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (preempting a state ban on pass-through of a severance tax on oil and gas, because Congress has occupied the field of wholesale sales of natural gas in interstate commerce); Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) (Natural Gas Act preempts state regulation of securities issuance by covered gas companies); Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (under Patent Clause, state law extending patent-like protection to unpatented designs invades an area of pervasive federal regulation).

[1208] City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

[1209] Oneok, Inc. v. Learjet, Inc., 575 U.S. ___, No. 13–271, slip op. at 10–12 (2015).

[1210] *Cf.* Hughes v. Talen Energy Mktg., LLC, 578 U.S. ___, No. 14–614, slip op. at 12–13 (2016) (holding that while "States . . . may regulate within the domain Congress assigned to them even when their laws incidentally affect areas" within the federal regulatory field, "States may not seek to achieve ends, however legiti-

the federal government asserted that state antitrust claims against the pipeline companies for alleged manipulation of certain indices used in setting natural gas prices were field preempted because the Natural Gas Act (NGA) regulates wholesale prices of natural gas.[1211] The Court disagreed. In so doing, the Court noted that the alleged manipulation of the price indices also affected retail prices, the regulation of which is left to the states by the NGA.[1212] Because the Court viewed Congress as having struck a "careful balance" between federal and state regulation when enacting the NGA, it took the view that,[1213] "where (as here) a state law can be applied" both to sales regulated by the federal government and to other sales, "we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents." [1214] The Court found no such preemption here, in part because the "*target* at which the state law aims" was practices affecting retail prices, something which the Court viewed as "firmly on the States' side of th[e] dividing line." [1215] The Court also noted that the "broad applicability" of state antitrust laws supported a finding of no preemption here,[1216] as does the states' historic role in providing common law and statutory remedies against monopolies and unfair business practices.[1217] However, while declining to find field preemption, the Court left open the possibility of conflict preemption, which had not been raised by the parties.[1218]

Congress may preempt state regulation without itself prescribing a federal standard; it may deregulate a field and thus occupy it by opting for market regulation and precluding state or local regulation.[1219]

Conflict Preemption. Several possible situations will lead to a holding that a state law is preempted as in conflict with federal law. First, it may be that the two laws, federal and state, will actually conflict. Thus, in *Rose v. Arkansas State Police*,[1220] federal law provided for death benefits for state law enforcement officers "in ad-

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mate, through regulatory means that intrude on" the federal government's authority over the field in question) (citing to *Oneok, Inc.*, slip op. at 11).

[1211] *See Oneok, Inc.*, slip op. at 3, 10.

[1212] *Id.* at 3.

[1213] *Id.* at 13.

[1214] *Id.* at 10.

[1215] *Id.* at 11.

[1216] *Id.* at 13.

[1217] *Id.* at 14.

[1218] *Id.* at 15–16.

[1219] Transcontinental Gas Pipe Line Corp. v. Mississippi Oil & Gas Board, 474 U.S. 409 (1986); Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988).

[1220] 479 U.S. 1 (1986).

dition to" any other compensation, while the state law required a reduction in state benefits by the amount received from other sources. The Court, in a brief, *per curiam* opinion, had no difficulty finding the state provision preempted.[1221]

Second, conflict preemption may occur when it is practically impossible to comply with the terms of both laws. Thus, where a federal agency had authorized federal savings and loan associations to include "due-on-sale" clauses in their loan instruments and where the state had largely prevented inclusion of such clauses, while it was literally possible for lenders to comply with both rules, the federal rule being permissive, the state regulation prevented the exercise of the flexibility the federal agency had conferred and was preempted.[1222] More problematic are circumstances in which a party has an administrative avenue for seeking removal of impediments to dual compliance. In *Pliva, Inc. v. Mensing*,[1223] federal law required generic drugs to be labeled the same as the brand name counterpart, while state tort law required drug labels to contain adequate warnings to render use of the drug reasonably safe. There had been accumulating evidence that long-term use of the drug metoclopramide carried a significant risk of severe neurological damage, but manufacturers of generic metoclopramide neither amended their warning labels nor sought to have the Food and Drug Administration require the brand name manufacturer to include stronger label warnings, which consequently would have led to stronger labeling of the generic. Five Justices held that state tort law was preempted.[1224] It was impossible to comply both with the state law duty to change the label and the federal law duty to keep the label the same.[1225] The four dissenting Justices argued that inability to change

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[1221] For similar examples of conflict preemption, see Wos v. E.M.A., 568 U.S. ___, No. 12–98, slip op. (2013) (holding that a North Carolina statute allowing the state to collect up to one-third of the amount of a tort settlement as reimbursement for state-paid medical expenses under Medicaid conflicted with anti-lien provisions of the federal Medicaid statute where the settlement designated an amount less than one-third as the medical expenses award). *See also* Doctor's Assoc.'s, Inc. v. Casarotto, 517 U.S. 681 (1996) (federal arbitration law preempts state statute that conditioned enforceability of arbitration clause on compliance with special notice requirement); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (federal arbitration law preempts state law invalidating predispute arbitration agreements that were not entered into in contemplation of substantial interstate activity).

[1222] Fidelity Fed. Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141 (1982).

[1223] 564 U.S. ___, No. 09–993, slip op. (2011).

[1224] 564 U.S. ___, No. 09–993, slip op. (2011) (Thomas, J.).

[1225] Justice Thomas, joined on point by three others, characterized the Supremacy Clause phrase "any [state law] to the Contrary notwithstanding" as a *non obtstante* provision that "suggests that federal law should be understood to impliedly repeal conflicting state law" and indicates limits on the extent to which courts should seek to reconcile federal and state law in preemption cases. 564 U.S. ___, No. 09–993, slip op. at 15–17 (2011) (Thomas, J.).

the labels unilaterally was insufficient, standing alone, to establish a defense based on impossibility.[1226] Emphasizing the federal duty to monitor the safety of their drugs, the dissenters would require that the generic manufacturers also show some effort to effectuate a labeling change through the FDA.

The Court reached a similar result in *Mutual Pharmaceutical Co. v. Bartlett*.[1227] There, the Court again faced the question of whether FDA labeling requirements preempted state tort law in a case involving sales by a generic drug manufacturer. The lower court had held that it was not impossible for the manufacturer to comply with both the FDA's labeling requirements and state law that required stronger warnings regarding the drug's safety because the manufacturer could simply stop selling the drug. The Supreme Court rejected the "stop-selling rationale" because it "would render impossibility pre-emption a dead letter and work a revolution in . . . preemption case law." [1228]

In contrast to *Pliva, Inc. v. Mensing* and *Mutual Pharmaceutical Co. v. Bartlett*, the Court found no preemption in *Wyeth v. Levine*,[1229] a state tort action against a brand-name drug manufacturer based on inadequate labeling. A brand-name drug manufacturer, unlike makers of generic drugs, could unilaterally strengthen labeling under federal regulations, subject to subsequent FDA override, and thereby independently meet state tort law requirements. In another case of alleged impossibility, it was held possible for an employer to comply both with a state law mandating leave and reinstatement to pregnant employees and with a federal law prohibiting employment discrimination on the basis of pregnancy.[1230] Similarly, when faced with both federal and state standards on the ripeness of avocados, the Court discerned that the federal standard was a "minimum" one rather than a "uniform" one and decided that growers could comply with both.[1231]

Third, a fruitful source of preemption is found when it is determined that the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[1232] Thus, de-

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[1226] 564 U.S. ___, No. 09–993, slip op. (2011) (Sotomayor, J., dissenting).
[1227] 570 U.S. ___, No. 12–142, slip op. (2013).
[1228] *Id.* at 1–2.
[1229] 555 U.S. ___, No. 06–1249, slip op. (2009).
[1230] California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987). *Compare* Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942) (federal law preempts more exacting state standards, even though both could be complied with and state standards were harmonious with purposes of federal law).
[1231] Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963).
[1232] The standard is drawn from Hines v. Davidowitz, 312 U.S. 52, 67 (1941), which often is held out as a leading example of field preemption analysis. When

spite the inclusion of a saving clause preserving liability under common law, the National Traffic and Motor Vehicle Safety Act nevertheless was found to have preempted a state common law tort action based on the failure of a car manufacturer to install front seat airbags: Giving car manufacturers some leeway in developing and introducing passive safety restraint devices was, according to the Court, a key congressional objective under the Act, one that would frustrated should a tort action be allowed to proceed.[1233] The Court also has voided a state requirement that the average net weight of a package of flour in a lot could not be less than the net weight stated on the package. While applicable federal law permitted variations from stated weight caused by distribution losses, such as through partial dehydration, the state allowed no such deviation. Although it was possible for a producer to satisfy the federal standard while satisfying the tougher state standard, the Court discerned that to do so defeated one purpose of the federal requirement—the facilitating of value comparisons by shoppers. Because different producers

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"frustration of purpose" predominates in an opinion, it may be fairer to characterize the issue as one of conflict preemption, rather than field preemption, for the possibility of a limited state role would appear to be implicitly recognized. Arizona v. United States, in which the Court found three of the four Arizona immigration provisions it examined to be preempted, illustrates the continuum from field to conflict analysis. In overturning state penalties for violations of federal alien registration requirements, the Court found the sweep and detail of the federal law to leave no room whatsoever for state regulation. In overturning state sanctions against unauthorized aliens seeking employment or working, the Court emphasized that the comprehensive system of federal employer sanctions eschewed employee sanctions, and allowing states to impose them would upset the careful policy balance struck by Congress. In overturning state authority to arrest individuals believed to be deportable on criminal grounds, the Court did not examine whether state officers have any inherent arrest authority in deportation cases, but rather found that allowing states to engage in such arrests as a general matter creates an obstacle to congressional objectives. And finally, the Court declined to overturn on its face a state policy of checking the immigration status of individuals stopped by the police for general law enforcement purposes, finding that federal law facilitated status checks and only implementation of the status check policy would disclose whether federal enforcement policy ultimately would be frustrated. 567 U.S. ___, No. 11–182, slip op. (2012).

See also Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996) (federal law empowering national banks in small towns to sell insurance preempts state law prohibiting banks from dealing in insurance; despite explicit preemption provision, state law stands as an obstacle to accomplishment of federal purpose); Hillman v. Maretta, 569 U.S. ___, No. 11–1221, slip op. (2013) (state law cause of action against ex-spouse for life insurance proceeds paid under a designation of beneficiary in a federal employee policy held to be preempted by a federal employee insurance statute giving employees the right to designate a beneficiary; beyond administrative convenience, Congress intended that the proceeds actually *belong* to the named beneficiary). Unsurprisingly, the Justices at times disagree on what Congress's primary objectives and purposes were in passing particular legislation, and such a disagreement can end with different conclusions about whether state law has been preempted. *See* AT&T Mobility, LLC v. Concepcion, 563 U.S. ___, No. 09–893, slip op. (2011).

[1233] Geier v. American Honda Motor Co., 529 U.S. 861 (2000).

in different situations in order to comply with the state standard may have to overpack flour to make up for dehydration loss, consumers would not be comparing packages containing identical amounts of flour solids.[1234] In *Felder v. Casey*,[1235] a state notice-of-claim statute was found to frustrate the remedial objectives of civil rights laws as applied to actions brought in state court under 42 U.S.C. § 1983. A state law recognizing the validity of an unrecorded oral sale of an aircraft was held preempted by the Federal Aviation Act's provision that unrecorded "instruments" of transfer are invalid, since the congressional purpose evidenced in the legislative history was to make information about an aircraft's title readily available by requiring that all transfers be documented and recorded.[1236]

In *Boggs v. Boggs*,[1237] the Court, 5-to-4, applied the "stands as an obstacle" test for conflict even though the statute (ERISA) contains an express preemption section. The dispute arose in a community-property state, in which heirs of a deceased wife claimed property that involved pension-benefit assets that was left to them by testamentary disposition, as against a surviving second wife. Two ERISA provisions operated to prevent the descent of the property to the heirs, but under community-property rules the property could have been left to the heirs by their deceased mother. The Court did not pause to analyze whether the ERISA preemption provision operated to preclude the descent of the property, either because state law "relate[d] to" a covered pension plan or because state law had an impermissible "connection with" a plan, but it instead decided that the operation of the state law insofar as it conflicted with the purposes Congress had intended to achieve by ERISA and insofar as it ran into the two noted provisions of ERISA stood as an obstacle to the effectuation of the ERISA law. "We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase 'relate to' provides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption." [1238]

Similarly, the Court found it unnecessary to consider field preemption due to its holding that a Massachusetts law barring state agencies from purchasing goods or services from companies doing

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[1234] Jones v. Rath Packing Co., 430 U.S. 519, 532–543 (1977).

[1235] 487 U.S. 131 (1988).

[1236] Philco Aviation v. Shacket, 462 U.S. 406 (1983).

[1237] 520 U.S. 833 (1997).

[1238] 520 U.S. at 841. The dissent, id. at 854 (Justice Breyer), agreed that conflict analysis was appropriate, but he did not find that the state law achieved any result that ERISA required.

business with Burma imposed obstacles to the accomplishment of Congress's full objectives under the federal Burma sanctions law.[1239] The state law was said to undermine the federal law in several respects that could have implicated field preemption—by limiting the President's effective discretion to control sanctions, and by frustrating the President's ability to engage in effective diplomacy in developing a comprehensive multilateral strategy—but the Court "decline[d] to speak to field preemption as a separate issue." [1240]

Also, a state law making agricultural producers' associations the exclusive bargaining agents and requiring payment of service fees by nonmember producers was held to counter a strong federal policy protecting the right of farmers to join or not join such associations.[1241] And a state assertion of the right to set minimum streamflow requirements different from those established by FERC in its licensing capacity was denied as being preempted under the Federal Power Act, despite language requiring deference to state laws "relating to the control, appropriation, use, or distribution of water." [1242]

Contrarily, a comprehensive federal regulation of insecticides and other such chemicals was held not to preempt a town ordinance that required a permit for the spraying of pesticides, there being no conflict between requirements.[1243] The application of state antitrust laws to authorize indirect purchasers to recover for all overcharges passed on to them by direct purchasers was held to implicate no preemption concerns, because the federal antitrust laws had been interpreted to not permit indirect purchasers to recover under *federal* law; the state law may have been inconsistent with federal law but in no way did it frustrate federal objectives and policies.[1244] The effect of federal policy was not strong enough to warrant a holding

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[1239] Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

[1240] 530 U.S. at 374 n.8.

[1241] Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd., 467 U.S. 461 (1984). *See also* Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) (state allocation of costs for purposes of setting retail electricity rates, by disallowing costs permitted by FERC in setting wholesale rates, frustrated federal regulation by possibly preventing the utility from recovering in its sales the costs of paying the FERC-approved wholesale rate); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (state ban on cable TV advertising frustrates federal policy in the copyright law by which cable operators pay a royalty fee for the right to retransmit distant broadcast signals upon agreement not to delete commercials); International Paper Co. v. Ouellette, 479 U.S. 481 (1987) (damage action based on common law of downstream state frustrates Clean Water Act's policies favoring permitting state in interstate disputes and favoring predictability in permit process).

[1242] California v. FERC, 495 U.S. 490 (1990). The savings clause was found inapplicable on the basis of an earlier interpretation of the language in First Iowa Hydro-Electric Cooperative v. FPC, 328 U.S. 152 (1946).

[1243] Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 614–16 (1991).

[1244] California v. ARC America Corp., 490 U.S. 93 (1989).

of preemption when a state authorized condemnation of abandoned railroad property after conclusion of an ICC proceeding permitting abandonment, although the railroad's opportunity costs in the property had been considered in the decision on abandonment.[1245]

Federal Versus State Labor Laws.—One group of cases, which has caused the Court much difficulty over the years, concerns the effect of federal labor laws on state power to govern labor-management relations. Although the Court some time ago reached a settled rule, changes in membership on the Court re-opened the issue and modified the rules.

With the enactment of the National Labor Relations Act and subsequent amendments, Congress declared a national policy in labor-management relations and established the NLRB to carry out that policy.[1246] It became the Supreme Court's responsibility to determine what role state law on labor-management relations was to play. At first, the Court applied a test of determination whether the state regulation was in direct conflict with the national regulatory scheme. Thus, in one early case, the Court held that an order by a state board which commanded a union to desist from mass picketing of a factory and from assorted personal threats was not in conflict with the national law that had not been invoked and that did not touch on some of the union conduct in question.[1247] A cease-and-desist order of a state board implementing a state provision making it an unfair labor practice for employees to conduct a slowdown or to otherwise interfere with production while on the job was found not to conflict with federal law,[1248] and another order of the board was also

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[1245] Hayfield Northern Ry. v. Chicago & N.W. Transp. Co., 467 U.S. 622 (1984). *See also* CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (federal law's broad purpose of protecting shareholders as a group is furthered by state anti-takeover law); Rose v. Rose, 481 U.S. 619 (1987) (provision governing veterans' disability benefits protects veterans' families as well as veterans, hence state child-support order resulting in payment out of benefits is not preempted).

[1246] Throughout the ups and downs of federal labor-law preemption, it remains the rule that the Board remains preeminent and almost exclusive. *See*, *e.g.*, Wisconsin Dep't of Industry v. Gould, Inc., 475 U.S. 282 (1986) (states may not supplement Board enforcement by debarring from state contracts persons or firms that have violated the NLRA); Golden Gate Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) (city may not condition taxicab franchise on settlement of strike by set date, because this intrudes into collective-bargaining process protected by NLRA). On the other hand, the NLRA's protection of associational rights is not so strong as to outweigh the Social Security Act's policy permitting states to determine whether to award unemployment benefits to persons voluntarily unemployed as the result of a labor dispute. New York Tel. Co. v. New York Labor Dep't, 440 U.S. 519 (1979); Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977); Baker v. General Motors Corp., 478 U.S. 621 (1986).

[1247] Allen-Bradley Local No. 1111 v. WERB, 315 U.S. 740 (1942).

[1248] United Automobile Workers v. WERB, 336 U.S. 245 (1949), *overruled by* Machinists & Aerospace Workers v. WERC, 427 U.S. 132 (1976).

sustained in its prohibition of the discharge of an employee under a maintenance-of-membership clause inserted in a contract under pressure from the War Labor Board and which violated state law.[1249]

By contrast, a state statute requiring business agents of unions operating in the state to file annual reports and to pay an annual fee of one dollar was voided as in conflict with federal law.[1250] And state statutes providing for mediation and outlawing public utility strikes were similarly voided as being in specific conflict with federal law.[1251] A somewhat different approach was noted in several cases in which the Court held that the federal act had so occupied the field in certain areas as to preclude state regulation.[1252] The latter approach was predominant through the 1950s, as the Court voided state court action in enjoining [1253] or awarding damages [1254] for peaceful picketing, in awarding of relief by damages or otherwise for conduct that constituted an unfair labor practice under federal law,[1255] or in enforcing state antitrust laws so as to affect collective bargaining agreements [1256] or to bar a strike as a restraint

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[1249] Algoma Plywood Co. v. WERB, 336 U.S. 301 (1949).

[1250] Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945). More recently, the Court has held that *Hill's* premise that the NLRA grants an unqualified right to select union officials has been removed by amendments prohibiting some convicted criminals from holding union office. Partly because the federal disqualification standard was itself dependent upon application of state law, the Court ruled that more stringent state disqualification provisions, also aimed at individuals who had been involved in racketeering and other criminal conduct, were not inconsistent with federal law. Brown v. Hotel Employees, 468 U.S. 491 (1984).

[1251] United Automobile Workers v. O'Brien, 339 U.S. 454 (1950); Bus Employees v. WERB, 340 U.S. 383 (1951). *See also* Bus Employees v. Missouri, 374 U.S. 74 (1963).

[1252] Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Local 776, 346 U.S. 485 (1953);Bethlehem Steel Co. v. New York Employment Relations Bd., 330 U.S. 767 (1947). *See also* Livadas v. Bradshaw, 512 U.S. 107 (1994) (finding a practice of a state labor commissioner preempted because it stood as an obstacle to the achievement of the purposes of NLRA). Of course, where Congress clearly specifies, the Court has had no difficulty. Thus, in the NLRA, Congress provided, 29 U.S.C. § 164(b), that state laws on the subject could override the federal law on union security arrangements and the Court sustained those laws. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949). When Congress in the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provided that the federal law on union security was to override contrary state laws, the Court sustained that determination. Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956). The Court has held that state courts may adjudicate questions relating to the permissibility of particular types of union security arrangements under state law even though the issue involves as well an interpretation of federal law. Retail Clerks Int'l Ass'n v. Schermerhorn, 375 U.S. 96 (1963).

[1253] Garner v. Teamsters Local 776, 346 U.S. 485 (1953); United Mine Workers v. Arkansas Flooring Co., 351 U.S. 62 (1956); Meat Cutters v. Fairlawn Meats, 353 U.S. 20 (1957); Construction Laborers v. Curry, 371 U.S. 542 (1963).

[1254] San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957).

[1255] Guss v. Utah Labor Board, 353 U.S. 1 (1957).

[1256] Teamsters Union v. Oliver, 358 U.S. 283 (1959).

of trade,[1257] even with regard to disputes over which the NLRB declined to assert jurisdiction because of the degree of effect on interstate commerce.

In *San Diego Building Trades Council v. Garmon*,[1258] the Court enunciated the rule, based on its previous decade of adjudication. "When an activity is arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." [1259]

For much of the period since *Garmon*, the dispute in the Court concerned the scope of the few exceptions permitted in the *Garmon* principle. First, when picketing is not wholly peaceful but is attended by intimidation, violence, and obstruction of the roads affording access to the struck establishment, state police powers have been held not disabled to deal with the conduct and narrowly drawn injunctions directed against violence and mass picketing have been permitted [1260] as well as damages to compensate for harm growing out of such activities.[1261]

A 1958 case permitted a successful state court suit for reinstatement and damages for lost pay because of a wrongful expulsion, leading to discharge from employment, based on a theory that the union constitution and by-laws constitute a contract between the union and the members the terms of which can be enforced by state courts without the danger of a conflict between state and federal law.[1262] The Court subsequently narrowed the interpretation of this ruling by holding in two cases that members who alleged union interference with their existing or prospective employment relations could not sue for damages but must file unfair labor practice charges with the NLRB.[1263] *Gonzales* was said to be limited to "purely inter-

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[1257] Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

[1258] 359 U.S. 236 (1959).

[1259] 359 U.S. at 245. The rule is followed in, *e.g.*, Radio & Television Technicians v. Broadcast Service of Mobile, 380 U.S. 255 (1965); Hattiesburg Building & Trades Council v. Broome, 377 U.S. 126 (1964); Longshoremen's Local 1416 v. Ariane Shipping Co., 397 U.S. 195 (1970); Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971). *Cf.* Nash v. Florida Industrial Comm., 389 U.S. 235 (1967).

[1260] United Automobile Workers v. WERB, 351 U.S. 266 (1956); Youngdahl v. Rainfair, 355 U.S. 131 (1957).

[1261] United Automobile Workers v. Russell, 356 U.S. 634 (1958); United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954).

[1262] International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

[1263] Journeymen & Plumbers' Union 100 v. Borden, 373 U.S. 690 (1963); Iron Workers Local 207 v. Perko, 373 U.S. 701 (1963). Applying *Perko*, the Court held that a state court action by a supervisor alleging union interference with his contractual relationship with his employer is preempted by the NLRA. Local 926, Int'l Union of Operating Engineers v. Jones, 460 U.S. 669 (1983).

nal union matters."[1264] Finally, *Gonzales*, was abandoned in a five-to-four decision in which the Court held that a person who alleged that his union had misinterpreted its constitution and its collective bargaining agreement with the individual's employer in expelling him from the union and causing him to be discharged from his employment because he was late paying his dues had to pursue his federal remedies.[1265] Justice Harlan wrote for the Court that, although it was not likely that, in *Gonzales*, a state court resolution of the scope of duty owed the member by the union would implicate principles of federal law, state court resolution in this case involved an interpretation of the contract's union security clause, a matter on which federal regulation is extensive.[1266]

One other exception has been based, like the violence cases, on the assumption that it concerns areas traditionally left to local law into which Congress would not want to intrude. In *Linn v. Plant Guard Workers*,[1267] the Court permitted a state court adjudication of a defamation action arising out of a labor dispute. And, in *Letter Carriers v. Austin*,[1268] the Court held that federal law preempts state defamation laws in the context of labor disputes to the extent that the state seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or in reckless disregard of truth or falsity.

However, a state tort action for the intentional infliction of emotional distress occasioned through an alleged campaign of personal abuse and harassment of a member of the union by the union and its officials was held not preempted by federal labor law. Federal law was not directed to the "outrageous conduct" alleged, and NLRB resolution of the dispute would neither touch upon the claim of emotional distress and physical injury nor award the plaintiff any compensation. But state court jurisdiction, in order that there not be interference with the federal scheme, must be premised on tortuous conduct either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.[1269]

[1264] 373 U.S. at 697 (*Borden*), and 705 (*Perko*).
[1265] Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971).
[1266] 403 U.S. at 296.
[1267] 383 U.S. 53 (1966).
[1268] 418 U.S. 264 (1974).
[1269] Farmer v. Carpenters, 430 U.S. 290 (1977). Following this case, the Court held that a state court action for misrepresentation and breach of contract, brought by replacement workers promised permanent employment when hired during a strike, was not preempted. The action for breach of contract by replacement workers having no remedies under the NLRA was found to be deeply rooted in local law and of

A significant retrenchment of *Garmon* occurred in *Sears, Roebuck & Co. v. Carpenters*,[1270] in the context of state court assertion of jurisdiction over trespassory picketing. Objecting to the company's use of nonunion work in one of its departments, the union picketed the store, using the company's property, the lot area surrounding the store, instead of the public sidewalks, to walk on. After the union refused to move its pickets to the sidewalk, the company sought and obtained a state court order enjoining the picketing on company property. Depending upon the union motivation for the picketing, it was either arguably prohibited or arguably protected by federal law, the trespassory nature of the picketing being one factor the NLRB would have looked to in determining at least the protected nature of the conduct. The Court held, however, that under the circumstances, neither the arguably prohibited nor the arguably protected rationale of *Garmon* was sufficient to deprive the state court of jurisdiction.

First, as to conduct arguably prohibited by NLRA, the Court seemingly expanded the *Garmon* exception recognizing state court jurisdiction for conduct that touches interests "deeply rooted in local feeling" [1271] in holding that where there exists "a significant state interest in protecting the citizens from the challenged conduct" and there exists "little risk of interference with the regulatory jurisdiction" of the NLRB, state law is not preempted. Here, there was obviously a significant state interest in protecting the company from trespass; the second, "critical inquiry" was whether the controversy presented to the state court was identical to or different from that which could have been presented to the Board. The Court concluded that the controversy was different. The Board would have been presented with determining the motivation of the picketing and the location of the picketing would have been irrelevant; the motivation was irrelevant to the state court and the situs of the picketing was the sole inquiry. Thus, there was deemed to be no realistic risk of state interference with Board jurisdiction.[1272]

Second, in determining whether the picketing was protected, the Board would have been concerned with the situs of the picketing, since under federal labor laws the employer has no absolute right to prohibit union activity on his property. Preemption of state court jurisdiction was denied, nonetheless, in this case on two joined bases. One, preemption is not required in those cases in which the party

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only peripheral concern under the Act. Belknap, Inc. v. Hale, 463 U.S. 491 (1983). *See also* Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986).

[1270] 436 U.S. 180 (1978).

[1271] San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959).

[1272] Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 190–98 (1978).

who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so. In this case, the union could have filed with the Board when the company demanded removal of the pickets, but did not, and the company could not file with the Board at all. Two, even if the matter is not presented to the Board, preemption is called for if there is a risk of erroneous state court adjudication of the protection issue that is unacceptable, so that one must look to the strength of the argument that the activity is protected. While the state court had to make an initial determination that the trespass was not protected under federal law, the same determination the Board would have made, in the instance of trespassory conduct, the risk of erroneous determination is small, because experience shows that a trespass is far more likely to be unprotected than protected.[1273]

Introduction of these two balancing tests into the *Garmon* rationale substantially complicates determining when state courts do not have jurisdiction, and will no doubt occasion much more litigation in state courts than has previously existed.

Another series of cases involves not a Court-created exception to the *Garmon* rule but the applicability and interpretation of § 301 of the Taft-Hartley Act,[1274] which authorizes suits in federal, and state,[1275] courts to enforce collective bargaining agreements. The Court has held that in enacting § 301, Congress authorized actions based on conduct arguably subject to the NLRA, so that the *Garmon* preemption doctrine does not preclude judicial enforcement of duties and obligations which would otherwise be within the exclusive jurisdiction of the NLRB so long as those duties and obligations are embodied in a collective-bargaining agreement, perhaps as interpreted in an arbitration proceeding.[1276]

Here, too, the permissible role of state tort actions has been in great dispute. Generally, a state tort action as an alternative to a § 301 arbitration or enforcement action is preempted if it is substantially dependent upon analysis of the terms of a collective-bargaining agreement.[1277] Thus, a state damage action for the bad-

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[1273] 436 U.S. at 199–207.

[1274] 61 Stat. 156 (1947), 29 U.S.C. § 185(a).

[1275] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962). The state courts must, however, apply federal law. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).

[1276] Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Humphrey v. Moore, 375 U.S. 335 (1964); Vaca v. Sipes, 386 U.S. 171 (1967).

[1277] *See* the analysis in Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (state tort action for retaliatory discharge for exercising rights under a state workers' compensation law is not preempted by § 301, there being no required interpretation of a collective-bargaining agreement).

faith handling of an insurance claim under a disability plan that was part of a collective-bargaining agreement was preempted because it involved interpretation of that agreement and because state enforcement would frustrate the policies of § 301 favoring uniform federal-law interpretation of collective-bargaining agreements and favoring arbitration as a predicate to adjudication.[1278]

Finally, the Court has indicated that, with regard to some situations, Congress has intended to leave the parties to a labor dispute free to engage in "self-help," so that conduct not subject to federal law is nonetheless withdrawn from state control.[1279] However, the NLRA is concerned primarily "with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions," so states are free to impose minimum labor standards.[1280]

COMMERCE WITH INDIAN TRIBES

Congress's power to regulate commerce "with the Indian tribes," once almost rendered superfluous by Court decision,[1281] has now been resurrected and made largely the basis for informing judicial judgment with respect to controversies concerning the rights and obligations of Native Americans. Although Congress in 1871 forbade the further making of treaties with Indian tribes,[1282] cases disputing the application of the old treaties and especially their effects upon attempted state taxation and regulation of on-reservation activities

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[1278] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985). *See also* Int'l Brotherhood of Electric Workers v. Hechler, 481 U.S. 851 (1987) (state-law claim that union breached duty to furnish employee a reasonably safe workplace preempted); United Steelworkers of America v. Rawson, 495 U.S. 362 (1990) (state-law claim that union was negligent in inspecting a mine, the duty to inspect being created by the collective-bargaining agreement preempted).

[1279] Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969); Machinists & Aerospace Workers v. WERC, 427 U.S. 132 (1976); Golden Gate Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986). *Cf.* New York Telephone Co. v. New York Labor Dept., 440 U.S. 519 (1979).

[1280] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (upholding a state requirement that health-care plans, including those resulting from collective bargaining, provide minimum benefits for mental-health care).

[1281] United States v. Kagama, 118 U.S. 375 (1886). Rejecting the Commerce Clause as a basis for congressional enactment of a system of criminal laws for Indians living on reservations, the Court nevertheless sustained the act on the ground that the Federal Government had the obligation and thus the power to protect a weak and dependent people. *Cf.* United States v. Holiday, 70 U.S. (3 Wall.) 407 (1866); United States v. Sandoval, 231 U.S. 28 (1913). This special fiduciary responsibility can also be created by statute. *E.g.*, United States v. Mitchell, 463 U.S. 206 (1983).

[1282] 16 Stat. 544, 566, 25 U.S.C. § 71.

continue to be a staple of the Court's docket.[1283] But this clause is one of the two bases now found sufficient to empower Federal Government authority over Native Americans. "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."[1284]

Forsaking reliance upon other theories and rationales, the Court has established the preemption doctrine as the analytical framework within which to judge the permissibility of assertions of state jurisdiction over the Indians. However, the "semi-autonomous status" of Indian tribes erects an "independent but related" barrier to the exercise of state authority over commercial activity on an Indian reservation.[1285] Thus, the question of preemption is not governed by the standards of preemption developed in other areas. "Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the preemption analysis that governs this inquiry. . . . As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity."[1286] A corollary is that the preemption doctrine will not be applied strictly to prevent states from aiding Native Americans.[1287] However, the protective rule is inapplicable to state regulation of liquor transac-

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[1283] *E.g.*, Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165 (1977); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Montana v. United States, 450 U.S. 544 (1981).

[1284] McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 n.7 (1973). *See also* Morton v. Mancari, 417 U.S. 535, 551–553 (1974); United States v. Mazurie, 419 U.S. 544, 553–56 (1974); Bryan v. Itasca County, 426 U.S. 373, 376 n.2 (1976); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837 (1982); United States v. Lara, 541 U.S. 193, 200 (2004).

[1285] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–143 (1980); Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837–838 (1982). "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." Id. at 837 (quoting *White Mountain*, 448 U.S. at 143).

[1286] Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838 (1982). *See also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[1287] Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984) (upholding state-court jurisdiction to hear claims of Native Americans against non-Indians involving transactions that occurred in Indian country). However, attempts by states to retrocede jurisdiction favorable to Native Americans may be held to be preempted. Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986).

tions, because there has been no tradition of tribal sovereignty with respect to that subject.[1288]

The scope of state taxing powers—the conflict of "the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations" [1289]—has been often litigated. Absent cession of jurisdiction or other congressional consent, states possess no power to tax Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.[1290] Off-reservation Indian activities require an express federal exemption to deny state taxing power.[1291] Subjection to taxation of non-Indians doing business with Indians on the reservation involves a close analysis of the federal statutory framework, although the operating premise was for many years to deny state power because of its burdens upon the development of tribal self-sufficiency as promoted through federal law and its interference with the tribes' ability to exercise their sovereign functions.[1292]

That operating premise, however, seems to have been eroded. For example, in *Cotton Petroleum Corp. v. New Mexico*,[1293] the Court held that, despite of the existence of multiple taxation occasioned by a state oil and gas severance tax applied to on-reservation operations by non-Indians, which was already taxed by the tribe,[1294] the impairment of tribal sovereignty was "too indirect and too insubstantial" to warrant a finding of preemption. The fact that the state provided significant services to the oil and gas lessees justified state taxation and also distinguished earlier cases in which the state had "asserted no legitimate regulatory interest that might justify the tax." [1295] Still further erosion, or relaxation, of the principle of construction may be found in a later case, in which the Court, confronted with arguments that the imposition of particular state taxes

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[1288] Rice v. Rehner, 463 U.S. 713 (1983).

[1289] McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 165 (1973).

[1290] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Bryan v. Itasca County, 426 U.S. 373 (1976); Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); Montana v. Blackfeet Tribe, 471 U.S. 759 (1985). *See also* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991). A discernable easing of the reluctance to find congressional cession is reflected in more recent cases. *See* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

[1291] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–149 (1973).

[1292] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982).

[1293] 490 U.S. 163 (1989).

[1294] Held permissible in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[1295] 490 U.S. at 185 (distinguishing *Bracker* and *Ramah Navaho School Bd*).

on Indian property on the reservation was inconsistent with self-determination and self-governance, denominated these as "policy" arguments properly presented to Congress rather than the Court.[1296]

The impact on tribal sovereignty is also a prime determinant of relative state and tribal regulatory authority.[1297]

Since *Worcester v. Georgia*,[1298] the Court has recognized that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.[1299] They are, of course, no longer possessed of the full attributes of sovereignty,[1300] having relinquished some part of it by their incorporation within the territory of the United States and their acceptance of its protection. By specific treaty provision, they yielded up other sovereign powers, and Congress has removed still others. "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." [1301]

[1296] County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 265 (1992). To be sure, this response was in the context of the reading of statutory texts and giving effect to them, but the unqualified designation is suggestive. For recent tax controversies, *see* Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Department of Taxation & Finance v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

[1297] *E.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[1298] 31 U.S. (6 Pet.) 515 (1832). *See also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Under this doctrine, tribes possess sovereign immunity from suit in the same way that the United States and the states do. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512–13 (1940). The Court has repeatedly rejected arguments to abolish tribal sovereign immunity or at least to curtail it. Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991).

[1299] United States v. Wheeler, 435 U.S. 313 (1978) (inherent sovereign power to punish tribal offenders). *Compare* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (state regulation of on-reservation bingo is preempted as basically civil/regulatory rather than criminal/prohibitory), *with* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (extensive ownership of land within "open areas" of reservation by non-members of tribe precludes application of tribal zoning within such areas). *See also* Hagen v. Utah, 510 U.S. 399 (1994). Among the fundamental attributes of sovereignty which a tribe possesses unless divested of it by federal law is the power to tax non-Indians entering the reservation to engage in economic activities. Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[1300] United States v. Kagama, 118 U.S. 375, 381 (1886); United States v. Wheeler, 435 U.S. 313, 323 (1978).

[1301] United States v. Wheeler, 435 U.S. 313, 323 (1978). *See* South Dakota v. Bourland, 508 U.S. 679 (1993) (abrogation of Indian treaty rights and reduction of sovereignty). Congress may also remove restrictions on tribal sovereignty. The Court has held that, absent authority from federal statute or treaty, tribes possess no criminal authority over non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). The Court also held, in Duro v. Reina, 495 U.S. 676 (1990), that a tribe has no criminal jurisdiction over non-tribal Indians who commit crimes on the reserva-

In a case of major import for the settlement of Indian land claims, the Court ruled in *County of Oneida v. Oneida Indian Nation*,[1302] that an Indian tribe may obtain damages for wrongful possession of land conveyed in 1795 without the federal approval required by the Nonintercourse Act.[1303] The Act reflected the accepted principle that extinguishment of the title to land by Native Americans required the consent of the United States and left intact a tribe's common-law remedies to protect possessory rights. The Court reiterated the accepted rule that enactments are construed liberally in favor of Native Americans and that Congress may abrogate Indian treaty rights or extinguish aboriginal land title only if it does so clearly and unambiguously. Consequently, federal approval of land-conveyance treaties containing references to earlier conveyances that had violated the Nonintercourse Act did not constitute ratification of the invalid conveyances.[1304] Similarly, the Court refused to apply the general rule for borrowing a state statute of limitations for the federal common-law action, and it rejected the dissent's view that, given "the extraordinary passage of time," the doctrine of laches should have been applied to bar the claim.[1305]

Although the power of Congress over Indian affairs is broad, it is not limitless.[1306] The Court has promulgated a standard of review that defers to the legislative judgment "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians . . . "[1307] A more searching review is warranted when it is alleged that the Federal Government's behavior toward the Indians has been in contravention of its obligation and that it has in fact taken property from a tribe which it had heretofore guaranteed to the tribe, without either com-

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tion; jurisdiction over members rests on consent of the self-governed, and absence of consent defeats jurisdiction. Congress, however, quickly enacted a statute recognizing inherent authority of tribal governments to exercise criminal jurisdiction over non-member Indians, and the Court upheld congressional authority to do so in United States v. Lara, 541 U.S. 193 (2004).

[1302] 470 U.S. 226 (1985).

[1303] 1 Stat. 379 (1793).

[1304] 470 U.S. at 246–48.

[1305] 470 U.S. at 255, 257 (Justice Stevens).

[1306] "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." United States v. Alcea Bank of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion) (quoted with approval in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977)).

[1307] Morton v. Mancari, 417 U.S. 535, 555 (1974). The Court applied the standard to uphold a statutory classification that favored Indians over non-Indians. But in Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977), the same standard was used to sustain a classification that disfavored, although inadvertently, one group of Indians as against other groups. While Indian tribes are unconstrained by federal or state constitutional provisions, Congress has legislated a "bill of rights" statute covering them. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

pensating the tribe or otherwise giving the Indians the full value of the land.[1308]

Clause 4. The Congress shall have Power * * * To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

NATURALIZATION AND CITIZENSHIP

Nature and Scope of Congress's Power

Naturalization has been defined by the Supreme Court as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen."[1309] In the *Dred Scott* case,[1310] the Court asserted that the power of Congress under this clause applies only to "persons born in a foreign country, under a foreign Government."[1311] These dicta are much too narrow to describe the power that Congress has actually exercised on the subject. The competence of Congress in this field merges, in fact, with its indefinite, inherent powers in the field of foreign relations. "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries."[1312]

Congress's power over naturalization is an exclusive power; no state has the independent power to constitute a foreign subject a citizen of the United States.[1313] But power to naturalize aliens under federal standards may be, and was early, devolved by Congress upon state courts of record.[1314] And though the states may not prescribe requirements for citizenship, they may confer rights, includ-

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[1308] United States v. Sioux Nation, 448 U.S. 371 (1980). *See also* Solem v. Bartlett, 465 U.S. 463, 472 (1984) (there must be "substantial and compelling evidence of congressional intention to diminish Indian lands" before the Court will hold that a statute removed land from a reservation); Nebraska v. Parker, 577 U.S. ___, No. 14–1406, slip op. at 5–6 (2016) (noting that "only Congress can divest a reservation of its land and diminish its boundaries," but finding that the statute in question did not clearly indicate Congress's intent to effect such a diminishment of the Omaha reservation).

[1309] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 162 (1892).

[1310] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[1311] 60 U.S. at 417.

[1312] Mackenzie v. Hare, 239 U.S. 299, 311 (1915).

[1313] Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898).

[1314] The first naturalization act, 1 Stat. 103 (1790), so provided. *See* 8 U.S.C. § 1421. In Holmgren v. United States, 217 U.S. 509 (1910), the Court held that Congress may provide for the punishment of false swearing in the proceedings in state courts.

ing political rights, to resident aliens. At one time, it was not uncommon for states to confer the right of suffrage upon resident aliens, especially upon those who had declared their intention to become citizens, and several states continued to do so until well into the twentieth century.[1315]

Citizenship by naturalization is a privilege to be given or withheld as Congress may determine: "It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by the law, or forego the privilege of citizenship. There is no middle choice." [1316] This interpretation makes of the naturalization power the only power granted in § 8 of Article I that is unrestrained by constitutional limitations on its exercise. Thus, the first naturalization act enacted by the first Congress restricted naturalization to "free white person[s]," [1317] which was expanded in 1870 so that persons of "African nativity and . . . descent" were entitled to be naturalized.[1318] "Chinese laborers" were specifically excluded from eligibility in 1882,[1319] and the courts enforced these provisions without any indication that constitutional issues were thereby raised.[1320] These exclusions are no longer law. Present naturalization statutes continue to require loyalty and good moral character

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[1315] Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977). *See* Spragins v. Houghton, 3 Ill. 377 (1840); Stewart v. Foster, 2 Binn. (Pa.) 110 (1809). *See also* K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES ch. 5 (1918).

[1316] United States v. Macintosh, 283 U.S. 605 (1931). *See also* Fong Yue Ting v. United States, 149 U.S. 698, 707–08 (1893). Though Congress broadly controls the path to naturalization in the United States, it is restricted in conditioning the retention of citizenship so conferred. The Fourteenth Amendment declares persons born or naturalized in the United States to be citizens, and Congress may not distinguish among classes of "Fourteenth Amendment" citizens in setting rules for expatriation (assuming the absence of fraud in obtaining naturalization). Schneider v. Rusk, 377 U.S. 163 (1964). By contrast, Congress controls by statute who born abroad becomes a U.S. citizen at birth (based generally on the citizenship status of the parents), at times has conditioned this "statutory" citizenship on subsequent periodic residence in the United States, and has had relinquishment of citizenship for failure to meet this condition subsequent upheld by the Court. Rogers v. Bellei, 401 U.S. 815 (1971).

[1317] 1 Stat. 103 (1790).

[1318] Act of July 14, 1870, § 7, 16 Stat. 254, 256.

[1319] Act of May 6, 1882, § 1, 22 Stat. 58. The statute defined "Chinese laborers" to mean "both skilled and unskilled laborers and Chinese employed in mining." 22 Stat. 61.

[1320] *Cf.* Ozawa v. United States, 260 U.S. 178 (1922); United States v. Bhagat Singh Thind, 261 U.S. 204 (1923); Toyota v. United States, 268 U.S. 402 (1925); Morrison v. California, 291 U.S. 82 (1934). The Court refused to review the only case in which the constitutional issue was raised and rejected. Kharaiti Ram Samras v. United States, 125 F.2d 879 (9th Cir. 1942), *cert. denied*, 317 U.S. 634 (1942).

and generally bar subversives, terrorists, and criminals, among others, from citizenship.[1321]

Although the usual form of naturalization is through individual application and official response on the basis of general congressional rules, naturalization is not so limited. Citizenship can be conferred by special act of Congress,[1322] it can be conferred collectively either through congressional action, such as the naturalization of all residents of an annexed territory or of a territory made a state,[1323] or through treaty provision.[1324]

Categories of Citizens: Birth and Naturalization

The first sentence of § 1 of the Fourteenth Amendment contemplates two sources of citizenship and two only: birth and naturalization.[1325] This contemplation is given statutory expression in § 301 of the Immigration and Nationality Act of 1952,[1326] which itemizes those categories of persons who are citizens of the United States at birth; all other persons in order to become citizens must pass through the naturalization process. The first category merely tracks the language of the first sentence of § 1 of the Fourteenth Amendment in declaring that all persons born in the United States and subject to the jurisdiction thereof are citizens by birth.[1327] But there are six other categories of citizens by birth. They are: (2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe, (3) a person born outside the United States of citizen parents one of whom has been resident in the United States, (4) a person born outside the United States of one citizen parent who has been continuously resident in the United States for one year prior to the birth and of a parent who is a national but not a citizen, (5) a person born in an outlying possession of the United States of one citizen parent who has been continuously resident in the United States or an outlying possession for one year prior to

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[1321] The Alien and Sedition Act of 1798, 1 Stat. 570, empowered the President to deport any alien he found dangerous to the peace and safety of the Nation. In 1903, Congress provided for denial of naturalization and for deportation for mere belief in certain doctrines, *i.e.*, anarchy. Act of March 3, 1903, 32 Stat. 1214. *See* United States ex rel. Turner v. Williams, 194 U.S. 279 (1904). The range of forbidden views was broadened in 1918 (Act of October 15, 1918, § 1, 40 Stat. 1012) and periodically thereafter. The present law is discussed in The Naturalization of Aliens, *infra*.

[1322] *E.g.*, 77 Stat. 5 (1963) (making Sir Winston Churchill an "honorary citizen of the United States").

[1323] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135 (1892); Contzen v. United States, 179 U.S. 191 (1900).

[1324] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 164, 168–69 (1892).

[1325] United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898).

[1326] 66 Stat. 235, 8 U.S.C. § 1401.

[1327] § 301(a)(1), 8 U.S.C. § 1401(a)(1).

the birth, (6) a person of unknown parentage found in the United States while under the age of five unless prior to his twenty-first birthday he is shown not to have been born in the United States, and (7) a person born outside the United States of an alien parent and a citizen parent who has been resident in the United States for a period of ten years, provided the person is to lose his citizenship unless he resides continuously in the United States for a period of five years between his fourteenth and twenty-eighth birthdays.

Subsection (7) citizens must satisfy the condition subsequent of five years continuous residence within the United States between the ages of fourteen and twenty-eight, a requirement held to be constitutional,[1328] which means in effect that for constitutional purposes, according to the prevailing interpretation, there is a difference between persons born or naturalized in, that is, within, the United States and persons born outside the confines of the United States who are statutorily made citizens.[1329] The principal difference is that the former persons may not be involuntarily expatriated whereas the latter may be, subject only to due process protections.[1330]

The Naturalization of Aliens

Although, as has been noted, throughout most of our history there were significant racial and ethnic limitations upon eligibility for naturalization, the present law prohibits any such discrimination.

"The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married."[1331] However, any person "who advocates or teaches, or who is a member of or affiliated with any organization that advocates or teaches . . . opposition to all organized government," or "who advocates or teaches or who is a member of or affiliated with any organization that advocates or teaches

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[1328] Rogers v. Bellei, 401 U.S. 815 (1971).

[1329] *Compare* Schneider v. Rusk, 377 U.S. 163 (1964); Afroyim v. Rusk, 387 U.S. 253 (1967). It will be noted that in practically all cases persons statutorily made citizens at birth will be dual nationals, having the citizenship of the country where they were born. Congress has never required a citizen having dual nationality to elect at some point one and forsake the other but it has enacted several restrictive statutes limiting the actions of dual nationals which have occasioned much litigation. *E.g.*, Savorgnan v. United States, 338 U.S. 491 (1950); Kawakita v. United States, 343 U.S. 717 (1952); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Schneider v. Rusk, 377 U.S. 163 (1964); Rogers v. Bellei, 401 U.S. 815 (1971).

[1330] *Cf.* Rogers v. Bellei, 401 U.S. 815, 836 (1971); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Perez v. Brownell, 356 U.S. 44, 58–62 (1958).

[1331] § 311, 66 Stat. 239 (1952), 8 U.S.C. § 1422.

the overthrow by force or violence or other unconstitutional means of the Government of the United States" or who is a member of or affiliated with the Communist Party, or other communist organizations, or other totalitarian organizations is ineligible.[1332] These provisions moreover are "applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filing of the petition for naturalization or after such filing and before taking the final oath of citizenship is, or has been found to be, within any of the classes enumerated within this section, notwithstanding that at the time the petition is filed he may not be included within such classes." [1333]

Other limitations on eligibility are also imposed. Eligibility may turn upon the decision of the responsible officials whether the petitioner is of "good moral character." [1334] The immigration and nationality laws themselves include a number of specific congressional determinations that certain persons do not possess "good moral character," including persons who are "habitual drunkards," [1335] adulterers,[1336] polygamists or advocates of polygamy,[1337] gamblers,[1338] convicted felons,[1339] and homosexuals.[1340] In order to petition for naturalization, an alien must have been resident for at least five years and to have possessed "good moral character" for all of that period.

The process of naturalization culminates in the taking in open court of an oath "(1) to support the Constitution of the United States; (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen; (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; (4) to bear true faith and allegiance to the same; and (5) (A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces of the United States when re-

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[1332] § 313(a), 66 Stat. 240 (1952), 8 U.S.C. § 1424(a). Whether "mere" membership is sufficient to constitute grounds for ineligibility is unclear. *Compare* Galvan v. Press, 347 U.S. 522 (1954), *with* Berenyi v. Immigration Director, 385 U.S. 630 (1967).

[1333] § 313(c), 66 Stat. 241 (1952), 8 U.S.C. § 1424(c).

[1334] § 316(a)(3), 66 Stat. 242, 8 U.S.C. § 1427(a)(3).

[1335] § 101(f)(1), 66 Stat. 172, 8 U.S.C. § 1101(f)(1).

[1336] § 101(f)(2), 66 Stat. 172, 8 U.S.C. § 1101(f)(2).

[1337] § 212(a)(11), 66 Stat. 182, 8 U.S.C. § 1182(a)(11).

[1338] § 101(f)(4) and (5), 66 Stat. 172, 8 U.S.C. § 1101(f)(4) and (5).

[1339] § 101(f)(7) and (8), 66 Stat. 172, 8 U.S.C. § 1101(f)(7) and (8).

[1340] § 212(a)(4), 66 Stat. 182, 8 U.S.C. § 1182(a)(4), barring aliens afflicted with "psychopathic personality," "a term of art intended to exclude homosexuals from entry into the United States." Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 119 (1967).

quired by the law, or (C) to perform work of national importance under civilian direction when required by law." [1341]

Any naturalized person who takes this oath with mental reservations or conceals or misrepresents beliefs, affiliations, and conduct, which under the law disqualify one for naturalization, is subject, upon these facts being shown in a proceeding brought for the purpose, to have his certificate of naturalization cancelled.[1342] Moreover, if within a year of his naturalization a person joins an organization or becomes in any way affiliated with one which was a disqualification for naturalization if he had been a member at the time, the fact is made *prima facie* evidence of his bad faith in taking the oath and grounds for instituting proceedings to revoke his admission to citizenship.[1343]

Rights of Naturalized Persons

Chief Justice Marshall early stated in dictum that "[a] naturalized citizen . . . becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." [1344] A similar idea was expressed in *Knauer*

[1341] § 337(a), 66 Stat. 258 (1952), 8 U.S.C. § 1448(a). In United States v. Schwimmer, 279 U.S. 644 (1929), and United States v. MacIntosh, 283 U.S. 605 (1931), a divided Court held that clauses (3) and (4) of the oath, as then prescribed, required the candidate for naturalization to be willing to bear arms for the United States, thus disqualifying conscientious objectors. These cases were overturned, purely as a matter of statutory interpretation by Girouard v. United States, 328 U.S. 61 (1946), and Congress codified the result, 64 Stat. 1017 (1950), as it now appears in the cited statute.

[1342] § 340(a), 66 Stat. 260 (1952), 8 U.S.C. § 1451(a). *See* Kungys v. United States, 485 U.S. 759 (1988) (badly fractured Court opinion dealing with the statutory requirements in a denaturalization proceeding under this section). *See also* Johannessen v. United States, 225 U.S. 227 (1912). Congress has imposed no time bar applicable to proceedings to revoke citizenship, so that many years after naturalization has taken place a naturalized citizen remains subject to divestment upon proof of fraud. Costello v. United States, 365 U.S. 265 (1961); Polites v. United States, 364 U.S. 426 (1960); Knauer v. United States, 328 U.S. 654 (1946); Fedorenko v. United States, 449 U.S. 490 (1981).

[1343] 340(c), 66 Stat. 261 (1952), 8 U.S.C. § 1451(c). The time period had previously been five years.

[1344] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 737, 827 (1824). One must be aware, however, that this language does not appear in any case having to do with citizenship or naturalization or the rights of naturalized citizens and its force may be therefore questioned. *Compare* Afroyim v. Rusk, 387 U.S. 253, 261 (1967) (Justice Black for the Court: "a mature and well-considered dictum . . . "), *with* id. at 275–76 (Justice Harlan dissenting: the dictum, "cannot have been intended to reach the question of citizenship"). The issue in *Osborn* was the right of the Bank to sue in federal court. Osborn had argued that the fact that the bank

v. United States.[1345] "Citizenship obtained through naturalization is not a second-class citizenship. . . . [It] carries with it the privilege of full participation in the affairs of our society, including the right to speak freely, to criticize officials and administrators, and to promote changes in our laws including the very Charter of our Government."

Despite these dicta, it is clear that particularly in the past but currently as well a naturalized citizen has been and is subject to requirements not imposed on native-born citizens. Thus, as we have noted above, a naturalized citizen is subject at any time to have his good faith in taking the oath of allegiance to the United States inquired into and to lose his citizenship if lack of such faith is shown in proper proceedings.[1346] And the naturalized citizen within a year of his naturalization will join a questionable organization at his peril.[1347] In *Luria v. United States*,[1348] the Court sustained a statute making *prima facie* evidence of bad faith a naturalized citizen's assumption of residence in a foreign country within five years after the issuance of a certificate of naturalization. But in *Schneider v. Rusk*,[1349] the Court voided a statute that provided that a naturalized citizen should lose his United States citizenship if following naturalization he resided continuously for three years in his former homeland. "We start," Justice Douglas wrote for the Court, "from the premise that the rights of citizenship of the native-born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the 'natural born' citizen is eligible to be President."[1350] The failure of the statute, the Court held, was that it impermissibly distinguished between native-born and naturalized citizens, denying the latter the equal protection of the laws.[1351] "This statute proceeds on the impermissible assumption that naturalized citizens as a class are less

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was chartered under the laws of the United States did not make any legal issue involving the bank one arising under the laws of the United States for jurisdictional purposes; to argue the contrary, Osborn contended, was like suggesting that the fact that persons were naturalized under the laws of Congress meant such persons had an automatic right to sue in federal courts, unlike natural-born citizens. The quoted language of Marshall's rejects this attempted analogy.

[1345] 328 U.S. 654, 658 (1946).

[1346] Johannessen v. United States, 225 U.S. 227 (1912); Knauer v. United States, 328 U.S. 654 (1946); Costello v. United States, 365 U.S. 265 (1961).

[1347] *See* 8 U.S.C. § 1451(c).

[1348] 231 U.S. 9 (1913). The provision has been modified to reduce the period to one year. 8 U.S.C. § 1451(d).

[1349] 377 U.S. 163 (1964).

[1350] 377 U.S. at 165.

[1351] Although there is no equal protection clause specifically applicable to the Federal Government, it is established that the Due Process Clause of the Fifth Amendment forbids discrimination in much the same manner as the Equal Protection Clause of the Fourteenth Amendment. In fact, "[e]qual protection analysis in the Fifth Amend-

reliable and bear less allegiance to this country than do the native-born. This is an assumption that is impossible for us to make. . . . A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance." [1352]

The *Schneider* equal protection rationale was abandoned in the next case in which the Court held that the Fourteenth Amendment forbade involuntary expatriation of naturalized persons.[1353] But in *Rogers v. Bellei*,[1354] the Court refused to extend this holding to persons statutorily naturalized at birth abroad because one of their parents was a citizen and similarly refused to apply *Schneider*. Thus, one who failed to honor a condition subsequent had his citizenship revoked. "Neither are we persuaded that a condition subsequent in this area impresses one with 'second-class citizenship.' That cliche is too handy and too easy, and, like most cliches, can be misleading. That the condition subsequent may be beneficial is apparent in the light of the conceded fact that citizenship was fully deniable. The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place. His citizenship, while it lasts, although conditional, is not 'second-class.'" [1355]

It is not clear where the progression of cases has left us in this area. Clearly, naturalized citizens are fully entitled to all the rights and privileges of those who are citizens because of their birth here. But it seems equally clear that with regard to retention of citizenship, naturalized citizens are not in the secure position of citizens born here.[1356]

On another point, the Court has held that, absent a treaty or statute to the contrary, a child born in the United States who is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, does not thereby lose

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ment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976).

[1352] Schneider v. Rusk, 377 U.S. 163, 168–69 (1964).

[1353] Afroyim v. Rusk, 387 U.S. 253 (1967).

[1354] 401 U.S. 815 (1971).

[1355] 401 U.S. at 835–36.

[1356] At least, there is a difference so long as *Afroyim* prevents Congress from making expatriation the consequence of certain acts when done by natural born citizens as well.

his American citizenship and that it is not necessary for him to make an election and return to the United States.[1357] On still another point, it has been held that naturalization is so far retroactive as to validate an acquisition of land prior to naturalization as to which the alien was under a disability.[1358]

Expatriation: Loss of Citizenship

The history of the right of expatriation, voluntarily on the part of the citizen or involuntarily under duress of statute, is shadowy in United States constitutional law. Justice Story, in the course of an opinion,[1359] and Chancellor Kent, in his writings,[1360] accepted the ancient English doctrine of perpetual and unchangeable allegiance to the government of one's birth, a citizen being precluded from renouncing his allegiance without permission of that government. The pre-Civil War record on the issue is so vague because there was wide disagreement on the basis of national citizenship in the first place, with some contending that national citizenship was derivative from state citizenship, which would place the power of providing for expatriation in the state legislatures, and with others contending for the primacy of national citizenship, which would place the power in Congress.[1361] The citizenship basis was settled by the first sentence of § 1 of the Fourteenth Amendment, but expatriation continued to be a muddled topic. An 1868 statute specifically recognized "the right of expatriation" by individuals, but it was directed to affirming the right of foreign nationals to expatriate themselves and to become naturalized United States citizens.[1362] An 1865 law provided for the forfeiture of the "rights of citizenship" of draft-dodgers and deserters, but whether the statute meant to deprive such persons of citizenship or of their civil rights is unclear.[1363] Be-

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[1357] Perkins v. Elg, 307 U.S. 325 (1939). The qualifying phrase "absent a treaty or statute . . . " is error now, so long as *Afroyim* remains in effect. But note Rogers v. Bellei, 401 U.S. 815, 832–833 (1971).

[1358] Governeur v. Robertson, 24 U.S. (11 Wheat.) 332 (1826); Osterman v. Baldwin, 73 U.S. (6 Wall.) 116 (1867); Manuel v. Wulff, 152 U.S. 505 (1894).

[1359] Shanks v. DuPont, 28 U.S. (3 Pet.) 242, 246 (1830).

[1360] 2 J. Kent, Commentaries 49–50 (1827).

[1361] J. Tenbroek, Anti-Slavery Origins of the Fourteenth Amendment 71–94 (1951); *see generally* J. Roche, The Early Development of United States Citizenship (1949).

[1362] Act of July 27, 1868, 15 Stat. 223. While the Act's preamble rhetorically proclaims the "natural and inherent right of all people" to expatriate themselves, its title is "An Act concerning the Rights of American Citizens in foreign States" and its operative parts are concerned with that subject. It has long been taken, however, as a general proclamation of United States recognition of the right of United States citizens to expatriate themselves. Mackenzie v. Hare, 239 U.S. 299, 309 (1915); Mandoli v. Acheson, 344 U.S. 133, 135–36 (1952). *Cf.* Savorgnan v. United States, 338 U.S. 491, 498 n.11 (1950).

[1363] The Enrollment Act of March 3, 1865, § 21, 13 Stat. 487, 490. The language of the section appears more consistent with a deprivation of civil rights than of citi-

ginning in 1940, however, Congress did enact laws designed to strip of their citizenship persons who committed treason,[1364] deserted the armed forces in wartime,[1365] left the country to evade the draft,[1366] or attempted to overthrow the government by force or violence.[1367] In 1907, Congress provided that female citizens who married foreign citizens were to have their citizenship held "in abeyance" while they remained wedded but to be entitled to reclaim it when the marriage was dissolved.[1368]

About the simplest form of expatriation, the renunciation of citizenship by a person, there is no constitutional difficulty. "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance." [1369] But while the Court has hitherto insisted on the voluntary character of the renunciation, it has sustained the power of Congress to prescribe conditions and circumstances the voluntary entering into of which constitutes renunciation; the person need not intend to renounce so long as he intended to do what he did in fact do.[1370]

The Court first encountered the constitutional issue of forced expatriation in the rather anomalous form of the statute,[1371] which placed in limbo the citizenship of any American female who married a foreigner. Sustaining the statute, the Court relied on the congressional foreign relations power exercised in order to prevent the development of situations that might entangle the United States in embarrassing or hostile relationships with a foreign country. Noting too the fictional merging of identity of husband and wife, the Court thought it well within congressional power to attach certain consequences to these actions, despite the woman's contrary intent and understanding at the time she entered the relationship.[1372]

Beginning in 1958, the Court had a running encounter with the provisions of the 1952 Immigration and Nationality Act, which prescribed expatriation for a lengthy series of actions.[1373] In 1958, a

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zenship. Note also that § 14 of the Wade-Davis Bill, pocket-vetoed by President Lincoln, specifically provided that any person holding office in the Confederate Government "is hereby declared not to be a citizen of the United States." 6 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 223 (1899).

[1364] Nationality Act of 1940, 54 Stat. 1169.

[1365] Id.

[1366] 58 Stat. 746 (1944).

[1367] 68 Stat. 1146 (1954).

[1368] 34 Stat. 1228 (1907), repealed by 42 Stat. 1021 (1922).

[1369] Perkins v. Elg, 307 U.S. 325, 334 (1939).

[1370] Mackenzie v. Hare, 239 U.S. 299, 309, 311–12 (1915); Savorgnan v. United States, 338 U.S. 491, 506 (1950).

[1371] 34 Stat. 1228 (1907).

[1372] Mackenzie v. Hare, 239 U.S. 299 (1915).

[1373] *See generally* 8 U.S.C. §§ 1481–1489. Among the acts for which loss of citizenship is prescribed are (1) obtaining naturalization in a foreign state, (2) taking

five-to-four decision sustained the power to divest a dual national of his United States citizenship because he had voted in an election in the other country of which he was a citizen.[1374] But at the same time, another five-to-four decision, in which a majority rationale was lacking, struck down punitive expatriation visited on persons convicted by court-martial of desertion from the armed forces in wartime.[1375] In the next case, the Court struck down another punitive expatriation visited on persons who, in time of war or emergency, leave or remain outside the country in order to evade military service.[1376] And, in the following year, the Court held unconstitutional a section of the law that expatriated a naturalized citizen who returned to his native land and resided there continuously for a period of three years.[1377]

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an oath of allegiance to a foreign state, (3) serving in the armed forces of a foreign state without authorization and with consequent acquisition of foreign nationality, (4) assuming public office under the government of a foreign state for which only nationals of that state are eligible, (5) voting in an election in a foreign state, (6) formally renouncing citizenship before a United States foreign service officer abroad, (7) formally renewing citizenship within the United States in time of war, subject to approval of the Attorney General, (8) being convicted and discharged from the armed services for desertion in wartime, (9) being convicted of treason or of an attempt to overthrow forcibly the Government of the United States, (10) fleeing or remaining outside the United States in wartime or a proclaimed emergency in order to evade military service, and (11) residing abroad if a naturalized citizen, subject to certain exceptions, for three years in the country of his birth or in which he was formerly a national or for five years in any other foreign state. Several of these sections have been declared unconstitutional, as explained in the text.

[1374] Perez v. Brownell, 356 U.S. 44 (1958). For the Court, Justice Frankfurter sustained expatriation as a necessary exercise of the congressional power to regulate the foreign relations of the United States to prevent the embarrassment and potential for trouble inherent in our nationals voting in foreign elections. Justice Whittaker dissented because he saw no problem of embarrassment or potential trouble if the foreign state permitted aliens or dual nationals to vote. Chief Justice Warren and Justices Black and Douglas denied that expatriation is within Congress's power to prescribe for an act, like voting, which is not necessarily a sign of intention to relinquish citizenship.

[1375] Trop v. Dulles, 356 U.S. 86 (1958). Chief Justice Warren for himself and three Justices held that expatriation for desertion was a cruel and unusual punishment proscribed by the Eighth Amendment. Justice Brennan concurred on the ground of a lack of the requisite relationship between the statute and Congress's war powers. For the four dissenters, Justice Frankfurter argued that Congress had power to impose loss of citizenship for certain activity and that there was a rational nexus between refusal to perform a duty of citizenship and deprivation of citizenship. Justice Frankfurter denied that the penalty was cruel and unusual punishment and denied that it was punishment at all "in any valid constitutional sense." Id. at 124.

[1376] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). For the Court Justice Goldberg held that penal expatriation effectuated solely by administrative determination violated due process because of the absence of procedural safeguards. Justices Black and Douglas continued to insist Congress could not deprive a citizen of his nationality at all. Justice Harlan for the dissenters thought the statute a valid exercise of Congress's war powers but the four dissenters divided two-to-two on the validity of a presumption spelled out in the statute.

[1377] Schneider v. Rusk, 377 U.S. 163 (1964).

The cases up to this point had lacked a common rationale and would have seemed to permit even punitive expatriation under the proper circumstances. But, in *Afroyim v. Rusk*,[1378] a five-to-four majority overruled the 1958 decision permitting expatriation for voting in a foreign election and announced a constitutional rule against all but purely voluntary renunciation of United States citizenship. The majority ruled that the first sentence of § 1 of the Fourteenth Amendment constitutionally vested citizenship in every person "born or naturalized in the United States" and that Congress was powerless to take that citizenship away.[1379] The continuing vitality of this decision was called into question by another five-to-four decision in 1971, which technically distinguished *Afroyim* in upholding a congressionally prescribed loss of citizenship visited upon a person who was statutorily naturalized "outside" the United States, and held not within the protection of the first sentence of § 1 of the Fourteenth Amendment.[1380] Thus, although *Afroyim* was distinguished, the tenor of the majority opinion was hostile to its holding, and it may be that a future case will overrule it.

The issue, then, of the constitutionality of congressionally prescribed expatriation is unsettled.

ALIENS

The power of Congress "to exclude aliens from the United States and to prescribe the terms and conditions on which they come in" is absolute, being an attribute of the United States as a sovereign nation. "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power. . . . The United States, in their relation to foreign countries and their subjects or citizens, are one nation, in-

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[1378] 387 U.S. 253 (1967).

[1379] Justice Harlan, for himself and Justices Clark, Stewart, and White, argued in dissent that there was no evidence that the drafters of the Fourteenth Amendment had at all the intention ascribed to them by the majority. He would have found in Afroyim's voluntary act of voting in a foreign election a voluntary renunciation of United States citizenship. 387 U.S. at 268.

[1380] Rogers v. Bellei, 401 U.S. 815 (1971). The three remaining *Afroyim* dissenters plus Chief Justice Burger and Justice Blackmun made up the majority, the three remaining Justices of the *Afroyim* majority plus Justice Marshall made up the dissenters. The continuing vitality of *Afroyim* was assumed in Vance v. Terrazas, 444 U.S. 252 (1980), in which a divided Court upheld a congressionally imposed standard of proof, preponderance of evidence, by which to determine whether one had by his actions renounced his citizenship.

vested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory." [1381]

Except for the Alien Act of 1798,[1382] Congress went almost a century without enacting laws regulating immigration into the United States. The first such statute, in 1875, barred convicts and prostitutes [1383] and was followed by a series of exclusions based on health,

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[1381] Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 603, 604 (1889); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893); The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903); United States ex rel. Turner v. Williams, 194 U.S. 279 (1904); Bugajewitz v. Adams, 228 U.S. 585 (1913); Hines v. Davidowitz, 312 U.S. 52 (1941); Kleindienst v. Mandel, 408 U.S. 753 (1972). In Galvan v. Press, 347 U.S. 522, 530–531 (1954), Justice Frankfurter for the Court wrote: "[M]uch could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history,' . . . but a whole volume. . . . [T]hat the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." Although the issue of racial discrimination was before the Court in Jean v. Nelson, 472 U.S. 846 (1985), in the context of parole for undocumented aliens, the Court avoided it, holding that statutes and regulations precluded INS considerations of race or national origin. Justices Marshall and Brennan, in dissent, argued for reconsideration of the long line of precedents and for constitutional restrictions on the government. Id. at 858. That there exists *some* limitation upon exclusion of aliens is one permissible interpretation of Reagan v. Abourezk, 484 U.S. 1 (1987), *aff'g by an equally divided Court*, 785 F.2d 1043 (D.C. Cir. 1986), holding that mere membership in the Communist Party could not be used to exclude an alien on the ground that his activities might be prejudicial to the interests of the United States.

The power of Congress to prescribe the rules for exclusion or expulsion of aliens is a "fundamental sovereign attribute" which is "of a political character and therefore subject only to narrow judicial review." Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976); Mathews v. Diaz, 426 U.S. 67, 81–82 (1976); Fiallo v. Bell, 430 U.S. 787, 792 (1977). Although aliens are "an identifiable class of persons," who aside from the classification at issue "are already subject to disadvantages not shared by the remainder of the community," Hampton v. Mow Sun Wong, 426 U.S. at 102, Congress may treat them in ways that would violate the Equal Protection Clause if a state should do it. *Diaz* (residency requirement for welfare benefits); *Fiallo* (sex and illegitimacy classifications). Nonetheless in *Mow Sun Wong*, 426 U.S. at 103, the Court observed that when the Federal Government asserts an overriding national interest as justification for a discriminatory rule that would violate the Equal Protection Clause if adopted by a state, due process requires that it be shown that the rule was actually intended to serve that interest. The case struck down a classification that the Court thought justified by the interest asserted but that had not been imposed by a body charged with effectuating that interest. *See* Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978). *See* Sale v. Haitian Centers Council, 509 U.S. 155 (1993) (construing statutes and treaty provisions restrictively to affirm presidential power to interdict and seize fleeing aliens on high seas to prevent them from entering U.S. waters).

[1382] Act of June 25, 1798, 1 Stat. 570. The Act was part of the Alien and Sedition Laws and authorized the expulsion of any alien the President deemed dangerous.

[1383] Act of March 3, 1875, 18 Stat. 477.

criminal, moral, economic, and subversion considerations.[1384] Another important phase was begun with passage of the Chinese Exclusion Act in 1882,[1385] which was not repealed until 1943.[1386] In 1924, Congress enacted into law a national origins quota formula which based the proportion of admittable aliens on the nationality breakdown of the 1920 census, which, of course, was heavily weighed in favor of English and northern European ancestry.[1387] This national origins quota system was in effect until it was repealed in 1965.[1388] The basic law remains the Immigration and Nationality Act of 1952,[1389] which retains its essential structure while undergoing several significant revisions. These revisions have included a temporary legalization program for certain unauthorized aliens, employer sanctions, a general expansion and tightening of rules for removal, changes in categories of aliens who may enter temporarily, and more express provisions on federal-state cooperation in immigration enforcement.

Numerous cases underscore the sweeping nature of the powers of the Federal Government to exclude aliens and to deport aliens by administrative process. For example, in *United States ex rel. Knauff v. Shaughnessy*,[1390] an order of the Attorney General excluding, on the basis of confidential information he would not disclose, a wartime bride, who was *prima facie* entitled to enter the United States,[1391] was held to be unreviewable by the courts. Nor were regulations on which the order was based invalid as an undue delegation of legislative power. "Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of

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[1384] 22 Stat. 214 (1882) (excluding idiots, lunatics, convicts, and persons likely to become public charges); 23 Stat. 332 (1885), and 24 Stat. 414 (1887) (regulating importing cheap foreign labor); 26 Stat. 1084 (1891) (persons suffering from certain diseases, those convicted of crimes involving moral turpitude, paupers, and polygamists); 32 Stat. 1213 (1903) (epileptics, insane persons, professional beggars, and anarchists); 34 Stat. 898 (1907) (feeble-minded, children unaccompanied by parents, persons suffering with tuberculosis, and women coming to the United States for prostitution or other immoral purposes).

[1385] Act of May 6, 1882, 22 Stat. 58.

[1386] Act of December 17, 1943, 57 Stat. 600.

[1387] Act of May 26, 1924, 43 Stat. 153.

[1388] Act of October 3, 1965, Pub. L. 89–236, 79 Stat. 911.

[1389] Act of June 27, 1952, Pub. L. 82–414, 66 Stat. 163, 8 U.S.C. §§ 1101 *et seq*. as amended.

[1390] 338 U.S. 537 (1950). *See also* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), in which the Court majority upheld the Government's power to exclude on the basis of information it would not disclose a permanent resident who had gone abroad for about nineteen months and was seeking to return on a new visa. But the Court will frequently read the applicable statutes and regulations strictly against the government for the benefit of persons sought to be excluded. *Cf.* Delgadillo v. Carmichael, 332 U.S. 388 (1947); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Rosenburg v. Fleuti, 374 U.S. 449 (1963).

[1391] Under the War Brides Act of 1945, 59 Stat. 659.

exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, *e.g.*, as was done here, for the best interests of the country during a time of national emergency. Executive officers may be entrusted with the duty of specifying the procedures for carrying out the congressional intent." [1392] However, when Congress has spelled out the basis for exclusion or deportation, the Court remains free to interpret the statute and review the administration of it and to apply it, often in a manner to mitigate the effects of the law on aliens.[1393]

Congress's power to admit aliens under whatever conditions it lays down is exclusive of state regulation. The states "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." [1394] This principle, however, has not precluded all state regulations dealing with aliens.[1395] The power of Congress to legislate with respect to the conduct of alien residents is a concomitant of its power to prescribe the terms and conditions on which they may enter the United States, to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers. It is not a power to lay down a special code of conduct for alien residents or to govern their private relations.[1396]

Yet Congress is empowered to assert a considerable degree of control over aliens after their admission to the country. By the Alien Registration Act of 1940, Congress provided that all aliens in the United States, fourteen years of age and over, should submit to reg-

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[1392] 338 U.S. at 543.

[1393] *E.g.*, Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966).

[1394] Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); De Canas v. Bica, 424 U.S. 351, 358 n.6 (1976); Toll v. Moreno, 458 U.S. 1, 12–13 (1982). *See also* Hines v. Davidowitz, 312 U.S. 52, 66 (1941); Graham v. Richardson, 403 U.S. 365, 376–380 (1971).

[1395] *E.g.*, Heim v. McCall, 239 U.S. 175 (1915); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927); Sugarman v. Dougall, 413 U.S. 634, 646–49 (1973); De Canas v. Bica, 424 U.S. 351 (1976); Cabell v. Chavez-Salido, 454 U.S. 432 (1982). *See also* Chamber of Commerce of the United States v. Whiting, 563 U.S. ___, No. 09–115, slip op. (2011).

[1396] Purporting to enforce this distinction, the Court voided a statute, which, in prohibiting the importation of "any alien woman or girl for the purpose of prostitution," provided that whoever should keep for the purpose of prostitution "any alien woman or girl within three years after she shall have entered the United States" should be deemed guilty of a felony. Keller v. United States, 213 U.S. 138 (1909).

istration and finger printing and willful failure to comply was made a criminal offense against the United States.[1397] This Act, taken in conjunction with other laws regulating immigration and naturalization, has constituted a comprehensive and uniform system for the regulation of all aliens.[1398]

An important benefit of this comprehensive, uniform regulation accruing to the alien is that it generally has precluded state regulation that may well be more severe and burdensome.[1399] For example, in *Hines v. Davidowitz*,[1400] the Court voided a Pennsylvania law requiring the annual registration and fingerprinting of aliens but going beyond the subsequently enacted federal law to require acquisition of an alien identification card that had to be carried at all times and to be exhibited to any police officer upon demand and to other licensing officers upon applications for such things as drivers' licenses.[1401]

Another decision voided a Pennsylvania law limiting those eligible to welfare assistance to citizens and an Arizona law prescrib-

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[1397] 54 Stat. 670, 8 U.S.C. §§ 1301–1306.

[1398] *See* Hines v. Davidowitz, 312 U.S. 52, 69–70 (1941).

[1399] In the 1990s, Congress began giving the states a larger role in the enforcement of federal immigration law. During this period, Congress also broadened the states' authority to deny aliens state benefits. Still, in the 2000s, states increasingly asserted greater independent authority to deter the presence of illegal aliens within their borders, both through curtailing benefits and assuming a more active role in direct immigration enforcement. Most of these efforts foundered under court challenge, but some did not, resulting, in at least one instance, in the imposition of more severe consequences under state law than under federal law for similar immigration violations. *See* Chamber of Commerce of the United States v. Whiting, 563 U.S. ___, No. 09–115, slip op. (2011). Nevertheless, the *Whiting* Court found a textual basis in federal statute for the state sanctions imposed there. Absent text-based authority for separate state penalties for federal immigration violations, those state penalties likely will fail on preemption grounds. Arizona v. United States, 567 U.S. ___, No. 11–182, slip op. (2012) (invalidating state sanctions on unauthorized aliens seeking work in violation of federal law and striking state penalties for violations of federal alien registration requirements). It would further appear that states must ground their efforts to detect, arrest, and remove unauthorized aliens in authority delegated by Congress. Id.

[1400] 312 U.S. 52 (1941).

[1401] 312 U.S. at 68. The Court did not squarely hold the state incapable of having such a law in the absence of federal law but appeared to lean in that direction. State sanctions for violating federal alien registration laws were overturned in Arizona v. United States, at least in part because the state penalties were greater than those under federal law for the same violation. *But see* De Canas v. Bica, 424 U.S. 351 (1976), in which the Court, ten years prior to enactment of federal employer sanctions, upheld a state law prohibiting an employer from hiring aliens not entitled to lawful residence in the United States. The Court wrote that states may enact legislation touching upon aliens coexistent with federal laws, under regular preemption standards, unless the nature of the regulated subject matter precludes the conclusion or unless Congress has unmistakably ordained the impermissibility of state law. For examples of state sanctions against unauthorized aliens that have been struck on preemption grounds, see Arizona v. United States, 567 U.S. ___, No. 11–182, slip op. (2012).

ing a fifteen-year durational residency period before an alien could be eligible for welfare assistance.[1402] Congress had provided, Justice Blackmun wrote for a unanimous Court, that persons who were likely to become public charges could not be admitted to the United States and that any alien who became a public charge within five years of his admission was to be deported unless he could show that the causes of his economic situation arose after his entry.[1403] Thus, in effect Congress had declared that lawfully admitted resident aliens who became public charges for causes arising after their entry were entitled to the full and equal benefit of all laws for the security of persons and property and the states were disabled from denying aliens these benefits.[1404]

Deportation

Unlike the exclusion proceedings,[1405] deportation proceedings afford the alien a number of constitutional rights: a right against self-incrimination,[1406] protection against unreasonable searches and seizures,[1407] guarantees against *ex post facto* laws, bills of attainder, and cruel and unusual punishment,[1408] a right to bail,[1409] a right to procedural due process,[1410] a right to counsel,[1411] a right to notice of charges and hearing,[1412] and a right to cross-examine.[1413]

Notwithstanding these guarantees, the Supreme Court has upheld a number of statutory deportation measures as not unconstitutional. The Internal Security Act of 1950, in authorizing the Attorney General to hold in custody, without bail, aliens who are members of the Communist Party of the United States, pending determination as to their deportability, is not unconstitutional.[1414] Nor was it

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[1402] Graham v. Richardson, 403 U.S. 365 (1971). *See also* Sugarman v. Dougall, 413 U.S. 634 (1973); *In re* Griffiths, 413 U.S. 717 (1973); Cabell v. Chavez-Salido, 454 U.S. 432 (1982).

[1403] 8 U.S.C. §§ 1182(a)(8), 1182(a)(15), 1251(a)(8).

[1404] *See* 42 U.S.C. § 1981, applied in Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 n.7 (1948).

[1405] *See* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950), where the Court noted that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

[1406] Kimm v. Rosenberg, 363 U.S. 405 (1960).

[1407] Abel v. United States, 362 U.S. 217, 229 (1960).

[1408] Marcello v. Bonds, 349 U.S. 302 (1955).

[1409] Carlson v. Landon, 342 U.S. 524, 540 (1952).

[1410] Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950). See discussion of aliens' due process rights under the Fifth Amendment, Aliens: Entry and Deportation.

[1411] 8 U.S.C. § 1252(b)(2).

[1412] 8 U.S.C. § 1252(b)(1).

[1413] 8 U.S.C. § 1252(b)(3).

[1414] Carlson v. Landon, 342 U.S. 524 (1952). In Reno v. Flores, 507 U.S. 292 (1993), the Court upheld an INS regulation providing for the ongoing detention of juveniles apprehended on suspicion of being deportable, unless parents, close rela-

unconstitutional to deport under the Alien Registration Act of 1940 [1415] a legally resident alien because of membership in the Communist Party, although such membership ended before the enactment of the Act. Such application of the Act did not make it *ex post facto*, being but an exercise of the power of the United States to terminate its hospitality *ad libitum*.[1416] And a statutory provision [1417] making it a felony for an alien against whom a specified order of deportation is outstanding "to willfully fail or refuse to make timely application for travel or other documents necessary to his departure" was not on its face void for "vagueness." [1418] An alien unlawfully in the country "has no constitutional right to assert selective enforcement as a defense against his deportation." [1419]

BANKRUPTCY

Persons Who May Be Released From Debt

In an early case on circuit, Justice Livingston suggested that inasmuch as the English statutes on the subject of bankruptcy from the time of Henry VIII down had applied only to traders it might "well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject." [1420] Neither Congress nor the Supreme Court has ever accepted this limited view. The first bankruptcy law, passed in 1800, departed from the English practice to the extent of including bankers, brokers, factors, and underwriters as well as traders.[1421] Asserting that the narrow scope of the English statutes was a mere matter of policy, which by no means entered into the nature of such laws, Justice Story defined bankruptcy legislation in the sense of the Constitution as a law making provisions for cases of persons failing to pay their debts.[1422]

This interpretation has been ratified by the Supreme Court. In *Hanover National Bank v. Moyses*,[1423] it held valid the Bankruptcy Act of 1898, which provided that persons other than traders might become bankrupts and that this might be done on voluntary peti-

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tives, or legal guardians were available to accept release, as against a substantive due process attack.

[1415] 54 Stat. 670. For existing statutory provisions as to deportation, *see* 8 U.S.C. §§ 1251 *et seq*.

[1416] Carlson v. Landon, 342 U.S. 524 (1952).

[1417] 8 U.S.C. § 1252(e).

[1418] United States v. Spector, 343 U.S. 169 (1952).

[1419] Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999).

[1420] Adams v. Storey, 1 Fed. Cas. 141, 142 (No. 66) (C.C.D.N.Y. 1817).

[1421] 2 Stat. 19 (1800).

[1422] 2 J. Story, Commentaries on the Constitution of the United States 1113 (1833).

[1423] 186 U.S. 181 (1902).

tion. The Court has given tacit approval to the extension of the bankruptcy laws to cover practically all classes of persons and corporations,[1424] including even municipal corporations[1425] and wage-earning individuals. The Bankruptcy Act has, in fact been amended to provide a wage-earners' extension plan to deal with the unique problems of debtors who derive their livelihood primarily from salaries or commissions. In furthering the implementation of this plan, the Supreme Court has held that a wage earner may make use of it, notwithstanding the fact he has been previously discharged in bankruptcy within the last six years.[1426]

Liberalization of Relief Granted and Expansion of the Rights of the Trustee

As the coverage of the bankruptcy laws has been expanded, the scope of the relief afforded to debtors has been correspondingly enlarged. The act of 1800, like its English antecedents, was designed primarily for the benefit of creditors. Beginning with the act of 1841, which opened the door to voluntary petitions, rehabilitation of the debtor has become an object of increasing concern to Congress. An adjudication in bankruptcy is no longer requisite to the exercise of bankruptcy jurisdiction. In 1867, the debtor for the first time was permitted, either before or after adjudication of bankruptcy, to propose terms of composition that would become binding upon acceptance by a designated majority of his creditors and confirmation by a bankruptcy court. This measure was held constitutional,[1427] as were later acts, which provided for the reorganization of corporations that are insolvent or unable to meet their debts as they mature,[1428] and for the composition and extension of debts in proceedings for the relief of individual farmer debtors.[1429]

Nor is the power of Congress limited to adjustment of the rights of creditors. The Supreme Court has also ruled that the rights of a purchaser at a judicial sale of the debtor's property are within reach of the bankruptcy power, and may be modified by a reasonable extension of the period for redemption from such sale.[1430] Moreover, the Court expanded the bankruptcy court's power over the prop-

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[1424] Continental Bank v. Rock Island Ry., 294 U.S. 648, 670 (1935).

[1425] United States v. Bekins, 304 U.S. 27 (1938), distinguishing Ashton v. Cameron County Dist., 298 U.S. 513 (1936).

[1426] Perry v. Commerce Loan Co., 383 U.S. 392 (1966).

[1427] *In re* Reiman, 20 Fed. Cas. 490 (No. 11,673) (D.C.S.D.N.Y. 1874), cited with approval in Continental Bank v. Rock Island Ry., 294 U.S. 648, 672 (1935).

[1428] Continental Bank v. Rock Island Ry., 294 U.S. 648 (1935).

[1429] Wright v. Vinton Branch, 300 U.S. 440 (1937); Adair v. Bank of America Ass'n, 303 U.S. 350 (1938).

[1430] Wright v. Union Central Ins. Co., 304 U.S. 502 (1938).

erty of the estate by affording the trustee affirmative relief on counterclaim against a creditor filing a claim against the estate.[1431]

Underlying most Court decisions and statutes in this area is the desire to achieve equity and fairness in the distribution of the bankrupt's funds.[1432] *United States v. Speers*,[1433] codified by an amendment to the Bankruptcy Act,[1434] furthered this objective by strengthening the position of the trustee as regards the priority of a federal tax lien unrecorded at the time of bankruptcy.[1435] The Supreme Court has held, in other cases dealing with the priority of various creditors' claims, that claims arising from the tort of the receiver is an "actual and necessary" cost of administration,[1436] that benefits under a nonparticipating annuity plan are not wages and are therefore not given priority,[1437] and that when taxes are allowed against a bankrupt's estate, penalties due because of the trustee's failure to pay the taxes incurred while operating a bankrupt business are also allowable.[1438] The Court's attitude with regard to these and other developments is perhaps best summarized in the opinion in *Continental Bank v. Rock Island Ry.*,[1439] where Justice Sutherland wrote, on behalf of a unanimous court: "[T]hese acts, far-reaching though they may be, have not gone beyond the limit of Congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed." [1440]

Constitutional Limitations on the Bankruptcy Power

In the exercise of its bankruptcy powers, Congress must not transgress the Fifth and Tenth Amendments. The Bankruptcy Act provides that use immunity may be granted "for persons required to submit to examination, to testify, or to provide information" in a bankruptcy case.[1441] Congress may not take from a creditor specific property previously acquired from a debtor, nor circumscribe the creditor's right to such an unreasonable extent as to deny him due process of law;[1442] this principle, however, is subject to the Supreme Court's finding that a bankruptcy court has summary jurisdiction for ordering the surrender of voidable preferences when the trustee

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[1431] Katchen v. Landy, 382 U.S. 323 (1966).
[1432] Bank of Marin v. England, 385 U.S. 99, 103 (1966).
[1433] 382 U.S. 266 (1965). *Cf.* United States v. Vermont, 337 U.S. 351 (1964).
[1434] Act of July 5, 1966, 80 Stat. 269, 11 U.S.C. § 501, repealed.
[1435] 382 U.S. at 271–72.
[1436] Reading Co. v. Brown, 391 U.S. 471 (1968).
[1437] Joint Industrial Bd. v. United States, 391 U.S. 224 (1968).
[1438] Nicholas v. United States, 384 U.S. 678 (1966).
[1439] 294 U.S. 648 (1935).
[1440] 294 U.S. at 671.
[1441] 11 U.S.C. § 344.
[1442] Louisville Bank v. Radford, 295 U.S. 555, 589, 602 (1935).

successfully counterclaims to a claim filed by the creditor receiving such preferences.[1443]

Because Congress may not supersede the power of a state to determine how a corporation shall be formed, supervised, and dissolved, a corporation that has been dissolved by a decree of a state court may not file a petition for reorganization under the Bankruptcy Act.[1444] But Congress may impair the obligation of a contract and may extend the provisions of the bankruptcy laws to contracts already entered into at the time of their passage.[1445] Although it may not subject the fiscal affairs of a political subdivision of a state to the control of a federal bankruptcy court,[1446] Congress may empower such courts to entertain petitions by taxing agencies or instrumentalities for a composition of their indebtedness where the state has consented to the proceeding and the federal court is not authorized to interfere with the fiscal or governmental affairs of such petitioners.[1447] Congress may recognize the laws of the state relating to dower, exemption, the validity of mortgages, priorities of payment and similar matters, even though such recognition leads to different results from state to state;[1448] for, although bankruptcy legislation must be uniform, the uniformity required is geographic, not personal.

The power of Congress to vest the adjudication of bankruptcy claims in entities not having the constitutional status of Article III federal courts is unsettled. At least, it may not give to non-Article III courts the authority to hear state law claims made subject to federal jurisdiction only because of their relevance to a bankruptcy proceeding.[1449]

Constitutional Status of State Insolvency Laws: Preemption

Prior to 1898, Congress exercised the power to establish "uniform laws on the subject of bankruptcy" only intermittently. The first national bankruptcy law was not enacted until 1800 and was repealed in 1803; the second was passed in 1841 and was repealed

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[1443] Katchen v. Landy, 382 U.S. 323, 327–40 (1966).

[1444] Chicago Title and Trust Co. v. Wilcox Bldg. Corp., 302 U.S. 120 (1937).

[1445] *In re* Klein, 42 U.S. (1 How.) 277 (1843); Hanover National Bank v. Moyses, 186 U.S. 181 (1902).

[1446] Ashton v. Cameron County Dist., 298 U.S. 513 (1936). *See also* United States v. Bekins, 304 U.S. 27 (1938).

[1447] United States v. Bekins, 304 U.S. 27 (1938).

[1448] Stellwagon v. Clum, 245 U.S. 605 (1918); Hanover National Bank v. Moyses, 186 U.S. 181, 190 (1902).

[1449] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). *See also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (Seventh Amendment right to jury trial in bankruptcy cases).

two years later; a third was enacted in 1867 and repealed in 1878.[1450] Thus, during the first eighty-nine years under the Constitution, a national bankruptcy law was in existence only sixteen years altogether. Consequently, the most important issue of interpretation that arose during that period concerned the effect of the clause on state law.

The Supreme Court ruled at an early date that, in the absence of congressional action, the states may enact insolvency laws, because it is not the mere existence of the power but rather its exercise that is incompatible with the exercise of the same power by the states.[1451] Later cases settled further that the enactment of a national bankruptcy law does not invalidate state laws in conflict therewith but serves only to relegate them to a state of suspended animation with the result that upon repeal of the national statute they again come into operation without re-enactment.[1452]

A state, of course, has no power to enforce any law governing bankruptcies that impairs the obligation of contracts,[1453] extends to persons or property outside its jurisdiction,[1454] or conflicts with the national bankruptcy laws.[1455] Giving effect to the policy of the federal statute, the Court has held that a state statute regulating this distribution of property of an insolvent was suspended by that law,[1456] and that a state court was without power to proceed with pending foreclosure proceedings after a farmer-debtor had filed a petition in federal bankruptcy court for a composition or extension of time to pay his debts.[1457] A state court injunction ordering a defendant to clean up a waste-disposal site was held to be a "liability on a claim" subject to discharge under the bankruptcy law, after the state had appointed a receiver to take charge of the defendant's property and comply with the injunction.[1458] A state law gov-

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[1450] Hanover National Bank v. Moyses, 186 U.S. 181, 184 (1902).

[1451] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199 (1819); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827).

[1452] Tua v. Carriere, 117 U.S. 201 (1886); Butler v. Goreley, 146 U.S. 303, 314 (1892).

[1453] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).

[1454] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827); Denny v. Bennett, 128 U.S. 489, 498 (1888); Brown v. Smart, 145 U.S. 454 (1892).

[1455] *In re* Watts and Sachs, 190 U.S. 1, 27 (1903); International Shoe Co. v. Pinkus, 278 U.S. 261, 264 (1929).

[1456] International Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929).

[1457] Kalb v. Feurerstein, 308 U.S. 433 (1940).

[1458] Ohio v. Kovacs, 469 U.S. 274 (1985). *Compare* Kelly v. Robinson, 479 U.S. 36 (1986) (restitution obligations imposed as conditions of probation in state criminal actions are nondischargeable in proceedings under chapter 7), *with* Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552 (1990) (restitution obligations imposed as condition of probation in state criminal actions are dischargeable in proceedings under chapter 13).

erning fraudulent transfers was found to be compatible with the federal law.[1459]

Substantial disagreement has marked the actions of the Justices in one area, however, resulting in three five-to-four decisions first upholding and then voiding state laws providing that a discharge in bankruptcy was not to relieve a judgment arising out of an automobile accident upon pain of suffering suspension of his driver's license.[1460] The state statutes were all similar enactments of the Uniform Motor Vehicle Safety Responsibility Act, which authorizes the suspension of the license of any driver who fails to satisfy a judgment against himself growing out of a traffic accident; a section of the law specifically provides that a discharge in bankruptcy will not relieve the debtor of the obligation to pay and the consequence of license suspension for failure to pay. In the first two decisions, the Court majorities decided that the object of the state law was not to see that such judgments were paid but was rather a device to protect the public against irresponsible driving.[1461] The last case rejected this view and held that the Act's sole emphasis was one of providing leverage for the collection of damages from drivers and as such was in fact intended to and did frustrate the purpose of the federal bankruptcy law, the giving of a fresh start unhampered by debt.[1462]

If a state desires to participate in the assets of a bankruptcy, it must submit to the appropriate requirements of the bankruptcy court with respect to the filing of claims by a designated date. It cannot assert a claim for taxes by filing a demand at a later date.[1463]

Clauses 5 and 6. The Congress shall have Power * * * To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.

* * * To provide for the Punishment of counterfeiting the Securities and current Coin of the United States.

[1459] Stellwagon v. Clum, 245 U.S. 605, 615 (1918).

[1460] Reitz v. Mealey, 314 U.S. 33 (1941); Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962); Perez v. Campbell, 402 U.S. 637 (1971).

[1461] Reitz v. Mealey, 314 U.S. 33, 37 (1941); Kesler v. Department of Public Safety, 369 U.S. 153, 169–74 (1962).

[1462] Perez v. Campbell, 402 U.S. 637, 644–48, 651–54 (1971). The dissenters, Justice Blackmun for himself and Chief Justice Burger and Justices Harlan and Stewart, argued, in line with the *Reitz* and *Kesler* majorities, that the provision at issue was merely an attempt to assure driving competence and care on the part of its citizens and had only tangential effect upon bankruptcy.

[1463] New York v. Irving Trust Co., 288 U.S. 329 (1933).

FISCAL AND MONETARY POWERS OF CONGRESS

Coinage, Weights, and Measures

The power "to coin money" and "regulate the value thereof" has been broadly construed to authorize regulation of every phase of the subject of currency. Congress may charter banks and endow them with the right to issue circulating notes,[1464] and it may restrain the circulation of notes not issued under its own authority.[1465] To this end it may impose a prohibitive tax upon the circulation of the notes of state banks [1466] or of municipal corporations.[1467] It may require the surrender of gold coin and of gold certificates in exchange for other currency not redeemable in gold. A plaintiff who sought payment for the gold coin and certificates thus surrendered in an amount measured by the higher market value of gold was denied recovery on the ground that he had not proved that he would suffer any actual loss by being compelled to accept an equivalent amount of other currency.[1468] Inasmuch as "every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power," [1469] the Supreme Court sustained the power of Congress to make Treasury notes legal tender in satisfaction of antecedent debts,[1470] and, many years later, to abrogate the clauses in private contracts calling for payment in gold coin, even though such contracts were executed before the legislation was passed.[1471] The power to coin money also imports authority to maintain such coinage as a medium of exchange at home, and to forbid its diversion to other uses by defacement, melting or exportation.[1472]

Punishment of Counterfeiting

In its affirmative aspect, this clause has been given a narrow interpretation; it has been held not to cover the circulation of counterfeit coin or the possession of equipment susceptible of use for making counterfeit coin.[1473] At the same time, the Supreme Court has rebuffed attempts to read into this provision a limitation upon

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[1464] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
[1465] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).
[1466] 75 U.S. at 548.
[1467] National Bank v. United States, 101 U.S. 1 (1880).
[1468] Nortz v. United States, 249 U.S. 317 (1935).
[1469] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 549 (1871); Juilliard v. Greenman, 110 U.S. 421, 449 (1884).
[1470] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).
[1471] Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935).
[1472] Ling Su Fan v. United States, 218 U.S. 302 (1910).
[1473] United States v. Marigold, 50 U.S. (9 How.), 560, 568 (1850).

either the power of the States or upon the powers of Congress under the preceding clause. It has ruled that a state may punish the issuance of forged coins.[1474] On the ground that the power of Congress to coin money imports "the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation,"[1475] it has sustained federal statutes penalizing the importation or circulation of counterfeit coin,[1476] or the willing and conscious possession of dies in the likeness of those used for making coins of the United States.[1477] In short, the above clause is entirely superfluous. Congress would have had the power it purports to confer under the Necessary and Proper Clause; and the same is the case with the other enumerated crimes it is authorized to punish. The enumeration was unnecessary and is not exclusive.[1478]

Borrowing Power Versus Fiscal Power

Usually the aggregate of the fiscal and monetary powers of the National Government—to lay and collect taxes, to borrow money and to coin money and regulate the value thereof—have reinforced each other, and, cemented by the necessary and proper clause, have provided a secure foundation for acts of Congress chartering banks and other financial institutions,[1479] or making its treasury notes legal tender in the payment of antecedent debts.[1480] But, in 1935, the opposite situation arose—one in which the power to regulate the value of money collided with the obligation incurred in the exercise of the power to borrow money. By a vote of eight-to-one the Supreme Court held that the obligation assumed by the exercise of the latter was paramount, and could not be repudiated to effectuate the monetary policies of Congress.[1481] In a concurring opinion, Justice Stone declined to join with the majority in suggesting that "the exercise of the sovereign power to borrow money on credit, which does not override the sovereign immunity from suit, may nevertheless preclude or impede the exercise of another sovereign power, to regulate the value of money; or to suggest that although there is and can be no present cause of action upon the repudiated gold clause,

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[1474] Fox v. Ohio, 46 U.S. (5 How.) 410 (1847).
[1475] United States v. Marigold, 50 U.S. (9 How.) 560, 568 (1850).
[1476] Id.
[1477] Baender v. Barnett, 255 U.S. 224 (1921).
[1478] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 536 (1871).
[1479] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 737, 861 (1824); Farmers' & Mechanics' Nat. Bank v. Dearing, 91 U.S. 29, 33 (1875); Smith v. Kansas City Title Co., 255 U.S. 180, 208 (1921).
[1480] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 540–47 (1871).
[1481] Perry v. United States, 294 U.S. 330, 353 (1935).

its obligation is nevertheless, in some manner and to some extent, not stated, superior to the power to regulate the currency which we now hold to be superior to the obligation of the bonds." [1482] However, with a view to inducing purchase of savings bonds, the sale of which is essential to successful management of the national debt, Congress is competent to authorize issuance of regulations creating a right of survivorship in such bonds registered in co-ownership form, and such regulations preempt provisions of state law prohibiting married couples from using the survivorship privilege whenever bonds are paid out of community property.[1483]

Clause 7. The Congress shall have Power * * * To establish Post Offices and post roads.

POSTAL POWER

"Establish"

The great question raised in the early days with reference to the postal clause concerned the meaning to be given to the word "establish"—did it confer upon Congress the power to construct post offices and post roads, or only the power to designate from existing places and routes those that should serve as post offices and post roads? As late as 1855, Justice McLean stated that this power "has generally been considered as exhausted in the designation of roads on which the mails are to be transported," and concluded that neither under the commerce power nor the power to establish post roads could Congress construct a bridge over a navigable water.[1484] A decade earlier, however, the Court, without passing upon the validity of the original construction of the Cumberland Road, held that being "charged . . . with the transportation of the mails," Congress could enter a valid compact with the State of Pennsylvania regarding the use and upkeep of the portion of the road lying in the state.[1485] The debate on the question was terminated in 1876 by the decision in *Kohl v. United States*,[1486] sustaining a proceeding by the United States to appropriate a parcel of land in Cincinnati as a site for a post office and courthouse.

Power To Protect the Mails

The postal powers of Congress embrace all measures necessary to insure the safe and speedy transit and prompt delivery of the

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[1482] 294 U.S. at 361.

[1483] Free v. Bland, 369 U.S. 663 (1962).

[1484] United States v. Railroad Bridge Co., 27 Fed. Cas. 686 (No. 16,114) (C.C.N.D. Ill. 1855).

[1485] Searight v. Stokes, 44 U.S. (3 How.) 151, 166 (1845).

[1486] 91 U.S. 367 (1876).

mails.[1487] And not only are the mails under the protection of the National Government, they are in contemplation of law its property. This principle was recognized by the Supreme Court in 1845 in holding that wagons carrying United States mail were not subject to a state toll tax imposed for use of the Cumberland Road pursuant to a compact with the United States.[1488] Half a century later it was availed of as one of the grounds on which the national executive was conceded the right to enter the national courts and demand an injunction against the authors of any widespread disorder interfering with interstate commerce and the transmission of the mails.[1489]

Prompted by the efforts of Northern anti-slavery elements to disseminate their propaganda in the Southern states through the mails, President Jackson, in his annual message to Congress in 1835, suggested "the propriety of passing such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection." In the Senate, John C. Calhoun resisted this recommendation, taking the position that it belonged to the States and not to Congress to determine what is and what is not calculated to disturb their security. He expressed the fear that if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation.[1490] On this point his reasoning would appear to be vindicated by such decisions as those denying the right of the states to prevent the importation of alcoholic beverages from other states.[1491]

Power To Prevent Harmful Use of the Postal Facilities

In 1872, Congress passed the first of a series of acts to exclude from the mails publications designed to defraud the public or corrupt its morals. In the pioneer case of *Ex parte Jackson*,[1492] the Court sustained the exclusion of circulars relating to lotteries on the general ground that "the right to designate what shall be carried necessarily involves the right to determine what shall be ex-

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[1487] *Ex parte* Jackson, 96 U.S. 727, 732 (1878). *See* United States Postal Serv. v. Council of Greenburgh Civic Assn's, 453 U.S. 114 (1981), in which the Court sustained the constitutionality of a law making it unlawful for persons to use, without payment of a fee (postage), a letterbox which has been designated an "authorized depository" of the mail by the Postal Service.

[1488] Searight v. Stokes, 44 U.S. (3 How.) 151, 169 (1845).

[1489] *In re* Debs, 158 U.S. 564, 599 (1895).

[1490] Cong. Globe, 24th Cong., 1st Sess., 3, 10, 298 (1835).

[1491] Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890).

[1492] 96 U.S. 727 (1878).

cluded." [1493] The leading fraud order case, decided in 1904, held to the same effect.[1494] Pointing out that it is "an indispensable adjunct to a civil government," to supply postal facilities, the Court restated its premise that the "legislative body in thus establishing a postal service may annex such conditions . . . as it chooses." [1495]

Later cases first qualified these sweeping assertions and then overturned them, holding government operation of the mails to be subject to constitutional limitations. In upholding requirements that publishers of newspapers and periodicals seeking second-class mailing privileges file complete information regarding ownership, indebtedness, and circulation and that all paid advertisements in the publications be marked as such, the Court emphasized that these provisions were reasonably designed to safeguard the second-class privilege from exploitation by mere advertising publications.[1496] Chief Justice White warned that the Court by no means intended to imply that it endorsed the Government's "broad contentions concerning . . . the classification of the mails, or by the way of condition . . . ." [1497] Again, when the Court sustained an order of the Postmaster General excluding from the second-class privilege a newspaper he had found to have published material in contravention of the Espionage Act of 1917, the claim of absolute power in Congress to withhold the privilege was sedulously avoided.[1498]

A unanimous Court transformed these reservations into a holding in *Lamont v. Postmaster General*,[1499] in which it struck down a statute authorizing the Post Office to detain mail it determined to be "communist political propaganda" and to forward it to the addressee only if he notified the Post Office he wanted to see it. Noting that Congress was not bound to operate a postal service, the Court observed that while it did, it was bound to observe constitutional guarantees.[1500] The statute violated the First Amendment be-

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[1493] 96 U.S. at 732.

[1494] Public Clearing House v. Coyne, 194 U.S. 497 (1904), followed in Donaldson v. Read Magazine, 333 U.S. 178 (1948).

[1495] 194 U.S. at 506.

[1496] Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

[1497] 229 U.S. at 316.

[1498] United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921). *See also* Hannegan v. Esquire, 327 U.S. 146 (1946), denying the Post Office the right to exclude Esquire Magazine from the mails on grounds of the poor taste and vulgarity of its contents.

[1499] 381 U.S. 301 (1965).

[1500] 381 U.S. at 305, quoting Justice Holmes in United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921) (dissenting opinion): "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues. . . ." *See also* Blount v. Rizzi, 400 U.S. 410, 416 (1971) (quoting same language). But for a different perspective on the meaning and appli-

cause it inhibited the right of persons to receive any information that they wished to receive.[1501]

On the other hand, a statute authorizing persons to place their names on a list in order to reject receipt of obscene or sexually suggestive materials is constitutional, because no sender has a right to foist his material on any unwilling receiver.[1502] But, as in other areas, postal censorship systems must contain procedural guarantees sufficient to ensure prompt resolution of disputes about the character of allegedly objectionable material consistently with the First Amendment.[1503]

Exclusive Power as an Adjunct to Other Powers

The cases just reviewed involved attempts to close the mails to communication that were deemed to be harmful. A much broader power of exclusion was asserted in the Public Utility Holding Company Act of 1935.[1504] To induce compliance with the regulatory requirements of that act, Congress denied the privilege of using the mails for any purpose to holding companies that failed to obey that law, irrespective of the character of the material to be carried. Viewing the matter realistically, the Supreme Court treated this provision as a penalty. Although it held this statute constitutional because the regulations whose infractions were thus penalized were themselves valid,[1505] it declared that "Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province. . . ." [1506]

State Regulations Affecting the Mails

In determining the extent to which state laws may impinge upon persons or corporations whose services are used by Congress in executing its postal powers, the task of the Supreme Court has been to determine whether particular measures are consistent with the general policies indicated by Congress. Broadly speaking, the Court

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cation of Holmes' language, *see* United States Postal Service v. Council of Greenburgh Civic Assn's, 453 U.S. 114, 127 n.5 (1981), although there too the Court observed that the postal power may not be used in a manner that abridges freedom of speech or press. Id. at 126. Notice, too, that first-class mail is protected against opening and inspection, except in accordance with the Fourth Amendment. *Ex parte* Jackson, 96 U.S. 727, 733 (1878); United States v. van Leeuwen, 397 U.S. 249 (1970). *But see* United States v. Ramsey, 431 U.S. 606 (1977) (border search).

[1501] Lamont v. Postmaster General, 381 U.S. 301, 306–07 (1965). *See also* id. at 308 (concurring opinion). This was the first federal statute ever voided for being in conflict with the First Amendment.

[1502] Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

[1503] Blount v. Rizzi, 400 U.S. 410 (1971).

[1504] 49 Stat. 803, 812, 813, 15 U.S.C. §§ 79d, 79e.

[1505] Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938).

[1506] 303 U.S. at 442.

has approved regulations having a trivial or remote relation to the operation of the postal service, while disallowing those constituting a serious impediment to it. Thus, a state statute, which granted to one company an exclusive right to operate a telegraph business in the state, was found to be incompatible with a federal law, which, in granting to any telegraph company the right to construct its lines upon post roads, was interpreted as a prohibition of state monopolies in a field Congress was entitled to regulate in the exercise of its combined power over commerce and post roads.[1507]

An Illinois statute that, as construed by the state courts, required an interstate mail train to make a detour of seven miles in order to stop at a designated station, also was held to be an unconstitutional interference with the power of Congress under this clause.[1508] But a Minnesota statute requiring intrastate trains to stop at county seats was found to be unobjectionable.[1509]

Local laws classifying postal workers with railroad employees for the purpose of determining a railroad's liability for personal injuries,[1510] or subjecting a union of railway mail clerks to a general law forbidding any "labor organization" to deny any person membership because of his race, color or creed,[1511] have been held not to conflict with national legislation or policy in this field. Despite the interference *pro tanto* with the performance of a federal function, a state may arrest a postal employee charged with murder while he is engaged in carrying out his official duties,[1512] but it cannot punish a person for operating a mail truck over its highways without procuring a driver's license from state authorities.[1513]

Clause 8. The Congress shall have Power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

COPYRIGHTS AND PATENTS

Origins and Scope of the Power

This clause is the foundation upon which the national patent and copyright laws rest, although it uses neither of those terms. As

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[1507] Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1878).
[1508] Illinois Cent. R.R. v. Illinois, 163 U.S. 142 (1896).
[1509] Gladson v. Minnesota, 166 U.S. 427 (1897).
[1510] Price v. Pennsylvania R.R., 113 U.S. 218 (1895); Martin v. Pittsburgh & Lake Erie R.R., 203 U.S. 284 (1906).
[1511] Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).
[1512] United States v. Kirby, 74 U.S. (7 Wall.) 482 (1869).
[1513] Johnson v. Maryland, 254 U.S. 51 (1920).

to patents, modern legislation harks back to the Statute of Monopolies of 1624, whereby Parliament endowed inventors with the sole right to their inventions for fourteen years.[1514] Copyright law, in turn, traces back to the Statute of Anne of 1710, which secured to authors of books sole publication rights for designated periods.[1515] These English statutes curtailed the royal prerogative to bestow monopolies to Crown favorites over works and products they did not create and many of which had long been enjoyed by the public.[1516] Informed by these precedents and colonial practice, the Framers restricted the power to confer monopolies over the use of intellectual property through the Copyright and Patent Clause. For example, the "exclusive Right" conferred to the writings of authors and the discoveries of inventors must be time limited. Another fundamental limitation inheres in the phrase "[t]o promote the Progress of Science and useful Arts": To merit copyright protection, a work must exhibit originality, embody some creative expression;[1517] to merit patent protection, an invention must be an innovative advancement, "push back the frontiers."[1518] Also deriving from the phrase "promotion of science and the arts" is the issue of whether Congress may only provide for grants of protection that broaden the availability of new materials.[1519]

[1514] Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 17, 18 (1829).

[1515] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 656, 658 (1834).

[1516] *Cf.* Graham v. John Deere Co., 383 U.S. 1, 5, 9 (1966). *See also* Golan v. Holder, 565 U.S. ___, No. 10–545, slip op. at 3 (2012) (Breyer, J., dissenting).

[1517] Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991) (publisher of telephone directory, consisting of white pages and yellow pages, not entitled to copyright in white pages, which are only compilations). "To qualify for copyright protection, a work must be original to the author. . . . Originality, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses some minimal degree of creativity. . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice." Id. at 345. First clearly articulated in The *Trade-Mark Cases*, 100 U.S. 82 (1879), and Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–60 (1884), the requirement is expressed in nearly every copyright opinion, but its forceful iteration in *Feist* was noteworthy, because originality is a statutory requirement as well, 17 U.S.C. § 102(a), and it was unnecessary to discuss the concept in constitutional terms.

[1518] A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950). In a concurring opinion, Justice Douglas wrote, for himself and Justice Black: "Every patent is the grant of a privilege of exacting tolls from the public. The Framers plainly did not want those monopolies freely granted. . . . It is not enough that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance." 340 U.S. at 154–55 (Justice Douglas concurring).

[1519] Kendall v. Winsor, 62 U.S. (21 How.) 322, 328 (1859) ("[T]he inventor who designedly, and with the view of applying it indefinitely and exclusively for his own

Acting within these strictures, Congress has broad leeway to determine how best to promote creativity and utility through temporary monopolies. "It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors," the Court has said.[1520] "Satisfied" in *Eldred v. Ashcroft* that the Copyright Term Extension Act did not violate the "limited times" prescription, the Court saw the only remaining question to be whether the enactment was "a rational exercise of the legislative authority conferred by the Copyright Clause."[1521] The Act, the Court concluded, "reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain."[1522] Moreover, the duration of copyrights and patents may be prolonged and, even then, the limits may not be easily enforced. The protection period may extend well beyond the life of the author or inventor.[1523] Also, in extending the duration of existing copyrights and patents, Congress may protect the rights of purchasers and assignees.[1524]

The copyright and patent laws do not, of their own force, have any extraterritorial operation.[1525]

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profit, withholds his invention from the public, comes not within the policy or objects of the Constitution or acts of Congress.").

In Golan v. Holder, publishers and musicians challenged a law that allowed for copyright protection of certain foreign works theretofore in the public domain, in conformance with international practice. Plaintiffs alleged the provision was invalid because, *inter alia*, it failed to give incentives for creating new works. Though this view found support in Justice Breyer's dissent, the majority held the Copyright Clause does not require that every provision of copyright law be designed to encourage new works. Rather, Congress has broad discretion to determine the intellectual property regime that, in its judgment, best serves the overall purposes of the Clause, including broader dissemination of existing and future American works. 565 U.S. ___, No. 10–545, slip op. at 21 (2012).

[1520] Eldred v. Ashcroft, 537 U.S. 186, 205 (2003) (quoting Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984)).

[1521] 537 U.S. at 204.

[1522] 537 U.S. at 205.

[1523] The Court in *Eldred* upheld extension of the term of existing copyrights from life of the author plus 50 years to life of the author plus 70 years. Although the more general issue was not raised, the Court opined that this length of time, extendable by Congress, was "clearly" not a regime of "perpetual" copyrights. The only two dissenting Justices, Stevens and Breyer, challenged this assertion.

[1524] Evans v. Jordan, 13 U.S. (9 Cr.) 199 (1815); Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 548 (1852); Bloomer v. Millinger, 68 U.S. (1 Wall.) 340, 350 (1864); Eunson v. Dodge, 85 U.S. (18 Wall.) 414, 416 (1873).

[1525] Brown v. Duchesne, 60 U.S. (19 How.) 183, 195 (1857); *see also* Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 531 (1972) ("Our patent system makes no claim to extraterritorial effect . . . ."); Quality King Distrib., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 154 (1998) (Justice Ginsburg concurring) ("Copyright protection is territorial"); Microsoft Corp. v. AT&T, 550 U.S. 437, 454–55 (2007) ("The presumption that United States law governs domestically but does not rule the world applies with particualr force in patent law".). It is, however, the ultimate objective of many nations, including the United States, to develop a system of pat-

Patentable Discoveries

The protection traditionally afforded by acts of Congress under this clause has been limited to new and useful inventions,[1526] and, although a patentable invention is a mental achievement,[1527] for an idea to be patentable it must have first taken physical form.[1528] Despite the fact that the Constitution uses the term "discovery" rather than "invention," a patent may not be issued for the discovery of a previously unknown phenomenon of nature. "If there is to be invention from such a discovery, it must come from the application of the law of nature to a new and useful end." [1529] In addition to refusing to allow patents for natural phenomena and laws of nature, the Court has held that abstract ideas and mathematical formulas may not be patented,[1530] for these are the "basic tools of scientific and technological work" [1531] that should be "free to all men and reserved to none." [1532]

As for the mental processes that traditionally must be evidenced, the Court has held that an invention must display "more ingenuity . . . than the work of a mechanic skilled in the art;" [1533] and, though combination patents have been at times sustained,[1534] the accumulation of old devices is patentable "only when the whole

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ent issuance and enforcement which transcends national boundaries; it has been recommended, therefore, that United States policy should be to harmonize its patent system with that of foreign countries so long as such measures do not diminish the quality of the United States patent standards. President's Commission on the Patent System, To Promote the Progress of Useful Arts, Report to the Senate Judiciary Committee, S. Doc. No. 5, 90th Cong., 1st sess. (1967), recommendation XXXV. Effectuation of this goal of transnational protection of intellectual property was begun with the United States agreement to the Berne Convention (the Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886), and Congress's conditional implementation of the Convention through legislation. The Berne Convention Implementation Act of 1988, Pub. L. 100–568, 102 Stat. 2853, 17 U.S.C. §§ 101 and notes.

[1526] Seymour v. Osborne, 78 U.S. (11 Wall.) 516, 549 (1871). *Cf.* Collar Company v. Van Dusen, 90 U.S. (23 Wall.) 530, 563 (1875); Reckendorfer v. Faber, 92 U.S. 347, 356 (1876).

[1527] Smith v. Nichols, 89 U.S. (21 Wall.) 112, 118 (1875).

[1528] Rubber-Tip Pencil Co. v. Howard, 87 U.S. (20 Wall.) 498, 507 (1874); Clark Thread Co. v. Willimantic Linen Co., 140 U.S. 481, 489 (1891).

[1529] Funk Bros. Seed Co. v. Kalo Co., 333 U.S. 127, 130 (1948); Diamond v. Diehr, 450 U.S. 175, 187 (1981) ("[A]n *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection".) (emphasis in original). *Cf.* Dow Co. v. Halliburton Co., 324 U.S. 320 (1945); Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 89 (1941).

[1530] Gottschalk v. Benson, 409 U.S. 63 (1972); Bilski v. Kappos, 561 U.S. ___, No. 08–964, slip op. (2010); Mayo Collaborative Servs. v. Prometheus Laboratories, Inc., 566 U.S. ___, No. 10–1150, slip op. (2012).

[1531] Gottschalk v. Benson, 409 U.S. 63, 67 (1972).

[1532] Funk Bros. Seed Co. v. Kalo Co., 333 U.S. 127, 130 (1948).

[1533] Sinclair Co. v. Interchemical Corp., 325 U.S. 327, 330 (1945); Marconi Wireless Co. v. United States, 320 U.S. 1 (1943).

[1534] Keystone Mfg. Co. v. Adams, 151 U.S. 139 (1894); Diamond Rubber Co. v. Consol. Tire Co., 220 U.S. 428 (1911).

in some way exceeds the sum of its parts." [1535] Though "inventive genius" and slightly varying language have been appearing in judicial decisions for over a century,[1536] "novelty and utility" has been the primary statutory test since the Patent Act of 1793.[1537] Section 103 of the Patent Act of 1952, however, required that an innovation be of a "nonobvious" nature; that is, it must not be an improvement that would be obvious to a person having ordinary skill in the pertinent art.[1538] This alteration of the standard of patentability was perceived by some as overruling previous Supreme Court cases requiring perhaps a higher standard for obtaining a patent,[1539] but, in *Graham v. John Deere Co.*,[1540] the Court inter-

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[1535] A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950). An interesting concurring opinion was filed by Justice Douglas for himself and Justice Black: "It is not enough," says Justice Douglas, "that an article is new and useful. The Constitution never sanctioned the patenting of gadgets. Patents serve a higher end—the advancement of science. An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance." Id. at 154–155. He then quotes the following from an opinion of Justice Bradley's given 70 years earlier:

"It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufacturers. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith. (Atlantic Works v. Brady, 107 U.S. 192, 200 (1882))." Id. at 155.

The opinion concludes: "The attempts through the years to get a broader, looser conception of patents than the Constitution contemplates have been persistent. The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction. And so it has placed a host of gadgets under the armour of patents—gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge. A few that have reached this Court show the pressure to extend monopoly to the simplest of devices: [listing instances]." Id. at 156–58.

[1536] "Inventive genius"—Justice Hunt in Reckendorfer v. Faber, 92 U.S. 347, 357 (1875); "Genius or invention"—Chief Justice Fuller in Smith v. Whitman Saddle Co., 148 U.S. 674, 681 (1893); "Intuitive genius"—Justice Brown in Potts v. Creager, 155 U.S. 597, 607 (1895); "Inventive genius"—Justice Stone in Concrete Appliances Co. v. Gomery, 269 U.S. 177, 185 (1925); "Inventive genius"—Justice Roberts in Mantle Lamp Co. v. Aluminum Co., 301 U.S. 544, 546 (1937); "the flash of creative genius, not merely the skill of the calling"—Justice Douglas in Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 91 (1941).

[1537] Act of February 21, 1793, ch. 11, 1 Stat. 318. *See* Graham v. John Deere Co., 383 U.S. 1, 3–4, 10 (1966).

[1538] 35 U.S.C. § 103.

[1539] *E.g.*, A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950); Jungerson v. Ostby & Barton Co., 335 U.S. 560 (1949); and Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84 (1941).

preted the provision as having codified its earlier holding in *Hotchkiss v. Greenwood*.[1541] The Court in *Graham* said: "Innovation, *advancement*, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.' This is the *standard* expressed in the Constitution and it may not be ignored."[1542] Congressional requirements on patentability, then, are conditions and tests that must fall within the constitutional standard. Underlying the constitutional tests and congressional conditions for patentability is the balancing of two interests—the interest of the public in being protected against monopolies and in having ready access to and use of new items versus the interest of the country, as a whole, in encouraging invention by rewarding creative persons for their innovations. By declaring a constitutional standard of patentability, however, the Court, rather than Congress, will be doing the ultimate weighing. As for the clarity of the patentability standard, the three-fold test of utility, novelty and advancement seems to have been made less clear by the Supreme Court's rejuvenation of "invention" as a standard of patentability.[1543]

Procedure in Issuing Patents

The standard of patentability is a constitutional standard, and the question of the validity of a patent is a question of law.[1544] Congress may authorize the issuance of a patent for an invention by a special, as well as by general, law, provided the question as to whether the patentee's device is in truth an invention is left open to investigation under the general law.[1545] The function of the Commissioner of Patents in issuing letters patent is deemed to be quasi-judicial in character. Hence an act granting a right of appeal from the Com-

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[1540] 383 U.S. 1 (1966).

[1541] 52 U.S. (11 How.) 248 (1850).

[1542] 383 U.S. at 6 (first emphasis added, second emphasis by Court). For a thorough discussion, *see* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146–52 (1989).

[1543] Anderson's-Black Rock, Inc. v. Pavement Salvage Co., 396 U.S. 57 (1969). "The question of invention must turn on whether the combination supplied the key requirement." Id. at 60. But the Court also appeared to apply the test of nonobviousness in the same decision: "We conclude that the combination was reasonably obvious to one with ordinary skill in the art." Id. *See also* McClain v. Ortmayer, 141 U.S. 419, 427 (1891), where, speaking of the use of "invention" as a standard of patentability the Court said: "The truth is the word cannot be defined in such manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not."

[1544] A. & P. Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950); Mahn v. Harwood, 112 U.S. 354, 358 (1884). In Markman v. Westview Instruments, Inc., 517 U.S. 348 (1996), the Court held that the interpretation of terms in a patent claim is a matter of law reserved entirely for the courts. The Seventh Amendment does not require that such issues be tried to a jury.

[1545] Evans v. Eaton, 16 U.S. (3 Wheat.) 454, 512 (1818).

mission to the Court of Appeals for the District of Columbia is not unconstitutional as conferring executive power upon a judicial body.[1546] The primary responsibility, however, for weeding out unpatentable devices rests in the Patent Office.[1547] The present system of "de novo" hearings before the Court of Appeals allows the applicant to present new evidence that the Patent Office has not heard,[1548] thus making somewhat amorphous the central responsibility.

Nature and Scope of the Right Secured for Copyright

The leading case on the nature of the rights that Congress is authorized to "secure" under the Copyright and Patent Clause is *Wheaton v. Peters*.[1549] Wheaton was the official reporter for the Supreme Court from 1816 to 1827, and Peters was his successor in that role. Wheaton charged Peters with having infringed his copyright in the twelve volumes of "Wheaton's Reports" by reprinting material from Wheaton's first volume in "a volume called 'Condensed Reports of Cases in the Supreme Court of the United States'"; [1550] Wheaton based his claim on both common law and a 1790 act of Congress. On the statutory claim, the Court remanded to the trial court for a determination of whether Wheaton had complied with all the requirements of the act.[1551] On the common law claim, the Court held for Peters, finding that, under common law, publication divests an author of copyright protection.[1552] Wheaton argued that the Constitution should be held to protect his common law copyright, because "the word *secure* . . . clearly indicates an intention, not to originate a right, but to protect one already in existence." [1553] The Court found, however, that "the word *secure*, as used in the constitution, could not mean the protection of an acknowledged legal right," but was used "in reference to a future right." [1554] Thus, the exclusive right that the Constitution authorizes Con-

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[1546] United States v. Duell, 172 U.S. 576, 586–89 (1899). *See also* Butterworth v. United States ex rel. Hoe, 112 U.S. 50 (1884).

[1547] Graham v. John Deere Co., 383 U.S. 1, 18 (1966).

[1548] In Jennings v. Brenner, 255 F. Supp. 410, 412 (D.D.C. 1966), District Judge Holtzoff suggested that a system of remand be adopted.

[1549] 33 U.S. (8 Pet.) 591 (1834).

[1550] 33 U.S. (8 Pet.) at 595.

[1551] 33 U.S. (8 Pet.) at 657–58. The Court noted that the same principle applies to "an individual who has invented a most useful and valuable machine. . . . [I]t has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly." Id.

[1552] 33 U.S. (8 Pet.) at 667.

[1553] 33 U.S. (8 Pet.) at 661; Holmes v. Hurst, 174 U.S. 82 (1899). The doctrine of common-law copyright was long statutorily preserved for unpublished works, but the 1976 revision of the federal copyright law abrogated the distinction between published and unpublished works, substituting a single federal system for that existing since the first copyright law in 1790. 17 U.S.C. § 301.

[1554] 33 U.S. (8 Pet.) at 661.

gress to "secure" to authors and inventors owes its existence solely to acts of Congress that secure it, from which it follows that the rights granted by a patent or copyright are subject to such qualifications and limitations as Congress sees fit to impose. The Court's "reluctance to expand [copyright] protection without explicit legislative guidance" controlled its decision in *Sony Corp. v. Universal City Studios*,[1555] which held that the manufacture and sale of video tape (or cassette) recorders for home use do not constitute "contributory" infringement of the copyright in television programs. Copyright protection, the Court reiterated, is "wholly statutory," and courts should be "circumspect" in extending protections to new technology. The Court refused to hold that contributory infringement could occur simply through the supplying of the devices with which someone else could infringe, especially in view of the fact that VCRs are capable of substantial noninfringing "fair use," *e.g.*, time-shifting of television viewing.

Congress was within its powers in giving to authors the exclusive right to dramatize any of their works. Even as applied to pantomime dramatization by means of silent motion pictures, the act was sustained against the objection that it extended the copyright to ideas rather than to the words in which they were clothed.[1556] But the copyright of the description of an art in a book was held not to lay a foundation for an exclusive claim to the art itself. The latter can be protected, if at all, only by letters patent.[1557] Because copyright is a species of property distinct from the ownership of the equipment used in making copies of the matter copyrighted, the sale of a copperplate under execution did not pass any right to print and publish the map which the copperplate was designed to produce.[1558] A patent right may, however, be subjected, by bill in equity, to payment of a judgment debt of the patentee.[1559]

Power of Congress Over Patents and Copyrights

Letters patent for a new invention or discovery in the arts confer upon the patentee an exclusive property in the patented invention that cannot be appropriated or used by the government with-

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[1555] 464 U.S. 417, 431 (1984). Cf. Metro-Goldwin-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (active encouragement of infringement by distribution of software for sharing of copyrighted music and video files can constitute infringement).

[1556] Kalem Co. v. Harper Bros., 222 U.S. 55 (1911). For other problems arising because of technological and electronic advancement, *see*, *e.g.*, Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).

[1557] Baker v. Selden, 101 U.S. 99, 105 (1880).

[1558] Stevens v. Gladding, 58 U.S. (17 How.) 447 (1855).

[1559] Ager v. Murray, 105 U.S. 126 (1882).

out just compensation.[1560] Congress may, however, modify rights under an existing patent, provided vested property rights are not thereby impaired,[1561] but it does not follow that it may authorize an inventor to recall rights that he has granted to others or reinvest in him rights of property that he had previously conveyed for a valuable and fair consideration.[1562] Furthermore, the rights the present statutes confer are subject to the antitrust laws, though it can hardly be said that the cases in which the Court has endeavored to draw the line between the rights claimable by patentees and the kind of monopolistic privileges that are forbidden by those acts are entirely consistent in their holdings.[1563]

Congress has the power to pass copyright laws that, in its political judgment, will serve the ends of the Copyright Clause. Congress may "promote the Progress of Science" (*i.e.*, the creation and dissemination of knowledge and learning) not only by providing incentives for new works, but also by conferring copyright protection to works in the public domain.[1564] The Copyright Clause also broadly empowers Congress to extend the terms of existing copyrights, so long as the extended terms are for determinable periods.[1565]

Copyright and the First Amendment

The Copyright Clause nominally restricts free speech by allowing for an author's monopoly to market his original work. The Court has "recognized that some restriction on expression is the inherent and intended effect of every grant of copyright."[1566] However, that the Copyright Clause and the First Amendment were adopted close in time reflects the Framers' belief that "copyright's limited monopolies are compatible with free speech principles."[1567] "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copy-

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[1560] James v. Campbell, 104 U.S. 356, 358 (1882). *See also* United States v. Burns, 79 U.S. (12 Wall.) 246, 252 (1871); Cammeyer v. Newton, 94 U.S. 225, 234 (1877); Hollister v. Benedict Mfg. Co., 113 U.S. 59, 67 (1885); United States v. Palmer, 128 U.S. 262, 271 (1888); Belknap v. Schild, 161 U.S. 10, 16 (1896).

[1561] McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843).

[1562] Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 553 (1852).

[1563] *See* Motion Picture Co. v. Universal Film Co., 243 U.S. 502 (1917); Morton Salt Co. v. Suppiger Co., 314 U.S. 488 (1942); United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. New Wrinkle, Inc., 342 U.S. 371 (1952), where the Justices divided 6 to 3 as to the significance for the case of certain leading precedents; and Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965).

[1564] Golan v. Holder, 565 U.S. ___, No. 10–545, slip op. (2012).

[1565] Eldred v. Ashcroft, 537 U.S. 186 (2003).

[1566] Golan v. Holder, 565 U.S. ___, No. 10–545, slip op. (2012).

[1567] Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

right supplies the economic incentive to create and disseminate ideas." [1568]

The Court has noted on several occasions that the copyright law contains two important First Amendment safeguards: (1) limiting copyright protection to an author's creative expression of ideas, but prohibiting protection of ideas in and of themselves; and (2) permitting fair use of a copyrighted work in certain circumstances, including for purposes of criticism, teaching, comment, news reporting, and parody. These traditional contours of copyright protection have foreclosed heightened First Amendmebnt scrutiny of copyright laws.[1569]

State Power Affecting Patents and Copyrights

Displacement of state police or taxing powers by federal patent or copyright has been a source of considerable dispute. Ordinarily, rights secured to inventors must be enjoyed in subordination to the general authority of the states over all property within their limits. A state statute requiring the condemnation of illuminating oils inflammable at less than 130 degrees Fahrenheit was held not to interfere with any right secured by the patent laws, although the oil for which the patent was issued could not be made to comply with state specifications.[1570] In the absence of federal legislation, a state may prescribe reasonable regulations for the transfer of patent rights, so as to protect its citizens from fraud. Hence, a requirement of state law that the words "given for a patent right" appear on the face of notes given in payment for such right is not unconstitutional.[1571] Royalties received from patents or copyrights are subject to nondiscriminatory state income taxes, a holding to the contrary being overruled.[1572]

State power to protect things not patented or copyrighted under federal law has been buffeted under changing Court doctrinal views. In two major cases, the Court held that a state could not use unfair competition laws to prevent or punish the copying of products not entitled to a patent. Emphasizing the necessity for a uniform national policy and adverting to the monopolistic effects of the state protection, the Court inferred that, because Congress had not extended the patent laws to the material at issue, federal policy

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[1568] Harper & Row Publishers, Inc., v. Nation Enterprises, 471 U.S. 539, 558 (1985).

[1569] Eldred v. Ashcroft, 537 U.S. 186 (2003); Golan v. Holder, 565 U.S. ___, No. 10–545, slip op. (2012).

[1570] Patterson v. Kentucky, 97 U.S. 501 (1879).

[1571] Allen v. Riley, 203 U.S. 347 (1906); John Woods & Sons v. Carl, 203 U.S. 358 (1906); Ozan Lumber Co. v. Union County Bank, 207 U.S. 251 (1907).

[1572] Fox Film Corp. v. Doyal, 286 U.S. 123 (1932), overruling Long v. Rockwood, 277 U.S. 142 (1928).

was to promote free access when the materials were thus in the public domain.[1573] But, in *Goldstein v. California*,[1574] the Court distinguished the two prior cases and held that the determination whether a state "tape piracy" statute conflicted with the federal copyright statute depended upon the existence of a specific congressional intent to forbid state protection of the "writing" there involved. Its consideration of the statute and of its legislative history convinced the Court that Congress in protecting certain "writings" and in not protecting others bespoke no intention that federally unprotected materials should enjoy no state protection, only that Congress "has left the area unattended." [1575] Similar analysis was used to sustain the application of a state trade secret law to protect a chemical process, that was patentable but not patented, from use by a commercial rival, which had obtained the process from former employees of the company, all of whom had signed agreements not to reveal the process. The Court determined that protection of the process by state law was not incompatible with the federal patent policy of encouraging invention and public use of patented inventions, inasmuch as the trade secret law serves other interests not similarly served by the patent law and where it protects matter clearly patentable it is not likely to deter applications for patents.[1576]

Returning to the *Sears* and *Compco* emphasis, the Court unanimously, in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,[1577] reasserted that "efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions." [1578] At the same time, however, the Court attempted to harmonize *Goldstein*, *Kewanee*, and other

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[1573] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

[1574] 412 U.S. 546 (1973). Informing the decisions were different judicial attitudes with respect to the preclusion of the states from acting in fields covered by the Copyright Clause, whether Congress had or had not acted. The latter case recognized permissible state interests, id. at 552–560, whereas the former intimated that congressional power was exclusive. Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 228–31 (1964).

[1575] In the 1976 revision of the copyright law, Congress broadly preempted, with narrow exceptions, all state laws bearing on material subject to copyright. 17 U.S.C. § 301. The legislative history makes clear Congress's intention to overturn *Goldstein* and "to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the federal copyright law." H. REP. NO. 94–1476, 94th Congress, 2d Sess. (1976), 130. The statute preserves state tape piracy and similar laws as to sound recordings fixed before February 15, 1972, until February 15, 2067. (Pub. L. 105–298 (1998), § 102, extended this date from February 15, 2047.)

[1576] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974). *See also* Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979).

[1577] 489 U.S. 141 (1989).

[1578] 489 U.S. at 156.

decisions: there is room for state regulation of the use of unpatented designs if those regulations are "necessary to promote goals outside the contemplation of the federal patent scheme." [1579] What states are forbidden to do is to "offer *patent-like protection* to intellectual creations which would otherwise remain unprotected as a matter of federal law." [1580] A state law "aimed directly at preventing the exploitation of the [unpatented] design" is invalid as impinging on an area of pervasive federal regulation.[1581]

Trade-Marks and Advertisements

In the famous *Trade-Mark Cases*,[1582] decided in 1879, the Supreme Court held void acts of Congress that, in apparent reliance upon this clause, extended the protection of the law to trademarks registered in the Patent Office. "The ordinary trade mark," Justice Miller wrote for the Court, "has no necessary relation to invention or discovery"; nor is it to be classified "under the head of writings of authors." It does not "depend upon novelty, invention, discovery, or any work of the brain." [1583] Not many years later, the Court, again speaking through Justice Miller, ruled that a photograph may be constitutionally copyrighted,[1584] and still later the Court held a circus poster to be entitled to the same protection. In answer to the objection of the circuit court that a lithograph that "has no other use than that of a mere advertisement" would not be within the meaning of the Constitution, Justice Holmes summoned forth the shades of Velasquez, Whistler, Rembrandt, Ruskin, Degas, and others in support of the proposition that it is not for the courts to attempt to judge the worth of pictorial illustrations outside the narrowest and most obvious limits.[1585]

Clause 9. The Congress shall have Power * * * To constitute Tribunals inferior to the supreme Court; (see Article III).

IN GENERAL

See discussion "The Power of Congress to Control the Federal Courts" under Article III, § 2, cl. 2, infra.

[1579] 489 U.S. at 166. As examples of state regulation that might be permissible, the Court referred to unfair competition, trademark, trade dress, and trade secrets laws. Perhaps by way of distinguishing *Sears* and *Compco*, both of which invalidated use of unfair competition laws, the Court suggested that prevention of "consumer confusion" is a permissible state goal that can be served in some instances by application of such laws. Id. at 154.

[1580] 489 U.S. at 156 (emphasis added).

[1581] 489 U.S. at 158.

[1582] 100 U.S. 82 (1879).

[1583] 100 U.S. at 94.

[1584] Burrow-Giles Lithographic Co. v. Saroney, 111 U.S. 53 (1884).

[1585] Bleisten v. Donaldson Lithographing Co., 188 U.S. 239, 252 (1903).

Clause 10. The Congress shall have Power * * * To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

PIRACIES, FELONIES, AND OFFENSES AGAINST THE LAW OF NATIONS

Origin of the Clause

"When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law. . . . The faithful observance of this law is essential to national character. . . ." [1586] These words of the Chancellor Kent expressed the view of the binding character of international law that was generally accepted at the time the Constitution was adopted. During the Revolutionary War, Congress took cognizance of all matters arising under the law of nations and professed obedience to that law.[1587] Under the Articles of Confederation, it was given exclusive power to appoint courts for the trial of piracies and felonies committed on the high seas, but no provision was made for dealing with offenses against the law of nations.[1588] The draft of the Constitution submitted to the Convention of 1787 by its Committee of Detail empowered Congress "to declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations." [1589] In the debate on the floor of the Convention, the discussion turned on the question as to whether the terms, "felonies" and the "law of nations," were sufficiently precise to be generally understood. The view that these terms were often so vague and indefinite as to require definition eventually prevailed and Congress was authorized to define as well as punish piracies, felonies, and offenses against the law of nations.[1590]

Definition of Offenses

The fact that the Constitutional Convention considered it necessary to give Congress authority to define offenses against the law of nations does not mean that in every case Congress must under-

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[1586] 1 J. KENT, COMMENTARIES ON AMERICAN LAW 1 (1826).

[1587] 19 JOURNALS OF THE CONTINENTAL CONGRESS 315, 361 (1912); 20 id. at 762; 21 id. at 1136–37, 1158.

[1588] Article IX.

[1589] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 168, 182 (Rev. ed. 1937).

[1590] Id. at 316.

take to codify that law or mark its precise boundaries before prescribing punishments for infractions thereof. An act punishing "the crime of piracy, as defined by the law of nations punishing the" was held to be an appropriate exercise of the constitutional authority to "define and punish" the offense, since it adopted by reference the sufficiently precise definition of International Law.[1591] Similarly, in *Ex parte Quirin*,[1592] the Court found that by the reference in the Fifteenth Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions . . . ," Congress had "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals." [1593] Where, conversely, Congress defines with particularity a crime which is "an offense against the law of nations," the law is valid, even if it contains no recital disclosing that it was enacted pursuant to this clause. Thus, the duty which the law of nations casts upon every government to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof, was found to furnish a sufficient justification for the punishment of the counterfeiting within the United States, of notes, bonds, and other securities of foreign governments.[1594]

Extraterritorial Reach of the Power

Since this clause contains the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States, a lower federal court held in 1932 [1595] that the general grant of admiralty and maritime jurisdiction by Article III, § 2, could not be construed as extending either the legislative or judicial power of the United States to cover offenses committed on vessels outside the United States but not on the high seas. Reversing that decision, the Supreme Court held that this provision "cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the National Government by Article III, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the

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[1591] United States v. Smith, 18 U.S. (5 Wheat.) 153, 160, 162 (1820). *See also The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40–41 (1826); United States v. Brig Malek Abhel, 43 U.S. (2 How.) 210, 232 (1844).

[1592] 317 U.S. 1 (1942).

[1593] 317 U.S. at 28.

[1594] United States v. Arjona, 120 U.S. 479, 487, 488 (1887).

[1595] United States v. Flores, 3 F. Supp. 134 (E.D. Pa. 1932).

states, was transferred to the National Government. It would be a surprising result, and one plainly not anticipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the states and the National Government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial waters."[1596] Within the meaning of this section, an offense is committed on the high seas even when the vessel on which it occurs is lying at anchor on the road in the territorial waters of another country.[1597]

Clauses 11, 12, 13, and 14. The Congress shall have power * * * ;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.

To provide and maintain a Navy.

To make Rules for the Government and Regulation of the land and naval Forces.

THE WAR POWER

Source and Scope

Three Theories.—Three different views regarding the source of the war power found expression in the early years of the Constitution and continued to vie for supremacy for nearly a century and a half. Writing in *The Federalist*,[1598] Hamilton elaborated the theory that the war power is an aggregate of the particular powers granted by Article I, § 8. Not many years later, in 1795, the argument was

[1596] United States v. Flores, 289 U.S. 137, 149–50 (1933).
[1597] United States v. Furlong, 18 U.S. (5 Wheat.) 184, 200 (1820).
[1598] The Federalist, No. 23 (J. Cooke ed. 1937), 146–51.

advanced that the war power of the National Government is an attribute of sovereignty and hence not dependent upon the affirmative grants of the written Constitution.[1599] Chief Justice Marshall appears to have taken a still different view, namely that the power to wage war is implied from the power to declare it. In *McCulloch v. Maryland*,[1600] he listed the power "to declare and conduct a war" [1601] as one of the "enumerated powers" from which the authority to charter the Bank of the United States was deduced. During the era of the Civil War, the two latter theories were both given countenance by the Supreme Court. Speaking for four Justices in *Ex parte Milligan*, Chief Justice Chase described the power to declare war as "necessarily" extending "to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns." [1602] In another case, adopting the terminology used by Lincoln in his Message to Congress on July 4, 1861,[1603] the Court referred to "the war power" as a single unified power.[1604]

An Inherent Power.—Thereafter, we find the phrase, "the war power," being used by both Chief Justice White [1605] and Chief Justice Hughes,[1606] the former declaring the power to be "complete and undivided." [1607] Not until 1936, however, did the Court explain the logical basis for imputing such an inherent power to the Federal Government. In *United States v. Curtiss-Wright Corp.*,[1608] the reasons for this conclusion were stated by Justice Sutherland as follows: "As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. . . . It results that the investment of the Federal Government with the pow-

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[1599] Penhallow v. Doane, 3 U.S. (3 Dall.) 53 (1795).
[1600] 17 U.S. (4 Wheat.) 316 (1819).
[1601] 17 U.S. at 407. (emphasis supplied).
[1602] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (dissenting opinion); *see also* Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871); and United States v. MacIntosh, 283 U.S. 605, 622 (1931).
[1603] CONG. GLOBE, 37th Congress, 1st Sess., App. 1 (1861).
[1604] Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 86 (1875).
[1605] Northern Pac. Ry. v. North Dakota ex rel. Langer, 250 U.S. 135, 149 (1919).
[1606] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
[1607] Northern Pac. Ry. v. North Dakota ex rel. Langer, 250 U.S. 135, 149 (1919).
[1608] 299 U.S. 304 (1936).

ers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality." [1609]

A Complexus of Granted Powers.—In *Lichter v. United States*,[1610] on the other hand, the Court speaks of the "war powers" of Congress. Upholding the Renegotiation Act, it declared that: "In view of this power 'To raise and support Armies, . . . and the power granted in the same Article of the Constitution 'to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers', . . . the only question remaining is whether the Renegotiation Act was a law 'necessary and proper for carrying into Execution' the war powers of Congress and especially its power to support armies." [1611] In a footnote, it listed the Preamble, the Necessary and Proper Clause, the provisions authorizing Congress to lay taxes and provide for the common defense, to declare war, and to provide and maintain a navy, together with the clause designating the President as Commander-in-Chief of the Army and Navy, as being "among the many other provisions implementing the Congress and the President with powers to meet the varied demands of war. . . ." [1612]

Declaration of War

In the early draft of the Constitution presented to the Convention by its Committee of Detail, Congress was empowered "to make war." [1613] Although there were solitary suggestions that the power should better be vested in the President alone,[1614] in the Senate alone,[1615] or in the President and the Senate,[1616] the sentiment of the Convention, as best we can determine from the limited notes of

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[1609] 299 U.S. at 316, 318. On the controversy respecting *Curtiss-Wright*, *see* The Curtiss-Wright Case, *infra*.

[1610] 334 U.S. 742 (1948).

[1611] 334 U.S. at 757–58.

[1612] 334 U.S. at 755 n.3.

[1613] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 313 (rev. ed. 1937).

[1614] Mr. Butler favored "vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." Id. at 318.

[1615] Mr. Pinkney thought the House was too numerous for such deliberations but that the Senate would be more capable of a proper resolution and more acquainted with foreign affairs. Additionally, with the states equally represented in the Senate, the interests of all would be safeguarded. Id.

[1616] Hamilton's plan provided that the President was "to make war or peace, with the advice of the senate . . . ." 1 id. at 300.

the proceedings, was that the potentially momentous consequences of initiating armed hostilities should be called up only by the concurrence of the President and both Houses of Congress.[1617] In contrast to the English system, the Framers did not want the wealth and blood of the Nation committed by the decision of a single individual;[1618] in contrast to the Articles of Confederation, they did not wish to forego entirely the advantages of executive efficiency nor to entrust the matter solely to a branch so close to popular passions.[1619]

The result of these conflicting considerations was that the Convention amended the clause so as to give Congress the power to "declare war."[1620] Although this change could be read to give Congress the mere formal function of recognizing a state of hostilities, in the context of the Convention proceedings it appears more likely the change was intended to insure that the President was empowered to repel sudden attacks[1621] without awaiting congressional action and to make clear that the conduct of war was vested exclusively in the President.[1622]

An early controversy revolved about the issue of the President's powers and the necessity of congressional action when hos-

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[1617] 2 id., 318–319. In THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 465, Hamilton notes: "[T]he President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature." (Emphasis in original). *See also* id. at No. 26, 164–171. *Cf.* C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES ch. V (1921).

[1618] THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 464–465, 470. During the Convention, Gerry remarked that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318 (rev. ed. 1937).

[1619] The Articles of Confederation vested powers with regard to foreign relations in the Congress.

[1620] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 318–319 (rev. ed. 1937).

[1621] Jointly introducing the amendment to substitute "declare" for "make," Madison and Gerry noted the change would "leav[e] to the Executive the power to repel sudden attacks." Id. at 318.

[1622] Connecticut originally voted against the amendment to substitute "declare" for "make" but "on the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function, Mr. Ellsworth gave up his opposition, and the vote of Connecticut was changed. . . ." Id. at 319. The contemporary and subsequent judicial interpretation was to the understanding set out in the text. *Cf.* Talbot v. Seeman, 5 U.S. ()1 Cr., 1, 28 (1801) (Chief Justice Marshall: "The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this inquiry."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).

tilities are initiated against us rather than the Nation instituting armed conflict. The Bey of Tripoli, in the course of attempting to extort payment for not molesting United States shipping, declared war upon the United States, and a debate began whether Congress had to enact a formal declaration of war to create a legal status of war. President Jefferson sent a squadron of frigates to the Mediterranean to protect our ships but limited its mission to defense in the narrowest sense of the term. Attacked by a Tripolitan cruiser, one of the frigates subdued it, disarmed it, and, pursuant to instructions, released it. Jefferson in a message to Congress announced his actions as in compliance with constitutional limitations on his authority in the absence of a declaration of war.[1623] Hamilton espoused a different interpretation, contending that the Constitution vested in Congress the power to initiate war but that when another nation made war upon the United States we were already in a state of war and no declaration by Congress was needed.[1624] Congress thereafter enacted a statute authorizing the President to instruct the commanders of armed vessels of the United States to seize all vessels and goods of the Bey of Tripoli "and also to cause to be done all such other acts of precaution or hostility as *the state of war will* justify . . . ." [1625] But no formal declaration of war was passed, Congress apparently accepting Hamilton's view.[1626]

Sixty years later, the Supreme Court sustained the blockade of the Southern ports instituted by Lincoln in April 1861 at a time when Congress was not in session.[1627] Congress had subsequently ratified Lincoln's action,[1628] so that it was unnecessary for the Court to consider the constitutional basis of the President's action in the absence of congressional authorization, but the Court nonetheless approved, five-to-four, the blockade order as an exercise of Presidential power alone, on the ground that a state of war was a fact. "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact." [1629] The minority challenged this doctrine on the ground that while the President could unquestionably adopt such measures as the laws permitted for the enforcement of order against insurgency, Congress alone could stamp

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[1623] MESSAGES AND PAPERS OF THE PRESIDENTS 326, 327 (J. Richardson ed., 1896).
[1624] 7 WORKS OF ALEXANDER HAMILTON 746–747 (J. Hamilton ed., 1851).
[1625] 2 Stat. 129, 130 (1802) (emphasis supplied).
[1626] Of course, Congress need not declare war in the all-out sense; it may provide for a limited war which, it may be, the 1802 statute recognized. *Cf.* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).
[1627] *Prize Cases*, 67 U.S. (2 Bl.) 635 (1863).
[1628] 12 Stat. 326 (1861).
[1629] *Prize Cases*, 67 U.S. (2 Bl.) 635, 669 (1863).

an insurrection with the character of war and thereby authorize the legal consequences ensuing from a state of war.[1630]

The view of the majority was proclaimed by a unanimous Court a few years later when it became necessary to ascertain the exact dates on which the war began and ended. The Court, the Chief Justice said, must "refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second." [1631]

These cases settled the issue whether a state of war could exist without formal declaration by Congress. When hostile action is taken against the Nation, or against its citizens or commerce, the appropriate response by order of the President may be resort to force. But the issue so much a source of controversy in the era of the Cold War and so divisive politically in the context of United States involvement in the Vietnam War has been whether the President is empowered to commit troops abroad to further national interests in the absence of a declaration of war or specific congressional authorization short of such a declaration.[1632] The Supreme Court studiously refused to consider the issue in any of the forms in which it was presented,[1633] and the lower courts generally refused, on "political question" grounds, to adjudicate the matter.[1634] In the absence of judicial elucidation, the Congress and the President have

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[1630] 67 U.S. at 682.

[1631] *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1872).

[1632] The controversy, not susceptible of definitive resolution in any event, was stilled for the moment, when in 1973 Congress set a cut-off date for United States military activities in Indochina, Pub. L. 93–52, 108, 87 Stat. 134, and subsequently, over the President's veto, Congress enacted the War Powers Resolution, providing a framework for the assertion of congressional and presidential powers in the use of military force. Pub. L. 93–148, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541–1548.

[1633] In Atlee v. Richardson, 411 U.S. 911 (1973), aff'g 347 F. Supp. 689 (E.D. Pa., 1982), the Court summarily affirmed a three-judge court's dismissal of a suit challenging the constitutionality of United States activities in Vietnam on political question grounds. The action constituted approval on the merits of the dismissal, but it did not necessarily approve the lower court's grounds. *See also* Massachusetts v. Laird, 400 U.S. 886 (1970); Holtzman v. Schlesinger, 414 U.S. 1304, 1316, 1321 (1973) (actions of individual justices on motions for stays). The Court simply denied certiorari in all cases on its discretionary docket.

[1634] *E.g.*, Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968), *aff'd sub nom.* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966), *aff'd* 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 945 (1968); Mora v. McNamara, 387 F.2d 862 (D.C., 1967), *cert. denied*, 389 U.S. 934 (1968); Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), and Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970), *consolidated and aff'd*, 443

been required to accommodate themselves in the controversy to accept from each other less than each has been willing to accept but more than either has been willing to grant.[1635]

THE POWER TO RAISE AND MAINTAIN ARMED FORCES

Purpose of Specific Grants

The clauses of the Constitution, which give Congress authority to raise and support armies, and so forth, were not inserted to endow the national government rather than the States with the power to do these things but to designate the department of the Federal Government, which would exercise the powers. As we have noted above, the English king was endowed with the power not only to initiate war but the power to raise and maintain armies and navies.[1636] Aware historically that these powers had been used to the detriment of the liberties and well-being of Englishmen and aware that in the English Declaration of Rights of 1688 it was insisted that standing armies could not be maintained without the consent of Parliament, the Framers vested these basic powers in Congress.[1637]

Time Limit on Appropriations for the Army

Prompted by the fear of standing armies to which Story alluded, the framers inserted the limitation that "no appropriation of money to that use shall be for a longer term than two years." In 1904, the question arose whether this provision would be violated if the government contracted to pay a royalty for use of a patent in constructing guns and other equipment where the payments are likely to continue for more than two years. Solicitor-General Hoyt ruled that such a contract would be lawful; that the appropriations lim-

F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

During the 1980s, the courts were no more receptive to suits, many by Members of Congress, seeking to obtain a declaration of the President's powers. The political question doctrine as well as certain discretionary authorities were relied on. *See*, *e.g.*, Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982) (military aid to El Salvador), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984) (invasion of Grenada), *dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (reflagging and military escort operation in Persian Gulf), *aff'd.* No. 87–5426 (D.C. Cir. 1988); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (U.S. Saudia Arabia/Persian Gulf deployment).

[1635] For further discussion, *see* section on President's commander-in-chief powers.

[1636] W. Blackstone, Commentaries 263 (St. G. Tucker ed., 1803).

[1637] 3 J. Story, Commentaries on the Constitution of the United States 1187 (1833).

ited by the Constitution "are those only which are to raise and support armies in the strict sense of the word 'support,' and that the inhibition of that clause does not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for the common defense. . . ." [1638] Relying on this earlier opinion, Attorney General Clark ruled in 1948 that there was "no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended." [1639]

Conscription

The constitutions adopted during the Revolutionary War by at least nine of the States sanctioned compulsory military service.[1640] Towards the end of the War of 1812, conscription of men for the army was proposed by James Monroe, then Secretary of War, but opposition developed and peace came before the bill could be enacted.[1641] In 1863, a compulsory draft law was adopted and put into operation without being challenged in the federal courts.[1642] Not so the Selective Service Act of 1917.[1643] This measure was attacked on the grounds that it tended to deprive the States of the right to "a well-regulated militia," that the only power of Congress to exact compulsory service was the power to provide for calling forth the militia for the three purposes specified in the Constitution, which did not comprehend service abroad, and finally that the compulsory draft imposed involuntary servitude in violation of the Thirteenth Amendment. The Supreme Court rejected all of these contentions. It held that the powers of the States with respect to the militia were exercised in subordination to the paramount power of the National Government to raise and support armies, and that the power of Congress to mobilize an army was distinct from its authority to provide for calling the militia and was not qualified or in any wise limited thereby.[1644]

Before the United States entered the first World War, the Court had anticipated the objection that compulsory military service would violate the Thirteenth Amendment and had answered it in the fol-

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[1638] 25 Ops. Atty. Gen. 105, 108 (1904).
[1639] 40 Ops. Atty. Gen. 555 (1948).
[1640] *Selective Draft Law Cases*, 245 U.S. 366, 380 (1918); Cox v. Wood, 247 U.S. 3 (1918).
[1641] 245 U.S. at 385.
[1642] 245 U.S. at 386–88. The measure was upheld by a state court. Kneedler v. Lane, 45 Pa. St. 238 (1863).
[1643] Act of May 18, 1917, 40 Stat. 76.
[1644] *Selective Draft Law Cases*, 245 U.S. 366, 381, 382 (1918).

lowing words: "It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers." [1645] Accordingly, in the *Selective Draft Law Cases*,[1646] it dismissed the objection under that amendment as a contention that was "refuted by its mere statement." [1647]

Although the Supreme Court has so far formally declined to pass on the question of the "peacetime" draft,[1648] its opinions leave no doubt of the constitutional validity of the act. In *United States v. O'Brien*,[1649] upholding a statute prohibiting the destruction of selective service registration certificates, the Court, speaking through Chief Justice Warren, thought "[t]he power of Congress to classify and conscript manpower for military service is 'beyond question.'" [1650] In noting Congress's "broad constitutional power" to raise and regulate armies and navies,[1651] the Court has specifically observed that the conscription act was passed "pursuant to" the grant of authority to Congress in clauses 12–14.[1652]

Care of the Armed Forces

Scope of the congressional and executive authority to prescribe the rules for the governance of the military is broad and subject to great deference by the judiciary. The Court recognizes "that the military is, by necessity, a specialized society separate from civilian society," that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," and that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [mili-

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[1645] Butler v. Perry, 240 U.S. 328, 333 (1916) (upholding state law requiring able-bodied men to work on the roads).

[1646] 245 U.S. 366 (1918).

[1647] 245 U.S. at 390.

[1648] Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C. App. §§ 451–473. Actual conscription was precluded as of July 1, 1973, Pub. L. 92–129, 85 Stat. 353, 50 U.S.C. App. § 467(c), and registration was discontinued on March 29, 1975. Pres. Proc. No. 4360, 3 C.F.R. 462 (1971–1975 Compilation), 50 U.S.C. App. § 453 note. Registration, but not conscription, was reactivated in the wake of the invasion of Afghanistan. Pub. L. 96–282, 94 Stat. 552 (1980).

[1649] 391 U.S. 367 (1968).

[1650] 391 U.S. at 377, quoting Lichter v. United States, 334 U.S. 742, 756 (1948).

[1651] Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

[1652] Rostker v. Goldberg, 453 U.S. 57, 59 (1981). *See* id. at 64–65. *See also* Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) (upholding denial of federal financial assistance under Title IV of the Higher Education Act to young men who fail to register for the draft).

tary society] shall be governed than it is when prescribing rules for [civilian society]." [1653] Denying that Congress or military authorities are free to disregard the Constitution when acting in this area,[1654] the Court nonetheless operates with "a healthy deference to legislative and executive judgments" about military affairs,[1655] so that, while constitutional guarantees apply, "the different character of the military community and of the military mission requires a different application of those protections." [1656]

In reliance upon this deference to congressional judgment about the roles of the sexes in combat and the necessities of military mobilization, coupled with express congressional consideration of the precise questions, the Court sustained as constitutional the legislative judgment to provide for registration of males only for possible future conscription.[1657] Emphasizing the unique, separate status of the military, the necessity to indoctrinate men in obedience and discipline, the tradition of military neutrality in political affairs, and the need to protect troop morale, the Court upheld the validity of military post regulations, backed by congressional enactments, banning speeches and demonstrations of a partisan political nature and the distribution of literature without prior approval of post headquarters, with the commander authorized to keep out only those materials that would clearly endanger the loyalty, discipline, or morale of troops on the base.[1658] On the same basis, the Court rejected challenges on constitutional and statutory grounds to military regulations requiring servicemen to obtain approval from their commanders before circulating petitions on base, in the context of circulations of petitions for presentation to Congress.[1659] And the statements of a military officer urging disobedience to certain or-

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[1653] Parker v. Levy, 417 U.S. 733, 743–52 (1974). *See also* Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Schlesinger v. Councilman, 420 U.S. 738, 746–48 (1975); Greer v. Spock, 424 U.S. 828, 837–38 (1976); Middendorf v. Henry, 425 U.S. 25, 45–46 (1976); Brown v. Glines, 444 U.S. 348, 353–58 (1980); Rostker v. Goldberg, 453 U.S. 57, 64–68 (1981).

[1654] Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

[1655] 453 U.S. at 66. "[P]erhaps in no other area has the Court accorded Congress greater deference." Id. at 64–65. *See also* Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

[1656] Parker v. Levy, 417 U.S. 733, 758 (1974). "[T]he tests and limitations [of the Constitution] to be applied may differ because of the military context." Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

[1657] Rostker v. Goldberg, 453 U.S. 57 (1981). *Compare* Frontiero v. Richardson, 411 U.S. 677 (1973), *with* Schlesinger v. Ballard, 419 U.S. 498 (1975).

[1658] Greer v. Spock, 424 U.S. 828 (1976), limiting Flower v. United States, 407 U.S. 197 (1972).

[1659] Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Huff, 444 U.S. 453 (1980). The statutory challenge was based on 10 U.S.C. § 1034, which protects the right of members of the armed forces to communicate with a Member of Congress, but which the Court interpreted narrowly.

ders could be punished under provisions that would have been of questionable validity in a civilian context.[1660] Reciting the considerations previously detailed, the Court has refused to allow enlisted men and officers to sue to challenge or set aside military decisions and actions.[1661]

Congress has a plenary and exclusive power to determine the age at which a soldier or seaman shall serve, the compensation he shall be allowed, and the service to which he shall be assigned. This power may be exerted to supersede parents' control of minor sons who are needed for military service. Where the statute requiring the consent of parents for enlistment of a minor son did not permit such consent to be qualified, their attempt to impose a condition that the son carry war risk insurance for the benefit of his mother was not binding on the government.[1662] Because the possession of government insurance payable to the person of his choice is calculated to enhance the morale of the serviceman, Congress may permit him to designate any beneficiary he desires, irrespective of state law, and may exempt the proceeds from the claims of creditors.[1663] Likewise, Congress may bar a state from taxing the tangible, personal property of a soldier, assigned for duty in the state, but domiciled elsewhere.[1664] To safeguard the health and welfare of the armed forces, Congress may authorize the suppression of bordellos in the vicinity of the places where forces are stationed.[1665]

[1660] Parker v. Levy, 417 U.S. 733 (1974).

[1661] Chappell v. Wallace, 462 U.S. 296 (1983) (enlisted men charging racial discrimination by their superiors in duty assignments and performance evaluations could not bring constitutional tort suits); United States v. Stanley, 483 U.S. 669 (1987) (officer who had been an unwitting, unconsenting subject of an Army experiment to test the effects of LSD on human subjects could not bring a constitutional tort action for damages). These considerations are also the basis of the Court's construction of the Federal Tort Claims Act as not reaching injuries arising incident to military service. Feres v. United States, 340 U.S. 135 (1950). In United States v. Johnson, 481 U.S. 681 (1987), four Justices urged reconsideration of *Feres*, but that has not occurred.

[1662] United States v. Williams, 302 U.S. 46 (1937). *See also In re* Grimley, 137 U.S. 147, 153 (1890); *In re* Morrissey, 137 U.S. 157 (1890).

[1663] Wissner v. Wissner, 338 U.S. 655 (1950); Ridgway v. Ridgway, 454 U.S. 46 (1981). In the absence of express congressional language, like that found in *Wissner*, the Court nonetheless held that a state court division under its community property system of an officer's military retirement benefits conflicted with the federal program and could not stand. McCarty v. McCarty, 453 U.S. 210 (1981). *See also* Porter v. Aetna Casualty Co., 370 U.S. 159 (1962) (exemption from creditors' claims of disability benefits deposited by a veteran's guardian in a savings and loan association).

[1664] Dameron v. Brodhead, 345 U.S. 322 (1953). *See also* California v. Buzard, 382 U.S. 386 (1966); Sullivan v. United States, 395 U.S. 169 (1969).

[1665] McKinley v. United States, 249 U.S. 397 (1919).

Trial and Punishment of Offenses: Servicemen, Civilian Employees, and Dependents

Under its power to make rules for the government and regulation of the armed forces, Congress has set up a system of criminal law binding on all servicemen, with its own substantive laws, its own courts and procedures, and its own appeals procedure.[1666] The drafters of these congressional enactments conceived of a military justice system with application to all servicemen wherever they are, to reservists while on inactive duty training, and to certain civilians in special relationships to the military. In recent years, all these conceptions have been restricted.

Servicemen.—Although there had been extensive disagreement about the practice of court-martial trial of servicemen for nonmilitary offenses,[1667] the matter never was raised in substantial degree until the Cold War period when the United States found it essential to maintain both at home and abroad a large standing army in which great numbers of servicemen were draftees. In *O'Callahan v. Parker*,[1668] the Court held that court-martial jurisdiction was lacking to try servicemen charged with a crime that was not "service connected." The Court did not define "service connection," but among the factors it found relevant were that the crime in question was committed against a civilian in peacetime in the United States off-base while the serviceman was lawfully off duty.[1669] *O'Callahan* was overruled in *Solorio v. United States*,[1670] the Court holding that "the requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged."[1671] Chief Justice Rehnquist's opinion for the Court insisted that *O'Callahan* had been based on erroneous readings of English and

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[1666] The Uniform Code of Military Justice of 1950, 64 Stat. 107, as amended by the Military Justice Act of 1968, 82 Stat. 1335, 10 U.S.C. §§ 801 *et seq*. For prior acts, *see* 12 Stat. 736 (1863); 39 Stat. 650 (1916). *See* Loving v. United States, 517 U.S. 748 (1996) (in context of the death penalty under the UCMJ).

[1667] *Compare* Solorio v. United States, 483 U.S. 435, 441–47 (1987) (majority opinion), *with* id. at 456–61 (dissenting opinion), and O'Callahan v. Parker, 395 U.S. 258, 268–72 (1969) (majority opinion), with id. at 276–80 (Justice Harlan dissenting). *See* Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435 (1960).

[1668] 395 U.S. 258 (1969).

[1669] 395 U.S. at 273–74. *See also* Relford v. Commandant, 401 U.S. 355 (1971); Gosa v. Mayden, 413 U.S. 665 (1973).

[1670] 483 U.S. 435 (1987).

[1671] 483 U.S. at 450–51.

American history, and that "the service connection approach . . . has proved confusing and difficult for military courts to apply." [1672]

It is not clear what provisions of the Bill of Rights and other constitutional guarantees apply to court-martial trials. The Fifth Amendment expressly excepts "[c]ases arising in the land and naval forces" from its grand jury provision, and there is an implication that these cases are also excepted from the Sixth Amendment.[1673] The double jeopardy provision of the Fifth Amendment appears to apply.[1674] The Court of Military Appeals now holds that servicemen are entitled to all constitutional rights except those expressly or by implication inapplicable to the military.[1675] The Uniform Code of Military Justice, supplemented by the *Manual for Courts-Martial*, affirmatively grants due process rights roughly comparable to civilian procedures, so it is unlikely that many issues necessitating constitutional will arise.[1676] However, the Code leaves intact much of the criticized traditional structure of courts-martial, including the pervasive possibilities of command influence,[1677] and the Court of Military Appeals is limited on the scope of its review,[1678] thus creating areas in which constitutional challenges are likely.

Upholding Articles 133 and 134 of the Uniform Code of Military Justice, the Court stressed the special status of military society.[1679] This difference has resulted in a military Code regulating aspects of the conduct of members of the military that in the civilian sphere would go unregulated, but on the other hand the penalties imposed range from the severe to well below the threshold of that possible in civilian life. Because of these factors, the Court,

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[1672] 483 U.S. at 448. Although the Court of Military Appeals had affirmed Solorio's military-court conviction on the basis that the service-connection test had been met, the Court elected to reconsider and overrule *O'Callahan* altogether.

[1673] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123, 138–39 (1866); *Ex parte* Quirin, 317 U.S. 1, 40 (1942). The matter was raised but left unresolved in Middendorf v. Henry, 425 U.S. 25 (1976).

[1674] *See* Wade v. Hunter, 336 U.S. 684 (1949). *Cf.* Grafton v. United States, 206 U.S. 333 (1907).

[1675] United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). This conclusion by the Court of Military Appeals is at least questioned and perhaps disapproved in Middendorf v. Henry, 425 U.S. 25, 43–48 (1976), in the course of overturning a CMA rule that counsel was required in summary court-martial. For the CMA's response to the holding, *see* United States v. Booker, 5 M. J. 238 (C.M.A. 1977), *rev'd in part on reh.*, 5 M. J. 246 (C.M.A. 1978).

[1676] The UCMJ guarantees counsel, protection from self-incrimination and double jeopardy, and warnings of rights prior to interrogation, to name a few.

[1677] *Cf.* O'Callahan v. Parker, 395 U.S. 258, 263–64 (1969).

[1678] 10 U.S.C. § 867.

[1679] Parker v. Levy, 417 U.S. 733 (1974). Article 133 punishes a commissioned officer for "conduct unbecoming an officer and gentleman," and Article 134 punishes any person subject to the Code for "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

while agreeing that constitutional limitations applied to military justice, was of the view that the standards of constitutional guarantees were significantly different in the military than in civilian life. Thus, the vagueness challenge to the Articles was held to be governed by the standard applied to criminal statutes regulating economic affairs, the most lenient of vagueness standards.[1680] Nor did application of the Articles to conduct essentially composed of speech necessitate a voiding of the conviction, as the speech was unprotected, and, even though it might reach protected speech, the officer here was unable to raise that issue.[1681]

Military courts are not Article III courts, but are agencies established pursuant to Article I.[1682] In the 19th century, the Court established that the civil courts have no power to interfere with courts-martial and that court-martial decisions are not subject to civil court review.[1683] Until August 1, 1984, the Supreme Court had no jurisdiction to review by writ of certiorari the proceedings of a military commission, but as of that date Congress conferred appellate jurisdiction of decisions of the Court of Military Appeals.[1684] Prior to that time, civil court review of court-martial decisions was possible through *habeas corpus* jurisdiction,[1685] an avenue that continues to exist, but the Court severely limited the scope of such review, restricting it to the issue whether the court-martial has jurisdiction over the person tried and the offense charged.[1686] In *Burns v. Wilson*,[1687] however, at least seven Justices appeared to reject the traditional view and adopt the position that civil courts on *habeas corpus* could review claims of denials of due process rights to which the military had not given full and fair consideration. Since *Burns*, the Court has thrown little light on the range of issues cognizable by a fed-

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[1680] 417 U.S. at 756.

[1681] 417 U.S. at 757–61.

[1682] Kurtz v. Moffitt, 115 U.S. 487 (1885); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858). Judges of Article I courts do not have the independence conferred by security of tenure and of compensation.

[1683] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[1684] Military Justice Act of 1983, Pub. L. 98–209, 97 Stat. 1393, 28 U.S.C. § 1259.

[1685] *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869); *Ex parte* Reed, 100 U.S. 13 (1879). While federal courts have jurisdiction to intervene in military court proceedings prior to judgment, as a matter of equity, following the standards applicable to federal court intervention in state criminal proceedings, they should act when the petitioner has not exhausted his military remedies only in extraordinary circumstances. Schlesinger v. Councilman, 420 U.S. 738 (1975).

[1686] *Ex parte* Reed, 100 U.S. 13 (1879); Swaim v. United States, 165 U.S. 553 (1897); Carter v. Roberts, 177 U.S. 496 (1900); Hiatt v. Brown, 339 U.S. 103 (1950).

[1687] 346 U.S. 137 (1953).

eral court in such litigation [1688] and the lower federal courts have divided several possible ways.[1689]

Civilians and Dependents.—In recent years, the Court rejected the view of the drafters of the Code of Military Justice with regard to the persons Congress may constitutionally reach under its clause 14 powers. Thus, it held that an honorably discharged former soldier, charged with having committed murder during military service in Korea, could not be tried by court-martial but must be charged in federal court, if at all.[1690] After first leaning the other way,[1691] the Court on rehearing found court-martial jurisdiction lacking, at least in peacetime, to try civilian dependents of service personnel for capital crimes committed outside the United States.[1692] Subsequently, the Court extended its ruling to civilian dependents overseas charged with noncapital crimes [1693] and to civilian employees of the military charged with either capital or noncapital crimes.[1694]

WAR LEGISLATION

War Powers in Peacetime

To some indeterminate extent, the power to wage war embraces the power to prepare for it and the power to deal with the problems of adjustment following its cessation. Justice Story emphasized that "[i]t is important also to consider, that the surest means of avoiding war is to be prepared for it in peace. . . . How could a readiness for war in time of peace be safely prohibited, unless we could in like manner prohibit the preparations and establishments of every hostile nation? . . . It will be in vain to oppose constitu-

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[1688] *Cf.* Fowler v. Wilkinson, 353 U.S. 583 (1957); United States v. Augenblick, 393 U.S. 348, 350 n.3, 351 (1969); Parker v. Levy, 417 U.S. 733 (1974); Secretary of the Navy v. Avrech, 418 U.S. 676 (1974).

[1689] *E.g.*, Calley v. Callaway, 519 F.2d 184 (5th Cir., 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976).

[1690] United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955). *See also* Lee v. Madigan, 358 U.S. 228 (1959).

[1691] Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956).

[1692] Reid v. Covert, 354 U.S. 1 (1957) (voiding court-martial convictions of two women for murdering their soldier husbands stationed in Japan). Chief Justice Warren and Justices Black, Douglas, and Brennan were of the opinion Congress's power under clause 14 could not reach civilians. Justices Frankfurter and Harlan concurred, limited to capital cases. Justices Clark and Burton dissented.

[1693] Kinsella v. United States, 361 U.S. 234 (1960) (voiding court-martial conviction for noncapital crime committed overseas by civilian wife of soldier). The majority could see no reason for distinguishing between capital and noncapital crimes. Justices Harlan and Frankfurter dissented on the ground that in capital cases greater constitutional protection, available in civil courts, was required.

[1694] Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).

tional barriers to the impulse of self-preservation." [1695] Authoritative judicial recognition of the power is found in *Ashwander v. TVA*,[1696] upholding the power of the Federal Government to construct and operate a dam and power plant, pursuant to the National Defense Act of June 3, 1916.[1697] The Court noted that the assurance of an abundant supply of electrical energy and of nitrates, which would be produced at the site, "constitute national defense assets," and the project was justifiable under the war powers.[1698]

Perhaps the most significant example of legislation adopted pursuant to the war powers when no actual "shooting war" was in progress was the Atomic Energy Act of 1946, establishing a body to oversee and further the research into and development of atomic energy for both military and civil purposes.[1699] Congress has also authorized a vast amount of highway construction, pursuant to its conception of their "primary importance to the national defense," [1700] and the first extensive program of federal financial assistance in the field of education was the National Defense Education Act.[1701] These measures, of course, might also be upheld under the power to spend for the "common defense." [1702] The post-World War II years, though nominally peacetime, constituted the era of the Cold War and the occasions for several armed conflicts, notably in Korea and Indochina, in which the Congress enacted much legislation designed to strengthen national security, including an apparently permanent draft,[1703] authorization of extensive space exploration,[1704] authorization for wage and price controls,[1705] and continued extension of the Renegotiation Act to recapture excess profits on defense

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[1695] 3 J. Story, Commentaries on the Constitution of the United States 1180 (1833).

[1696] 297 U.S. 288 (1936).

[1697] 39 Stat. 166 (1916).

[1698] 297 U.S. at 327–28.

[1699] 60 Stat. 755 (1946), 42 U.S.C. §§ 1801 *et seq*.

[1700] 108(a), 70 Stat. 374, 378 (1956), 23 U.S.C. § 101(b), naming the Interstate System the "National System of Interstate and Defense Highways."

[1701] 72 Stat. 1580 (1958), as amended, codified to various sections of Titles 20 and 42.

[1702] Article I, § 8, cl.1.

[1703] Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C. App. §§ 451–473. Actual conscription has been precluded as of July 1, 1973, Pub. L. 92–129, 85 Stat. 353, 50 U.S.C. App. § 467(c), although registration for possible conscription is in effect. Pub. L. 96–282, 94 Stat. 552 (1980).

[1704] National Aeronautics and Space Act of 1958, 72 Stat. 426, as amended, codified in various sections of Titles 5, 18, and 50.

[1705] Title II of the Defense Production Act Amendments of 1970, 84 Stat. 799, as amended, provided temporary authority for wage and price controls, a power which the President subsequently exercised. E.O. 11615, 36 Fed Reg. 15727 (August 16, 1971). Subsequent legislation expanded the President's authority. 85 Stat. 743, 12 U.S.C. § 1904 note.

contracts.[1706] Additionally, the period saw extensive regulation of matter affecting individual rights, such as loyalty-security programs,[1707] passport controls,[1708] and limitations on members of the Communist Party and associated organizations,[1709] all of which are dealt with in other sections.

Other legislation is designed to effect a transition from war to peace. The war power "is not limited to victories in the field. . . . It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." [1710] This principle was given a much broader application after the First World War in *Hamilton v. Kentucky Distilleries, Co.*,[1711] where the War Time Prohibition Act [1712] adopted after the signing of the Armistice was upheld as an appropriate measure for increasing war efficiency. The Court was unable to conclude that the war emergency had passed with the cessation of hostilities.[1713] But in 1924, it held that a rent control law for the District of Columbia, which had been previously upheld,[1714] had ceased to operate because the emergency which justified it had come to an end.[1715]

A similar issue was presented after World War II, and the Court held that the authority of Congress to regulate rents by virtue of the war power did not end with the presidential proclamation terminating hostilities on December 31, 1946.[1716] However, the Court cautioned that "[w]e recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely

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[1706] Renegotiation Act of 1951, 65 Stat. 7, as amended, 50 U.S.C. App. §§ 1211 *et seq*.

[1707] *E.g.*, Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961); Peters v. Hobby, 349 U.S. 331 (1955).

[1708] Zemel v. Rusk, 381 U.S. 1 (1965); United States v. Laub, 385 U.S. 475 (1967).

[1709] United States v. Robel, 389 U.S. 258 (1967); United States v. Brown, 381 U.S. 437 (1965).

[1710] Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1871) (upholding a federal statute that tolled the limitations period for state causes of action for the period during which the Civil War prevented the bringing of an action). *See also* Mayfield v. Richards, 115 U.S. 137 (1885).

[1711] 251 U.S. 146 (1919). *See also* Ruppert v. Caffey, 251 U.S. 264 (1920).

[1712] Act of November 21, 1918, 40 Stat. 1046.

[1713] 251 U.S. at 163.

[1714] Block v. Hirsh, 256 U.S. 135 (1921).

[1715] Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924).

[1716] Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948). *See also* Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947).

obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision." [1717]

In the same year, the Court sustained by only a five-to-four vote the Government's contention that the power which Congress had conferred upon the President to deport enemy aliens in times of a declared war was not exhausted when the shooting stopped.[1718] "It is not for us to question," said Justice Frankfurter for the Court, "a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilites [sic] do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come." [1719]

Delegation of Legislative Power in Wartime

During wartime, Congress has been prone to delegate more powers to the President than at other times.[1720] The Court, however, has insisted that, "[i]n peace or war it is essential that the Constitution be scrupulously obeyed, and particularly that as in times of peace the respective branches of the government keep within the power assigned to each by the Constitution. On the other hand, . . . [i]n time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending its national safety." [1721] Few cases, however, actually discuss when a wartime delegation of legislative power might be excessive.[1722] Two theories have been advanced at times when the delegation doctrine carried more force than it has in recent years. First, has been suggested that, because the war power is inherent in the Federal Government, and one shared by the legislative and executive branches, Congress does not really delegate legislative power when it authorizes the President to exercise the war power in a prescribed manner. But this view overlooks the fact that the Constitution expressly vests the war power as a legislative power in

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[1717] 333 U.S. at 143–44.

[1718] Ludecke v. Watkins, 335 U.S. 160 (1948).

[1719] 335 U.S. at 170.

[1720] For an extensive consideration of this subject in the context of the President's redelegation of it, *see* N. GRUNDSTEIN, PRESIDENTIAL DELEGATION OF AUTHORITY IN WARTIME (1961).

[1721] Lichter v. United States, 334 U.S. 742, 779–80 (1948).

[1722] In the *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918), a "contention that an act [was] void as a delegation of federal power to state officials" was dismissed as "too wanting in merit to require further notice." Likewise, "the contention that . . . vesting administrative officers with legislative discretion [is unconstitutional] has been so completely adversely settled as to require reference only to some of the decided cases." Id. (citing three cases). A wartime delegation was upheld by reference to peacetime precedents in Yakus v. United States, 321 U.S. 414, 424 (1944).

Congress. Second, it has been suggested that Congress's power to delegate in wartime is as limited as in other situations, but that the existence of a state of war is a factor weighing in favor of the validity of the delegation.

The first theory was fully stated by Justice Bradley in *Hamilton v. Dillin*,[1723] upholding a levy imposed by the Secretary of the Treasury pursuant to an act of Congress. To the argument that the levy was a tax the fixing of which Congress could not delegate, Justice Bradley noted that the power exercised "does not belong to the same category as the power to levy and collect taxes, duties, and excises. It belongs to the war powers of the Government. . . ." [1724]

Both theories found expression in different passages of Chief Justice Stone's opinion in *Hirabayashi v. United States*,[1725] upholding executive imposition of a curfew on Japanese-Americans pursuant to legislative delegation. On the one hand, he spoke to Congress and the Executive, "acting in cooperation," to impose the curfew,[1726] while, on the other hand, he noted that a delegation in which Congress has determined the policy and the rule of conduct, leaving to the Executive the carrying-out of the policy, is permissible delegation.[1727]

A similar ambiguity is found in *Lichter v. United States*,[1728] upholding the Renegotiation Act, but taken as a whole the Court there espoused the second theory. "The power [of delegation] is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress. The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition. . . . Thus, while the constitutional structure and controls of our Government are our guides equally in war and in peace, they must be read with the realistic purposes of the entire instrument fully in mind." [1729] The Court then examined the exigencies of war and concluded that the delegation was valid.[1730]

[1723] 88 U.S. (21 Wall.) 73 (1875).
[1724] 88 U.S. at 96–97. *Cf.* United States v. Chemical Foundation, 272 U.S. 1 (1926).
[1725] 320 U.S. 81 (1943).
[1726] 320 U.S. at 91–92, 104.
[1727] 320 U.S. at 104.
[1728] 334 U.S. 742 (1948).
[1729] 334 U.S. at 778–79, 782.
[1730] 334 U.S. at 778–83.

CONSTITUTIONAL RIGHTS IN WARTIME

Constitution and the Advance of the Flag

Theater of Military Operations.—Military law to the exclusion of constitutional limitations otherwise applicable is the rule in the areas in which military operations are taking place. This view was assumed by all members of the Court in *Ex parte Milligan*,[1731] in which the trial by a military commission of a civilian charged with disloyalty in a part of the country remote from the theater of military operations was held invalid. Although unanimous in the result, the Court divided five-to-four on the ground of decision. The point of disagreement was over which department of the government had authority to say with finality what regions lie within the theater of military operations. The majority claimed this function for the courts and asserted that an area in which the civil courts were open and functioning, and in which there were no hostilities, does not qualify.[1732] The minority argued that the question was for Congress's determination.[1733] The entire Court rejected the Government's contention that the President's determination was conclusive in the absence of restraining legislation.[1734]

Similarly, in *Duncan v. Kahanamoku*,[1735] the Court declared that the authority granted by Congress to the territorial governor of Hawaii to declare martial law under certain circumstances, which he exercised in the aftermath of the attack on Pearl Harbor, did not warrant the supplanting of civil courts with military tribunals and the trial of civilians for civilian crimes in these military tribunals at a time when no obstacle stood in the way of the operation of the civil courts, except, of course, the governor's order.

Enemy Country.—It has seemed reasonably clear that the Constitution does not follow the advancing troops into conquered territory. Persons in such territory have been held entirely beyond the reach of constitutional limitations and subject to the laws of war as interpreted and applied by the Congress and the President.[1736] "What is the law which governs an army invading an enemy's country?" the Court asked in *Dow v. Johnson*.[1737] "It is not the civil law of the invaded country; it is not the civil law of the conquering country; it is military law—the law of war—and its supremacy for the

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[1731] 71 U.S. (4 Wall.) 2 (1866).
[1732] 71 U.S. at 127.
[1733] 71 U.S. at 132, 138.
[1734] 71 U.S. at 121, 139–42.
[1735] 327 U.S. 304 (1946).
[1736] New Orleans v. The Steamship Co., 87 U.S. (20 Wall.) 387 (1874); Santiago v. Nogueras, 214 U.S. 260 (1909); Madsen v. Kinsella, 343 U.S. 341 (1952).
[1737] 100 U.S. 158, 170 (1880).

protection of the officers and soldiers of the army, when in service in the field in the enemy's country, is as essential to the efficiency of the army as the supremacy of the civil law at home, and, in time of peace, is essential to the preservation of liberty."

These conclusions follow not only from the usual necessities of war but also from the Court's doctrine that the Constitution is not automatically applicable in all territories acquired by the United States. The question turns upon whether Congress has made the area "incorporated" or "unincorporated" territory.[1738] In *Reid v. Covert*,[1739] however, Justice Black asserted in a plurality opinion that wherever the United States acts it must do so only "in accordance with all the limitations imposed by the Constitution. . . . [C]onstitutional protections for the individual were designed to restrict the United States Government when it acts outside of this country, as well as at home."[1740] The case, however, involved the trial of a United States citizen abroad and the language quoted was not subscribed to by a majority of the Court; thus, it must be regarded as a questionable rejection of the previous line of cases.[1741]

Enemy Property.—In *Brown v. United States*,[1742] Chief Justice Marshall dealt definitively with the legal position of enemy property during wartime. He held that the mere declaration of war by Congress does not effect a confiscation of enemy property situated within the territorial jurisdiction of the United States, but the right of Congress by further action to subject such property to confiscation was asserted in the most positive terms. As an exercise of the war power, such confiscation was held not subject to the restrictions of the Fifth and Sixth Amendments. Since such confiscation is unrelated to the personal guilt of the owner, it is immaterial whether the property belongs to an alien, a neutral, or even to a citizen. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within his reach, whether within his territory or outside it, impairs his ability to resist the confiscating government and at

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[1738] De Lima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904).

[1739] 354 U.S. 1 (1957).

[1740] 354 U.S. at 6, 7.

[1741] For a comprehensive treatment, preceding Reid v. Covert, of the matter in the context of the post-War war crimes trials, *see* Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587 (1949).

[1742] 12 U.S. (8 Cr.) 110 (1814). *See also* Conrad v. Waples, 96 U.S. 279 (1878).

the same furnishes to that government means for carrying on the war.[1743]

Prizes of War.—The power of Congress with respect to prizes is plenary; no one can have any interest in prizes captured except by permission of Congress.[1744] Nevertheless, since international law is a part of our law, the Court will administer it so long as it has not been modified by treaty or by legislative or executive action. Thus, during the Civil War, the Court found that the Confiscation Act of 1861, and the Supplementary Act of 1863, which, in authorizing the condemnation of vessels, made provision for the protection of interests of loyal citizens, merely created a municipal forfeiture and did not override or displace the law of prize. It decided, therefore, that when a vessel was liable to condemnation under either law, the government was at liberty to proceed under the most stringent rules of international law, with the result that the citizen would be deprived of the benefit of the protective provisions of the statute.[1745] Similarly, when Cuban ports were blockaded during the Spanish-American War, the Court held, over the vigorous dissent of three of its members, that the rule of international law exempting unarmed fishing vessels from capture was applicable in the absence of any treaty provision, or other public act of the government in relation to the subject.[1746]

The Constitution at Home in Wartime

Personal Liberty.—"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority." [1747]

[1743] Miller v. United States, 78 U.S. (11 Wall.) 268 (1871); Steehr v. Wallace, 255 U.S. 239 (1921); Central Union Trust Co. v. Garvan, 254 U.S. 554 (1921); United States v. Chemical Foundation, 272 U.S. 1 (1926); Silesian-American Corp. v. Clark, 332 U.S. 469 (1947); Cities Service Co. v. McGrath, 342 U.S. 330 (1952); Handelsbureau La Mola v. Kennedy, 370 U.S. 940 (1962); *cf.* Honda v. Clark, 386 U.S. 484 (1967).

[1744] *The Siren*, 80 U.S. (13 Wall.) 389 (1871).

[1745] *The Hampton*, 72 U.S. (5 Wall.) 372, 376 (1867).

[1746] *The Paquete Habana*, 175 U.S. 677, 700, 711 (1900).

[1747] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866).

Ex parte Milligan, from which these words are quoted, is justly deemed one of the great cases undergirding civil liberty in this country in times of war or other great crisis. The Court held that, except in areas in which armed hostilities have made enforcement of civil law impossible, constitutional rights may not be suspended and civilians subjected to the vagaries of military justice. Yet, the words were uttered after the cessation of hostilities, and the Justices themselves recognized that with the end of the shooting there arose the greater likelihood that constitutional rights could be and would be observed and that the Court would require the observance.[1748] This pattern recurs with each critical period.

That the power of Congress to punish seditious utterances in wartime is limited by the First Amendment was assumed by the Court in a series of cases,[1749] in which it nonetheless affirmed conviction for violations of the Espionage Act of 1917.[1750] The Court also upheld a state law making it an offense for persons to advocate that citizens of the state should refuse to assist in prosecuting war against enemies of the United States.[1751] Justice Holmes matter-of-factly stated the essence of the pattern that we have mentioned: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." [1752]

By far, the most dramatic restraint of personal liberty imposed during World War II was the detention and relocation of the Japanese residents of the Western states, including those who were native-born citizens of the United States. When various phases of this program were challenged, the Court held that, in order to prevent espionage and sabotage, the authorities could restrict the movement of these persons by a curfew order [1753] and even exclude them from defined areas by regulation,[1754] but that a citizen of Japanese

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[1748] "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which were happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment." 71 U.S. (4 Wall.) at 109 (emphasis by Court).

[1749] Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Sugarman v. United States, 249 U.S. 182 (1919) ; Frohwerk v. United States, 249 U.S. 204 (1919); Abrams v. United States, 250 U.S. 616 (1919).

[1750] 40 Stat. 217 (1917), as amended by 40 Stat. 553 (1918).

[1751] Gilbert v. Minnesota, 254 U.S. 325 (1920).

[1752] Schenck v. United States, 249 U.S. 47, 52 (1919).

[1753] Hirabayashi v. United States, 320 U.S. 81 (1943).

[1754] Korematsu v. United States, 323 U.S. 214 (1944). The five-Justice majority opinion in *Korematsu*was careful to state that it was ruling on exclusion only, and

ancestry whose loyalty was conceded could not continue to be detained in a relocation camp.[1755]

A mixed pattern emerges from an examination of the Cold War period. Legislation designed to regulate and punish the organizational activities of the Communist Party and its adherents was at first upheld,[1756] and then in a series of cases was practically vitiated.[1757] Against a contention that Congress's war powers had been used to achieve the result, the Court struck down for the second time in history a congressional statute as an infringement of the First Amendment.[1758] It voided a law making it illegal for any member of a "communist-action organization" to work in a defense facility.[1759] The majority reasoned that the law overbroadly required a person to choose between his First Amendment-protected right of association and his right to hold a job, without attempting to distinguish between those persons who constituted a threat and those who did not.[1760]

On the other hand, in *New York Times Co. v. United States*,[1761] a majority of the Court agreed that in appropriate circumstances the First Amendment would not preclude a prior restraint of publication of information that might result in a sufficient degree of harm to the national interest, although a different majority concurred in denying the government's request for an injunction in that case.[1762]

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not on compelled reporting to and remaining in an assembly center or relocation camp, which were the highly likely consequences of obeying the exclusion order under the regulation. 323 U.S. at 222–23.

[1755] *Ex parte* Endo, 323 U.S. 283 (1944). The *Endo* Court expressly avoided a direct constitutional ruling, holding instead that continued detention could not be supported by the statute and executive orders that underlay the detention program. 323 U.S. at 297–300.

[1756] *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961); American Communications Association v. Douds, 339 U.S. 382 (1950).

[1757] *E.g.*, Yates v. United States, 354 U.S. 298 (1957); Albertson v. Subversive Activities Control Bd., 382 U.S. 70 (1965); United States v. Brown, 381 U.S. 437 (1965).

[1758] United States v. Robel, 389 U.S. 258 (1967); *cf.* Aptheker v. Secretary of State, 378 U.S. 500 (1964). *See also* Schneider v. Smith, 390 U.S. 17 (1968).

[1759] Section 5(a)(1)(D) of the Subversive Control Act of 1950, 64 Stat 992, 50 U.S.C. § 784(a)(1)(D).

[1760] 389 U.S. at 264–66. Justices Harlan and White dissented, contending that the right of association should have been balanced against the public interest and finding the weight of the latter the greater. Id. at 282.

[1761] 403 U.S. 713 (1971).

[1762] The result in the case was reached by a six-to-three majority. The three dissenters, Chief Justice Burger, 403 U.S. at 748, Justice Harlan, id. at 752, and Justice Blackmun, id. at 759, would have granted an injunction in the case; Justices Stewart and White, id. at 727, 730, would not in that case but could conceive of cases in which they would.

Enemy Aliens.—The Alien Enemy Act of 1798 authorized the President to deport any alien or to license him to reside within the United States at any place to be designated by the President.[1763] Though critical of the measure, many persons conceded its constitutionality on the theory that Congress's power to declare war carried with it the power to treat the citizens of a foreign power against which war has been declared as enemies entitled to summary justice.[1764] A similar statute was enacted during World War I[1765] and was held valid in *Ludecke v. Watkins*.[1766]

During World War II, in *Ex parte Quirin*, the Court unanimously upheld the power of the President to order to trial before a military tribunal German saboteurs captured within the United States.[1767] Chief Justice Stone found that enemy combatants, who without uniforms come secretly through the lines during time of war, for the purpose of committing hostile acts, are not entitled to the status of prisoners of war but are unlawful combatants punishable by military tribunals. Because this use of military tribunals was sanctioned by Congress, the Court has found it unnecessary to decide whether "the President may constitutionally convene military commissions 'without the sanction of Congress's in cases of 'controlling necessity.'"[1768]

Eminent Domain.—An oft-cited dictum uttered shortly after the Mexican War asserted the right of an owner to compensation for property destroyed to prevent its falling into the hands of the enemy, or for that taken for public use.[1769] In *United States v. Russell*, decided following the Civil War, a similar conclusion was based squarely on the Fifth Amendment, although the case did not necessarily involve the point. Finally, in *United States v. Pacific Railroad*,[1770] also a Civil War case, the Court held that the United States was not responsible for the injury or destruction of private property by military operations, but added that it did not have in mind claims for property of loyal citizens taken for the use of the national forces. "In such cases," the Court said, "it has been the practice of the government to make compensation for the property taken. . . . although the seizure and appropriation of private prop-

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[1763] 1 Stat. 577 (1798).

[1764] 6 WRITINGS OF JAMES MADISON 360–361 (G. Hunt ed., 1904).

[1765] 40 Stat. 531 (1918), 50 U.S.C. § 21.

[1766] 335 U.S. 160 (1948).

[1767] 317 U.S. 1 (1942).

[1768] Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006). But see, id. at 591 ("Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8, and Article III, § 1, of the Constitution unless some other part of that document authorizes a response to the felt need.").

[1769] Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1852).

[1770] 120 U.S. 227 (1887).

erty under such circumstances by the military authorities may not be within the terms of the constitutional clauses." [1771]

Meanwhile, however, in 1874, a committee of the House of Representatives, in an elaborate report on war claims growing out of the Civil War, had voiced the opinion that the Fifth Amendment embodies the distinction between a taking of property in the course of military operations or other urgent military necessity, and other takings for war purposes, and required compensation of owners in the latter class of cases.[1772] In determining what constitutes just compensation for property requisitioned for war purposes during World War II, the Court has assumed that the Fifth Amendment is applicable to such takings.[1773] But as to property seized and destroyed to prevent its use by the enemy, it has relied on the principle enunciated in *United States v. Pacific Railroad* as justification for the conclusion that owners thereof are not entitled to compensation.[1774]

Rent and Price Controls.—Even at a time when the Court was using substantive due process to void economic regulations, it generally sustained such regulations in wartime. Thus, shortly following the end of World War I, it sustained, by a narrow margin, a rent control law for the District of Columbia, which not only limited permissible rent increases but also permitted existing tenants to continue in occupancy provided they paid rent and observed other stipulated conditions.[1775] Justice Holmes for the majority conceded in effect that in the absence of a war emergency the legislation might transcend constitutional limitations,[1776] but noted that "a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation." [1777]

During World War II and thereafter, economic controls were uniformly sustained.[1778] An apartment house owner who complained

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[1771] 120 U.S. at 239.

[1772] H.R. REP. NO. 262, 43d Cong., 1st Sess. (1874), 39–40.

[1773] United States v. Commodities Trading Corp., 339 U.S. 121 (1950); United States v. Toronto Navigation Co., 338 U.S. 396 (1949); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Cors, 337 U.S. 325 (1949); United States v. Felin & Co., 334 U.S. 624 (1948); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

[1774] United States v. Caltex, Inc., 344 U.S. 149, 154 (1952). Justices Douglas and Black dissented.

[1775] Block v. Hirsh, 256 U.S. 135 (1921).

[1776] But *quaere* in the light of Nebbia v. New York, 291 U.S. 502 (1934), Olsen v. Nebraska ex rel. Western Reference and Bond Ass'n, 313 U.S. 236 (1941), and their progeny.

[1777] Block v. Hirsh, 256 U.S. 135, 156 (1921).

[1778] Yakus v. United States, 321 U.S. 414 (1944); Bowles v. Willingham, 321 U.S. 503 (1944); Lockerty v. Phillips, 319 U.S. 182 (1943); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947); Lichter v. United States, 334 U.S. 742 (1948).

that he was not allowed a "fair return" on the property was dismissed with the observation that "a nation which can demand the lives of its men and women in the waging of . . . war is under no constitutional necessity of providing a system of price control . . . which will assure each landlord a 'fair return' on his property." [1779] The Court also held that rental ceilings could be established without a prior hearing when the exigencies of national security precluded the delay which would ensue.[1780]

But, in another World War I case, the Court struck down a statute that penalized the making of "any unjust or unreasonable rate or charge in handling . . . any necessaries" [1781] as repugnant to the Fifth and Sixth Amendments in that it was so vague and indefinite that it denied due process and failed to give adequate notice of what acts would violate it.[1782]

Clause 15. The Congress shall have Power * * * To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

Clause 16. The Congress shall have Power * * * To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

THE MILITIA CLAUSES

Calling Out the Militia

The states as well as Congress may prescribe penalties for failure to obey the President's call of the militia. They also have a concurrent power to aid the National Government by calls under their own authority, and in emergencies may use the militia to put down armed insurrection.[1783] The Federal Government may call out the militia in case of civil war; its authority to suppress rebellion is

[1779] Bowles v. Willingham, 321 U.S. 503, 519 (1944).

[1780] 321 U.S. at 521. The Court stressed, however, that Congress had provided for judicial review after the regulations and orders were made effective.

[1781] Act of October 22, 1919, 2, 41 Stat. 297.

[1782] United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

[1783] Moore v. Houston, 3 S. & R. (Pa.) 169 (1817), *aff'd*, Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

found in the power to suppress insurrection and to carry on war.[1784] The act of February 28, 1795,[1785] which delegated to the President the power to call out the militia, was held constitutional.[1786] A militiaman who refused to obey such a call was not "employed in the service of the United States so as to be subject to the article of war," but was liable to be tried for disobedience of the act of 1795.[1787]

Regulation of the Militia

The power of Congress over the militia "being unlimited, except in the two particulars of officering and training them . . . it may be exercised to any extent that may be deemed necessary by Congress. . . . The power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the General Government. . . ." [1788] Under the National Defense Act of 1916,[1789] the militia, which had been an almost purely state institution, was brought under the control of the National Government. The term "militia of the United States" was defined to comprehend "all able-bodied male citizens of the United States and all other able-bodied males who have . . . declared their intention to become citizens of the United States," between the ages of eighteen and forty-five. The act reorganized the National Guard, determined its size in proportion to the population of the several States, required that all enlistments be for "three years in service and three years in reserve," limited the appointment of officers to those who "shall have successfully passed such tests as to . . . physical, moral and professional fitness as the President shall prescribe," and authorized the President in certain emergencies to "draft into the military service of the United States to serve therein for the period of the war unless sooner discharged, any or all members of the Na-

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[1784] Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1871).

[1785] 1 Stat. 424 (1795), 10 U.S.C. § 332.

[1786] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32 (1827).

[1787] Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

[1788] Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16 (1820). Organizing and providing for the militia being constitutionally committed to Congress and statutorily shared with the Executive, the judiciary is precluded from exercising oversight over the process, Gilligan v. Morgan, 413 U.S. 1 (1973), although wrongs committed by troops are subject to judicial relief in damages. Scheuer v. Rhodes, 416 U.S. 233 (1974).

[1789] 39 Stat. 166, 197, 198, 200, 202, 211 (1916), codified in sections of Titles 10 & 32. *See* Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

tional Guard and National Guard Reserve," who thereupon should "stand discharged from the militia."[1790]

The militia clauses do not constrain Congress in raising and supporting a national army. The Court has approved the system of "dual enlistment," under which persons enlisted in state militia (National Guard) units simultaneously enlist in the National Guard of the United States, and, when called to active duty in the federal service, are relieved of their status in the state militia. Consequently, the restrictions in the first militia clause have no application to the federalized National Guard; there is no constitutional requirement that state governors hold a veto power over federal duty training conducted outside the United States or that a national emergency be declared before such training may take place.[1791]

Clause 17. Congress shall have power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

SEAT OF THE GOVERNMENT

The Convention was moved to provide for the creation of a site in which to locate the Capital of the Nation, completely removed from the control of any state, because of the humiliation suffered by the Continental Congress on June 21, 1783. Some eighty soldiers, unpaid and weary, marched on the Congress sitting in Philadelphia, physically threatened and verbally abused the members, and caused the Congress to flee the City when neither municipal nor state authorities would take action to protect the members.[1792] Thus, Madison noted that "[t]he indispensable necessity of complete authority at the seat of government, carries its own evidence with it. . . . Without it, not only the public authority might be in-

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[1790] Military and civilian personnel of the National Guard are state, rather than federal, employees and the Federal Government is thus not liable under the Federal Tort Claims Act for their negligence. Maryland v. United States, 381 U.S. 41 (1965).

[1791] Perpich v. Department of Defense, 496 U.S. 434 (1990).

[1792] J. Fiske, The Critical Period of American History, 1783–1789 112–113 (1888); W. Tindall, The Origin and Government of the District of Columbia 31–36 (1903).

sulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of government, for protection in the exercise of their duty, might bring on the national council an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy." [1793]

The actual site was selected by compromise, Northerners accepting the Southern-favored site on the Potomac in return for Southern support for a Northern aspiration, assumption of Revolutionary War debts by the National Government.[1794] Maryland and Virginia both authorized the cession of territory [1795] and Congress accepted.[1796] Congress divided the District into two counties, Washington and Alexandria, and provided that the local laws of the two states should continue in effect.[1797] It also established a circuit court and provided for the appointment of judicial and law enforcement officials.[1798]

There seems to have been no consideration, at least none recorded, given at the Convention or in the ratifying conventions to the question of the governance of the citizens of the District.[1799] Madison in *The Federalist* did assume that the inhabitants "will have had their voice in the election of the government which is to exercise authority over them, as a municipal legislature for all local purposes, derived from their own suffrages, will of course be allowed them. . . ." [1800] Although there was some dispute about the consti-

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[1793] THE FEDERALIST, No. 43 (J. Cooke ed. 1961), 288–289. *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1213, 1214 (1833).

[1794] W. TINDALL, THE ORIGIN AND GOVERNMENT OF THE DISTRICT OF COLUMBIA 5–30 (1903).

[1795] Maryland Laws 1798, ch. 2, p. 46; 13 Laws of Virginia 43 (Hening 1789).

[1796] Act of July 16, 1790, 1 Stat. 130. In 1846, Congress authorized a referendum in Alexandria County on the question of retroceding that portion to Virginia. The voters approved and the area again became part of Virginia. Laws of Virginia 1845–46, ch. 64, p. 50; Act of July 9, 1846, 9 Stat. 35; Proclamation of September 7, 1846; 9 Stat. 1000. Constitutional questions were raised about the retrocession but suit did not reach the Supreme Court until some 40 years later and the Court held that the passage of time precluded the raising of the question. Phillips v. Payne, 92 U.S. 130 (1875).

[1797] Act of February 27, 1801, 2 Stat. 103. The declaration of the continuing effect of state law meant that law in the District was frozen as of the date of cession, unless Congress should change it, which it seldom did. For some of the problems, *see* Tayloe v. Thompson, 30 U.S. (5 Pet.) 358 (1831); *Ex parte* Watkins, 32 U.S. (7 Pet.) 568 (1833); Stelle v. Carroll, 37 U.S. (12 Pet.) 201 (1838); Van Ness v. United States Bank, 38 U.S. (13 Pet.) 17 (1839); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842).

[1798] Act of March 3, 1801, 2 Stat. 115.

[1799] The objections raised in the ratifying conventions and elsewhere seemed to have consisted of prediction of the perils to the Nation of setting up the National Government in such a place. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1215, 1216 (1833).

[1800] THE FEDERALIST, No. 43 (J. Cooke ed. 1961), 289.

tutional propriety of permitting local residents a measure of "home rule," to use the recent term,[1801] almost from the first there were local elections provided for. In 1802, the District was divided into five divisions, in some of which the governing officials were elected; an elected mayor was provided in 1820. District residents elected some of those who governed them until this form of government was swept away in the aftermath of financial scandals in 1874[1802] and replaced with a presidentially appointed Commission in 1878.[1803] The Commission lasted until 1967 when it was replaced by an appointed Mayor-Commissioner and an appointed city council.[1804] In recent years, Congress provided for a limited form of self-government in the District, with the major offices filled by election.[1805] District residents vote for President and Vice President[1806] and elect a nonvoting delegate to Congress.[1807] An effort by constitutional amendment to confer voting representation in the House and Senate failed of ratification.[1808]

Constitutionally, it appears that Congress is neither required to provide for a locally elected government[1809] nor precluded from delegating its powers over the District to an elective local government.[1810] The Court has indicated that the "exclusive" jurisdiction granted was meant to exclude any question of state power over the area and was not intended to require Congress to exercise all powers itself.[1811]

[1801] Such a contention was cited and rebutted in 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1218 (1833).

[1802] Act of May 3, 1802, 2 Stat. 195; Act of May 15, 1820, 3 Stat. 583; Act of February 21, 1871, 16 Stat. 419; Act of June 20, 1874, 18 Stat. 116. The engrossing story of the postwar changes in the government is related in W. WHYTE, THE UNCIVIL WAR: WASHINGTON DURING THE RECONSTRUCTION (1958).

[1803] Act of June 11, 1878, 20 Stat. 103.

[1804] Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11699, reprinted as appendix to District of Columbia Code, Title I.

[1805] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93–198, 87 Stat. 774.

[1806] Twenty-third Amendment.

[1807] Pub. L. 91–405, 84 Stat. 848, D.C. Code, § 1–291.

[1808] H.J. Res. 554, 95th Congress, passed the House on March 2, 1978, and the Senate on August 22, 1978, but only 16 states had ratified before the expiration of the proposal after seven years.

[1809] Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820); Heald v. District of Columbia, 259 U.S. 114 (1922).

[1810] District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953). The case upheld the validity of ordinances enacted by the District governing bodies in 1872 and 1873 prohibiting racial discrimination in places of public accommodations.

[1811] 346 U.S. at 109–10. *See also* Thompson v. Lessee of Carroll, 63 U.S. (22 How.) 422 (1860); Stoutenburgh v. Hennick, 129 U.S. 141 (1889).

Chief Justice Marshall for the Court held in *Hepburn v. Ellzey* [1812] that the District of Columbia was not a state within the meaning of the diversity jurisdiction clause of Article III. This view, adhered to for nearly a century and a half,[1813] was overturned in 1949, the Court upholding the constitutionality of a 1940 statute authorizing federal courts to take jurisdiction of nonfederal controversies between residents of the District of Columbia and the citizens of a state.[1814] The decision was by a five to four division, but the five in the majority disagreed among themselves on the reasons. Three thought the statute to be an appropriate exercise of the power of Congress to legislate for the District of Columbia pursuant to this clause without regard to Article III.[1815] Two others thought that *Hepburn v. Ellzey* had been erroneously decided and would have overruled it.[1816] But six Justices rejected the former rationale and seven Justices rejected the latter one; since five Justices agreed, however, that the statute was constitutional, it was sustained.

It is not disputed that the District is a part of the United States and that its residents are entitled to all the guarantees of the United States Constitution including the privilege of trial by jury [1817] and of presentment by a grand jury.[1818] Legislation restrictive of liberty and property in the District must find justification in facts adequate to support like legislation by a state in the exercise of its police power.[1819]

Congress possesses over the District of Columbia the blended powers of a local and national legislature.[1820] This fact means that in some respects ordinary constitutional restrictions do not operate; thus, for example, in creating local courts of local jurisdiction in the District, Congress acts pursuant to its legislative powers un-

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[1812] 6 U.S. (2 Cr.) 445 (1805); *see also* Sere v. Pitot, 10 U.S. (6 Cr.) 332 (1810); New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816). The District was held to be a state within the terms of a treaty. Geofroy v. Riggs, 133 U.S. 258 (1890).

[1813] Barney v. City of Baltimore, 73 U.S. (6 Wall.) 280 (1868); Hooe v. Jamieson, 166 U.S. 395 (1897); Hooe v. Werner, 166 U.S. 399 (1897).

[1814] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

[1815] 337 U.S. at 588–600 (Justices Jackson, Black and Burton).

[1816] 337 U.S. at 604 (Justices Rutledge and Murphy). The dissents were by Chief Justice Vinson, id. at 626, joined by Justice Douglas, and by Justice Frankfurter, id. at 646, joined by Justice Reed.

[1817] Callan v. Wilson, 127 U.S. 540 (1888); Capital Traction Co. v. Hof, 174 U.S. 1 (1899).

[1818] United States v. Moreland, 258 U.S. 433 (1922).

[1819] Wright v. Davidson, 181 U.S. 371, 384 (1901); *cf.* Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[1820] Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 619 (1838); Shoemaker v. United States, 147 U.S. 282, 300 (1893); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932); O'Donoghue v. United States, 289 U.S. 516, 518 (1933).

der clause 17 and need not create courts that comply with Article III court requirements.[1821] And when legislating for the District Congress remains the legislature of the Union, so that it may give its enactments nationwide operation to the extent necessary to make them locally effective.[1822]

AUTHORITY OVER PLACES PURCHASED

"Places"

This clause has been broadly construed to cover all structures necessary for carrying on the business of the National Government.[1823] It includes post offices,[1824] a hospital and a hotel located in a national park,[1825] and locks and dams for the improvement of navigation.[1826] But it does not cover lands acquired for forests, parks, ranges, wild life sanctuaries or flood control.[1827] Nevertheless, the Supreme Court has held that a state may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired within the geographical limits of a state, for purposes other than those enumerated in clause 17.[1828]

After exclusive jurisdiction over lands within a state has been ceded to the United States, Congress alone has the power to punish crimes committed within the ceded territory.[1829] Private property located thereon is not subject to taxation by the state,[1830] nor can state statutes enacted subsequent to the transfer have any op-

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[1821] In the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91–358, 111, 84 Stat. 475, D.C. Code, § 11–101, Congress specifically declared it was acting pursuant to Article I in creating the Superior Court and the District of Columbia Court of Appeals and pursuant to Article III in continuing the United States District Court and the United States Court of Appeals for the District of Columbia. The Article I courts were sustained in Palmore v. United States, 411 U.S. 389 (1973). *See also* Swain v. Pressley, 430 U.S. 372 (1977). The latter, federal courts, while Article III courts, traditionally have had some non-Article III functions imposed on them, under the "hybrid" theory announced in O'Donoghue v. United States, 289 U.S. 516 (1933). *E.g.*, Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967), appeal dismissed, 393 U.S. 801 (1968) (power then vested in District Court to appoint school board members). *See also* Keller v. Potomac Elec. Co., 261 U.S. 428 (1923); Embry v. Palmer, 107 U.S. 3 (1883).

[1822] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821).

[1823] James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

[1824] Battle v. United States, 209 U.S. 36 (1908).

[1825] Arlington Hotel v. Fant, 278 U.S. 439 (1929).

[1826] James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

[1827] Collins v. Yosemite Park Co., 304 U.S. 518, 530 (1938).

[1828] 304 U.S. at 528.

[1829] Battle v. United States, 209 U.S. 36 (1908); Johnson v. Yellow Cab Co., 321 U.S. 383 (1944); Bowen v. Johnston, 306 U.S. 19 (1939).

[1830] Surplus Trading Co. v. Cook, 281 U.S. 647 (1930).

eration therein.[1831] But the local laws in force at the date of cession that are protective of private rights continue in force until abrogated by Congress.[1832] Moreover, as long as there is no interference with the exclusive jurisdiction of the United States, an area subject to such jurisdiction may be annexed by a municipality.[1833]

Duration of Federal Jurisdiction

A state may qualify its cession of territory by a condition that jurisdiction shall be retained by the United States only so long as the place is used for specified purposes.[1834] Such a provision operates prospectively and does not except from the grant that portion of a described tract which is then used as a railroad right of way.[1835] In 1892, the Court upheld the jurisdiction of the United States to try a person charged with murder on a military reservation, over the objection that the state had ceded jurisdiction only over such portions of the area as were used for military purposes and that the particular place on which the murder was committed was used solely for farming. The Court held that the character and purpose of the occupation having been officially established by the political department of the government, it was not open to the Court to inquire into the actual uses to which any portion of the area was temporarily put.[1836] A few years later, however, it ruled that the lease to a city, for use as a market, of a portion of an area which had been ceded to the United States for a particular purpose, suspended the exclusive jurisdiction of the United States.[1837]

The question arose whether the United States retains jurisdiction over a place that was ceded to it unconditionally, after it has abandoned the use of the property for governmental purposes and entered into a contract for sale to private persons. Minnesota asserted the right to tax the equitable interest of the purchaser in

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[1831] Western Union Tel. Co. v. Chiles, 214 U.S. 274 (1909); Arlington Hotel v. Fant, 278 U.S. 439 (1929); Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285 (1943). The Assimilative Crimes Act of 1948, 18 U.S.C. § 13, making applicable to a federal enclave a subsequently enacted criminal law of the state in which the enclave is situated entails no invalid delegation of legislative power to the state. United States v. Sharpnack, 355 U.S. 286, 294, 296–97 (1958).

[1832] Chicago, R.I. & P. Ry. v. McGlinn, 114 U.S. 542, 545 (1885); Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).

[1833] Howard v. Commissioners, 344 U.S. 624 (1953). As *Howard* recognized, such areas of federal property do not cease to be part of the state in which they are located and the residents of the areas are for most purposes residents of the state. Thus, a state may not constitutionally exclude such residents from the privileges of suffrage if they are otherwise qualified. Evans v. Cornman, 398 U.S. 419 (1970).

[1834] Palmer v. Barrett, 162 U.S. 399 (1896).

[1835] United States v. Unzeuta, 281 U.S. 138 (1930).

[1836] Benson v. United States, 146 U.S. 325, 331 (1892).

[1837] Palmer v. Barrett, 162 U.S. 399 (1896).

such land, and the Supreme Court upheld its right to do so. The majority assumed that "the Government's unrestricted transfer of property to nonfederal hands is a relinquishment of the exclusive legislative power."[1838] In separate concurring opinions, Chief Justice Stone and Justice Frankfurter reserved judgment on the question of territorial jurisdiction.[1839]

Reservation of Jurisdiction by States

For more than a century the Supreme Court kept alive, by repeated dicta,[1840] the doubt expressed by Justice Story "whether Congress are by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of a State legislature, where such consent is so qualified that it will not justify the 'exclusive legislation' of Congress there. It may well be doubted if such consent be not utterly void."[1841] But when the issue was squarely presented in 1937, the Court ruled that, when the United States purchases property within a state with the consent of the latter, it is valid for the state to convey, and for the United States to accept, "concurrent jurisdiction" over such land, the state reserving to itself the right to execute process "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States."[1842] The holding logically renders the second half of clause 17 superfluous. In a companion case, the Court ruled further that even if a general state statute purports to cede exclusive jurisdiction, such jurisdiction does not pass unless the United States accepts it.[1843]

Clause 18. The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.

[1838] S.R.A., Inc. v. Minnesota, 327 U.S. 558, 564 (1946).

[1839] 327 U.S. at 570, 571.

[1840] Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 532 (1885); United States v. Unzeuta, 281 U.S. 138, 142 (1930); Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930).

[1841] United States v. Cornell, 25 Fed. Cas. 646, 649 (No. 14,867) (C.C.D.R.I. 1819).

[1842] James v. Dravo Contracting Co., 302 U.S. 134, 145 (1937).

[1843] Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937). *See also* Atkinson v. Tax Comm'n, 303 U.S. 20 (1938).

NECESSARY AND PROPER CLAUSE

Scope and Operation

The Necessary and Proper Clause, sometimes called the "coefficient" or "elastic" clause, is an enlargement, not a constriction, of the powers expressly granted to Congress. Chief Justice Marshall's classic opinion in *McCulloch v. Maryland* [1844] set the standard in words that reverberate to this day. "Let the end be legitimate," he wrote, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." [1845] Moreover, the provision gives Congress a share in the responsibilities lodged in other departments, by virtue of its right to enact legislation necessary to carry into execution all powers vested in the National Government. Conversely, where necessary for the efficient execution of its own powers, Congress may delegate some measure of legislative power to other departments.[1846]

Practically every power of the National Government has been expanded in some degree by the Necessary and Proper Clause. Under the authority granted it by that clause, Congress has adopted measures requisite to discharge the treaty obligations of the nation,[1847] has organized the federal judicial system, and has enacted a large body of law defining and punishing crimes. Effective control of the national economy has been made possible by the authority to regulate the internal commerce of a state to the extent necessary to protect and promote interstate commerce.[1848] The right of Congress to use all known and appropriate means for collecting revenue, including the distraint of property for federal taxes,[1849] and to exercise the power of eminent domain to acquire property for pub-

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[1844] 17 U.S. (4 Wheat.) 316 (1819).

[1845] 17 U.S. at 420. This decision had been clearly foreshadowed fourteen years earlier by Marshall's opinion in United States v. Fisher, 6 U.S. (2 Cr.) 358, 396 (1805). Upholding an act which gave priority to claims of the United States against the estate of a bankrupt he wrote: "The government is to pay the debt of the Union, and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittance, by bills or otherwise, and to take those precautions which will render the transaction safe."

[1846] See "Delegation of Legislative Power," supra.

[1847] Neely v. Henkel, 180 U.S. 109, 121 (1901). *See also* Missouri v. Holland, 252 U.S. 416 (1920).

[1848] See discussion of "Necessary and Proper Clause" under the commerce power, supra.

[1849] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 281 (1856). Congress may also legislate to protect its spending power. Sabri v. United States, 541 U.S. 600 (2004) (upholding imposition of criminal penalties for bribery of state and local officials administering programs receiving federal funds).

lic use,[1850] have greatly extended the range of national power. But the widest application of the Necessary and Proper Clause has occurred in the field of monetary and fiscal controls. Because the various specific powers granted by Article I, § 8, do not add up to a general legislative power over such matters, the Court has relied heavily upon this clause to sustain the comprehensive control that Congress has asserted over this subject.[1851]

Definition of Punishment and Crimes

Although the only crimes which Congress is expressly authorized to punish are piracies, felonies on the high seas, offenses against the law of nations, treason and counterfeiting of the securities and current coin of the United States, its power to create, define, and punish crimes and offenses whenever necessary to effectuate the objects of the Federal Government is universally conceded.[1852] Illustrative of the offenses which have been punished under this power are the alteration of registered bonds,[1853] the bringing of counterfeit bonds into the country,[1854] conspiracy to injure prisoners in custody of a United States marshal,[1855] impersonation of a federal officer with intent to defraud,[1856] conspiracy to injure a citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States,[1857] the receipt by government officials of contributions from government employees for political purposes,[1858] and advocating the overthrow of the government by force.[1859] Part I of Title 18 of the United States Code comprises more than 500 sections defining penal offenses against the United States.[1860]

[1850] Kohl v. United States, 91 U.S. 367, 373 (1876); United States v. Fox, 95 U.S. 670 (1878).

[1851] See "Fiscal and Monetary Powers of Congress," supra.

[1852] United States v. Fox, 95 U.S. 670, 672 (1878); United States v. Hall, 98 U.S. 343, 357 (1879); United States v. Worrall, 2 U.S. (2 Dall.) 384, 394 (1798); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). That this power has been freely exercised is attested by the pages of the United States Code devoted to Title 18, entitled "Criminal Code and Criminal Procedure." In addition, numerous regulatory measures in other titles prescribe criminal penalties.

[1853] *Ex parte* Carll, 106 U.S. 521 (1883).

[1854] United States v. Marigold, 50 U.S. (9 How.) 560, 567 (1850).

[1855] Logan v. United States, 144 U.S. 263 (1892).

[1856] United States v. Barnow, 239 U.S. 74 (1915).

[1857] *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States v. Waddell, 112 U.S. 76 (1884); *In re* Quarles and Butler, 158 U.S. 532, 537 (1895); Motes v. United States, 178 U.S. 458 (1900); United States v. Mosley, 238 U.S. 383 (1915). *See also* Rakes v. United States, 212 U.S. 55 (1909).

[1858] *Ex parte* Curtis, 106 U.S. 371 (1882).

[1859] 18 U.S.C. § 2385.

[1860] *See* National Commission on Reform of Federal Criminal Laws, Final Report (Washington: 1970); National Commission on Reform of Federal Criminal Laws, Working Papers (Washington: 1970), 2 vols.

One of the most expansive interpretations of the Necessary and Proper Clause arose in the context of the administration of the federal penal system. In *United States v. Comstock*,[1861] the Court evaluated a federal statute which allowed for the civil commitment of a federal prisoner past the term of his imprisonment if that prisoner would have serious difficulty in refraining from sexually violent conduct or child molestation.[1862] The statute contained no requirement that the threatened future conduct would fall under federal jurisdiction, raising the question of what constitutional basis could be cited for its enforcement. The majority opinion in *Comstock* upheld the statute after considering five factors: (1) the historic breadth of the Necessary and Proper Clause; (2) the history of federal involvement in this area; (3) the reason for the statute's enactment; (4) the statute's accommodation of state interests; and (5) whether the scope of statute was too attenuated from Article I powers.[1863]

In evaluating these factors, the Court noted that previous federal involvement in the area included not only the civil commitment of defendants who were incompetent to stand trial or who became insane during the course of their imprisonment, but, starting in 1949, the continued confinement of those adjudged incompetent or insane past the end of their prison term. In upholding the sex offender statute, the Court found that protection of the public and the probability that such prisoners would not be committed by the state represented a "rational basis" for the passage of such legislation.[1864] The Court further found that state interests were protected by the legislation, as the statute provided for transfer of the committed individuals to state authorities willing to accept them.

[1861] 560 U.S. ___, No. 08–1224, slip op. (May 17, 2010). Breyer wrote the opinion of the Court, joined by Justices Roberts, Stevens, Ginsburg and Sotomayor. Justices Kennedy and Alito concurred in the judgement, while Justices Thomas and Scalia dissented.

[1862] In *United States v. Kebodeaux*, 570 U.S. ___, No. 12–418, slip op. (2013), the Court concluded that a sex offender, convicted by the Air Force in a special court-martial, had, upon his release, been subject to state sex offender registration laws, violation of which was prohibited under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103–322, 108 Stat. 2038–2042 (1994). Kebodeaux was later convicted of failing to register under the "very similar" provisions of the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109–248, Title I, 120 Stat. 587, 590, (2006) (codified at 42 U.S.C. §§ 16901 *et seq.*), which had superseded the Jacob Wetterling Act. The Court held Congress was well within its authority under the Necessary and Proper Clause to have modified the Jacob Wetterling Act's registration requirements, and Kebodeaux was properly subject to SORNA requirements, even if they were enacted after his release.

[1863] 560 U.S. ___, No. 08–1224, slip op. at 22.

[1864] Justice Kennedy, in concurrence, expressed concern that whether a statute is "rationally related" to the implementation of a power, *see* Williamson v. Lee Optical Co., 348 U.S. 483, 487–88 (1955) (Due Process Clause), is too deferential a standard to be used as regards the Necessary and Proper Clause. Justice Kennedy would use a more rigorous "rational basis" standard, found in Commerce Clause cases, where

Finally, the Court found that the statute was not too attenuated from the Article I powers underlying the criminal laws which had been the basis for incarceration, as it related to the responsible administration of the United States prison system.

Chartering of Banks

As an appropriate means for executing "the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies . . . ," Congress may incorporate banks and kindred institutions.[1865] Moreover, it may confer upon them private powers, which, standing alone, have no relation to the functions of the Federal Government, if those privileges are essential to the effective operation of such corporations.[1866] Where necessary to meet the competition of state banks, Congress may authorize national banks to perform fiduciary functions, even though, apart from the competitive situation, federal instrumentalities might not be permitted to engage in such business.[1867] The Court will not undertake to assess the relative importance of the public and private functions of a financial institution Congress has seen fit to create. It sustained the act setting up the Federal Farm Loan Banks to provide funds for mortgage loans on agricultural land against the contention that the right of the Secretary of the Treasury, which he had not exercised, to use these banks as depositories of public funds, was merely a pretext for chartering those banks for private purposes.[1868]

Currency Regulations

Reinforced by the necessary and proper clause, the powers "'to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States,' and 'to borrow money on the credit of the United States and to coin money and regulate the value thereon . . . ,'"[1869] have been held to give Congress virtually complete control over money and currency. A prohibitive tax on the notes of state banks,[1870] the issuance of treasury notes impressed with the quality of legal tender in payment of pri-

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there must be shown a "demonstrated link in fact, based on empirical demonstration." *See Comstock*, 560 U.S. ___, No. 08–1224, slip op. at 3 (Kennedy, J., concurring).

[1865] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[1866] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 862 (1824). *See also* Pittman v. Home Owners' Corp., 308 U.S. 21 (1939).

[1867] First National Bank v. Follows ex rel. Union Trust Co., 244 U.S. 416 (1917); Missouri ex rel. Burnes Nat'l Bank v. Duncan, 265 U.S. 17 (1924).

[1868] Smith v. Kansas City Title Co., 255 U.S. 180 (1921).

[1869] Juilliard v. Greenman, 110 U.S. 421, 449 (1884).

[1870] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

vate debts [1871] and the abrogation of clauses in private contracts, which called for payment in gold coin,[1872] were sustained as appropriate measures for carrying into effect some or all of the foregoing powers.

Power to Charter Corporations

In addition to the creation of banks, Congress has been held to have authority to charter a railroad corporation,[1873] or a corporation to construct an interstate bridge,[1874] as instrumentalities for promoting commerce among the states, and to create corporations to manufacture aircraft [1875] or merchant vessels [1876] as incidental to the war power.

Courts and Judicial Proceedings

Because the Constitution "delineated only the great outlines of the judicial power . . . , leaving the details to Congress, . . . [t]he distribution and appropriate exercise of the judicial power must . . . be made by laws passed by Congress. . . ." [1877] As a necessary and proper provision for the exercise of the jurisdiction conferred by Article III, § 2, Congress may direct the removal from a state to a federal court of a criminal prosecution against a federal officer for acts done under color of federal law,[1878] may require the tolling of a state statute of limitations while a state cause of action that is supplemental to a federal claim is pending in federal court,[1879] and may authorize the removal before trial of civil cases arising under the laws of the United States.[1880] It may prescribe the effect to be given to judicial proceedings of the federal courts [1881] and may make all laws necessary for carrying into execution the judgments of federal courts.[1882] When a territory is admitted as a state, Congress may designate the court to which the records of the territorial courts shall be transferred and may prescribe the mode for enforcement and review of judgments rendered by those courts.[1883] In the exer-

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[1871] Juilliard v. Greenman, 110 U.S. 421 (1884). *See also* Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).

[1872] Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 303 (1935).

[1873] *Pacific R.R. Removal Cases*, 115 U.S. 1 (1885); California v. Pacific R.R., 127 U.S. 1, 39 (1888).

[1874] Luxton v. North River Bridge Co., 153 U.S. 525 (1894).

[1875] Clallam County v. United States, 263 U.S. 341 (1923).

[1876] Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549 (1922).

[1877] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).

[1878] Tennessee v. Davis, 100 U.S. 257, 263 (1880).

[1879] Jinks v. Richland County, 538 U.S. 456 (2003).

[1880] Railway Company v. Whitton, 80 U.S. (13 Wall.) 270, 287 (1872).

[1881] Embry v. Palmer, 107 U.S. 3 (1883).

[1882] Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 53 (1825).

[1883] Express Co. v. Kountze Bros., 75 U.S. (8 Wall.) 342, 350 (1869).

cise of other powers conferred by the Constitution, apart from Article III, Congress may create legislative courts and "clothe them with functions deemed essential or helpful in carrying those powers into execution." [1884]

Special Acts Concerning Claims

The Necessary and Proper Clause enables Congress to pass special laws to require other departments of the government to prosecute or adjudicate particular claims, whether asserted by the government itself or by private persons. In 1924,[1885] Congress adopted a Joint Resolution directing the President to cause suit to be instituted for the cancellation of certain oil leases alleged to have been obtained from the government by fraud and to prosecute such other actions and proceedings, civil and criminal, as were warranted by the facts. This resolution also authorized the appointment of special counsel to have charge of such litigation. Private acts providing for a review of an order for compensation under the Longshore and Harbor Workers' Compensation Act,[1886] or conferring jurisdiction upon the Court of Claims, after it had denied recovery, to hear and determine certain claims of a contractor against the government, have been held constitutional.[1887]

Maritime Law

Congress may implement the admiralty and maritime jurisdiction conferred upon the federal courts by revising and amending the maritime law that existed at the time the Constitution was adopted, but in so doing, it cannot go beyond the reach of that jurisdiction.[1888] This power cannot be delegated to the states; hence, acts of Congress that purported to make state workers' compensation laws applicable to maritime cases were held unconstitutional.[1889]

SECTION 9. Clause 1. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may

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[1884] *Ex parte* Bakelite Corp., 279 U.S. 438, 449 (1929). *But see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67–69 (1982).

[1885] 43 Stat. 5 (1924). *See* Sinclair v. United States, 279 U.S. 263 (1929).

[1886] Paramino Co. v. Marshall, 309 U.S. 370 (1940).

[1887] Pope v. United States, 323 U.S. 1 (1944).

[1888] Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934).

[1889] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. Dawson & Co., 264 U.S. 219 (1924).

be imposed on such Importation, not exceeding ten dollars for each Person.

IN GENERAL

This sanction for the importation of slaves by the states for twenty years after the adoption of the Constitution, when considered with the section requiring escaped slaves to be returned to their masters, Art. IV, § 1, cl. 3, was held by Chief Justice Taney in *Scott v. Sandford*,[1890] to show conclusively that such persons and their descendants were not embraced within the term "citizen" as used in the Constitution. Today this ruling is interesting only as an historical curiosity.

Clause 2. The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

IN GENERAL

This clause is the only place in the Constitution in which the Great Writ is mentioned, a strange fact in the context of the regard with which the right was held at the time the Constitution was written[1891] and stranger in the context of the role the right has come to play in the Supreme Court's efforts to constitutionalize federal and state criminal procedure.[1892]

Only the Federal Government and not the states, it has been held obliquely, is limited by the clause.[1893] The issue that has always excited critical attention is the authority in which the clause places the power to determine whether the circumstances warrant suspension of the privilege of the Writ.[1894] The clause itself does

[1890] 60 U.S. (19 How.) 393, 411 (1857).

[1891] R. Walker, The American Reception of the Writ of Liberty (1961).

[1892] See discussion under Article III, Habeas Corpus: Scope of Writ.

[1893] Gasquet v. Lapeyre, 242 U.S. 367, 369 (1917).

[1894] In form, of course, clause 2 is a limitation of power, not a grant of power, and is in addition placed in a section of limitations. It might be argued, therefore, that the power to suspend lies elsewhere and that this clause limits that authority. This argument is opposed by the little authority there is on the subject. 3 M. Farrand, The Records of the Federal Convention of 1787 213 (Luther Martin ed., 1937); *Ex parte* Merryman, 17 Fed. Cas. 144, 148 (No. 9487) (C.C.D. Md. 1861); *but cf.* 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 464 (Edmund Randolph, 2d ed. 1836). At the Convention, Gouverneur Morris proposed the language of the present clause: the first section of the clause, down to "unless" was adopted unanimously, but the second part, qualifying the prohibition on suspension was adopted over the opposition of three states. 2 M. Farrand, op. cit., 438. It would hardly have been meaningful for those states opposing

not specify, and although most of the clauses of § 9 are directed at Congress not all of them are.[1895] At the Convention, the first proposal of a suspending authority expressly vested "in the legislature" the suspending power,[1896] but the author of this proposal did not retain this language when the matter was taken up,[1897] the present language then being adopted.[1898] Nevertheless, Congress's power to suspend was assumed in early commentary[1899] and stated in dictum by the Court.[1900] President Lincoln suspended the privilege on his own motion in the early Civil War period,[1901] but this met with such opposition[1902] that he sought and received congressional authorization.[1903] Three other suspensions were subsequently ordered on the basis of more or less express authorizations from Congress.[1904]

When suspension operates, what is suspended? In *Ex parte Milligan*,[1905] the Court asserted that the Writ is not suspended but only the privilege, so that the Writ would issue and the issuing court on its return would determine whether the person applying can proceed, thereby passing on the constitutionality of the suspension and whether the petitioner is within the terms of the suspension.

Restrictions on habeas corpus placed in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) have provided occasion for further analysis of the scope of the Suspension Clause. AEDPA's restrictions on successive petitions from state pris-

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any power to suspend to vote against this language if the power to suspend were conferred elsewhere.

[1895] *Cf.* Clauses 7, 8.

[1896] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 341 (rev. ed. 1937).

[1897] Id. at 438.

[1898] Id.

[1899] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1336 (1833).

[1900] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 101 (1807).

[1901] *Cf.* J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 118–139 (rev. ed. 1951).

[1902] Including a finding by Chief Justice Taney on circuit that the President's action was invalid. *Ex parte* Merryman, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

[1903] Act of March 3, 1863, 1, 12 Stat. 755. *See* Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 U. WIS. HISTORY BULL. 213 (1907).

[1904] The privilege of the Writ was suspended in nine counties in South Carolina in order to combat the Ku Klux Klan, pursuant to Act of April 20, 1871, 4, 17 Stat. 14. It was suspended in the Philippines in 1905, pursuant to the Act of July 1, 1902, 5, 32 Stat. 692. *Cf.* Fisher v. Baker, 203 U.S. 174 (1906). Finally, it was suspended in Hawaii during World War II, pursuant to a section of the Hawaiian Organic Act, 67, 31 Stat. 153 (1900). *Cf.* Duncan v. Kahanamoku, 327 U.S. 304 (1946). For the problem of *de facto* suspension through manipulation of the jurisdiction of the federal courts, *see infra* discussion under Article III, The Theory of Plenary Congressional Control.

[1905] 71 U.S. (4 Wall.) 2, 130–131 (1866).

oners are "well within the compass" of an evolving body of principles restraining "abuse of the writ," and hence do not amount to a suspension of the writ within the meaning of the Clause.[1906] Interpreting IIRIRA so as to avoid what it viewed as a serious constitutional problem, the Court in another case held that Congress had not evidenced clear intent to eliminate federal court habeas corpus jurisdiction to determine whether the Attorney General retained discretionary authority to waive deportation for a limited category of resident aliens who had entered guilty pleas before IIRIRA repealed the waiver authority.[1907] "[At] the absolute minimum," the Court wrote, "the Suspension Clause protects the writ as it existed in 1789. At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." [1908]

Clause 3. No Bill of Attainder or ex post facto Law shall be passed.

BILLS OF ATTAINDER

"Bills of attainder . . . are such special acts of the legislature, as inflict capital punishments upon persons supposed to be guilty of high offences, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a bill of pains and penalties. . . . In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions." [1909] The phrase "bill of attainder," as used in this clause and in clause 1 of § 10, applies to bills of pains and penalties as well as to the traditional bills of attainder.[1910]

The prohibition embodied in this clause is not to be narrowly construed in the context of traditional forms but is to be inter-

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[1906] Felker v. Turpin, 518 U.S. 651 (1996).

[1907] INS v. St. Cyr, 533 U.S. 289 (2001).

[1908] 533 U.S. at 301 (internal quotation marks and citation omitted).

[1909] 3 J. Story, Commentaries on the Constitution of the United States 1338 (1833).

[1910] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); *cf.* United States v. Brown, 381 U.S. 437, 441–442 (1965).

preted in accordance with the designs of the framers so as to preclude trial by legislature, which would violate the separation of powers.[1911] The clause thus prohibits all legislative acts, "no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ." [1912] That the Court has applied the clause dynamically is revealed by a consideration of the three cases in which acts of Congress have been struck down as violating it.[1913] In *Ex parte Garland*,[1914] the Court struck down a statute that required attorneys to take an oath that they had taken no part in the Confederate rebellion against the United States before they could practice in federal courts. The statute, and a state constitutional amendment requiring a similar oath of persons before they could practice certain professions,[1915] were struck down as legislative acts inflicting punishment on a specific group the members of which had taken part in the rebellion and therefore could not truthfully take the oath. The clause then lay unused until 1946 when the Court used it to strike down a rider to an appropriations bill forbidding the use of money appropriated in the bill to pay the salaries of three named persons whom the House of Representatives wished discharged because they were deemed to be "subversive." [1916]

Then, in *United States v. Brown*,[1917] a sharply divided Court held void as a bill of attainder a statute making it a crime for a member of the Communist Party to serve as an officer or as an employee of a labor union. Congress could, Chief Justice Warren wrote for the majority, under its commerce power, protect the economy from harm by enacting a prohibition generally applicable to any person who commits certain acts or possesses certain characteristics making him likely in Congress's view to initiate political strikes or other harmful deeds and leaving it to the courts to determine whether a particular person committed the specified acts or possessed the specified characteristics. It was impermissible, however, for Congress to designate a class of persons—members of the Communist Party—as

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[1911] United States v. Brown, 381 U.S. 437, 442–46 (1965). Four dissenting Justices, however, denied that any separation of powers concept underlay the clause. Id. at 472–73.

[1912] United States v. Lovett, 328 U.S. 303, 315 (1946).

[1913] For a rejection of the Court's approach and a plea to adhere to the traditional concept, *see* id. at 318 (Justice Frankfurter concurring).

[1914] 71 U.S. (4 Wall.) 333 (1867).

[1915] Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

[1916] United States v. Lovett, 328 U.S. 303 (1946).

[1917] 381 U.S. 437 (1965).

being forbidden to hold union office.[1918] The dissenters viewed the statute as merely expressing in shorthand the characteristics of those persons who were likely to utilize union responsibilities to accomplish harmful acts; Congress could validly conclude that all members of the Communist Party possessed those characteristics.[1919]

The majority's decision in *Brown* cast in doubt certain statutes and certain statutory formulations that had been held not to constitute bills of attainder. For example, a predecessor of the statute struck down in *Brown*, which had conditioned a union's access to the NLRB upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party, had been upheld,[1920] and although Chief Justice Warren distinguished the previous case from *Brown* on the basis that the Court in the previous decision had found the statute to be preventive rather than punitive,[1921] he then proceeded to reject the contention that the punishment necessary for a bill of attainder had to be punitive or retributive rather than preventive,[1922] thus undermining the prior decision. Of much greater significance was the effect of the *Brown* decision on "conflict-of-interest" legislation typified by that upheld in *Board of Governors v. Agnew*.[1923] The statute there forbade any partner or employee of a firm primarily engaged in underwriting securities from being a director of a national bank.[1924] Chief Justice Warren distinguished the prior decision and the statute on three grounds from the statute then under consideration. First, the union statute inflicted its deprivation upon the members of a suspect political group in typical bill-of-attainder fashion, unlike the statute in *Agnew*. Second, in the *Agnew* statute, Congress did not express a judgment upon certain men or members of a particular group; it rather concluded that any man placed in the two positions would suffer a temptation any man might yield to. Third, Congress established in the *Agnew* statute an objective standard of conduct expressed in shorthand which precluded persons from holding the two positions.

[1918] The Court of Appeals had voided the statute as an infringement of First Amendment expression and association rights, but the Court majority did not rely upon this ground. 334 F.2d 488 (9th Cir. 1964). However, in United States v. Robel, 389 U.S. 258 (1967), a very similar statute making it unlawful for any member of a "Communist-action organization" to be employed in a defense facility was struck down on First Amendment grounds and the bill of attainder argument was ignored.

[1919] United States v. Brown, 381 U.S. 437, 462 (1965) (Justices White, Clark, Harlan, and Stewart dissenting).

[1920] American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

[1921] *Douds*, 339 U.S. at 413, 414, cited in United States v. Brown, 381 U.S. 437, 457–458 (1965).

[1922] *Brown*, 381 U.S. at 458–61.

[1923] 329 U.S. 441 (1947).

[1924] 12 U.S.C. § 78.

Apparently withdrawing from the *Brown* analysis in upholding a statute providing for governmental custody of documents and recordings accumulated during the tenure of former President Nixon,[1925] the Court set out a rather different formula for deciding bill of attainder cases.[1926] The law specifically applied only to President Nixon and directed an executive agency to assume control over the materials and prepare regulations providing for ultimate public dissemination of at least some of them; the act assumed that it did not deprive the former President of property rights but authorized the award of just compensation if it should be judicially determined that there was a taking. First, the Court denied that the clause denies the power to Congress to burden some persons or groups while not so treating all other plausible individuals or groups; even the present law's specificity in referring to the former President by name and applying only to him did not condemn the act because he "constituted a legitimate class of one" on whom Congress could "fairly and rationally" focus.[1927] Second, even if the statute's specificity did bring it within the prohibition of the clause, the lodging of Mr. Nixon's materials with the GSA did not inflict punishment within the meaning of the clause. This analysis was a three-pronged one: 1) the law imposed no punishment traditionally judged to be prohibited by the clause; 2) the law, viewed functionally in terms of the type and severity of burdens imposed, could rationally be said to further nonpunitive legislative purposes; and 3) the law had no legislative record evincing a congressional intent to punish.[1928] That is, the Court, looking "to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect," concluded that the statute served to further legitimate policies of preserving the availability of evidence for criminal trials and the functioning of the adversary legal system and in promoting the preservation of records of historical value, all in a way that did not and was not intended to punish the former President.

[1925] The Presidential Recordings and Materials Preservation Act, Pub. L. 93–526, 88 Stat. 1695 (1974), note following 44 U.S.C. § 2107. For an application of this statute, *see* Nixon v. Warner Communications, 435 U.S. 589 (1978).

[1926] Nixon v. Administrator of General Services, 433 U.S. 425, 468–84 (1977). Justice Stevens' concurrence is more specifically directed to the facts behind the statute than is the opinion of the Court, id. at 484, and Justice White, author of the dissent in *Brown*, merely noted he found the act nonpunitive. Id. at 487. Chief Justice Burger and Justice Rehnquist dissented. Id. at 504, 536–45. Adding to the impression of a departure from *Brown* is the quotation in the opinion of the Court at several points of the *Brown* dissent, id. at 470 n.31, 471 n.34, while the dissent quoted and relied on the opinion of the Court in *Brown*. Id. at 538, 542.

[1927] 433 U.S. at 472. Justice Stevens carried the thought further, although in the process he severely limited the precedential value of the decision. Id. at 484.

[1928] 433 U.S. at 473–84.

The clause protects individual persons and groups who are vulnerable to nonjudicial determinations of guilt and does not apply to a state; nor does a state have standing to invoke the clause for its citizens against the Federal Government.[1929]

EX POST FACTO LAWS

Definition

Both federal and state governments are prohibited from enacting *ex post facto* laws,[1930] and the Court applies the same analysis whether the law in question is a federal or a state enactment. When these prohibitions were adopted as part of the original Constitution, many persons understood the term *ex post facto* laws to "embrace all retrospective laws, or laws governing or controlling past transactions, whether . . . of a civil or a criminal nature."[1931] But in the early case of *Calder v. Bull*,[1932] the Supreme Court decided that the phrase, as used in the Constitution, was a term of art that applied only to penal and criminal statutes. But, although it is inapplicable to retroactive legislation of any other kind,[1933] the constitutional prohibition may not be evaded by giving a civil form to a measure that is essentially criminal.[1934] Every law that makes criminal an act that was innocent when done, or that inflicts a greater punishment than the law annexed to the crime when committed, is an *ex post facto* law within the prohibition of the Constitution.[1935] A prosecution under a temporary statute that was extended before the date originally set for its expiration does not offend this provision even though it is instituted subsequent to the extension of the statute's duration for a violation committed prior thereto.[1936] Because this provision does not apply to crimes committed outside the jurisdiction of the United States against the laws of a foreign country, it is immaterial in extradition proceedings whether the foreign law is *ex post facto* or not.[1937]

[1929] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[1930] The prohibition on state *ex post facto* legislation appears in Art. I, § 10, cl. 1.

[1931] 3 J. Story, Commentaries on the Constitution of the United States 1339 (1833).

[1932] 3 U.S. (3 Dall.) 386, 393 (1798).

[1933] Bankers Trust Co. v. Blodgett, 260 U.S. 647, 652 (1923).

[1934] Burgess v. Salmon, 97 U.S. 381 (1878).

[1935] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1867); Burgess v. Salmon, 97 U.S. 381, 384 (1878).

[1936] United States v. Powers, 307 U.S. 214 (1939).

[1937] Neely v. Henkel, 180 U.S. 109, 123 (1901). *Cf. In re* Yamashita, 327 U.S. 1, 26 (1946) (dissenting opinion of Justice Murphy); Hirota v. MacArthur, 338 U.S. 197, 199 (1948) (concurring opinion of Justice Douglas).

What Constitutes Punishment

The issue of whether a law is civil or punitive in nature is essentially the same for *ex post facto* and for double jeopardy analysis.[1938] "A court must ascertain whether the legislature intended the statute to establish civil proceedings. A court will reject the legislature's manifest intent only where a party challenging the Act provides the clearest proof that the statutory scheme is so punitive in either purpose or effect as to negate the State's intention."[1939] A statute that has been held to be civil and not criminal in nature cannot be deemed punitive "as applied" to a single individual.[1940]

A variety of federal laws have been challenged as *ex post facto*. A statute that prescribed as a qualification for practice before the federal courts an oath that the attorney had not participated in the Rebellion was found unconstitutional because it operated as a punishment for past acts.[1941] But a statute that denied to polygamists the right to vote in a territorial election was upheld even as applied to one who had not contracted a polygamous marriage and had not cohabited with more than one woman since the act was passed, because the law did not operate as an additional penalty for the offense of polygamy but merely defined it as a disqualification of a voter.[1942] A deportation law authorizing the Secretary of Labor to expel aliens for criminal acts committed before its passage is not *ex post facto* because deportation is not a punishment.[1943] For this reason, a statute terminating payment of old-age benefits to an alien deported for Communist affiliation also is not *ex post facto*, for the denial of a non-contractual benefit to a deported alien is not a penalty but a regulation designed to relieve the Social Security System of administrative problems of supervision and enforcement likely to arise from disbursements to beneficiaries residing abroad.[1944] Likewise, an act permitting the cancel-

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[1938] Kansas v. Hendricks, 521 U.S. 346 (1997); Seling v. Young, 531 U.S. 250 (2001).

[1939] Seling v. Young, 531 U.S. 250, 261 (2001) (interpreting Art. I, § 10).

[1940] Seling v. Young, 531 U.S. at 263 (2001).

[1941] *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867).

[1942] Murphy v. Ramsey, 114 U.S. 15 (1885).

[1943] Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585 (1913); Marcello v. Bonds, 349 U.S. 302 (1955). Justices Black and Douglas, reiterating in Lehman v. United States ex rel. Carson, 353 U.S. 685, 690–91 (1957), their dissent from the premise that the *ex post facto* clause is directed solely to penal legislation, disapproved a holding that an immigration law, enacted in 1952, 8 U.S.C. § 1251, which authorized deportation of an alien who, in 1945, had acquired a status of nondeportability under pre-existing law is valid. In their opinion, to banish, in 1957, an alien who had lived in the United States for almost 40 years, for an offense committed in 1936, and for which he already had served a term in prison, was to retrospectively subject him to a new punishment.

[1944] Flemming v. Nestor, 363 U.S. 603 (1960).

lation of naturalization certificates obtained by fraud prior to the passage of the law was held not to impose a punishment, but instead simply to deprive the alien of his ill-gotten privileges.[1945]

Change in Place or Mode of Trial

A change of the place of trial of an alleged offense after its commission is not an *ex post facto* law. If no place of trial was provided when the offense was committed, Congress may designate the place of trial thereafter.[1946] A law that alters the rule of evidence to permit a person to be convicted upon less or different evidence than was required when the offense was committed is invalid,[1947] but a statute that simply enlarges the class of persons who may be competent to testify in criminal cases is not *ex post facto* as applied to a prosecution for a crime committed prior to its passage.[1948]

Clause 4. No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

DIRECT TAXES

The Hylton Case

The crucial problem under clause 4 is to distinguish "direct" from other taxes. In its opinion in *Pollock v. Farmers' Loan & Trust Co.*, the Court declared: "It is apparent . . . that the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it." [1949] Against this confident dictum may be set the following brief excerpt from Madison's *Notes on the Convention*: "Mr. King asked what was the precise meaning of *direct* taxation? No one answered." [1950] The first case to come before the Court on this issue was *Hylton v. United States*,[1951] which was decided early in 1796. Congress has levied, according to the rule of uniformity, a specific tax upon all carriages, for the conveyance of persons, which were to be kept by, or for any person, for his own use, or to be let out for hire, or for the conveying of passengers. In a fictitious statement of facts, it was stipulated that the carriages involved in the case were kept exclusively for the per-

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[1945] Johannessen v. United States, 225 U.S. 227 (1912).
[1946] Cook v. United States, 138 U.S. 157, 183 (1891).
[1947] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).
[1948] Hopt v. Utah, 110 U.S. 574, 589 (1884).
[1949] 157 U.S. 429, 573 (1895).
[1950] J. Madison, The Debates in the Federal Convention of 1787 435 (G. Hunt & J. Scott eds., Greenwood Press ed. 1970).
[1951] 3 U.S. (3 Dall.) 171 (1796).

sonal use of the owner and not for hire. The principal argument for the constitutionality of the measure was made by Hamilton, who treated it as an "excise tax," [1952] whereas Madison, both on the floor of Congress and in correspondence, attacked it as "direct" and therefore void, because it was levied without apportionment.[1953] The Court, taking the position that the direct tax clause constituted in practical operation an exception to the general taxing powers of Congress, held that no tax ought to be classified as "direct" that could not be conveniently apportioned, and on this basis sustained the tax on carriages as one on their "use" and therefore an "excise." Moreover, each of the judges advanced the opinion that the direct tax clause should be restricted to capitation taxes and taxes on land, or that, at most, it might cover a general tax on the aggregate or mass of things that generally pervade all the states, especially if an assessment should intervene, while Justice Paterson, who had been a member of the Federal Convention, testified to his recollection that the principal purpose of the provision had been to allay the fear of the Southern states that their Negroes and land should be subjected to a specific tax.[1954]

From the Hylton to the Pollock Case

The result of the *Hylton* case was not challenged until after the Civil War. A number of the taxes imposed to meet the demands of that war were assailed during the postwar period as direct taxes, but without result. The Court sustained successively, as "excises" or "duties," a tax on an insurance company's receipts for premiums and assessments,[1955] a tax on the circulating notes of state banks,[1956] an inheritance tax on real estate,[1957] and finally a general tax on incomes.[1958] In the last case, the Court took pains to state that it regarded the term "direct taxes" as having acquired a definite and fixed meaning, to wit, capitation taxes, and taxes on land.[1959] Then, almost one hundred years after the *Hylton* case, the famous case of *Pollock v. Farmers' Loan & Trust Co.*[1960] arose under the Income

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[1952] THE WORKS OF ALEXANDER HAMILTON 845 (J. Hamilton ed., 1851). "If the meaning of the word excise is to be sought in the British statutes, it will be found to include the duty on carriages, which is there considered as an excise, and then must necessarily be uniform and liable to apportionment; consequently, not a direct tax."

[1953] 4 ANNALS OF CONGRESS 730 (1794); 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14 (1865).

[1954] 3 U.S. (3 Dall.) 171, 177 (1796).

[1955] Pacific Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433 (1869).

[1956] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

[1957] Scholey v. Rew, 90 U.S. (23 Wall.) 331 (1875).

[1958] Springer v. United States, 102 U.S. 586 (1881).

[1959] 102 U.S. at 602.

[1960] 157 U.S. 429 (1895); 158 U.S. 601 (1895).

Tax Act of 1894.[1961] Undertaking to correct "a century of error," the Court held, by a vote of five-to-four, that a tax on income from property was a direct tax within the meaning of the Constitution and hence void because not apportioned according to the census.

Restriction of the Pollock Decision

The *Pollock* decision encouraged taxpayers to challenge the right of Congress to levy by the rule of uniformity numerous taxes that had always been reckoned to be excises. But the Court evinced a strong reluctance to extend the doctrine to such exactions. Purporting to distinguish taxes levied "because of ownership" or "upon property as such" from those laid upon "privileges," [1962] it sustained as "excises" a tax on sales on business exchanges,[1963] a succession tax which was construed to fall on the recipients of the property transmitted rather than on the estate of the decedent,[1964] and a tax on manufactured tobacco in the hands of a dealer, after an excise tax had been paid by the manufacturer.[1965] Again, in *Thomas v. United States*,[1966] the validity of a stamp tax on sales of stock certificates was sustained on the basis of a definition of "duties, imposts and excises." These terms, according to the Chief Justice, "were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like." [1967] On the same day, in *Spreckels Sugar Refining Co. v. McClain*,[1968] it ruled that an exaction, denominated a special excise tax, that was imposed on the business of refining sugar and measured by the gross receipts thereof, was in truth an excise and hence properly levied by the rule of uniformity. The lesson of *Flint v. Stone Tracy Co.*[1969] was the same. In *Flint*, what was in form an income tax was sustained as a tax on the privilege of doing business as a corporation, the value of the privilege being measured by the income, including income from investments. Similarly, in *Stanton v. Baltic Mining Co.*,[1970] a tax on the annual production of mines was held to be "independently of the effect of the operation of the Sixteenth Amendment . . . not a tax upon property as such be-

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[1961] 28 Stat. 509, 553 (1894).
[1962] Stanton v. Baltic Mining Co., 240 U.S. 103 (1916); Knowlton v. Moore, 178 U.S. 41, 80 (1900).
[1963] Nicol v. Ames, 173 U.S. 509 (1899).
[1964] Knowlton v. Moore, 178 U.S. 41 (1900).
[1965] Patton v. Brady, 184 U.S. 608 (1902).
[1966] 192 U.S. 363 (1904).
[1967] 192 U.S. at 370.
[1968] 192 U.S. 397 (1904).
[1969] 220 U.S. 107 (1911).
[1970] 240 U.S. 103 (1916).

cause of its ownership, but a true excise levied on the results of the business of carrying on mining operations." [1971]

A convincing demonstration of the extent to which the *Pollock* decision had been whittled down by the time the Sixteenth Amendment was adopted is found in *Billings v. United States*.[1972] In challenging an annual tax assessed for the year 1909 on the use of foreign built yachts—a levy not distinguishable in substance from the carriage tax involved in the *Hylton* case as construed by the Supreme Court—counsel did not even suggest that the tax should be classed as a direct tax. Instead, he based his argument that the exaction constituted a taking of property without due process of law upon the premise that it was an excise, and the Supreme Court disposed of the case upon the same assumption.

In 1921, the Court cast aside the distinction drawn in *Knowlton v. Moore* between the right to transmit property on the one hand and the privilege of receiving it on the other, and sustained an estate tax as an excise. "Upon this point," wrote Justice Holmes for a unanimous Court, "a page of history is worth a volume of logic." [1973] Having established this proposition, the Court had no difficulty in deciding that the inclusion in the computation of the estate tax of property held as joint tenants,[1974] or as tenants by the entirety,[1975] or the entire value of community property owned by husband and wife,[1976] or the proceeds of insurance upon the life of the decedent,[1977] did not amount to direct taxation of such property. Similarly, it upheld a graduated tax on gifts as an excise, saying that it was "a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another." [1978] Justice Sutherland, speaking for himself and two associates, urged that "the right to give away one's property is as fundamental as the right to sell it or, indeed, to possess it." [1979]

Miscellaneous

The power of Congress to levy direct taxes is not confined to the states represented in that body. Such a tax may be levied in

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[1971] 240 U.S. at 114.
[1972] 232 U.S. 261 (1914).
[1973] New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).
[1974] Phillips v. Dime Trust & S.D. Co., 284 U.S. 160 (1931).
[1975] Tyler v. United States, 281 U.S. 497 (1930).
[1976] Fernandez v. Wiener, 326 U.S. 340 (1945).
[1977] Chase Nat'l Bank v. United States, 278 U.S. 327 (1929); United States v. Manufacturers Nat'l Bank, 363 U.S. 194, 198–201 (1960).
[1978] Bromley v. McCaughn, 280 U.S. 124, 136 (1929). *See also* Helvering v. Bullard, 303 U.S. 297 (1938).
[1979] Bromley v. McCaughn, 280 U.S. 124, 140 (1929).

proportion to population in the District of Columbia.[1980] A penalty imposed for nonpayment of a direct tax is not a part of the tax itself and hence is not subject to the rule of apportionment. Accordingly, the Supreme Court sustained the penalty of fifty percent, which Congress exacted for default in the payment of the direct tax on land in the aggregate amount of twenty million dollars that was levied and apportioned among the states during the Civil War.[1981]

Clause 5. No Tax or Duty shall be laid on Articles exported from any State.

TAXES ON EXPORTS

The prohibition on excise taxes applies only to the imposition of duties on goods by reason of exportation.[1982] The word "export" signifies goods exported to a foreign country, not to an unincorporated territory of the United States.[1983] A general tax laid on all property alike, including that intended for export, is not within the prohibition, if it is not levied on goods in course of exportation nor because of their intended exportation.[1984]

Continuing its refusal to modify its export clause jurisprudence,[1985] the Court held unconstitutional the Harbor Maintenance Tax (HMT) under the export clause insofar as the tax was applied to goods loaded at United States ports for export. The HMT required shippers to pay a uniform charge on commercial cargo shipped through the Nation's ports. The clause, said the Court, "categorically bars Congress from imposing any tax on exports."[1986] However, the clause does not interdict a "user fee," which is a charge that lacks the attributes of a generally applicable tax or duty and is designed to compensate for government supplied services, facilities, or benefits; and it was that defense to which the government repaired once it failed to obtain a modification of the rules under the clause. But the HMT bore the indicia of a tax. It was titled as a tax, described as a tax in the law, and codified in the Internal Revenue Code. Aside from labels, however, courts must look to how things operate, and the HMT did not qualify as a user fee. It did not represent compensation for services rendered. The value of ex-

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[1980] Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820).

[1981] De Treville v. Smalls, 98 U.S. 517, 527 (1879).

[1982] Turpin v. Burgess, 117 U.S. 504, 507 (1886). *Cf.* Almy v. California, 65 U.S. (24 How.) 169, 174 (1861).

[1983] Dooley v. United States, 183 U.S. 151, 154 (1901).

[1984] Cornell v. Coyne, 192 U.S. 418, 428 (1904); Turpin v. Burgess, 117 U.S. 504, 507 (1886).

[1985] *See* United States v. IBM, 517 U.S. 843, 850–61 (1996).

[1986] United States v. United States Shoe Corp., 523 U.S. 360, 363 (1998).

port cargo did not correspond reliably with the federal harbor services used or usable by the exporter. Instead, the extent and manner of port use depended on such factors as size and tonnage of a vessel and the length of time it spent in port.[1987] The HMT was thus a tax, and therefore invalid.

Where the sale to a commission merchant for a foreign consignee was consummated by delivery of the goods to an exporting carrier, the sale was held to be a step in the exportation and hence exempt from a general tax on sales of such commodity.[1988] The giving of a bond for exportation of distilled liquor was not the commencement of exportation so as to exempt from an excise tax spirits that were not exported pursuant to such bond.[1989] A tax on the income of a corporation derived from its export trade was not a tax on "articles exported" within the meaning of the Constitution.[1990]

In *United States v. IBM Corp.*,[1991] the Court rejected the government's argument that it should refine its export-tax-clause jurisprudence. Rather than read the clause as a bar on any tax that applies to a good in the export stream, the government contended that the Court should bring this clause in line with the Import-Export Clause[1992] and with dormant-commerce-clause doctrine. In that view, the Court should distinguish between discriminatory and nondiscriminatory taxes on exports. But the Court held that sufficient differences existed between the export clause and the other two clauses, so that its bar should continue to apply to any and all taxes on goods in the course of exportation.

Stamp Taxes

A stamp tax imposed on foreign bills of lading,[1993] charter parties,[1994] or marine insurance policies,[1995] was in effect a tax or duty upon exports, and so void; but an act requiring the stamping of all

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[1987] 523 U.S. at 367–69.

[1988] Spalding & Bros. v. Edwards, 262 U.S. 66 (1923).

[1989] Thompson v. United States, 142 U.S. 471 (1892).

[1990] Peck & Co. v. Lowe, 247 U.S. 165 (1918); National Paper Co. v. Bowers, 266 U.S. 373 (1924).

[1991] 517 U.S. 843 (1996).

[1992] Article I, § 10, cl. 2, applying to the states.

[1993] Fairbank v. United States, 181 U.S. 283 (1901).

[1994] United States v. Hvoslef, 237 U.S. 1 (1915).

[1995] Thames & Mersey Inc. v. United States, 237 U.S. 19 (1915). In United States v. IBM Corp., 517 U.S. 843 (1996), the Court adhered to *Thames & Mersey*, and held unconstitutional a federal excise tax upon insurance policies issued by foreign countries as applied to coverage for exported products. The Court admitted that one could question the earlier case's equating of a tax on the insurance of exported goods with a tax on the goods themselves, but it observed that the government had chosen not to present that argument. Principles of *stare decisis* thus cautioned observance of the earlier case. Id. at 854–55. The dissenters argued that the issue had

packages of tobacco intended for export in order to prevent fraud was held not to be forbidden as a tax on exports.[1996]

Clause 6. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another.

THE "NO PREFERENCE" CLAUSE

The no-preference clause was designed to prevent preferences between ports because of their location in different states. Discriminations between individual ports are not prohibited. Acting under the Commerce Clause, Congress may do many things that benefit particular ports and that incidentally result to the disadvantage of other ports in the same or neighboring states. It may establish ports of entry, erect and operate lighthouses, improve rivers and harbors, and provide structures for the convenient and economical handling of traffic.[1997] A rate order of the Interstate Commerce Commission that allowed an additional charge to be made for ferrying traffic across the Mississippi to cities on the east bank of the river was sustained over the objection that it gave an unconstitutional preference to ports in Texas.[1998] Although there were a few early intimations that this clause was applicable to the states as well as to Congress,[1999] the Supreme Court declared emphatically in 1886 that state legislation was unaffected by it.[2000] After more than a century, the Court confirmed, over the objection that this clause was offended, the power that the First Congress had exercised [2001] in sanctioning the continued supervision and regulation of pilots by the states.[2002]

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been presented and should be decided by overruling the earlier case. Id. at 863 (Justices Kennedy and Ginsburg dissenting).

[1996] Pace v. Burgess, 92 U.S. 372 (1876); Turpin v. Burgess, 117 U.S. 504, 505 (1886).

[1997] Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 131 (1931); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856); South Carolina v. Georgia, 93 U.S. 4 (1876). In Williams v. United States, 255 U.S. 336 (1921), the argument that an act of Congress which prohibited interstate transportation of liquor into states whose laws prohibited manufacture or sale of liquor for beverage purposes was repugnant to this clause was rejected.

[1998] Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 132 (1931).

[1999] Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 282, 414 (1849) (opinion of Justice Wayne); *cf.* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 314 (1851).

[2000] Morgan v. Louisiana, 118 U.S. 455, 467 (1886). *See also* Munn v. Illinois, 94 U.S. 113, 135 (1877); Johnson v. Chicago & Pacific Elevator Co., 119 U.S. 388, 400 (1886).

[2001] 1 Stat. 53, 54, § 4 (1789).

[2002] Thompson v. Darden, 198 U.S. 310 (1905).

Clause 7. No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

APPROPRIATIONS

The restriction on drawing money from the Treasury "was intended as a restriction upon the disbursing authority of the Executive department," and "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[2003] Congress may recognize and pay a claim of an equitable, moral, or honorary nature. When it directs a specific sum to be paid to a certain person, neither the Secretary of the Treasury nor any court has discretion to determine whether the person is entitled to receive it.[2004] In making appropriations to pay claims arising out of the Civil War, Congress could, the Court held, provide that certain persons, *i.e.*, those who had participated in the rebellion, should not be paid out of the funds made available by the general appropriation, but that such persons should seek relief from Congress.[2005]

The Court has also recognized that Congress has wide discretion with regard to the extent to which it may prescribe details of expenditures for which it appropriates funds, and has approved the frequent practice of making "lump sum" appropriations, *i.e.*, general appropriations of large amounts to be allotted and expended as directed by designated government agencies. As an example, the Court cited the act of June 17, 1902,[2006] "where all moneys received from the sale and disposal of public lands in a large number of states and territories [were] set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories," and "[t]he expenditures [were] to be made under the direction of the Secretary of the Interior upon such projects as he determined to be practicable and advisable." The Court declared: "The constitutionality of this delegation of authority has never been seriously questioned."[2007]

[2003] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); Knote v. United States, 95 U.S. 149, 154 (1877).

[2004] United States v. Price, 116 U.S. 43 (1885); United States v. Realty Co., 163 U.S. 427, 439 (1896); Allen v. Smith, 173 U.S. 389, 393 (1899).

[2005] Hart v. United States, 118 U.S. 62, 67 (1886).

[2006] 32 Stat. 388 (1902).

[2007] Cincinnati Soap Co. v. United States, 301 U.S. 308, 322 (1937).

PAYMENT OF CLAIMS

No officer of the Federal Government is authorized to pay a debt due from the United States, whether reduced to judgment or not, without an appropriation for that purpose.[2008] Nor may a government employee, by erroneous advice to a claimant, bind the United States through equitable estoppel principles to pay a claim for which an appropriation has not been made.[2009]

After the Civil War, a number of controversies arose out of attempts by Congress to restrict the payment of the claims of persons who had aided the Rebellion but had thereafter received a pardon from the President. The Supreme Court held that Congress could not prescribe the evidentiary effect of a pardon in a proceeding in the Court of Claims for property confiscated during the Civil War,[2010] but that where the confiscated property had been sold and the proceeds paid into the Treasury, a pardon did not of its own force authorize the restoration of such proceeds.[2011] It was within the competence of Congress to declare that the amount due to persons thus pardoned should not be paid out of the Treasury and that no general appropriation should extend to their claims.[2012]

Clause 8. No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

IN GENERAL

In 1871 the Attorney General of the United States ruled that: "A minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power . . . but the acceptance of a formal commission, as minister plenipotentiary, creates an official relation between the individual thus commissioned and the government which

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[2008] Reeside v. Walker, 52 U.S. (11 How.) 272 (1851).
[2009] OPM v. Richmond, 496 U.S. 414 (1990).
[2010] United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).
[2011] Knote v. United States, 95 U.S. 149, 154 (1877); Austin v. United States, 155 U.S. 417, 427 (1894).
[2012] Hart v. United States, 118 U.S. 62, 67 (1886).

in this way accredits him as its representative," which is prohibited by this clause of the Constitution.[2013]

SECTION 10. Clause 1. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Treaties, Alliances, or Confederations

At the time of the Civil War, the Court relied on the prohibition on treaties, alliances, or confederations in holding that the Confederation formed by the seceding states could not be recognized as having any legal existence.[2014] Today, the prohibition's practical significance lies in the limitations that it implies upon the power of the states to deal with matters having a bearing upon international relations.

In the early case of *Holmes v. Jennison*,[2015] Chief Justice Taney invoked it as a reason for holding that a state had no power to deliver up a fugitive from justice to a foreign state. More recently, the kindred idea that the responsibility for the conduct of foreign relations rests exclusively with the Federal Government prompted the Court to hold that, because the oil under the three-mile marginal belt along the California coast might well become the subject of international dispute, and because the ocean, including this three-mile belt, is of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world, the Federal Government has paramount rights in and power over that belt, including full dominion over the resources of the soil under the water area.[2016] In *Skiriotes v. Florida*,[2017] the Court, on the other hand, ruled that this clause did not disable Florida from regulating the manner in which its own citizens may engage in sponge fishing outside its territorial waters. Speaking for a unanimous Court, Chief Justice Hughes declared, "When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign

[2013] 13 Ops. Atty. Gen. 538 (1871).
[2014] Williams v. Bruffy, 96 U.S. 176, 183 (1878).
[2015] 39 U.S. (14 Pet.) 540 (1840).
[2016] United States v. California, 332 U.S. 19 (1947).
[2017] 313 U.S. 69 (1941).

authority of the United States over its citizens in like circumstances."[2018]

Bills of Credit

Within the sense of the Constitution, bills of credit signify a paper medium of exchange, intended to circulate between individuals, and between the government and individuals, for the ordinary purposes of society. It is immaterial whether the quality of legal tender is imparted to such paper. Interest-bearing certificates, in denominations not exceeding ten dollars, that were issued by loan offices established by the state of Missouri and made receivable in payment of taxes or other moneys due to the state, and in payment of the fees and salaries of state officers, were held to be bills of credit whose issuance was banned by this section.[2019] The states are not forbidden, however, to issue coupons receivable for taxes,[2020] nor to execute instruments binding themselves to pay money at a future day for services rendered or money borrowed.[2021] Bills issued by state banks are not bills of credit;[2022] it is immaterial that the state is the sole stockholder of the bank,[2023] that the officers of the bank were elected by the state legislature,[2024] or that the capital of the bank was raised by the sale of state bonds.[2025]

Legal Tender[2026]

Relying on this clause, which applies only to the states and not to the Federal Government, the Supreme Court has held that, where the marshal of a state court received state bank notes in payment and discharge of an execution, the creditor was entitled to demand payment in gold or silver.[2027] Because, however, there is nothing in the Constitution prohibiting a bank depositor from consenting when he draws a check that payment may be made by draft, a state law

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[2018] 313 U.S. at 78–79.

[2019] Craig v. Missouri, 29 U.S. (4 Pet.) 410, 425 (1830); Byrne v. Missouri, 33 U.S. (8 Pet.) 40 (1834).

[2020] Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270 (1885); Chaffin v. Taylor, 116 U.S. 567 (1886).

[2021] Houston & Texas Central R.R. v. Texas, 177 U.S. 66 (1900).

[2022] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

[2023] Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12, 15 (1851); Curran v. Arkansas, 56 U.S. (15 How.) 304, 317 (1854).

[2024] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

[2025] Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 205 (1851).

[2026] Juilliard v. Greenman, 110 U.S. 421, 446 (1884).

[2027] Gwin v. Breedlove, 43 U.S. (2 How.) 29, 38 (1844). *See also* Griffin v. Thompson, 43 U.S. (2 How.) 244 (1844).

providing that checks drawn on local banks should, at the option of the bank, be payable in exchange drafts, was held valid.[2028]

Bills of Attainder

Statutes passed after the Civil War with the intent and result of excluding persons who had aided the Confederacy from following certain callings, by the device of requiring them to take an oath that they had never given such aid, were held invalid as being bills of attainder, as well as *ex post facto* laws.[2029]

Other attempts to raise bill-of-attainder claims have been unsuccessful. A Court majority denied that a municipal ordinance that required all employees to execute oaths that they had never been affiliated with Communist or similar organizations, violated the clause, on the grounds that the ordinance merely provided standards of qualifications and eligibility for employment.[2030] A law that prohibited any person convicted of a felony and not subsequently pardoned from holding office in a waterfront union was not a bill of attainder because the "distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt" and the prohibition "embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction." [2031]

Ex Post Facto Laws

Scope of the Provision.—The prohibition against state *ex post facto* laws, like the cognate restriction imposed on the Federal Government by § 9, relates only to penal and criminal legislation and not to civil laws that affect private rights adversely.[2032] Distinguishing between civil and penal laws was at the heart of the Court's decision in *Smith v. Doe* [2033] upholding application of Alaska's "Megan's Law" to sex offenders who were convicted before the law's en-

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[2028] Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 659 (1923).

[2029] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); Klinger v. Missouri, 80 U.S. (13 Wall.) 257 (1872); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234, 239 (1873).

[2030] Garner v. Board of Pub. Works, 341 U.S. 716, 722–723 (1951). *Cf.* Konigsberg v. State Bar of California, 366 U.S. 36, 47 n.9 (1961).

[2031] De Veau v. Braisted, 363 U.S. 144, 160 (1960). Presumably, United States v. Brown, 381 U.S. 437 (1965), does not qualify this decision.

[2032] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110 (1834); Baltimore and Susquehanna R.R. v. Nesbit, 51 U.S. (10 How.) 395, 401 (1850); Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456, 463 (1855); Loche v. New Orleans, 71 U.S. (4 Wall.) 172 (1867); Orr v. Gilman, 183 U.S. 278, 285 (1902); Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1911). In Eastern Enterprises v. Apfel, 524 U.S. 498, 538 (1998) (concurring), Justice Thomas indicated a willingness to reconsider *Calder* to determine whether the clause should apply to civil legislation.

[2033] 538 U.S. 84 (2003).

actment. The Alaska law requires released sex offenders to register with local police and also provides for public notification via the Internet. The Court accords "considerable deference" to legislative intent; if the legislature's purpose was to enact a civil regulatory scheme, then the law can be ex post facto only if there is "the clearest proof" of punitive effect.[2034] Here, the Court determined, the legislative intent was civil and non-punitive—to promote public safety by "protecting the public from sex offenders." The Court then identified several "useful guideposts" to aid analysis of whether a law intended to be non-punitive nonetheless has punitive effect. Registration and public notification of sex offenders are of recent origin, and are not viewed as a "traditional means of punishment."[2035] The Act does not subject the registrants to an "affirmative disability or restraint"; there is no physical restraint or occupational disbarment, and there is no restraint or supervision of living conditions, as there can be under conditions of probation. The fact that the law might deter future crimes does not make it punitive. All that is required, the Court explained, is a rational connection to a non-punitive purpose, and the statute need not be narrowly tailored to that end.[2036] Nor is the act "excessive" in relation to its regulatory purpose.[2037] Rather, the "means chosen are reasonable in light of the [state's] non-punitive objective" of promoting public safety by giving its citizens information about former sex offenders, who, as a group, have an alarmingly high rate of recidivism.[2038]

There are three categories of *ex post facto* laws: those "which punish[ ] as a crime an act previously committed, which was innocent when done; which make[ ] more burdensome the punishment for a crime, after its commission; or which deprive[ ] one charged with crime of any defense available according to law at the time when the act was committed."[2039] The bar is directed only against

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[2034] 538 U.S. at 92.

[2035] The law's requirements do not closely resemble punishments of public disgrace imposed in colonial times; the stigma of Megan's Law results not from public shaming but from the dissemination of information about a criminal record, most of which is already public. 538 U.S. at 98.

[2036] 538 U.S. at 102.

[2037] Excessiveness was alleged to stem both from the law's duration (15 years of notification by those convicted of less serious offenses; lifetime registration by serious offenders) and in terms of the widespread (Internet) distribution of the information.

[2038] 538 U.S. at 105. Unlike involuntary civil commitment, where "the magnitude of restraint [makes] individual assessment appropriate," the state may make "reasonable categorical judgments," and need not provide individualized determinations of dangerousness. Id. at 103.

[2039] Collins v. Youngblood, 497 U.S. 37, 42 (1990) (quoting Beazell v. Ohio, 269 U.S. 167, 169–70 (1925)). Alternatively, the Court described the reach of the clause as extending to laws that "alter the definition of crimes or increase the punishment

legislative action and does not touch erroneous or inconsistent decisions by the courts.[2040]

The fact that a law is *ex post facto* and invalid as to crimes committed prior to its enactment does not affect its validity as to subsequent offenses.[2041] A statute that mitigates the rigor of the law in force at the time the crime was committed,[2042] or merely penalizes the continuance of conduct lawfully begun before its passage, is not *ex post facto*. Thus, measures penalizing the failure of a railroad to cut drains through existing embankments [2043] or making illegal the continued possession of intoxicating liquors which were lawfully acquired [2044] have been held valid.

Denial of Future Privileges to Past Offenders.—The right to practice a profession may be denied to one who was convicted of an offense before the statute was enacted if the offense reasonably may be regarded as a continuing disqualification for the profession. Without offending the Constitution, statutes barring a person from practicing medicine after conviction of a felony,[2045] or excluding convicted felons from waterfront union offices unless pardoned or in receipt of a parole board's good conduct certificate,[2046] may be enforced against a person convicted before the measures were passed. But the test oath prescribed after the Civil War, under which office holders, attorneys, teachers, clergymen, and others were required to swear that they had not participated in the rebellion or expressed sympathy for it, was held invalid on the ground that it had no reasonable relation to fitness to perform official or professional

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for criminal acts." Id. at 43. Justice Chase's oft-cited formulation has a fourth category: "every law that aggravates a crime, or makes it greater than it was, when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798), *cited in*, *e.g.*, Carmell v. Texas, 529 U.S. 513, 522 (2000).

[2040] Frank v. Mangum, 237 U.S. 309, 344 (1915); Ross v. Oregon, 227 U.S. 150, 161 (1913). However, an unforeseeable judicial enlargement of a criminal statute so as to encompass conduct not covered on the face of the statute operates like an *ex post facto* law if it is applied retroactively and violates due process in that event. Bouie v. City of Columbia, 378 U.S. 347 (1964). *See* Marks v. United States, 430 U.S. 188 (1977) (applying *Bouie* in context of § 9, cl. 3). *But see* Splawn v. California, 431 U.S. 595 (1977) (rejecting application of *Bouie*). The Court itself has not always adhered to this standard. *See* Ginzburg v. United States, 383 U.S. 463 (1966).

[2041] Jaehne v. New York, 128 U.S. 189, 194 (1888).

[2042] Rooney v. North Dakota, 196 U.S. 319, 325 (1905).

[2043] Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915).

[2044] Samuels v. McCurdy, 267 U.S. 188 (1925).

[2045] Hawker v. New York, 170 U.S. 189, 190 (1898). *See also* Reetz v. Michigan, 188 U.S. 505, 509 (1903); Lehmann v. State Board of Public Accountancy, 263 U.S. 394 (1923).

[2046] DeVeau v. Braisted, 363 U.S. 144, 160 (1960).

duties, but rather was a punishment for past offenses.[2047] A similar oath required of suitors in the courts also was held void.[2048]

Changes in Punishment.—Justice Chase in *Calder v. Bull* gave an alternative description of the four categories of *ex post facto* laws, two of which related to punishment. One such category was laws that inflict punishment "where the party was not, by law, liable to any punishment"; the other was laws that inflict greater punishment than was authorized when the crime was committed.[2049]

Illustrative of the first of these punishment categories is "a law enacted after expiration of a previously applicable statute of limitations period [as] applied to revive a previously time-barred prosecution." Such a law, the Court ruled in *Stogner v. California*,[2050] is prohibited as *ex post facto*. Courts that had upheld extension of unexpired statutes of limitation had been careful to distinguish situations in which the limitations periods have expired. The Court viewed revival of criminal liability after the law had granted a person "effective amnesty" as being "unfair" in the sense addressed by the *Ex Post Facto* Clause.

Illustrative of the second punishment category are statutes, all applicable to offenses committed prior to their enactment, that changed an indeterminate sentence law to require a judge to impose the maximum sentence,[2051] that required solitary confinement for prisoners previously sentenced to death,[2052] and that allowed a warden to fix, within limits of one week, and keep secret the time of execution.[2053] Because it made more onerous the punishment for crimes committed before its enactment, a law that altered sentencing guidelines to make it more likely that the sentencing authority would impose on a defendant a more severe sentence than was previously likely and making it impossible for the defendant to challenge the sentence was *ex post facto* as to one who had committed the offense prior to the change.[2054] The Court adopted similar reasoning regarding changes in the U.S. Sentencing Guidelines: even though the Guide-

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[2047] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 316 (1867).

[2048] Pierce v. Carskadon, 83 U.S. (16 Wall.) 234, 237–39 (1873).

[2049] 3 U.S. (3 Dall.) 386, 389 (1798).

[2050] 539 U.S. 607, 632–33 (2003) (invalidating application of California's law to revive child abuse charges 22 years after the limitations period had run for the alleged crimes).

[2051] Lindsey v. Washington, 301 U.S. 397 (1937). But note the limitation of *Lindsey* in Dobbert v. Florida, 432 U.S. 282, 298–301 (1977).

[2052] Holden v. Minnesota, 137 U.S. 483, 491 (1890).

[2053] *Medley, Petitioner*, 134 U.S. 160, 171 (1890).

[2054] Miller v. Florida, 482 U.S. 423 (1987). *But see* California Dep't of Corrections v. Morales, 514 U.S. 499 (1995) (a law amending parole procedures to decrease frequency of parole-suitability hearings is not *ex post facto* as applied to prisoners who committed offenses before enactment). The opinion modifies previous opinions that had held some laws impermissible because they operated to the disadvantage

lines are advisory only, an increase in the applicable sentencing range is ex post facto if applied to a previously committed crime because of a significant risk of a lengthier sentence being imposed.[2055] But laws providing heavier penalties for new crimes thereafter committed by habitual criminals,[2056] "prescrib[ing] electrocution as the method of producing death instead of hanging, fix[ing] the place therefor within the penitentiary, and permitt[ing] the presence of more invited witnesses that had theretofore been allowed," [2057] or providing for close confinement of six to nine months in the penitentiary, in lieu of three to six months in jail prior to execution, and substituting the warden for the sheriff as hangman, have been sustained.[2058]

In *Dobbert v. Florida*,[2059] the Court may have formulated a new test for determining when the punishment provided by a criminal statute is *ex post facto*. The defendant murdered two of his children at a time when Florida law provided the death penalty upon conviction for certain takings of life. Subsequently, the Supreme Court held capital sentencing laws similar to Florida's unconstitutional, although convictions obtained under the statutes were not to be overturned,[2060] and the Florida Supreme Court voided its death penalty statutes on the authority of the High Court decision. The Florida legislature then enacted a new capital punishment law, which was sustained. Dobbert was convicted and sentenced to death under the new law, which had been enacted after the commission of his offenses. The Court rejected the *ex post facto* challenge to the sentence on the basis that whether or not the old statute was constitutional, "it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State as-

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of covered offenders. Henceforth, "the focus of *ex post facto* inquiry is . . . whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Id. at 506 n.3. *Accord*, Garner v. Jones, 529 U.S. 244 (2000) (evidence insufficient to determine whether change in frequency of parole hearings significantly increases the likelihood of prolonging incarceration). *But see* Lynce v. Mathis, 519 U.S. 433 (1997) (cancellation of release credits already earned and used, resulting in reincarceration, violates the Clause).

[2055] Peugh v. United States, 569 U.S. ___, No. 12–62, slip op. (2013).

[2056] Gryger v. Burke, 334 U.S. 728 (1948); McDonald v. Massachusetts, 180 U.S. 311 (1901); Graham v. West Virginia, 224 U.S. 616 (1912).

[2057] Malloy v. South Carolina, 237 U.S. 180, 183 (1915).

[2058] Rooney v. North Dakota, 196 U.S. 319, 324 (1905).

[2059] 432 U.S. 282, 297–98 (1977).

[2060] Furman v. Georgia, 408 U.S. 238 (1972). The new law was sustained in Proffitt v. Florida, 428 U.S. 242 (1976).

cribed to the act of murder."[2061] Whether the "fair warning" standard is to have any prominent place in *ex post facto* jurisprudence may be an interesting question, but it is problematical whether the fact situation will occur often enough to make the principle applicable in many cases.

Changes in Procedure.—An accused person does not have a right to be tried in all respects in accordance with the law in force when the crime charged was committed.[2062] Laws shifting the place of trial from one county to another,[2063] increasing the number of appellate judges and dividing the appellate court into divisions,[2064] granting a right of appeal to the state,[2065] changing the method of selecting and summoning jurors,[2066] making separate trials for persons jointly indicted a matter of discretion for the trial court rather than a matter of right,[2067] and allowing a comparison of handwriting experts,[2068] have been sustained over the objection that they were *ex post facto*. It was suggested in a number of these cases, and two decisions were rendered precisely on the basis, that the mode of procedure might be changed only so long as the "substantial" rights of the accused were not curtailed.[2069] The Court has now disavowed this position.[2070] All that the language of most of these cases meant was that a legislature might not evade the *ex post facto* clause by labeling changes as alteration of "procedure." If a change labeled "procedural" effects a substantive change in the definition of a crime or increases punishment or denies a defense, the clause is invoked; however, if a law changes the procedures by which a criminal case is adjudicated, the clause is not implicated, regardless of the increase in the burden on a defendant.[2071]

[2061] 432 U.S. at 297.

[2062] Gibson v. Mississippi, 162 U.S. 565, 590 (1896).

[2063] Gut v. Minnesota, 76 U.S. (9 Wall.) 35, 37 (1870).

[2064] Duncan v. Missouri, 152 U.S. 377 (1894).

[2065] Mallett v. North Carolina, 181 U.S. 589, 593 (1901).

[2066] Gibson v. Mississippi, 162 U.S. 565, 588 (1896).

[2067] Beazell v. Ohio, 269 U.S. 167 (1925).

[2068] Thompson v. Missouri, 171 U.S. 380, 381 (1898).

[2069] *E.g.*, Duncan v. Missouri, 152 U.S. 377, 382 (1894); Malloy v. South Carolina, 237 U.S. 180, 183 (1915); Beazell v. Ohio, 269 U.S. 167, 171 (1925). The two cases decided on the basis of the distinction were Thompson v. Utah, 170 U.S. 343 (1898) (application to felony trial for offense committed before enactment of change from twelve-person jury to an eight-person jury void under clause), and Kring v. Missouri, 107 U.S. 221 (1883) (as applied to a case arising before change, a law abolishing a rule under which a guilty plea functioned as a acquittal of a more serious offense, so that defendant could be tried on the more serious charge, a violation of the clause).

[2070] Collins v. Youngblood, 497 U.S. 37, 44–52 (1990). In so doing, the Court overruled *Kring* and Thompson v. Utah.

[2071] 497 U.S. at 44, 52. *Youngblood* upheld a Texas statute, as applied to a person committing an offense and tried before passage of the law, that authorized crimi-

Changes in evidentiary rules that allow conviction on less evidence than was required at the time the crime was committed can also run afoul of the *ex post facto* clause. This principle was applied in the Court's invalidation of retroactive application of a Texas law that eliminated the requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses, and allowed conviction on the victim's testimony alone.[2072]

Obligation of Contracts

"Law" Defined.—The Contract Clause provides that no state may pass a "Law impairing the Obligation of Contracts," and a "law" in this context may be a statute, constitutional provision,[2073] municipal ordinance,[2074] or administrative regulation having the force and operation of a statute.[2075] But are judicial decisions within the clause? The abstract principle of the separation of powers, at least until recently, forbade the idea that the courts "make" law and the word "pass" in the above clause seemed to confine it to the formal and acknowledged methods of exercise of the law-making function. Accordingly, the Court has frequently said that the clause does not cover judicial decisions, however erroneous, or whatever their effect on existing contract rights.[2076] Nevertheless, there are important exceptions to this rule that are set forth below.

Status of Judicial Decisions.—Although the highest state court usually has final authority in determining the construction as well as the validity of contracts entered into under the laws of the state, and federal courts will be bound by decisions of the highest state court on such matters, this rule does not hold when the contract is

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nal courts to reform an improper verdict assessing a punishment not authorized by law, which had the effect of denying defendant a new trial to which he would have been previously entitled.

[2072] Carmell v. Texas, 529 U.S. 513 (2000).

[2073] Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1856); Ohio & M. R.R. v. McClure, 77 U.S. (10 Wall.) 511 (1871); New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885); Bier v. McGehee, 148 U.S. 137, 140 (1893).

[2074] New Orleans Water-Works Co. v. Rivers, 115 U.S. 674 (1885); City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1 (1898); City of Vicksburg v. Waterworks Co., 202 U.S. 453 (1906); Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548 (1914); Cuyahoga Power Co. v. City of Akron, 240 U.S. 462 (1916).

[2075] Id. *See also* Grand Trunk Ry. v. Indiana R.R. Comm'n, 221 U.S. 400 (1911); Appleby v. Delaney, 271 U.S. 403 (1926).

[2076] Central Land Co. v. Laidley, 159 U.S. 103 (1895). *See also* New Orleans Water-Works Co. v. Louisiana Sugar Co., 125 U.S. 18 (1888); Hanford v. Davies, 163 U.S. 273 (1896); Ross v. Oregon, 227 U.S. 150 (1913); Detroit United Ry. v. Michigan, 242 U.S. 238 (1916); Long Sault Development Co. v. Call, 242 U.S. 272 (1916); McCoy v. Union Elevated R. Co., 247 U.S. 354 (1918); Columbia Ry., Gas & Electric Co. v. South Carolina, 261 U.S. 236 (1923); Tidal Oil Co. v. Flannagan, 263 U.S. 444 (1924).

one whose obligation is alleged to have been impaired by state law.[2077] Otherwise, the challenged state authority could be vindicated through the simple device of a modification or outright nullification by the state court of the contract rights in issue. Similarly, the highest state court usually has final authority in construing state statutes and determining their validity in relation to the state constitution. But this rule too has had to bend to some extent to the Supreme Court's interpretation of the Contract Clause.[2078]

Suppose the following situation: (1) a municipality, acting under authority conferred by a state statute, has issued bonds in aid of a railway company; (2) the validity of this statute has been sustained by the highest state court; (3) later the state legislature repeals certain taxes to be used to pay off the bonds when they become due; (4) the repeal is sustained by a decision of the highest state court holding that the statute authorizing the bonds was unconstitutional *ab initio*. In such a case the Supreme Court would take an appeal from the state court and would reverse the latter's decision of unconstitutionality because of its effect in rendering operative the repeal of the tax.[2079]

Suppose, however, that the state court has held the statute authorizing the bonds unconstitutional *ab initio* in a suit by a creditor for payment without the state legislature's having repealed the taxes. In this situation, the Supreme Court would still afford relief if the case were one between citizens of different states, which reached it via a lower federal court.[2080] This is because in cases of this nature the Court formerly felt free to determine questions of fundamental justice for itself. Indeed, in such a case, the Court in the

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[2077] Jefferson Branch Bank v. Skelly, 66 U.S. (1 Bl.) 436, 443 (1862); Bridge Proprietors v. Hoboken Co., 68 U.S. (1 Wall.) 116, 145 (1863); Wright v. Nagle, 101 U.S. 791, 793 (1880); McGahey v. Virginia, 135 U.S. 662, 667 (1890); Scott v. McNeal, 154 U.S. 34, 35 (1894); Stearns v. Minnesota, 179 U.S. 223, 232–33 (1900); Coombes v. Getz, 285 U.S. 434, 441 (1932); Atlantic Coast Line R.R. v. Phillips, 332 U.S. 168, 170 (1947).

[2078] McCullough v. Virginia, 172 U.S. 102 (1898); Houston & Texas Central Rd. Co. v. Texas, 177 U.S. 66, 76, 77 (1900); Hubert v. New Orleans, 215 U.S. 170, 175 (1909); Carondelet Canal Co. v. Louisiana, 233 U.S. 362, 376 (1914); Louisiana Ry. & Nav. Co. v. New Orleans, 235 U.S. 164, 171 (1914).

[2079] State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369 (1854) (discussed below), and Ohio Life Ins. and Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1854), are the leading cases. *See also* Jefferson Branch Bank v. Skelly, 66 U.S. (1 Bl.) 436 (1862); Louisiana v. Pilsbury, 105 U.S. 278 (1882); McGahey v. Virginia, 135 U.S. 662 (1890); Mobile & Ohio R.R. v. Tennessee, 153 U.S. 486 (1894); Bacon v. Texas, 163 U.S. 207 (1896); McCullough v. Virginia, 172 U.S. 102 (1898).

[2080] Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175, 206 (1865); Havemayer v. Iowa County, 70 U.S. (3 Wall.) 294 (1866); Thomson v. Lee County, 70 U.S. (3 Wall.) 327 (1866); The City v. Lamson, 76 U.S. (9 Wall.) 477 (1870); Olcott v. The Supervisors, 83 U.S. (16 Wall.) 678 (1873); Taylor v. Ypsilanti, 105 U.S. 60 (1882); Anderson v. Santa Anna, 116 U.S. 356 (1886); Wilkes County v. Coler, 180 U.S. 506 (1901).

past has apparently regarded itself as free to pass upon the constitutionality of the state law authorizing the bonds even though there had been no prior decision by the highest state court sustaining them, the idea being that contracts entered into simply on the faith of the presumed constitutionality of a state statute are entitled to this protection.[2081]

In other words, in cases in which it has jurisdiction because of diversity of citizenship, the Court has held that the obligation of contracts is capable of impairment by subsequent judicial decisions no less than by subsequent statutes, and that it is able to prevent such impairment. In cases, on the other hand, of which it obtains jurisdiction only on the constitutional ground and by appeal from a state court, it has always adhered in terms to the doctrine that the word "laws" as used in Article I, § 10, does not include judicial decisions. Yet, even in these cases, it will intervene to protect contracts entered into on the faith of existing decisions from an impairment that is the direct result of a reversal of such decisions, but there must be in the offing, as it were, a statute of some kind—one possibly many years older than the contract rights involved—on which to pin its decision.[2082]

In 1922, Congress, through an amendment to the Judicial Code, endeavored to extend the reviewing power of the Supreme Court to "any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States . . . ."[2083] This appeared to be an invitation to the Court to say frankly that the obligation of a contract can be impaired by a subsequent court decision. The Court, however, declined the invitation in an opinion by Chief Justice Taft that reviewed many of the cases covered in the preceding paragraphs.

Dealing with *Gelpcke* and subsequent decisions, Chief Justice Taft said: "These cases were not writs of error to the Supreme Court of a State. They were appeals or writs of error to federal courts where recovery was sought upon municipal or county bonds or some other form of contracts, the validity of which had been sustained by decisions of the Supreme Court of a State prior to their execution, and had been denied by the same court after their issue or making. In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what

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[2081] Great Southern Hotel Co. v. Jones, 193 U.S. 532, 548 (1904).

[2082] Sauer v. New York, 206 U.S. 536 (1907); Muhlker v. New York & Harlem R.R., 197 U.S. 544, 570 (1905).

[2083] 42 Stat. 366.

the state law was, and to enforce it as laid down by the State Supreme Court before the contracts were made rather than in later decisions. They did not base this conclusion on Article I, § 10, of the Federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third Article of the Federal Constitution they were empowered to do. *Burgess v. Seligman*, 107 U.S. 20 [1883]."[2084] Although doubtless this was an available explanation in 1924, the decision in 1938, in *Erie Railroad Co. v. Tompkins*,[2085] so cut down the power of the federal courts to decide diversity of citizenship cases according to their own notions of "general principles of common law" as to raise the question whether the Court will not be required eventually to put *Gelpcke* and its companions and descendants squarely on the Contract Clause or else abandon them.

"Obligation" Defined.—A contract is analyzable into two elements: the agreement, which comes from the parties, and the obligation, which comes from the law and makes the agreement binding on the parties. The concept of obligation is an importation from the civil law and its appearance in the Contract Clause is supposed to have been due to James Wilson, a graduate of Scottish universities and a civilian. Actually, the term as used in the Contract Clause has been rendered more or less superfluous by the doctrine that "[t]he laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it."[2086] Hence, the Court sometimes recognizes the term in its decisions applying the clause, and sometimes ignores it. In *Sturges v. Crowninshield*,[2087] Chief Justice Marshall defined "obligation of contract" as the law that binds a party "to perform his undertaking," but a little later the same year, in *Dartmouth College v. Woodward*, he set forth the points presented for consideration to be: "1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?"[2088] The word "obligation" undoubtedly implies that the Constitution was intended to protect only executory contracts—*i.e.*, contracts still awaiting performance—but this implication was rejected early on for a certain class of contracts, with immensely important result for the clause.

[2084] Tidal Oil Co. v. Flannagan, 263 U.S. 444, 452 (1924).

[2085] 304 U.S. 64 (1938).

[2086] Walker v. Whitehead, 83 U.S. (16 Wall.) 314, 317 (1873); Wood v. Lovett, 313 U.S. 362, 370 (1941).

[2087] 17 U.S. (4 Wheat.) 122, 197 (1819); *see also* Curran v. Arkansas, 56 U.S. (15 How.) 304 (1854).

[2088] 17 U.S. (4 Wheat.) 518, 627 (1819).

"Impair" Defined.—"The obligations of a contract," said Chief Justice Hughes for the Court in *Home Building & Loan Ass'n v. Blaisdell*,[2089] "are impaired by a law which renders them invalid, or releases or extinguishes them . . . , and impairment . . . has been predicated upon laws which without destroying contracts derogate from substantial contractual rights."[2090] But he adds: "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile,—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court."[2091] In short, the law from which the obligation stems must be understood to include constitutional law and, moreover a "progressive" constitutional law.[2092]

Vested Rights Not Included.—The term "contracts" is used in the Contract Clause in its popular sense of an agreement of minds. The clause therefore does not protect vested rights that are not referable to such an agreement between the state and an individual, such as the right of recovery under a judgment. The individual in question may have a case under the Fourteenth Amendment, but not one under Article I, § 10.[2093]

Public Grants That Are Not "Contracts".—Not all grants by a state constitute "contracts" within the sense of Article I, § 10. In his *Dartmouth College* decision, Chief Justice Marshall conceded that "if the act of incorporation be a grant of political power, if it creates a civil institution, to be employed in the administration of the government . . . the subject is one in which the legislature of the State may act according to its own judgment," unrestrained by the

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[2089] 290 U.S. 398 (1934).

[2090] 290 U.S. at 431.

[2091] 290 U.S. at 435. *See also* City of El Paso v. Simmons, 379 U.S. 497 (1965).

[2092] "The *Blaisdell* decision represented a realistic appreciation of the fact that ours is an evolving society and that the general words of the contract clause were not intended to reduce the legislative branch of government to helpless impotency." Justice Black, in Wood v. Lovett, 313 U.S. 362, 383 (1941).

[2093] Crane v. Hahlo, 258 U.S. 142, 145–46 (1922); Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 288 (1883); Morley v. Lake Shore Ry., 146 U.S. 162, 169 (1892). That the Contract Clause did not protect vested rights merely as such was stated by the Court as early as Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 413 (1829); and again in Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 539–40 (1837).

Constitution [2094]—thereby drawing a line between "public" and "private" corporations that remained undisturbed for more than half a century.[2095]

It has been subsequently held many times that municipal corporations are mere instrumentalities of the state for the more convenient administration of local governments, whose powers may be enlarged, abridged, or entirely withdrawn at the pleasure of the legislature.[2096] The same principle applies, moreover, to the property rights that the municipality derives either directly or indirectly from the state. This was first held as to the grant of a franchise to a municipality to operate a ferry and has since then been recognized as the universal rule.[2097] It was stated in a case decided in 1923 that the distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity, though it limited the legal liability of municipalities for the negligent acts or omissions of its officers or agents, did not, however, furnish ground for the application of constitutional restraints against the state in favor of its own municipalities.[2098] Thus, no contract rights were impaired by a statute relocating a county seat, even though the former location was by law to be "permanent" and the citizens of the community had donated land and furnished bonds for the erection of public buildings.[2099] Similarly, a statute changing the boundaries of a school district, giving to the new district the property within its limits that had belonged to the former district, and requiring the new district to assume the debts of the old district, did not impair the obligation of contracts.[2100] Nor was the Contract Clause violated by state legislation authorizing state control over insolvent communities through a Municipal Finance Commission.[2101]

On the same ground of public agency, neither appointment nor election to public office creates a contract in the sense of Article I,

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[2094] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629 (1819).

[2095] In Munn v. Illinois, 94 U.S. 113 (1877), a category of "business affected with a public interest" and whose property is "impressed with a public use" was recognized. A corporation engaged in such a business becomes a "quasi-public" corporation, and the power of the state to regulate it is larger than in the case of a purely private corporation. Because most corporations receiving public franchises are of this character, the final result of *Munn* was to enlarge the police power of the state in the case of the most important beneficiaries of the *Dartmouth College* decision.

[2096] Meriwether v. Garrett, 102 U.S. 472 (1880); Covington v. Kentucky, 173 U.S. 231 (1899); Hunter v. Pittsburgh, 207 U.S. 161 (1907).

[2097] East Hartford v. Hartford Bridge Co., 51 U.S. (10 How.) 511 (1851); Hunter v. Pittsburgh, 207 U.S. 161 (1907).

[2098] City of Trenton v. New Jersey, 262 U.S. 182, 191 (1923).

[2099] Newton v. Commissioners, 100 U.S. 548 (1880).

[2100] Michigan ex rel. Kies v. Lowrey, 199 U.S. 233 (1905).

[2101] Faitoute Co. v. City of Asbury Park, 316 U.S. 502 (1942).

§ 10, whether as to tenure, or salary, or duties, all of which remain, so far as the Constitution of the United States is concerned, subject to legislative modification or outright repeal.[2102] Indeed, there can be no such thing in this country as property in office, although the common law sustained a different view sometimes reflected in early cases.[2103] When, however, services have once been rendered, there arises an implied contract that they shall be compensated at the rate in force at the time they were rendered.[2104] Also, an express contract between the state and an individual for the performance of specific services falls within the protection of the Constitution. Thus, a contract made by the governor pursuant to a statute authorizing the appointment of a commissioner to conduct, over a period of years, a geological, mineralogical, and agricultural survey of the state, for which a definite sum had been authorized, was held to have been impaired by repeal of the statute.[2105] But a resolution of a local board of education reducing teachers' salaries for the school year 1933–1934, pursuant to an act of the legislature authorizing such action, was held not to impair the contract of a teacher who, having served three years, was by earlier legislation exempt from having his salary reduced except for inefficiency or misconduct.[2106] Similarly, the Court held that an Illinois statute that reduced the annuity payable to retired teachers under an earlier act did not violate the Contract Clause, because it had not been the intention of the earlier act to propose a contract but only to put into effect a general policy.[2107] On the other hand, the right a teacher whose position had become "permanent" under the Indiana Teachers Tenure Act of 1927, to continued employment was held to be contractual and to have been impaired by the repeal in 1933 of the earlier act.[2108]

Tax Exemptions: When Not "Contracts".—From a different point of view, the Court has sought to distinguish between grants of privileges, whether to individuals or to corporations, which are contracts and those which are mere revocable licenses, although on account of the doctrine of presumed consideration mentioned ear-

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[2102] Butler v. Pennsylvania, 51 U.S. (10 How.) 402 (1850); Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); Dodge v. Board of Education, 302 U.S. 74 (1937); Mississippi ex rel. Robertson v. Miller, 276 U.S. 174 (1928).

[2103] Butler v. Pennsylvania, 51 U.S. (10 How.) 420 (1850). *Cf.* Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803) Hoke v. Henderson, 154 N.C. (4 Dev.) 1 (1833). *See also* United States v. Fisher, 109 U.S. 143 (1883); United States v. Mitchell, 109 U.S. 146 (1883); Crenshaw v. United States, 134 U.S. 99 (1890).

[2104] Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); Mississippi ex rel. Robertson v. Miller, 276 U.S. 174 (1928).

[2105] Hall v. Wisconsin, 103 U.S. 5 (1880). *Cf.* Higginbotham v. City of Baton Rouge, 306 U.S. 535 (1930).

[2106] Phelps v. Board of Education, 300 U.S. 319 (1937).

[2107] Dodge v. Board of Education, 302 U.S. 74 (1937).

[2108] Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938).

lier, this has not always been easy to do. In pursuance of the precedent set in *New Jersey v. Wilson*,[2109] the legislature of a state "may exempt particular parcels of property or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation, to which such property shall be subjected," and such an exemption is frequently a contract within the sense of the Constitution. Indeed this is always so when the immunity is conferred upon a corporation by the clear terms of its charter.[2110] When, on the other hand, an immunity of this sort springs from general law, its precise nature is more open to doubt, as a comparison of decisions will serve to illustrate.

In *State Bank of Ohio v. Knoop*,[2111] a closely divided Court held that a general banking law of Ohio, which provided that companies complying therewith and their stockholders should be exempt from all but certain taxes, was, as to a bank organized under it and its stockholders, a contract within the meaning of Article I, § 10. The provision was not, the Court said, "a legislative command nor a rule of taxation until changed, but a contract stipulating against any change, from the nature of the language used and the circumstances under which it was adopted."[2112] When, however, the State of Michigan pledged itself, by a general legislative act, not to tax any corporation, company, or individual undertaking to manufacture salt in the state from water there obtained by boring on property used for this purpose and, furthermore, to pay a bounty on the salt so manufactured, it was held not to have engaged itself within the constitutional sense. "General encouragements," the Court wrote, "held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time."[2113] So far as exemption from taxation is concerned the difference between these two cases is obviously slight, but the later one

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[2109] 11 U.S. (7 Cr.) 164 (1812).

[2110] The *Delaware Railroad Tax*, 85 U.S. (18 Wall.) 206, 225 (1874); Pacific R.R. v. Maguire, 87 U.S. (20 Wall.) 36, 43 (1874); Humphrey v. Pegues, 83 U.S. (16 Wall.) 244, 249 (1873); Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 438 (1869).

[2111] 57 U.S. (16 How.) 369 (1854).

[2112] 57 U.S. at 383.

[2113] Salt Company v. East Saginaw, 80 U.S. (13 Wall.) 373, 379 (1872). *See also* Welch v. Cook, 97 U.S. 541 (1879); Grand Lodge v. New Orleans, 166 U.S. 143 (1897); Wisconsin & Michigan Ry. v. Powers, 191 U.S. 379 (1903). *Cf.* Ettor v. Tacoma, 228 U.S. 148 (1913), in which it was held that the repeal of a statute providing for consequential damages caused by changes of grades of streets could not constitutionally affect an already accrued right to compensation.

is unquestionable authority for the proposition that legislative bounties are repealable at will.

Furthermore, exemptions from taxation have in certain cases been treated as gratuities repealable at will, even when conferred by specific legislative enactments. This would seem always to be the case when the beneficiaries were already in existence when the exemption was created and did nothing of a more positive nature to qualify for it than to continue in existence.[2114] Yet the cases are not always easy to explain in relation to each other, except in light of the fact that the Court's point of view has altered from time to time.[2115]

"Contracts" Include Public Contracts and Corporate Charters.—The question, which was settled very early, was whether the clause was intended to be applied solely in protection of private contracts or in the protection also of public grants, or, more broadly, in protection of public contracts, in short, those to which a state is a party.[2116] Support for the affirmative answer accorded this question could be derived from the following sources. For one thing, the clause departed from the comparable provision in the Northwest Ordinance (1787) in two respects: first, in the presence of the word "obligation;" secondly, in the absence of the word "private." There is good reason for believing that James Wilson may have been responsible for both alterations, as two years earlier he had denounced a current proposal to repeal the Bank of North America's Pennsylvania charter in the following words: "If the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, every precedent will be established for repealing, in the same manner, every other legislative charter in Pennsylvania. A pretence, as specious as any that can be alleged on this occasion, will

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[2114] *See* Rector of Christ Church v. County of Philadelphia, 65 U.S. (24 How.) 300, 302 (1861); Seton Hall College v. South Orange, 242 U.S. 100 (1916).

[2115] *Compare* the above cases *with* Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 437 (1869); Illinois Cent, R.R. v. Decatur, 147 U.S. 190 (1893), with Wisconsin & Michigan Ry. Co. v. Powers, 191 U.S. 379 (1903).

[2116] According to Benjamin F. Wright, throughout the first century of government under the Constitution "the contract clause had been considered in almost forty per cent of all cases involving the validity of State legislation," and of these the vast proportion involved legislative grants of one type or other, the most important category being charters of incorporation. However, the numerical prominence of such grants in the cases does not overrate their relative importance from the point of view of public interest. B. Wright, The Contract Clause of the Constitution 95 (1938).

Madison explained the clause by allusion to what had occurred "in the internal administration of the States" in the years preceding the Constitutional Convention, in regard to private debts. Violations of contracts had become familiar in the form of depreciated paper made legal tender, of property substituted for money, of installment laws, and of the occlusions of the courts of justice. 3 M. Farrand, The Records of the Federal Convention of 1787 548 (rev. ed. 1937); The Federalist, No. 44 (J. Cooke ed. 1961), 301–302.

never be wanting on any future occasion. Those acts of the state, which have hitherto been considered as the sure anchors of privilege and of property, will become the sport of every varying gust of politicks, and will float wildly backwards and forwards on the irregular and impetuous tides of party and faction."[2117]

Furthermore, in its first important constitutional case, *Chisholm v. Georgia*,[2118] the Court ruled that its original jurisdiction extended to an action in assumpsit brought by a citizen of South Carolina against the State of Georgia. This construction of the federal judicial power was, to be sure, promptly repealed by the Eleventh Amendment, but without affecting the implication that the contracts protected by the Constitution included public contracts.

One important source of this diversity of opinion is to be found in that ever welling spring of constitutional doctrine in early days, the prevalence of natural law notions and the resulting vague significance of the term "law." In *Sturges v. Crowninshield*, Chief Justice Marshall defined the obligation of contract as the law that binds a party "to perform his undertaking."[2119] Whence, however, comes this law? If it comes from the state alone, which Marshall was later to deny even as to private contracts,[2120] then it is hardly possible to hold that the states' own contracts are covered by the clause, which manifestly does not create an obligation for contracts but only protects such obligation as already exists. But, if, on the other hand, the law furnishing the obligation of contracts comprises natural law and kindred principles, as well as law that springs from state authority, then, as the state itself is presumably bound by such principles, the state's own obligations, so far as harmonious with them, are covered by the clause.

Fletcher v. Peck[2121] has the double claim to fame that it was the first case in which the Supreme Court held a state enactment to be in conflict with the Constitution, and also the first case to hold that the Contract Clause protected public grants. By an act passed on January 7, 1795, the Georgia Legislature directed the sale to four land companies of public lands comprising most of what are now the States of Alabama and Mississippi. As soon became known, the passage of the measure had been secured by open and wholesale bribery. So when a new legislature took over in the winter of 1795–1796, almost its first act was to revoke the sale made the previous year.

[2117] 2 The Works of James Wilson 834 (R. McCloskey ed., 1967).
[2118] 2 U.S. (2 Dall.) 419 (1793).
[2119] 17 U.S. (4 Wheat.) 122, 197 (1819).
[2120] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 338 (1827).
[2121] 10 U.S. (6 Cr.) 87 (1810).

Meantime, however, the land companies had disposed of several millions of acres of their holdings to speculators and prospective settlers, and following the rescinding act some of these took counsel with Alexander Hamilton as to their rights. In an opinion which was undoubtedly known to the Court when it decided *Fletcher v. Peck*, Hamilton characterized the repeal as contravening "the first principles of natural justice and social policy," especially so far as it was made "to the prejudice . . . of third persons . . . innocent of the alleged fraud or corruption; . . . moreover," he added, "the Constitution of the United States, article first, section tenth, declares that no State shall pass a law impairing the obligations of contract. This must be equivalent to saying no State shall pass a law revoking, invalidating, or altering a contract. Every grant from one to another, whether the grantor be a State or an individual, is virtually a contract that the grantee shall hold and enjoy the thing granted against the grantor, and his representatives. It, therefore, appears to me that taking the terms of the Constitution in their large sense, and giving them effect according to the general spirit and policy of the provisions, the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States, and, therefore null. And that the courts of the United States, in cases within their jurisdiction, will be likely to pronounce it so."[2122] Hamilton's views were quoted frequently in the congressional debate over the "Yazoo Land Frauds," as they were contemporaneously known.

So far as it invoked the Contract Clause, Marshall's opinion in *Fletcher v. Peck* performed two creative acts. It recognized that an obligatory contract was one still to be performed—in other words, was an executory contract, also that a grant of land was an executed contract—a conveyance. But, Marshall asserted, every grant is attended by "an implied contract" on the part of the grantor not to claim again the thing granted. Thus, grants are brought within the category of contracts having continuing obligation and so within Article I, § 10. But the question still remained of the nature of this obligation. Marshall's answer to this can only be inferred from his statement at the end of his opinion. The State of Georgia, he says, "was restrained" from the passing of the rescinding act "either by general principles which are common to our free institutions, or by particular provisions of the Constitution of the United States."[2123]

[2122] B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 22 (1938). Professor Wright dates Hamilton's pamphlet as from 1796.

[2123] 10 U.S. (6 Cr.) 87, 139 (1810). Justice Johnson, in his concurring opinion, relied exclusively on general principles. "I do not hesitate to declare, that a State does not possess the power of revoking its own grants. But I do it, on a general

The protection thus thrown about land grants was presently extended, in the case of *New Jersey v. Wilson*,[2124] to a grant of immunity from taxation that the State of New Jersey had accorded certain Indian lands, and several years after that, in *Dartmouth College*,[2125] to the charter privileges of an eleemosynary corporation.

In *City of El Paso v. Simmons*,[2126] the Court held, over a vigorous dissent by Justice Black, that Texas had not violated this clause when it amended its laws governing the sale of public lands so as to restrict the previously unlimited right of a delinquent to reinstate himself upon forfeited land by a single payment of all past interest due.

Corporate Charters: Different Ways of Regarding.—There are three ways in which the charter of a corporation may be regarded. In the first place, it may be thought of simply as a license terminable at will by the state, like a liquor-seller's license or an auctioneer's license, but affording the incorporators, so long as it remains in force, the privileges and advantages of doing business in the form of a corporation. Nowadays, indeed, when corporate charters are usually issued to all legally qualified applicants by an administrative officer who acts under a general statute, this would probably seem to be the natural way of regarding them were it not for the *Dartmouth College* decision. But, in 1819 charters were granted directly by the state legislatures in the form of special acts and there were very few profit-taking corporations in the country. The later extension of the benefits of the *Dartmouth College* decision to corporations organized under general law took place without discussion.

Secondly, a corporate charter may be regarded as a franchise constituting a vested or property interest in the hands of the holders, and therefore as forfeitable only for abuse or in accordance with its own terms. This is the way in which some of the early state courts did regard them at the outset.[2127] It is also the way in which

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principle, on the reason and nature of things; a principle which will impose laws even on the Deity." Id. at 143.

[2124] 11 U.S. (7 Cr.) 164 (1812). The exemption from taxation which was involved in this case was held in 1886 to have lapsed through the acquiescence for sixty years by the owners of the lands in the imposition of taxes upon these. Given v. Wright, 117 U.S. 648 (1886).

[2125] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[2126] 379 U.S. 497 (1965). *See also* Thorpe v. Housing Authority, 393 U.S. 268, 278–79 (1969).

[2127] In 1806, Chief Justice Parsons of the Supreme Judicial Court of Massachusetts, without mentioning the Contract Clause, declared that rights legally vested in a corporation cannot be "controlled of destroyed by a subsequent statute, unless a power [for that purpose] be reserved to the legislature in the act of incorporation," Wales v. Stetson, 2 Mass. 142 (1806). *See also* Stoughton v. Baker, 4 Mass. 521 (1808)

Blackstone regarded them in relation to the royal prerogative, although not in relation to the sovereignty of Parliament, and the same point of view found expression in Story's concurring opinion in *Dartmouth College v. Woodward*, as it did also in Webster's argument in that case.[2128]

The third view is the one formulated by Chief Justice Marshall in his controlling opinion in *Dartmouth College v. Woodward*.[2129] This is that the charter of Dartmouth College, a purely private institution, was the outcome and partial record of a contract between the donors of the college, on the one hand, and the British Crown, on the other, and the contract still continued in force between the State of New Hampshire, as the successor to the Crown and Government of Great Britain, and the trustees, as successors to the donors. The charter, in other words, was not simply a grant—rather it was the documentary record of a still existent agreement between still existent parties.[2130] Taking this view, which he developed with great ingenuity and persuasiveness, Marshall was able to appeal to the Contract Clause directly, and without further use of his fiction in *Fletcher v. Peck* of an executory contract accompanying the grant.

A difficulty still remained, however, in the requirement that a contract, before it can have obligation, must import consideration, that is to say, must be shown not to have been entirely gratuitous on either side. Moreover, the consideration, which induced the Crown to grant a charter to Dartmouth College, was not merely a speculative one. It consisted of the donations of the donors to the important public interest of education. Fortunately or unfortunately, in dealing with this phase of the case, Marshall used more sweeping terms than were needed. "The objects for which a corporation is created," he wrote, "are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant." In other words, the simple fact of the charter having been granted imports consideration from the point of view of the state.[2131] With this doctrine before it, the Court in *Provi-*

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to like effect; *cf.* Locke v. Dane, 9 Mass. 360 (1812), in which it is said that the purpose of the Contract Clause was to provide against paper money and insolvent laws. Together these holdings add up to the conclusion that the reliance of the Massachusetts court was on "fundamental principles," rather than the Contract Clause.

[2128] 17 U.S. (4 Wheat.) at 577–95 (Webster's argument); id. at 666 (Story's opinion). *See also* Story's opinion for the Court in Terrett v. Taylor, 13 U.S. (9 Cr.) 43 (1815).

[2129] 17 U.S. (4 Wheat.) 518 (1819).

[2130] 17 U.S. at 627.

[2131] 17 U.S. at 637; *see also* Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 437 (1869).

dence Bank v. Billings,[2132] and again in *Charles River Bridge v. Warren Bridge*,[2133] admitted, without discussion of the point, the applicability of the *Dartmouth College* decision to purely business concerns.

Reservation of Right to Alter or Repeal Corporate Charters.—There are four principles or doctrines by which the Court has broken down the force of the *Dartmouth College* decision in great measure in favor of state legislative power. By the logic of *Dartmouth College* itself, the state may reserve in a corporate charter the right to "amend, alter, and repeal" the same, and such reservation becomes a part of the contract between the state and the incorporators, the obligation of which is accordingly not impaired by the exercise of the right.[2134] Later decisions recognize that the state may reserve the right to amend, alter, and repeal by general law, with the result of incorporating the reservation in all charters of subsequent date.[2135] There is, however, a difference between a reservation by a statute and one by constitutional provision. Although the former may be repealed as to a subsequent charter by the specific terms thereof, the latter may not.[2136]

Is the right reserved by a state to "amend" or "alter" a charter without restriction? When it is accompanied, as it generally is, by the right to "repeal," one would suppose that the answer to this question was self-evident. Nonetheless, there is judicial dicta to the effect that this power is not without limit, that it must be exercised reasonably and in good faith, and that the alterations made must be consistent with the scope and object of the grant.[2137] Yet, although some state courts have applied tests of this nature to the disallowance of legislation, the U.S. Supreme Court has apparently never done so.[2138]

It is quite different with respect to the distinction that some cases point out between, on the one hand, the franchises and privi-

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[2132] 29 U.S. (4 Pet.) 514 (1830).

[2133] 36 U.S. (11 Pet.) 420 (1837).

[2134] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 712 (1819) (Justice Story).

[2135] Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 438 (1869); *Pennsylvania College Cases*, 80 U.S. (13 Wall.) 190, 213 (1872); Miller v. New York, 82 U.S. (15 Wall.) 478 (1873); Murray v. Charleston, 96 U.S. 432 (1878); Greenwood v. Freight Co., 105 U.S. 13 (1882); Chesapeake & Ohio Ry. v. Miller, 114 U.S. 176 (1885); Louisville Water Company v. Clark, 143 U.S. 1 (1892).

[2136] New Jersey v. Yard, 95 U.S. 104, 111 (1877).

[2137] *See* Holyoke Company v. Lyman, 82 U.S. (15 Wall.) 500, 520 (1873), *See also* Shields v. Ohio, 95 U.S. 319 (1877); Fair Haven R.R. v. New Haven, 203 U.S. 379 (1906); Berea College v. Kentucky, 211 U.S. 45 (1908). Also Lothrop v. Stedman, 15 Fed. Cas. 922 (No. 8519) (C.C.D. Conn. 1875), where the principles of natural justice are thought to set a limit to the power.

[2138] *See* in this connection the cases cited by Justice Sutherland in his opinion for the Court in Phillips Petroleum Co. v. Jenkins, 297 U.S. 629 (1936).

leges that a corporation derives from its charter, and, on the other hand, the rights of property and contract that accrue to it in the course of its existence. Even the outright repeal of the former does not wipe out the latter or cause them to escheat to the state. The primary heirs of the defunct organization are its creditors, but whatever of value remains after their valid claims are met goes to the former shareholders.[2139] By the earlier weight of authority, however, persons who contract with companies whose charters are subject to legislative amendment or repeal do so at their own risk; any "such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the State and the corporation in respect to the right of the State to alter, modify, or amend such a charter . . . ."[2140] But later holdings becloud this rule.[2141]

Corporation Subject to the Law and Police Power.—But suppose that the state neglects to reserve the right to amend, alter, or repeal. Is it, then, without power to control its corporate creatures? By no means. Private corporations, like other private persons, are always presumed to be subject to the legislative power of the state, from which it follows that immunities conferred by charter are to be treated as exceptions to an otherwise controlling rule. This principle was recognized by Chief Justice Marshall in *Providence Bank v. Billings*,[2142] which held that, in the absence of express stipulation or reasonable implication to the contrary in its charter, the bank was subject to the state's taxing power, notwithstanding that the power to tax is the power to destroy.

And of course the same principle is equally applicable to the exercise by the state of its police powers. Thus, in what was perhaps the leading case before the Civil War, the Supreme Court of Vermont held that the legislature of that state had the right, in furtherance of the public safety, to require chartered companies operating railways to fence in their tracks and provide cattle guards. In a matter of this nature, said the court, corporations are on a level with individuals engaged in the same business, unless, from

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[2139] Curran v. Arkansas, 56 U.S. (15 How.) 304 (1853); Shields v. Ohio, 95 U.S. 319 (1877); Greenwood v. Freight Co., 105 U.S. 13 (1882); Adirondack Ry. v. New York, 176 U.S. 335 (1900); Stearns v. Minnesota, 179 U.S. 223 (1900); Chicago, M. & St. P. R.R. v. Wisconsin, 238 U.S. 491 (1915); Coombes v. Getz, 285 U.S. 434 (1932).

[2140] *Pennsylvania College Cases*, 80 U.S. (13 Wall.) 190, 218 (1872). *See also* Calder v. Michigan, 218 U.S. 591 (1910).

[2141] Lake Shore & Mich. So. Ry. v. Smith, 173 U.S. 684, 690 (1899); Coombes v. Getz, 285 U.S. 434 (1932). Both these decisions cite Greenwood v. Freight Co., 105 U.S. 13, 17 (1882), but without apparent justification.

[2142] 29 U.S. (4 Pet.) 514 (1830).

their charter, they can prove the contrary.[2143] Since then the rule has been applied many times in justification of state regulation of railroads,[2144] and even of the application of a state prohibition law to a company that had been chartered expressly to manufacture beer.[2145]

Strict Construction of Charters, Tax Exemptions.—Long before the cases last cited were decided, the principle that they illustrate had come to be powerfully reinforced by two others, the first of which is that all charter privileges and immunities are to be strictly construed as against the claims of the state, or as it is otherwise often phrased, "nothing passes by implication in a public grant."

The leading case was *Charles River Bridge v. Warren Bridge*,[2146] which was decided by a substantially new Court shortly after Chief Justice Marshall's death. The question at issue was whether the charter of the complaining company, which authorized it to operate a toll bridge, stood in the way of the state's permitting another company of later date to operate a free bridge in the immediate vicinity. Because the first company could point to no clause in its charter specifically vesting it with an exclusive right, the Court held the charter of the second company to be valid on the principle just stated. Justice Story presented a vigorous dissent in which he argued cogently, but unavailingly, that the monopoly claimed by the Charles River Bridge Company was fully as reasonable an implication from the terms of its charter and the circumstances surround-

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[2143] Thorpe v. Rutland & Burlington R.R., 27 Vt. 140 (1854).

[2144] Thus a railroad may be required, at its own expense and irrespective of benefits to itself, to eliminate grade crossings in the interest of the public safety, New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894), to make highway crossings reasonably safe and convenient for public use, Great Northern Ry. v. Minnesota ex rel. Clara City, 246 U.S. 434 (1918), to repair viaducts, Northern Pacific Railway v. Duluth, 208 U.S. 583 (1908), and to fence its right of way, Minneapolis & St. Louis Ry. v. Emmons, 149 U.S. 364 (1893). Though a railroad company owns the right of way along a street, the city may require it to lay tracks to conform to the established grade; to fill in tracks at street intersections; and to remove tracks from a busy street intersection, when the attendant disadvantage and expense are small and the safety of the public appreciably enhanced Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919).

Likewise the state, in the public interest, may require a railroad to reestablish an abandoned station, even though the railroad commission had previously authorized its abandonment on condition that another station be established elsewhere, a condition which had been complied with. Railroad Co. v. Hamersley, 104 U.S. 1 (1881). It may impose upon a railroad liability for fire communicated by its locomotives, even though the state had previously authorized the company to use said type of locomotive power, St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1, 5 (1897), and it may penalize the failure to cut drains through embankments so as to prevent flooding of adjacent lands. Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915).

[2145] Beer Co. v. Massachusetts, 97 U.S. 25 (1878). *See also* Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 345 (1909).

[2146] 36 U.S. (11 Pet.) 420 (1837).

ing its concession as perpetuity had been from the terms of the Dartmouth College charter and the ensuing transaction.

The Court was in fact making new law, because it was looking at things from a new point of view. This was the period when judicial recognition of the police power began to take on a doctrinal character. It was also the period when the railroad business was just beginning. Chief Justice Taney's opinion evinces the influence of both these developments. The power of the state to provide for its own internal happiness and prosperity was not, he asserted, to be pared away by mere legal intendments, nor was its ability to avail itself of the lights of modern science to be frustrated by obsolete interests such as those of the old turnpike companies, the charter privileges of which, he apprehended, might easily become a bar to the development of transportation along new lines.[2147]

The Court has reiterated the rule of strict construction many times. In *Blair v. City of Chicago*,[2148] decided nearly seventy years after *Charles River Bridge*, the Court said: "Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. It is a matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give. This is one among many reasons why they are to be strictly construed. . . . The principle is this, that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State." [2149]

An excellent illustration of the operation of the rule in relation to tax exemptions was furnished by the derivative doctrine that an immunity of this character must be deemed as intended solely for the benefit of the corporation receiving it and hence, in the absence of express permission by the state, may not be passed on to a suc-

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[2147] 36 U.S. at 548–53.

[2148] 201 U.S. 400 (1906).

[2149] 201 U.S. at 471, 472, quoting *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51, 75 (1866).

cessor.[2150] Thus, where two companies, each exempt from taxation, were permitted by the legislature to consolidate, the new corporation was held to be subject to taxation.[2151] Again, a statute that granted a corporation all "the rights and privileges" of an earlier corporation was held not to confer the latter's "immunity" from taxation.[2152] Yet again, a legislative authorization of the transfer by one corporation to another of the former's "estate, property, right, privileges, and franchises" was held not to clothe the later company with the earlier one's exemption from taxation.[2153]

Furthermore, an exemption from taxation is to be strictly construed even in the hands of one clearly entitled to it. Thus, the exemption conferred by its charter on a railway company was held not to extend to branch roads it constructed pursuant to a later statute.[2154] Also, a general exemption of the property of a corporation from taxation was held to refer only to the property actually employed in its business.[2155] And, the charter exemption of the capital stock of a railroad from taxation "for ten years after completion of the said road" was held not to become operative until the completion of the road.[2156] So also the exemption of the campus and endowment fund of a college was held to leave other lands of the college, though a part of its endowment, subject to taxation.[2157] Provisions in a statute that bonds of the state and its political subdivisions were not to be taxed and should not be taxed were held not to exempt interest on them from taxation as income of the owners.[2158]

Strict Construction and the Police Power.—The police power, too, has frequently benefitted from the doctrine of strict construction, although this recourse is today seldom, if ever, necessary in this connection. Some of the more striking cases may be briefly summarized. The provision in the charter of a railway company permitting it to set reasonable charges still left the legislature free to de-

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[2150] Memphis & L.R. R.R. v. Comm'rs, 112 U.S. 609, 617 (1884). *See also* Morgan v. Louisiana, 93 U.S. 217 (1876); Wilson v. Gaines, 103 U.S. 417 (1881); Louisville & Nashville R.R. v. Palmes, 109 U.S. 244, 251 (1883); Norfolk & Western R.R. v. Pendleton, 156 U.S. 667, 673 (1895); Picard v. East Tennessee, V. & G. R.R., 130 U.S. 637, 641 (1889).

[2151] Atlantic & Gulf R.R. v. Georgia, 98 U.S. 359, 365 (1879).

[2152] Phoenix F. & M. Ins. Co. v. Tennessee, 161 U.S. 174 (1896).

[2153] Rochester Ry. v. Rochester, 205 U.S. 236 (1907); followed in Wright v. Georgia R.R. & Banking Co., 216 U.S. 420 (1910); Rapid Transit Corp. v. New York, 303 U.S. 573 (1938). *Cf.* Tennessee v. Whitworth, 117 U.S. 139 (1886), the authority of which is respected in the preceding case.

[2154] Chicago, B. & K.C. R.R. v. Guffey, 120 U.S. 569 (1887).

[2155] Ford v. Delta and Pine Land Company, 164 U.S. 662 (1897).

[2156] Vicksburg, S. & P. R.R. v. Dennis, 116 U.S. 665 (1886).

[2157] Millsaps College v. City of Jackson, 275 U.S. 129 (1927).

[2158] Hale v. State Board, 302 U.S. 95 (1937).

termine what charges were reasonable.[2159] However, when a railway agreed to accept certain rates for a specified period, it thereby foreclosed the question of the reasonableness of such rates.[2160] The grant to a company of the right to supply a city with water for twenty-five years was held not to prevent a similar concession to another company by the same city.[2161] The promise by a city in the charter of a water company not to make a similar grant to any other person or corporation was held not to prevent the city itself from engaging in the business.[2162] A municipal concession to a water company to run for thirty years, and accompanied by the provision that the "said company shall charge the following rates," was held not to prevent the city from reducing such rates.[2163] But more broadly, the grant to a municipality of the power to regulate the charges of public service companies was held not to bestow the right to contract away this power.[2164] Indeed, any claim by a private corporation that it received the ratemaking power from a municipality must survive a two-fold challenge: first, as to the right of the municipality under its charter to make such a grant, secondly, as to whether it has actually done so, and in both respects an affirmative answer must be based on express words and not on implication.[2165]

Doctrine of Inalienability as Applied to Eminent Domain, Taxing, and Police Powers.—The second of the doctrines mentioned above, whereby the principle of the subordination of all persons, corporate and individual alike, to the legislative power of the state has been fortified, is the doctrine that certain of the state's powers are inalienable, and that any attempt by a state to alienate them, upon any consideration whatsoever, is *ipso facto* void and hence

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[2159] Railroad Comm'n Cases (Stone v. Farmers' Loan & Trust Co.), 116 U.S. 307, 330 (1886), extended in Southern Pacific Co. v. Campbell, 230 U.S. 537 (1913) to cases in which the word "reasonable" does not appear to qualify the company's right to prescribe tolls. *See also* American Bridge Co. v. Railroad Comm'n, 307 U.S. 486 (1939).

[2160] Georgia Ry. v. Town of Decatur, 262 U.S. 432 (1923). *See also* Southern Iowa Elec. Co. v. City of Chariton, 255 U.S. 539 (1921).

[2161] City of Walla Walla v. Walla Walla Water Co., 172 U.S. 1, 15 (1898).

[2162] Skaneateles Water Co. v. Skaneateles, 184 U.S. 354 (1902); Water Co. v. City of Knoxville, 200 U.S. 22 (1906); Madera Water Works v. City of Madera, 228 U.S. 454 (1913).

[2163] Rogers Park Water Co. v. Fergus, 180 U.S. 624 (1901).

[2164] Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908); Wyandotte Gas Co. v. Kansas, 231 U.S. 622 (1914).

[2165] *See also* Puget Sound Traction Co. v. Reynolds, 244 U.S. 574 (1917). "Before we can find impairment of a contract we must find an obligation of the contract which has been impaired. Since the contract here relied upon is one between a political subdivision of a state and private individuals, settled principles of construction require that the obligation alleged to have been impaired be clearly and unequivocally expressed." Justice Black for the Court in Keefe v. Clark, 322 U.S. 393, 396–397 (1944).

incapable to producing a "contract" within the meaning of Article I, § 10. One of the earliest cases to assert this principle was decided in New York in 1826. The corporation of the City of New York, having conveyed certain lands for the purposes of a church and cemetery together with a covenant for quiet enjoyment, later passed a by-law forbidding their use as a cemetery. In denying an action against the city for breach of covenant, the state court said the defendants "had no power as a party, [to the covenant] to make a contract which should control or embarrass their legislative powers and duties." [2166]

The Supreme Court first applied similar doctrine in 1848 in a case involving a grant of exclusive right to construct a bridge at a specified locality. Sustaining the right of the State of Vermont to make a new grant to a competing company, the Court held that the obligation of the earlier exclusive grant was sufficiently recognized in making just compensation for it; and that corporate franchises, like all other forms of property, are subject to the overruling power of eminent domain.[2167] This reasoning was reinforced by an appeal to the theory of state sovereignty, which was held to involve the corollary of the inalienability of all the principal powers of a state.

The subordination of all charter rights and privileges to the power of eminent domain has been maintained by the Court ever since; not even an explicit agreement by the state to forego the exercise of the power will avail against it.[2168] Conversely, the state may revoke an improvident grant of public property without recourse to the power of eminent domain, such a grant being inherently beyond the power of the state to make. Thus, when the legislature of Illinois in 1869 devised to the Illinois Central Railroad Company, its successors and assigns, the state's right and title to nearly a thousand acres of submerged land under Lake Michigan along the harbor front of Chicago, and four years later sought to repeal the grant, the Court, a four-to-three decision, sustained an action by the state to recover the lands in question. Justice Field wrote for the majority: "Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. . . . Any

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[2166] Brick Presbyterian Church v. New York, 5 Cow. (N.Y.) 538, 540 (1826).

[2167] West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848). *See also* Backus v. Lebanon, 11 N.H. 19 (1840); White River Turnpike Co. v. Vermont Cent. R. Co., 21 Vt. 590 (1849); and Bonaparte v. Camden & A.R. Co., 3 Fed. Cas. 821 (No. 1617) (C.C.D.N.J. 1830).

[2168] Pennsylvania Hospital v. City of Philadelphia, 245 U.S. 20 (1917).

grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time." [2169]

On the other hand, repeated endeavors to subject tax exemptions to the doctrine of inalienability, though at times supported by powerful minorities on the Bench, have failed.[2170] As recently as January 1952, the Court ruled that the Georgia Railway Company was entitled to seek an injunction in the federal courts against an attempt by Georgia's Revenue Commission to compel it to pay ad valorem taxes contrary to the terms of its special charter issued in 1833. In answer to the argument that this was a suit contrary to the Eleventh Amendment, the Court declared that the immunity from federal jurisdiction created by the Amendment "does not extend to individuals who act as officers without constitutional authority." [2171]

The leading case involving the police power is *Stone v. Mississippi*.[2172] In 1867, the legislature of Mississippi chartered a company to which it expressly granted the power to conduct a lottery. Two years later, the state adopted a new Constitution which contained a provision forbidding lotteries, and a year later the legislature passed an act to put this provision into effect. In upholding this act and the constitutional provision on which it was based, the Court said: "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights," and these agencies can neither give away nor sell their discretion. All that one can get by a charter permitting the business of conducting a lottery "is suspension of certain governmental rights in his favor, subject to withdrawal at will." [2173]

The Court shortly afterward applied the same reasoning in a case challenging the right of Louisiana to invade the exclusive privilege of a corporation engaged in the slaughter of cattle in New Orleans by granting another company the right to engage in the same business. Although the state did not offer to compensate the older

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[2169] Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453, 455 (1892).

[2170] *See especially* Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430 (1869), and The Washington University v. Rouse, 75 U.S. (8 Wall.) 439 (1869).

[2171] Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 305–06 (1952). The Court distinguished *In re* Ayers, 123 U.S. 443 (1887) on the ground that the action there was barred "as one in substance directed at the State merely to obtain specific performance of a contract with the State." 342 U.S. at 305.

[2172] 101 U.S. 814 (1880).

[2173] 101 U.S. at 820–21.

company for the lost monopoly, its action was sustained on the ground that it had been taken in the interest of the public health.[2174] When, however, the City of New Orleans, in reliance on this precedent, sought to repeal an exclusive franchise which it had granted a company for fifty years to supply gas to its inhabitants, the Court interposed its veto, explaining that in this instance neither the public health, the public morals, nor the public safety was involved.[2175]

Later decisions, nonetheless, apply the principle of inalienability broadly. To quote from one: "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power to the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and all contract and property rights are held subject to its fair exercise." [2176]

It would scarcely suffice today for a company to rely upon its charter privileges or upon special concessions from a state in resisting the application to it of measures alleged to have been enacted under the police power thereof; if this claim is sustained, the obligation of the contract clause will not avail, and if it is not, the due process of law clause of the Fourteenth Amendment will furnish a sufficient reliance. That is to say, the discrepancy that once existed between the Court's theory of an overriding police power in these two adjoining fields of constitutional law is today apparently at an end. Indeed, there is usually no sound reason why rights based on public grant should be regarded as more sacrosanct than rights that involve the same subject matter but are of different provenance.

Private Contracts.—The term "private contract" is, naturally, not all-inclusive. A judgment, though granted in favor of a creditor, is not a contract in the sense of the Constitution,[2177] nor is mar-

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[2174] Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co., 111 U.S. 746 (1884).

[2175] New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885).

[2176] Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548, 558 (1914). *See also* Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915); Pennsylvania Hospital v. Philadelphia, 245 U.S. 20 (1917); where the police power and eminent domain are treated on the same basis in respect of inalienability; Wabash R.R. v. Defiance, 167 U.S. 88, 97 (1897); Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908).

[2177] Morley v. Lake Shore Ry., 146 U.S. 162 (1892); New Orleans v. New Orleans Water-Works Co., 142 U.S. 79 (1891); Missouri & Ark. L. & M. Co. v. Sebastian County, 249 U.S. 170 (1919). *But cf.* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469, 549 (1833); and Garrison v. New York, 88 U.S. (21 Wall.) 196, 203 (1875), suggesting that a different view was earlier entertained in the case of judgments in actions of debt.

riage.[2178] And whether a particular agreement is a valid contract is a question for the courts, and finally for the Supreme Court, when the protection of the contract clause is invoked.[2179]

The question of the nature and source of the obligation of a contract, which went by default in *Fletcher v. Peck* and the *Dartmouth College* case, with such vastly important consequences, had eventually to be met and answered by the Court in connection with private contracts. The first case involving such a contract to reach the Supreme Court was *Sturges v. Crowninshield*,[2180] in which a debtor sought escape behind a state insolvency act of later date than his note. The act was held inoperative, but whether this was because of its retroactivity in this particular case or for the broader reason that it assumed to excuse debtors from their promises was not at the time made clear. As noted earlier, Chief Justice Marshall's definition on this occasion of the obligation of a contract as the law that binds the parties to perform their undertakings was not free from ambiguity, owing to the uncertain connotation of the term "law."[2181]

These obscurities were finally cleared up for most cases in *Ogden v. Saunders*,[2182] in which the temporal relation of the statute and the contract involved was exactly reversed—the former antedating the latter. Chief Justice Marshall contended unsuccessfully that the statute was void because it purported to release the debtor from that original, intrinsic obligation that always attaches under natural law to the acts of free agents. "When," he wrote, "we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contracts," and that they took their views on these subjects from those sources. He also posed the question of what would happen to the Contract Clause if states might pass acts declaring that all contracts made subsequently thereto should be subject to legislative control.[2183]

[2178] Maynard v. Hill, 125 U.S. 190 (1888); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 629 (1819). *Cf.* Andrews v. Andrews, 188 U.S. 14 (1903). The question whether a wife's rights in the community property under the laws of California were of a contractual nature was raised but not determined in Moffit v. Kelly, 218 U.S. 400 (1910).

[2179] New Orleans v. New Orleans Water-Works Co., 142 U.S. 79 (1891); Zane v. Hamilton County, 189 U.S. 370, 381 (1903).

[2180] 17 U.S. (4 Wheat.) 122 (1819).

[2181] 17 U.S. (4 Wheat.) at 197.

[2182] 25 U.S. (12 Wheat.) 213 (1827).

[2183] 25 U.S. at 353–54.

For the first and only time, a majority of the Court abandoned the Chief Justice's leadership. Speaking by Justice Washington, it held that the obligation of private contracts is derived from the municipal law—state statutes and judicial decisions—and that the inhibition of Article I, § 10, is confined to legislative acts made after the contracts affected by them, subject to the following exception. By a curiously complicated line of reasoning, the Court also held in the same case that, when the creditor is a nonresident, then a state by an insolvency law may not alter the former's rights under a contract, albeit one of later date.

With the proposition established that the obligation of a private contract comes from the municipal law in existence when the contract is made, a further question presents itself, namely, what part of the municipal law is referred to? No doubt, the law which determines the validity of the contract itself is a part of such law. Also part of such law is the law which interprets the terms used in the contract, or which supplies certain terms when others are used, as for instance, constitutional provisions or statutes which determine what is "legal tender" for the payment of debts, or judicial decisions which construe the term "for value received" as used in a promissory note, and so on. In short, any law which at the time of the making of a contract goes to measure the rights and duties of the parties to it in relation to each other enters into its obligation.

Remedy a Part of the Private Obligation.—Suppose, however, that one of the parties to a contract fails to live up to his obligation as thus determined. The contract itself may now be regarded as at an end, but the injured party, nevertheless, has a new set of rights in its stead, those which are furnished him by the remedial law, including the law of procedure. In the case of a mortgage, he may foreclose; in the case of a promissory note, he may sue; and in certain cases, he may demand specific performance. Hence the further question arises, whether this remedial law is to be considered a part of the law supplying the obligation of contracts. Originally, the predominating opinion was negative, since as we have just seen, this law does not really come into operation until the contract has been broken. Yet it is obvious that the sanction which this law lends to contracts is extremely important—indeed, indispensable. In due course it became the accepted doctrine that part of the law which supplies one party to a contract with a remedy if the other party does not live up to his agreement, as authoritatively interpreted, entered into the "obligation of contracts" in the constitutional sense of this term, and so might not be altered to the material weakening of existing contracts. In the Court's own words: "Nothing can be more material to the obligation than the means of

enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable. . . .”[2184]

This rule was first definitely announced in 1843 in *Bronson v. Kinzie*.[2185] Here, an Illinois mortgage giving the mortgagee an unrestricted power of sale in case of the mortgagor’s default was involved, along with a later act of the legislature that required mortgaged premises to be sold for not less than two-thirds of the appraised value and allowed the mortgagor a year after the sale to redeem them. It was held that the statute, in altering the pre-existing remedies to such an extent, violated the constitutional prohibition and hence was void. The year following a like ruling was made in *McCracken v. Hayward*,[2186] as to a statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value.

But the rule illustrated by these cases does not signify that a state may make no changes in its remedial or procedural law that affect existing contracts. “Provided,” the Court has said, “a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract, the Legislature may modify or change existing remedies or prescribe new modes of procedure.”[2187] Thus, states are constantly remodelling their judicial systems and modes of practice unembarrassed by the Contract Clause.[2188] The right of a state to abolish imprisonment for debt was early asserted.[2189] Again, the right of a state to shorten the time for the bringing of actions has been affirmed even as to existing causes of action, but with the proviso added that a reasonable time must be left for the bringing of such actions.[2190] On the other hand, a statute which withdrew the judicial power to enforce satisfaction of a certain class of judgments by mandamus was held invalid.[2191] In the words of the Court: “Every case must be determined upon its own circumstances”;[2192] and it later added: “In all

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[2184] United States ex rel. Von Hoffman v. Quincy, 71 U.S. (4 Wall.) 535, 552 (1867).
[2185] 42 U.S. (1 How.) 311 (1843).
[2186] 43 U.S. (2 How.) 608 (1844).
[2187] Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437, 439 (1903); City & Lake R.R. v. New Orleans, 157 U.S. 219 (1895).
[2188] Antoni v. Greenhow, 107 U.S. 769 (1883).
[2189] The right was upheld in Mason v. Haile, 25 U.S. (12 Wheat.) 370 (1827), and again in *Penniman’s Case*, 103 U.S. 714 (1881).
[2190] McGahey v. Virginia, 135 U.S. 662 (1890).
[2191] Louisiana v. New Orleans, 102 U.S. 203 (1880).
[2192] United States ex rel. Von Hoffman v. Quincy, 71 U.S. (4 Wall.) 535, 554 (1867).

such cases the question becomes . . . one of reasonableness, and of that the legislature is primarily the judge." [2193]

Contracts involving municipal bonds merit special mention. While a city is from one point of view but an emanation from the government's sovereignty and an agent thereof, when it borrows money it is held to be acting in a corporate or private capacity and so to be suable on its contracts. Furthermore, as was held in the leading case of *United States ex rel. Von Hoffman v. Quincy*,[2194] "where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied." In this case the Court issued a mandamus compelling the city officials to levy taxes for the satisfaction of a judgment on its bonds in accordance with the law as it stood when the bonds were issued.[2195] Nor may a state by dividing an indebted municipality among others enable it to escape its obligations. The debt follows the territory and the duty of assessing and collecting taxes to satisfy it devolves upon the succeeding corporations and their officers.[2196] But where a municipal organization has ceased practically to exist through the vacation of its offices, and the government's function is exercised once more by the state directly, the Court has thus far found itself powerless to frustrate a program of repu-

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[2193] Antoni v. Greenhow, 107 U.S. 769, 775 (1883). Illustrations of changes in remedies, which have been sustained, may be seen in the following cases: Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830); Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457 (1831); Crawford v. Branch Bank of Mobile, 48 U.S. (7 How.) 279 (1849); Curtis v. Whitney, 80 U.S. (13 Wall.) 68 (1872); Railroad Co. v. Hecht, 95 U.S. 168 (1877); Terry v. Anderson, 95 U.S. 628 (1877); Tennessee v. Sneed, 96 U.S. 69 (1877); South Carolina v. Gaillard, 101 U.S. 433 (1880); Louisiana v. New Orleans, 102 U.S. 203 (1880); Connecticut Mut. Life Ins. Co. v. Cushman, 108 U.S. 51 (1883); Vance v. Vance, 108 U.S. 514 (1883); Gilfillan v. Union Canal Co., 109 U.S. 401 (1883); Hill v. Merchant's Ins. Co., 134 U.S. 515 (1890); City & Lake R.R. v. New Orleans, 157 U.S. 219 (1895); Red River Valley Bank v. Craig, 181 U.S. 548 (1901); Wilson v. Standefer, 184 U.S. 399 (1902); Oshkosh Waterworks Co. v. Oshkosh, 187 U.S. 437 (1903); Waggoner v. Flack, 188 U.S. 595 (1903); Bernheimer v. Converse, 206 U.S. 516 (1907); Henley v. Myers, 215 U.S. 373 (1910); Selig v. Hamilton, 234 U.S. 652 (1914); Security Bank v. California, 263 U.S. 282 (1923); United States Mortgage Co. v. Matthews, 293 U.S. 232 (1934); McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

Compare the following cases, where changes in remedies were deemed to be of such character as to interfere with substantial rights: Wilmington & Weldon R.R. v. King, 91 U.S. 3 (1875); Memphis v. United States, 97 U.S. 293 (1878); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270, 298, 299 (1885); Effinger v. Kenney, 115 U.S. 566 (1885); Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885); Bradley v. Lightcap, 195 U.S. 1 (1904); Bank of Minden v. Clement, 256 U.S. 126 (1921).

[2194] 71 U.S. (4 Wall.) 535, 554–55 (1867).

[2195] *See also* Nelson v. St. Martin's Parish, 111 U.S. 716 (1884).

[2196] Mobile v. Watson, 116 U.S. 289 (1886); Graham v. Folsom, 200 U.S. 248 (1906).

diation.[2197] However, there is no reason why the state should enact the role of *particeps criminis* in an attempt to relieve its municipalities of the obligation to meet their honest debts. Thus, in 1931, during the Great Depression, New Jersey created a Municipal Finance Commission with power to assume control over its insolvent municipalities. To the complaint of certain bondholders that this legislation impaired the contract obligations of their debtors, the Court, speaking by Justice Frankfurter, pointed out that the practical value of an unsecured claim against a city is "the effectiveness of the city's taxing power," which the legislation under review was designed to conserve.[2198]

Private Contracts and the Police Power.—The increasing subjection of public grants to the police power of the states has been previously pointed out. That purely private contracts should be in any stronger situation in this respect obviously would be anomalous in the extreme. In point of fact, the ability of private parties to curtail governmental authority by the easy device of contracting with one another is, with an exception to be noted, even less than that of the state to tie its own hands by contracting away its own powers. So, when it was contended in an early Pennsylvania case that an act prohibiting the issuance of notes by unincorporated banking associations violated the Contract Clause because of its effect upon certain existing contracts of members of such association, the state Supreme Court answered: "But it is said, that the members had formed a contract between themselves, which would be dissolved by the stoppage of their business. And what then? Is that such a violation of contracts as is prohibited by the Constitution of the United States? Consider to what such a construction would lead. Let us suppose, that in one of the States there is no law against gaming, cock-fighting, horse-racing or public masquerades, and that companies should be formed for the purpose of carrying on these

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[2197] Heine v. Levee Commissioners, 86 U.S. (19 Wall.) 655 (1874). *Cf.* Virginia v. West Virginia, 246 U.S. 565 (1918).

[2198] Faitoute Co. v. City of Asbury Park, 316 U.S. 502, 510 (1942). Alluding to the ineffectiveness of purely judicial remedies against defaulting municipalities, Justice Frankfurter says: "For there is no remedy when resort is had to 'devices and contrivances' to nullify the taxing power which can be carried out only through authorized officials. See Rees v. City of Watertown, 19 Wall. [86 U.S.] 107, 124 [1874]. And so we have had the spectacle of taxing officials resigning from office in order to frustrate tax levies through mandamus, and officials running on a platform of willingness to go to jail rather than to enforce a tax levy (see Raymond, State and Municipal Bonds, 342–343), and evasion of service by tax collectors, thus making impotent a court's mandate. Yost v. Dallas County, 236 U.S. 50, 57 [1915]." Id. at 511.

practices. . . .” Would the legislature then be powerless to prohibit them? The answer returned, of course, was no.[2199]

The prevailing doctrine was stated by the U.S. Supreme Court: “It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. . . . In other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good.” [2200]

So, in an early case, we find a state recording act upheld as applying to deeds dated before the passage of the act.[2201] Later cases have brought the police power in its more customary phases into contact with private as well as with public contracts. Lottery tickets, valid when issued, were necessarily invalidated by legislation prohibiting the lottery business; [2202] contracts for the sale of beer, valid when entered into, were similarly nullified by a state prohibition law; [2203] and contracts of employment were modified by later laws regarding the liability of employers and workmen’s compensation.[2204] Likewise, a contract between plaintiff and defendant did not prevent the state from making the latter a concession that rendered the contract worthless; [2205] nor did a contract as to rates between two railway companies prevent the state from imposing different rates; [2206] nor did a contract between a public utility company and a customer protect the rates agreed upon from being superseded by those fixed by the state.[2207] Similarly, a contract for the conveyance of water beyond the limits of a state did not prevent the state from prohibiting such conveyance.[2208]

But the most striking exertions of the police power touching private contracts, as well as other private interests within recent years,

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[2199] Myers v. Irwin, 2 S. & R. (Pa.) 367, 372 (1816); *see*, to the same effect, Lindenmuller v. The People, 33 Barb. (N.Y.) 548 (1861); Brown v. Penobscot Bank, 8 Mass. 445 (1812).

[2200] Manigault v. Springs, 199 U.S. 473, 480 (1905).

[2201] Jackson v. Lamphire, 28 U.S. (3 Pet.) 280 (1830). *See also* Phalen v. Virginia, 49 U.S. (8 How.) 163 (1850).

[2202] Stone v. Mississippi, 101 U.S. 814 (1880).

[2203] Beer Co. v. Massachusetts, 97 U.S. 25 (1878).

[2204] New York Cent. R.R. v. White, 243 U.S. 188 (1917). In this and the preceding two cases the legislative act involved did not except from its operation existing contracts.

[2205] Manigault v. Springs, 199 U.S. 473 (1905).

[2206] Portland Ry. v. Oregon R.R. Comm’n, 229 U.S. 397 (1913).

[2207] Midland Co. v. Kansas City Power Co., 300 U.S. 109 (1937).

[2208] Hudson Water Co. v. McCarter, 209 U.S. 349 (1908).

have been evoked by war and economic depression. Thus, in World War I, the State of New York enacted a statute which, declaring that a public emergency existed, forbade the enforcement of covenants for the surrender of the possession of premises on the expiration of leases, and wholly deprived for a period owners of dwellings, including apartment and tenement houses, within the City of New York and contiguous counties, of possessory remedies for the eviction from their premises of tenants in possession when the law took effect, providing the latter were able and willing to pay a reasonable rent. In answer to objections leveled against this legislation on the basis of the Contract Clause, the Court said: "But contracts are made subject to this exercise of the power of the State when otherwise justified, as we have held this to be." [2209] In a subsequent case, however, the Court added that, although the declaration by the legislature of a justifying emergency was entitled to great respect, it was not conclusive; a law "depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change," and whether they have changed was always open to judicial inquiry.[2210]

Summing up the result of the cases referred to above, Chief Justice Hughes, speaking for the Court in *Home Building & Loan Ass'n v. Blaisdell*,[2211] remarked in 1934: "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends. . . . The principle of this development is . . . that the reser-

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[2209] Marcus Brown Co. v. Feldman, 256 U.S. 170, 198 (1921), followed in Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

[2210] Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–48 (1924).

[2211] 290 U.S. 398 (1934).

vation of the reasonable exercise of the protective power of the States is read into all contracts . . . .” [2212]

Evaluation of the Clause Today.—It should not be inferred that the Contract Clause is today totally moribund. Even prior to the most recent decisions, it still furnished the basis for some degree of judicial review as to the substantiality of the factual justification of a professed exercise by a state legislature of its police power, and in the case of legislation affecting the remedial rights of creditors, it still affords a solid and palpable barrier against legislative erosion. Nor is this surprising in view of the fact that, as we have seen, such rights were foremost in the minds of the framers of the clause. The Court’s attitude toward insolvency laws, redemption laws, exemption laws, appraisement laws and the like, has always been that they may not be given retroactive operation,[2213] and the general lesson of these earlier cases is confirmed by the Court’s decisions between 1934 and 1945 in certain cases involving state moratorium statutes. In *Home Building & Loan Ass’n v. Blaisdell*,[2214] the leading case, a closely divided Court sustained the Minnesota Moratorium Act of April 18, 1933, which, reciting the existence of a severe financial and economic depression for several years and the frequent occurrence of mortgage foreclosure sales for inadequate prices, and asserting that these conditions had created an economic emergency calling for the exercise of the State’s police power, authorized its courts to extend the period for redemption from foreclosure sales for such additional time as they might deem just and equitable, although in no event beyond May 1, 1935.

The act also left the mortgagor in possession during the period of extension, subject to the requirement that he pay a reasonable rental for the property as fixed by the court. Contemporaneously, however, less carefully drawn statutes from Missouri and Arkansas, acts that were not as considerate of creditor’s rights, were set aside as violating the Contract Clause.[2215] “A State is free to regulate the procedure in its courts even with reference to contracts al-

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[2212] 290 U.S. at 442, 444. *See also* Veix v. Sixth Ward Ass’n, 310 U.S. 32 (1940), in which was sustained a New Jersey statute amending in view of the Depression the law governing building and loan associations. The authority of the state to safeguard the vital interests of the people, said Justice Reed, “extends to economic needs as well.” Id. at 39. In Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 531–32 (1949), the Court dismissed out-of-hand a suggestion that a state law outlawing union security agreements was an invalid impairment of existing contracts, citing *Blaisdell* and *Veix*.

[2213] *See* Edwards v. Kearzey, 96 U.S. 595 (1878); Barnitz v. Beverly, 163 U.S. 118 (1896).

[2214] 290 U.S. 398 (1934).

[2215] W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935).

ready made," said Justice Cardozo for the Court, "and moderate extensions of the time for pleading or for trial will ordinarily fall within the power so reserved. A different situation is presented when extensions are so piled up as to make the remedy a shadow. . . . What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." [2216] On the other hand, in the most recent of this category of cases, the Court gave its approval to an extension by the State of New York of its moratorium legislation. While recognizing that business conditions had improved, the Court found reason to believe that "the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate." [2217]

In the meantime, the Court had sustained New York State legislation under which a mortgagee of real property was denied a deficiency judgment in a foreclosure suit where the state court found that the value of the property purchased by the mortgagee at the foreclosure sale was equal to the debt secured by the mortgage.[2218] "Mortgagees," the Court said, "are constitutionally entitled to no more than payment in full. . . . To hold that mortgagees are entitled under the contract clause to retain the advantages of a forced sale would be to dignify into a constitutionally protected property right their chance to get more than the amount of their contracts. . . . The contract clause does not protect such a strategical, procedural advantage." [2219]

More important, the Court has been at pains most recently to reassert the vitality of the clause, although one may wonder whether application of the clause will be more than episodic.

"[T]he Contract Clause remains a part of our written Constitution." [2220] So saying, the Court struck down state legislation in two

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[2216] 295 U.S. at 62.

[2217] East New York Bank v. Hahn, 326 U.S. 230, 235 (1945), quoting New York Legislative Document (1942), No. 45, p. 25.

[2218] Honeyman v. Jacobs, 306 U.S. 539 (1939). *See also* Gelfert v. National City Bank, 313 U.S. 221 (1941).

[2219] 313 U.S. at 233–34.

[2220] United States Trust Co. v. New Jersey, 431 U.S. 1, 16 (1977). "It is not a dead letter." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978). A majority of the Court seems fully committed to using the clause. Only Justices Brennan, White, and Marshall dissented in both cases. Chief Justice Burger and Jus-

instances, one law involving the government's own contractual obligation and the other affecting private contracts.[2221] A finding that a contract has been "impaired" in some way is merely the preliminary step in evaluating the validity of the state action.[2222] But in both cases the Court applied a stricter-than-usual scrutiny to the statutory action, in the public contracts case precisely because it was its own obligation that the State was attempting to avoid and in the private contract case, apparently, because the legislation was in aid of a "narrow class."[2223]

The approach in any event is one of balancing. "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation."[2224] Having determined that a severe impairment had resulted in both cases,[2225] the Court moved on to assess the justification for the state action.

In *United States Trust*, the Court ruled that an impairment would be upheld only if it were "necessary" and "reasonable" to serve an important public purpose. But the two terms were given restrictive meanings. Necessity is shown only when the state's objectives could not have been achieved through less dramatic modifications of the contract; reasonableness is a function of the extent to which alteration of the contract was prompted by circumstances unforeseen at the time of its formation. The repeal of the covenant in issue was found to fail both prongs of the test.[2226]

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tices Rehnquist and Stevens joined both opinions of the Court. Of the three remaining Justices, who did not participate in one or the other case, Justice Blackmun wrote the opinion in *United States Trust* while Justice Stewart wrote the opinion in *Spannaus* and Justice Powell joined it.

[2221] *United States Trust* involved a repeal of a covenant statutorily enacted to encourage persons to purchase New York-New Jersey Port Authority bonds by limiting the Authority's ability to subsidize rail passenger transportation. *Spannaus* involved a statute requiring prescribed employers who had a qualified pension plan to provide funds sufficient to cover full pensions for all employees who had worked at least 10 years if the employer either terminated the plan or closed his offices in the state, a law that greatly altered the company's liabilities under its contractual pension plan.

[2222] 431 U.S. at 21; 438 U.S. at 244.

[2223] 431 U.S. at 22–26; 438 U.S. at 248.

[2224] 438 U.S. at 245.

[2225] 431 U.S. at 17–21 (the Court was unsure of the value of the interest impaired but deemed it "an important security provision"); 438 U.S. 244–47 (statute mandated company to recalculate, and in one lump sum, contributions previously adequate).

[2226] 431 U.S. at 25–32 (state could have modified the impairment to achieve its purposes without totally abandoning the covenant, though the Court reserved judgment whether lesser impairments would have been constitutional, id. at 30 n.28,

In *Spannaus*, the Court drew from its prior cases four standards: did the law deal with a broad generalized economic or social problem, did it operate in an area already subject to state regulation at the time the contractual obligations were entered into, did it effect simply a temporary alteration of the contractual relationship, and did the law operate upon a broad class of affected individuals or concerns. The Court found that the challenged law did not possess any of these attributes and thus struck it down.[2227]

Whether these two cases portend an active judicial review of economic regulatory activities, in contrast to the extreme deference shown such legislation under the due process and equal protection clauses, is problematical. Both cases contain language emphasizing the breadth of the police powers of government that may be used to further the public interest and admitting limited judicial scrutiny. Nevertheless, "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." [2228]

Clause 2. No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

DUTIES ON EXPORTS OR IMPORTS

Scope

Only articles imported from or exported to a foreign country, or "a place over which the Constitution has not extended its commands with respect to imports and their taxation," are comprehended by the terms "imports" and "exports." [2229] With respect to

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and it had alternate means to achieve its purposes; the need for mass transportation was obvious when covenant was enacted and state could not claim that unforeseen circumstances had arisen.)

[2227] 438 U.S. at 244–51. *See also* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (emphasizing the first but relying on all but the third of these tests in upholding a prohibition on pass-through of an oil and gas severance tax).

[2228] 438 U.S. at 242 (emphasis by Court).

[2229] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 673 (1945). Goods brought from another State are not within the clause. Woodruff v. Parham, 75 U.S. (8 Wall.) 123

exports, the exemption from taxation "attaches to the export and not to the article before its exportation," [2230] requiring an essentially factual inquiry into whether there have been acts of movement toward a final destination constituting sufficient entrance into the export stream as to invoke the protection of the clause.[2231] To determine how long imported wares remain under the protection of this clause, the Supreme Court enunciated the original package doctrine in the leading case of *Brown v. Maryland*. "When the importer has so acted upon the thing imported," wrote Chief Justice Marshall, "that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the Constitution." [2232] A box, case, or bale in which separate parcels of goods have been placed by the foreign seller is regarded as the original package, and upon the opening of such container for the purpose of using the separate parcels, or of exposing them for sale, each loses its character as an import and becomes subject to taxation as a part of the general mass of property in the state.[2233] Imports for manufacture cease to be such when the intended processing takes place,[2234] or when the original packages are broken.[2235] Where a manufacturer imports merchandise and stores it in his warehouse in the original packages, that merchandise does not lose its quality as an import, at least so long as it is not required to meet such immediate needs.[2236] The purchaser of imported goods is deemed to be the importer if he was the efficient cause of the importation, whether the title to the goods vested in him at the time of shipment, or after its arrival in this country.[2237] A state franchise tax measured by properly apportioned gross re-

(1869). Justice Thomas has called recently for reconsideration of *Woodruff* and the possible application of the clause to interstate imports and exports. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 609, 621 (1997) (dissenting).

[2230] Cornell v. Coyne, 192 U.S. 418, 427 (1904).

[2231] Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69 (1946); Empress Siderurgica v. County of Merced, 337 U.S. 154 (1947); Kosydar v. National Cash Register Co., 417 U.S. 62 (1974).

[2232] 25 U.S. (12 Wheat.) 419, 441–42 (1827).

[2233] May v. New Orleans, 178 U.S. 496, 502 (1900).

[2234] 178 U.S. at 501; Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928); McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1940).

[2235] Low v. Austin, 80 U.S. (13 Wall.) 29 (1872); May v. New Orleans, 178 U.S. 496 (1900).

[2236] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 667 (1945). *But see* Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984) (overruling the earlier decision).

[2237] 324 U.S. at 664.

ceipts may be imposed upon a railroad company in respect of the company's receipts for services in handling imports and exports at its marine terminal.[2238]

Privilege Taxes

A state law requiring importers to take out a license to sell imported goods amounts to an indirect tax on imports and hence is unconstitutional.[2239] Likewise, a franchise tax upon foreign corporations engaged in importing nitrate and selling it in the original packages,[2240] a tax on sales by brokers[2241] and auctioneers[2242] of imported merchandise in original packages, and a tax on the sale of goods in foreign commerce consisting of an annual license fee plus a percentage of gross sales,[2243] have been held invalid. On the other hand, pilotage fees,[2244] a tax upon the gross sales of a purchaser from the importer,[2245] a license tax upon dealing in fish which, through processing, handling, and sale, have lost their distinctive character as imports,[2246] an annual license fee imposed on persons engaged in buying and selling foreign bills of exchange,[2247] and a tax upon the right of an alien to receive property as heir, legatee, or donee of a deceased person[2248] have been held not to be duties on imports or exports.

Property Taxes

Overruling a line of prior decisions that it thought misinterpreted the language of *Brown v. Maryland*, the Court now holds that the clause does not prevent a state from levying a nondiscriminatory, *ad valorem* property tax upon goods that are no longer in import transit.[2249] Thus, a company's inventory of imported tires main-

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[2238] Canton R.R. v. Regan, 340 U.S. 511 (1951).

[2239] Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 447 (1827).

[2240] Anglo-Chilean Corp. v. Alabama, 288 U.S. 218 (1933).

[2241] Low v. Austin, 80 U.S. (13 Wall.) 29, 33 (1872).

[2242] Cook v. Pennsylvania, 97 U.S. 566, 573 (1878).

[2243] Crew Levick Co. v. Pennsylvania, 245 U.S. 292 (1917).

[2244] Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 313 (1851).

[2245] Waring v. The Mayor, 75 U.S. (8 Wall.) 110, 122 (1869). *See also* Pervear v. Massachusetts. 72 U.S. (5 Wall.) 475, 478 (1867); Schollenberger v. Pennsylvania, 171 U.S. 1, 24 (1898).

[2246] Gulf Fisheries Co. v. MacInerney, 276 U.S. 124 (1928).

[2247] Nathan v. Louisiana, 49 U.S. (8 How.) 73, 81 (1850).

[2248] Mager v. Grima, 49 U.S. (8 How.) 490 (1850).

[2249] Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), overruling Low v. Austin, 80 U.S. (13 Wall.) 29 (1872), expressly, and, necessarily, Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945), among others. The latter case was expressly overruled in Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984), involving the same tax and the same parties. In Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534 (1959), property taxes were sustained on the basis that the materials taxed had lost their character as imports. On exports, *see* Selliger v. Kentucky, 213 U.S. 200 (1909)

tained at its whole distribution warehouse could be included in the state's tax upon the entire inventory. The clause does not prohibit every "tax" with some impact upon imports or exports but reaches rather exactions directed only at imports or exports or commercial activity therein as such.[2250]

Inspection Laws

Inspection laws "are confined to such particulars as, in the estimation of the legislature and according to the customs of trade, are deemed necessary to fit the inspected article for the market, by giving the purchaser public assurance that the article is in that condition, and of that quality, which makes it merchantable and fit for use or consumption."[2251] In *Turner v. Maryland*,[2252] the Court listed as recognized elements of inspection laws, the "quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds . . . "[2253] It sustained as an inspection law a charge for storage and inspection imposed upon every hogshead of tobacco grown in the state and intended for export, which the law required to be brought to a state warehouse to be inspected and branded. The Court has cited this section as a recognition of a general right of the states to pass inspection laws, and to bring within their reach articles of interstate, as well as of foreign, commerce.[2254] But on the ground that, "it has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequence of its use or abuse," it held that a state law forbidding the importation of intoxicating liquors into the state could not be sustained as an inspection law.[2255]

(property tax levied on warehouse receipts for whiskey exported to Germany invalid). *See also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 76–78 (1993), *and see* id. at 81–82 (Justice Scalia concurring).

[2250] Michelin Tire Corp. v. Wages, 423 U.S. 276, 290–94 (1976). *Accord*, R. J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986) (tax on imported tobacco stored for aging in customs-bonded warehouse and destined for domestic manufacture and sale); *but cf.* Xerox Corp. v. County of Harris, 459 U.S. 145, 154 (1982) (similar tax on goods stored in customs-bonded warehouse is preempted "by Congress's comprehensive regulation of customs duties;" case, however, dealt with goods stored for export).

[2251] Bowman v. Chicago & Nw. Ry., 125 U.S. 465, 488 (1888).

[2252] 107 U.S. 38 (1883).

[2253] 107 U.S. at 55.

[2254] Patapsco Guano Co. v. North Carolina, 171 U.S. 345, 361 (1898).

[2255] Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888). The Twenty-first Amendment has had no effect on this principle. Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964).

Clause 3. No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

TONNAGE DUTIES

The purpose of the Tonnage Clause is "to 'restrai[n] the states themselves from the exercise' of the taxing power 'injuriously to the interests of each other.' . . . In writing the Tonnage Clause, the Framers recognized that, if 'the states had been left free to tax the privilege of access by vessels to their harbors the prohibition [in Article I, § 10, clause 2] against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise.'" [2256] The prohibition against tonnage duties embraces all taxes and duties, regardless of their name or form, whether measured by the tonnage of the vessel or not, that, in effect, are charges for the privilege of entering, trading in, or lying in a port.[2257] The Tonnage Clause, however, does not ban all "taxes which fall on vessels that use a State's port, harbor, or other waterways. Such a radical proposition would transform the Tonnage Clause from one that protects vessels, and their owners, from discrimination by seaboard States, to one that gives vessels preferential treatment vis-à-vis all other property, and its owners, in a seaboard State." [2258] But it does not extend to charges made by state authority, even if graduated according to tonnage,[2259] for services rendered to the vessel, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, or storage.[2260]

For the purpose of determining wharfage charges, it is immaterial whether the wharf was built by the state, a municipal corpora-

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[2256] Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. ___, No. 08–310, slip op. at 3, 4 (2009).

[2257] Clyde Mallory Lines v. Alabama, 296 U.S. 261, 265 (1935); Cannon v. City of New Orleans, 87 U.S. (20 Wall.) 577, 581 (1874); Transportation Co. v. Wheeling, 99 U.S. 273, 283 (1879); Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. ___, No. 08–310 (2009).

[2258] Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. ___, No. 08–310, slip op. at 6 (2009) (citation omitted).

[2259] Packet Co. v. Keokuk, 95 U.S. 80 (1877); Transportation Co. v. Parkersburg, 107 U.S. 691 (1883); Ouachita Packet Co. v. Aiken, 121 U.S. 444 (1887).

[2260] Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 314 (1851); *Ex parte* McNiel, 80 U.S. (13 Wall.) 236 (1872); Inman Steamship Co. v. Tinker, 94 U.S. 238, 243 (1877); Packet Co. v. St. Louis, 100 U.S. 423 (1880); City of Vicksburg v. Tobin, 100 U.S. 430 (1880); Packet Co. v. Catlettsburg, 105 U.S. 559 (1882).

tion, or an individual. Where the wharf was owned by a city, the fact that the city realized a profit beyond the amount expended did not render the toll objectionable.[2261] The services of harbor masters for which fees are allowed must be actually rendered, and a law permitting harbor masters or port wardens to impose a fee in all cases is void.[2262] A state may not levy a tonnage duty to defray the expenses of its quarantine system,[2263] but it may exact a fixed fee for examination of all vessels passing quarantine.[2264] A state license fee for ferrying on a navigable river is not a tonnage tax but rather is a proper exercise of the police power and the fact that a vessel is enrolled under federal law does not exempt it.[2265] In the *State Tonnage Tax Cases*,[2266] an annual tax on steamboats measured by their registered tonnage was held invalid despite the contention that it was a valid tax on the steamboat as property.

KEEPING TROOPS

This provision contemplates the use of the state's military power to put down an armed insurrection too strong to be controlled by civil authority,[2267] and the organization and maintenance of an active state militia is not a keeping of troops in time of peace within the prohibition of this clause.[2268]

INTERSTATE COMPACTS

Background of Clause

Except for the single limitation that the consent of Congress must be obtained, the original inherent sovereign rights of the states to make compacts with each other was not surrendered under the Constitution.[2269] "The Compact," as the Supreme Court has put it, "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations." [2270] In American history, the compact technique can be traced back to the numerous controversies that arose over the ill-defined boundaries of the original colonies.

[2261] Huse v. Glover, 119 U.S. 543, 549 (1886).
[2262] Steamship Co. v. Portwardens, 73 U.S. (6 Wall.) 31 (1867).
[2263] Peete v. Morgan, 86 U.S. (19 Wall.) 581 (1874).
[2264] Morgan v. Louisiana, 118 U.S. 455, 462 (1886).
[2265] Wiggins Ferry Co. v. City of East St. Louis, 107 U.S. 365 (1883). *See also* Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 212 (1885); Philadelphia Steamship Co. v. Pennsylvania, 122 U.S. 326, 338 (1887); Osborne v. City of Mobile, 83 U.S. (16 Wall.) 479, 481 (1873).
[2266] 79 U.S. (12 Wall.) 204, 217 (1871).
[2267] Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849).
[2268] Presser v. Illinois, 116 U.S. 252 (1886).
[2269] Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 209 (1837).
[2270] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104 (1938).

These disputes were usually resolved by negotiation, with the resulting agreement subject to approval by the Crown.[2271] When the political ties with Britain were broken, the Articles of Confederation provided for appeal to Congress in all disputes between two or more states over boundaries or "any cause whatever"[2272] and required the approval of Congress for any "treaty confederation or alliance" to which a state should be a party.[2273]

The Framers of the Constitution went further. By the first clause of this section they laid down an unqualified prohibition against "any treaty, alliance or confederation," and by the third clause they required the consent of Congress for "any agreement or compact." The significance of this distinction was pointed out by Chief Justice Taney in *Holmes v. Jennison*:[2274] "[A]s these words ['agreement' and 'compact'] could not have been idly or superfluously used by the framers of the constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive. . . . The word 'agreement,' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an 'agreement.' And the use of all of these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the constitution to use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification; and so apply it as to prohibit every agreement, written or verbal, formal or informal[,] positive or implied, by the mutual understanding of the parties."[2275] But, in *Virginia v. Tennessee*,[2276] decided more than a half century later, the Court shifted position, holding that the unqualified prohibition of compacts and agreements between states without the consent of Congress did not apply to agreements concerning such minor matters as adjustments of boundaries, which have no tendency to increase the political powers of the contracting states or to encroach upon the just supremacy of the United States. Adhering to this later understand-

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[2271] Frankfurter and Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 YALE L.J. 685, 691 (1925).

[2272] Article IX.

[2273] Article VI.

[2274] 39 U.S. (14 Pet.) 540 (1840).

[2275] 39 U.S. at 571, 572.

[2276] 148 U.S. 503, 518 (1893). *See also* Stearns v. Minnesota, 179 U.S. 223, 244 (1900).

ing of the clause, the Court found no enhancement of state power in relation to the Federal Government through entry into the Multistate Tax Compact, and thus sustained the agreement among participating states without congressional consent.[2277]

Subject Matter of Interstate Compacts

For many years after the Constitution was adopted, boundary disputes continued to predominate as the subject matter of agreements among the states. Since the turn of the twentieth century, however, the interstate compact has been used to an increasing extent as an instrument for state cooperation in carrying out affirmative programs for solving common problems.[2278] The execution of vast public undertakings, such as the development of the Port of New York by the Port Authority created by compact between New York and New Jersey, flood control, the prevention of pollution, and the conservation and allocation of water supplied by interstate streams, are among the objectives accomplished by this means. Another important use of this device was recognized by Congress in the act of June 6, 1934,[2279] whereby it consented in advance to agreements for the control of crime. The first response to this stimulus was the Crime Compact of 1934, providing for the supervision of parolees and probationers, to which most of the states have given adherence.[2280] Subsequently, Congress has authorized, on varying conditions, compacts touching the production of tobacco, the conservation of natural gas, the regulation of fishing in inland waters, the furtherance of flood and pollution control, and other matters. Moreover, many states have set up permanent commissions for interstate cooperation, which have led to the formation of a Council of State Governments, the creation of special commissions for the study of the crime problem, the problem of highway safety, the trailer problem, problems created by social security legislation, and the framing of uniform state legislation for dealing with some of these.[2281]

Consent of Congress

The Constitution makes no provision with regard to the time when the consent of Congress shall be given or the mode or form

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[2277] United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978). *See also* New Hampshire v. Maine, 426 U.S. 363 (1976).

[2278] Frankfurter and Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925); F. ZIMMERMAN AND M. WENDELL, INTERSTATE COMPACTS SINCE 1925 (1951); F. ZIMMERMAN AND M. WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS (1961).

[2279] 48 Stat. 909 (1934).

[2280] F. ZIMMERMAN AND M. WENDELL, INTERSTATE COMPACTS SINCE 1925 91 (1951).

[2281] 7 U.S.C. § 515; 15 U.S.C. § 717j; 16 U.S.C. § 552; 33 U.S.C. §§ 11, 567–567b.

by which it shall be signified.[2282] While the consent will usually precede the compact or agreement, it may be given subsequently where the agreement relates to a matter which could not be well considered until its nature is fully developed.[2283] The required consent is not necessarily an expressed consent; it may be inferred from circumstances.[2284] It is sufficiently indicated, when not necessary to be made in advance, by the approval of proceedings taken under it.[2285] The consent of Congress may be granted conditionally "upon terms appropriate to the subject and transgressing no constitutional limitations." [2286] Congress does not, by giving its consent to a compact, relinquish or restrict its own powers, as for example, its power to regulate interstate commerce.[2287]

Grants of Franchise to Corporations by Two States

It is competent for a railroad corporation organized under the laws of one state, when authorized so to do by the consent of the state that created it, to accept authority from another state to extend its railroad into such state and to receive a grant of powers to own and control, by lease or purchase, railroads therein and to subject itself to such rules and regulations as may be prescribed by the second state. Such legislation on the part of two or more states is not, in the absence of inhibitory legislation by Congress, regarded as within the constitutional prohibition of agreements or compacts between states.[2288]

Legal Effect of Interstate Compacts

Whenever, by the agreement of the states concerned and the consent of Congress, an interstate compact comes into operation, it has the same effect as a treaty between sovereign powers. Boundaries established by such compacts become binding upon all citizens of the signatory states and are conclusive as to their rights.[2289] Private rights may be affected by agreements for the equitable apportionment of the water of an interstate stream, without a judi-

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[2282] Green v. Biddle, 21 U.S. (8 Wheat.) 1, 85 (1823).

[2283] Virginia v. Tennessee, 148 U.S. 503 (1893).

[2284] Virginia v. West Virginia, 78 U.S. (11 Wall.) 39 (1871).

[2285] Wharton v. Wise, 153 U.S. 155, 173 (1894).

[2286] James v. Dravo Contracting Co., 302 U.S. 134 (1937). *See also* Arizona v. California, 292 U.S. 341, 345 (1934). When it approved the New York-New Jersey Waterfront Compact, 67 Stat. 541, Congress, for the first time, expressly gave its consent to the subsequent adoption of implementing legislation by the participating states. DeVeau v. Braisted, 363 U.S. 144, 145 (1960).

[2287] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856).

[2288] St. Louis & S.F. Ry. v. James, 161 U.S. 545, 562 (1896).

[2289] Poole v. Fleeger, 36 U.S. (11 Pet.) 185, 209 (1837); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 725 (1838).

cial determination of existing rights.[2290] Valid interstate compacts are within the protection of the Contract Clause,[2291] and a "sue and be sued" provision therein operates as a waiver of immunity from suit in federal courts otherwise afforded by the Eleventh Amendment.[2292] The Supreme Court in the exercise of its original jurisdiction may enforce interstate compacts following principles of general contract law.[2293] Congress also has authority to compel compliance with such compacts.[2294] Nor may a state read herself out of a compact which she has ratified and to which Congress has consented by pleading that under the state's constitution as interpreted by the highest state court she had lacked power to enter into such an agreement and was without power to meet certain obligations thereunder. The final construction of the state constitution in such a case rests with the Supreme Court.[2295]

[2290] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104, 106 (1938).

[2291] Green v. Biddle, 21 U.S. (8 Wheat.) 1, 13 (1823); Virginia v. West Virginia, 246 U.S. 565 (1918). *See also* Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 566 (1852); Olin v. Kitzmiller, 259 U.S. 260 (1922).

[2292] Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[2293] Texas v. New Mexico, 482 U.S. 124 (1987). If the compact makes no provision for resolving impasse, then the Court may exercise its jurisdiction to apportion waters of interstate streams. In doing so, however, the Court will not rewrite the compact by ordering appointment of a third voting commissioner to serve as a tie-breaker; rather, the Court will attempt to apply the compact to the extent that its provisions govern the controversy. Texas v. New Mexico, 462 U.S. 554 (1983).

[2294] Virginia v. West Virginia, 246 U.S. 565, 601 (1918).

[2295] Dyer v. Sims, 341 U.S. 22 (1951).

ARTICLE II

EXECUTIVE DEPARTMENT

CONTENTS

EXECUTIVE DEPARTMENT

ARTICLE II

SECTION 1. Clause 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years and, together with the Vice President, chosen for the same Term, be elected, as follows:

NATURE AND SCOPE OF PRESIDENTIAL POWER

Creation of the Presidency

Of all the issues confronting the members of the Philadelphia Convention, the nature of the presidency ranks among the most important and the resolution of the question one of the most significant steps taken.[1] The immediate source of Article II was the New York constitution, in which the governor was elected by the people and was thus independent of the legislature, his term was three years and he was indefinitely re-eligible, his decisions except with regard to appointments and vetoes were unencumbered with a council, he was in charge of the militia, he possessed the pardoning power, and he was charged to take care that the laws were faithfully executed.[2] But, from when the Convention assembled and almost to its closing days, there was no assurance that the executive department would not be headed by plural administrators, would not be unalterably tied to the legislature, and would not be devoid of many of the powers normally associated with an executive.

Debate in the Convention proceeded against a background of many things, but most certainly uppermost in the delegates' minds was the experience of the states and of the national government under the Articles of Confederation. Reacting to the exercise of powers by the royal governors, the framers of the state constitutions had generally created weak executives and strong legislatures, though

[1] The background and the action of the Convention is comprehensively examined in C. THACH, THE CREATION OF THE PRESIDENCY 1775–1789 (1923). A review of the Constitution's provisions being put into operation is J. HART, THE AMERICAN PRESIDENCY IN ACTION 1789 (1948).

[2] Hamilton observed the similarities and differences between the President and the New York Governor in THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 462–470. On the text, *see* New York Constitution of 1777, Articles XVII–XIX, in 5 F. Thorpe, *The Federal and State Constitutions*, H. DOC. NO. 357, 59th Congress, 2d sess. (1909), 2632–2633.

not in all instances. The Articles of Confederation vested all powers in a unicameral congress. Experience had demonstrated that harm was to be feared as much from an unfettered legislature as from an uncurbed executive and that many advantages of a reasonably strong executive could not be conferred on the legislative body.[3]

Nevertheless, the Virginia Plan, which formed the basis of discussion, offered in somewhat vague language a weak executive. Selection was to be by the legislature, and that body was to determine the major part of executive competency. The executive's salary was, however, to be fixed and not subject to change by the legislative branch during the term of the executive, and he was ineligible for re-election so that he need not defer overly to the legislature. A council of revision was provided, of which the executive was a part, with power to negative national and state legislation. The executive power was said to be the power to "execute the national laws" and to "enjoy the Executive rights vested in Congress by the Confederation." The Plan did not provide for a single or plural executive, leaving that issue open.[4]

When the executive portion of the Plan was taken up on June 1, James Wilson immediately moved that the executive should consist of a single person.[5] In the course of his remarks, Wilson demonstrated his belief in a strong executive, advocating election by the people, which would free the executive of dependence on the national legislature and on the states, proposing indefinite reeligibility, and preferring an absolute negative though in concurrence with a council of revision.[6] The vote on Wilson's motion was put over until the questions of method of selection, term, mode of removal, and powers to be conferred had been considered; subsequently, the motion carried,[7] and the possibility of the development of a strong President was made real.

Only slightly less important was the decision finally arrived at not to provide for an executive council, which would participate not only in the executive's exercise of the veto power but also in the exercise of all his executive duties, notably appointments and treaty making. Despite strong support for such a council, the Convention ultimately rejected the proposal and adopted language vesting in

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[3] C. Thach, The Creation of the Presidency 1775–1789 chs. 1–3 (1923).

[4] The plans offered and the debate is reviewed in C. Thach, The Creation of the Presidency 1775–1789 ch. 4 (1923). The text of the Virginia Plan may be found in 1 M. Farrand, The Records of the Federal Convention of 1787 21 (rev. ed. 1937).

[5] Id. at 65.

[6] Id. at 65, 66, 68, 69, 70, 71, 73.

[7] Id. at 93.

the Senate the power to "advise and consent" with regard to these matters.[8]

Finally, the designation of the executive as the "President of the United States" was made in a tentative draft reported by the Committee on Detail[9] and accepted by the Convention without discussion.[10] The same clause had provided that the President's title was to be "His Excellency,"[11] and, while this language was also accepted without discussion,[12] it was subsequently omitted by the Committee on Style and Arrangement[13] with no statement of the reason and no comment in the Convention.

Executive Power: Theory of the Presidential Office

The most obvious meaning of the language of Article II, § 1, is to confirm that the executive power is vested in a single person, but almost from the beginning it has been contended that the words mean much more than this simple designation of locus. Indeed, contention with regard to this language reflects the much larger debate about the nature of the Presidency. With Justice Jackson, we "may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other."[14] At the least, it is no doubt true that the "loose and general expressions" by which the powers and duties of the executive branch are denominated[15] place the President in a position in which he, as Professor Woodrow Wilson noted, "has the right, in law and conscience, to be as big a man as he can" and in which "only his capacity will set the limit."[16]

Hamilton and Madison.—Hamilton's defense of President Washington's issuance of a neutrality proclamation upon the outbreak of

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[8] The last proposal for a council was voted down on September 7. 2 id. at 542.
[9] Id. at 185.
[10] Id. at 401.
[11] Id. at 185.
[12] Id. at 401.
[13] Id. at 597.
[14] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–635 (1952) (concurring opinion).
[15] A. Upshur, A Brief Enquiry into the True Nature and Character of Our Federal Government 116 (1840).
[16] W. Wilson, Constitutional Government in the United States 202, 205 (1908).

war between France and Great Britain contains not only the lines but most of the content of the argument that Article II vests significant powers in the President as possessor of executive powers not enumerated in subsequent sections of Article II.[17] Hamilton wrote: "The second article of the Constitution of the United States, section first, establishes this general proposition, that 'the Executive Power shall be vested in a President of the United States of America.' The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed*. It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties."

"The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, 'All legislative powers herein granted shall be vested in a Congress of the United States.' In that which grants the executive power, the expressions are, 'The *executive power* shall be vested in a President of the United States.' The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government. The general doctrine of our Constitution then is, that the *executive power*

[17] 32 WRITINGS OF GEORGE WASHINGTON 430 (J. Fitzpatrick ed., 1939). *See* C. THOMAS, AMERICAN NEUTRALITY IN 1793: A STUDY IN CABINET GOVERNMENT (1931).

of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument." [18]

Madison's reply to Hamilton, in five closely reasoned articles,[19] was almost exclusively directed to Hamilton's development of the contention from the quoted language that the conduct of foreign relations was in its nature an executive function and that the powers vested in Congress which bore on this function, such as the power to declare war, did not diminish the discretion of the President in the exercise of his powers. Madison's principal reliance was on the vesting of the power to declare war in Congress, thus making it a legislative function rather than an executive one, combined with the argument that possession of the exclusive power carried with it the exclusive right to judgment about the obligations to go to war or to stay at peace, negating the power of the President to proclaim the nation's neutrality. Implicit in the argument was the rejection of the view that the first section of Article II bestowed powers not vested in subsequent sections. "Were it once established that the powers of war and treaty are in their nature executive; that so far as they are not by strict construction transferred to the legislature, they actually belong to the executive; that of course all powers not less executive in their nature than those powers, if not granted to the legislature, may be claimed by the executive; if granted, are to be taken strictly, with a residuary right in the executive; or . . . perhaps claimed as a concurrent right by the executive; and no citizen could any longer guess at the character of the government under which he lives; the most penetrating jurist would be unable to scan the extent of constructive prerogative." [20] The arguments are today pursued with as great fervor, as great learning, and with two hundred years experience, but the constitutional part of the contentiousness still settles upon the reading of the vesting clauses of Articles I, II, and III.[21]

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[18] 7 WORKS OF ALEXANDER HAMILTON 76, 80–81 (J. C. Hamilton ed., 1851) (emphasis in original).

[19] 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 611–654 (1865).

[20] Id. at 621. In the congressional debates on the President's power to remove executive officeholders, *cf.* C. THACH, THE CREATION OF THE PRESIDENCY 1775–1789 ch. 6 (1923), Madison had urged contentions quite similar to Hamilton's, finding in the first section of Article II and in the obligation to execute the laws a vesting of executive powers sufficient to contain the power solely on his behalf to remove subordinates. 1 ANNALS OF CONGRESS 496–497. Madison's language here was to be heavily relied on by Chief Justice Taft on this point in Myers v. United States, 272 U.S. 52, 115–126 (1926), *but compare*, Corwin, *The President's Removal Power Under the Constitution*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467, 1474–1483, 1485–1486 (1938).

[21] *Compare* Calabresi & Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992), *with* Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994), and responses by Calabresi, Rhodes and Froomkin, id. at 1377, 1406, 1420.

The Myers Case.—However much the two arguments are still subject to dispute, Chief Justice Taft, himself a former President, appears in *Myers v. United States*[22] to have carried a majority of the Court with him in establishing the Hamiltonian conception as official doctrine. That case confirmed one reading of the "Decision of 1789" in holding the removal power to be constitutionally vested in the President.[23] But its importance here lies in its interpretation of the first section of Article II. That language was read, with extensive quotation from Hamilton and from Madison on the removal power, as vesting all executive power in the President, the subsequent language was read as merely particularizing some of this power, and consequently the powers vested in Congress were read as exceptions which must be strictly construed in favor of powers retained by the President.[24] *Myers* remains the fountainhead of the latitudinarian constructionists of presidential power, but its *dicta*, with regard to the removal power, were first circumscribed in *Humphrey's Executor v. United States*,[25] and then considerably altered in *Morrison v. Olson*;[26] with regard to the President's "inherent" powers, the *Myers* dicta were called into considerable question by *Youngstown Sheet & Tube Co. v. Sawyer*.[27]

The Curtiss-Wright Case.—Further Court support of the Hamiltonian view was advanced in *United States v. Curtiss-Wright Export Corp.*,[28] in which Justice Sutherland posited the doctrine that the power of the National Government in foreign relations is not one of enumerated powers, but rather is inherent. The doctrine was then combined with Hamilton's contention that control of foreign relations is exclusively an executive function with obvious implications for the power of the President. The case arose as a challenge to the delegation of power from Congress to the President with regard to a foreign relations matter. Justice Sutherland denied that

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[22] 272 U.S. 52 (1926). *See* Corwin, *The President's Removal Power Under the Constitution*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467 (1938).

[23] C. THACH, THE CREATION OF THE PRESIDENCY, 1775–1789, ch. 6 (1923).

[24] Myers v. United States, 272 U.S. 52, 163–164 (1926). Professor Taft had held different views. "The true view of the executive functions is, as I conceive it, that the president can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary in its exercise. Such specific grant must be either in the federal constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest. . . ." W. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139–140 (1916).

[25] 295 U.S. 602 (1935).

[26] 487 U.S. 654, 685–93 (1988).

[27] 343 U.S. 579 (1952).

[28] 299 U.S. 304 (1936).

the limitations on delegation in the domestic field were at all relevant in foreign affairs:

"The broad statement that the Federal Government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. . . ."

"As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. . . ."

"It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have been vested in the Federal Government as necessary concomitants of nationality. . . ."

"Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." [29]

Scholarly criticism of Justice Sutherland's reasoning has demonstrated that his essential postulate, the passing of sovereignty in external affairs directly from the British Crown to the colonies as a collective unit, is in error.[30] Dicta in later cases controvert the con-

[29] 299 U.S. at 315–16, 318, 319.

[30] Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L. J. 467 (1946); Patterson, *In re United States v. Curtiss-Wright Corp.*, 22 TEXAS L. REV. 286, 445 (1944); Lofgren, *United States v. Curtiss-Wright Corporation: An Historical Reassessment*, 83 YALE L. J. 1 (1973), reprinted in C. LOFGREN, GOVERNMENT FROM REFLECTION AND CHOICE: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 167 (1986).

clusions drawn in *Curtiss-Wright* about the foreign relations power being inherent rather than subject to the limitations of the delegated powers doctrine.[31] The holding in *Kent v. Dulles*[32] that delegation to the Executive of discretion in the issuance of passports must be measured by the usual standards applied in domestic delegations appeared to circumscribe Justice Sutherland's more expansive view, but the subsequent limitation of that decision, though formally reasoned within its analytical framework, coupled with language addressed to the President's authority in foreign affairs, leaves clouded the vitality of that decision.[33] The case nonetheless remains with *Myers v. United States* the source and support of those contending for broad inherent executive powers.[34]

The Youngstown Case.—The first case in the post-World War II era to consider extensively the "inherent" powers of the President, or the issue of what executive powers are vested by the first section of Article II, was *Youngstown Sheet & Tube Co. v. Sawyer*,[35] but its multiple opinions did not reflect a uniform understanding of these matters. During the Korean War, President Truman seized the steel industry, then in the throes of a strike. No statute authorized the seizure, and the Solicitor General defended the action as

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[31] *E.g.*, *Ex parte* Quirin, 317 U.S. 1, 25 (1942) (Chief Justice Stone); Reid v. Covert, 354 U.S. 1, 5–6 (1957) (plurality opinion, per Justice Black).

[32] 357 U.S. 116, 129 (1958).

[33] Haig v. Agee, 453 U.S. 280 (1981). For the reliance on *Curtiss-Wright*, *see* id. at 291, 293–94 & n.24, 307–08. *But see* Dames & Moore v. Regan, 453 U.S. 654, 659–62 (1981), qualified by id. at 678. *Compare* Webster v. Doe, 486 U.S. 592 (1988) (construing National Security Act as not precluding judicial review of constitutional challenges to CIA Director's dismissal of employee, over dissent relying in part on *Curtiss-Wright* as interpretive force counseling denial of judicial review), *with* Department of the Navy v. Egan, 484 U.S. 518 (1988) (denying Merit Systems Protection Board authority to review the substance of an underlying security-clearance determination in reviewing an adverse action and noticing favorably President's inherent power to protect information without any explicit legislative grant). In Loving v. United States, 517 U.S. 748 (1996), the Court recurred to the original setting of *Curtiss-Wright*, a delegation to the President without standards. Congress, the Court found, had delegated to the President authority to structure the death penalty provisions of military law so as to bring the procedures, relating to aggravating and mitigating factors, into line with constitutional requirements, but Congress had provided no standards to guide the presidential exercise of the authority. Standards were not required, held the Court, because his role as Commander-in-Chief gave him responsibility to superintend the military establishment and Congress and the President had interlinked authorities with respect to the military. Where the entity exercising the delegated authority itself possesses independent authority over the subject matter, the familiar limitations on delegation do not apply. Id. at 771–74.

[34] That the opinion "remains authoritative doctrine" is stated in L. Henkin, Foreign Affairs and the Constitution 25–26 (1972). It is used as an interpretive precedent in American Law Institute, Restatement (Third) of the Law, The Foreign Relations Law of the United States see, *e.g.*, §§ 1, 204, 339 (1987). The Restatement is circumspect, however, about the reach of the opinion in controversies between presidential and congressional powers.

[35] 343 U.S. 579 (1952).

an exercise of the President's executive powers that were conveyed by the first section of Article II, by the obligation to enforce the laws, and by the vesting of the function of commander-in-chief. By vote of six-to-three, the Court rejected this argument and held the seizure void. But the doctrinal problem is complicated by the fact that Congress had expressly rejected seizure proposals in considering labor legislation and had authorized procedures not followed by the President that did not include seizure. Thus, four of the majority Justices [36] appear to have been decisively influenced by the fact that Congress had denied the power claimed and that this in an area in which the Constitution vested the power to decide at least concurrently if not exclusively in Congress. Three and perhaps four Justices [37] appear to have rejected the government's argument on the merits while three [38] accepted it in large measure. Despite the inconclusiveness of the opinions, it seems clear that the result was a substantial retreat from the proclamation of vast presidential powers made in *Myers* and *Curtiss-Wright*.[39]

The Zivotofsky Case.—The Supreme Court's decision in *Zivotofsky v. Kerry* appears to be the first instance in which the Court held that an act of Congress unconstitutionally infringed upon a foreign affairs power of the President.[40] The case concerned a legislative

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[36] 343 U.S. 593, 597–602 (Justice Frankfurter concurring, though he also noted he expressly joined Justice Black's opinion as well), 634, 635–40 (Justice Jackson concurring), 655, 657 (Justice Burton concurring), 660 (Justice Clark concurring).

[37] 343 U.S. at 582 (Justice Black delivering the opinion of the Court), 629 (Justice Douglas concurring, but note his use of the Fifth Amendment just compensation argument), 634 (Justice Jackson concurring), 655 (Justice Burton concurring).

[38] 343 U.S. at 667 (Chief Justice Vinson and Justices Reed and Minton dissenting).

[39] Myers v. United States, 272 U.S. 52 (1926); United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). In Dames & Moore v. Regan, 453 U.S. 654, 659–62, 668–69 (1981), the Court turned to *Youngstown* as embodying "much relevant analysis" on an issue of presidential power. And, in Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006), the Court cited *Youngstown* with approval, as did Justice Kennedy, in a concurring opinion joined by three other Justices, id. at 638.

[40] Zivotofsky v. Kerry, 576 U.S. ___, No. 13–628, slip op. at 2 (2015). It appears that in every prior instance where the Supreme Court considered executive action in the field of foreign affairs that conflicted with the requirements of a federal statute, the Court had ruled the executive action invalid. *See id.* at 2 (Roberts, C.J., dissenting) ("For our first 225 years, no President prevailed when contradicting a statute in the field of foreign affairs."); Medellin v. Texas, 552 U.S. 491 (2008) (President could not direct state courts to reconsider cases barred from further review by state and federal procedural rules in order to implement requirements flowing from a ratified U.S. treaty that was not self-executing, as legislative authorization from Congress was required); Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (military tribunals convened by presidential order did not comply with the Uniform Code of Military Justice); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804) (upholding damage award to owners of U.S. merchant ship seized during quasi-war with France, when Congress had not authorized such seizures).

enactment requiring the Secretary of State to identity a Jerusalem-born U.S. citizen's place of birth as "Israel" on his passport if requested by the citizen or his legal guardian.[41] The State Department had declined to follow this statutory command, citing longstanding executive policy of declining to recognize any country's sovereignty over the city of Jerusalem.[42] It argued the statute impermissibly intruded upon the President's constitutional authority over the recognition of foreign nations and their territorial bounds, and attempted to compel "the President to contradict his recognition position regarding Jerusalem in official communications with foreign sovereigns."[43]

The *Zivotofsky* Court evaluated the permissibility of the State Department's non-adherence to a statutory command using the framework established by Justice Jackson's concurring opinion in *Youngstown*, under which executive action taken in contravention of a legislative enactment will only be sustained if the President's asserted power is both "exclusive" and "conclusive" on the matter.[44] The Constitution does not specifically identify the recognition of foreign governments among either Congress's or the President's enumerated powers. But in an opinion that employed multiple modes of constitutional interpretation, the Court concluded that the Constitution not only conferred recognition power to the President, but also that this power was not shared with Congress.

The Court's analysis of recognition began with an examination of "the text and structure of the Constitution," which it construed as reflecting the Founders' understanding that the recognition power was exercised by the President.[45] Much of the Court's discussion of the textual basis for the recognition power focused on the President's responsibility under the Reception Clause to "receive Ambassadors and other public Ministers."[46] At the time of the founding, the Court reasoned, receiving ambassadors of a foreign government was tantamount to recognizing the foreign entity's sovereign claims, and it was logical to infer "a Clause directing the President

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[41] Foreign Relations Authorization Act, Fiscal Year 2003, P.L. 107–228, § 214(d), 116 Stat. 1350, 1366 (2002).

[42] *Zivotofsky*, slip op. at 4. The State Department's Foreign Affairs Manual generally provides that in issuing passports to U.S. citizens born abroad, the passport shall identify the country presently exercising sovereignty over the citizen's birth location. 7 Foreign Affairs Manual § 1330 Appendix D (2008). The Manual provides that employees should "write JERUSALEM as the place of birth in the passport. Do not write Israel, Jordan or West Bank for a person born within the current municipal borders of Jerusalem." Id. at § 1360 Appendix D.

[43] *Zivotofsky*, slip op. at 7 (quoting Brief from Respondent at 48).

[44] *Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 637–38 (1952) (Jackson, J., concurring)).

[45] *Id.* at 8–11.

[46] U.S. CONST., art. II, § 3, cl. 4. *Zivotofsky*, slip op. at 9–10.

alone to receive ambassadors" as "being understood to acknowledge his power to recognize other nations."[47] In addition to the Reception Clause, the *Zivotofsky* Court identified additional Article II provisions as providing support for the inference that the President retains the recognition power,[48] including the President's power to "make Treaties" with the advice and consent of the Senate,[49] and to appoint ambassadors and other ministers and consuls with Senate approval.[50]

The *Zivotofsky* Court emphasized "functional considerations" supporting the Executive's claims of exclusive authority over recognition,[51] stating that recognition is a matter on which the United States must "speak with . . . one voice,"[52] and the executive branch is better suited than Congress to exercise this power for several reasons, including its "characteristic of unity at all times," as well as its ability to engage in "delicate and often secret diplomatic contacts that may lead to a decision on recognition" and "take the decisive, unequivocal action necessary to recognize other states at international law."[53]

The Court also concluded that historical practice and prior jurisprudence gave credence to the President's unilateral exercise of the recognition power. Here, the Court acknowledged that the historical record did not provide unequivocal support for this view, but characterized "the weight" of historical evidence as reflecting an understanding that the President's power over recognition is exclusive.[54] Although the Executive had consistently claimed unilateral recognition authority from the Washington Administration onward, and Congress had generally acquiesced to the President's exercise of such authority, there were instances in which Congress also played a role in matters of recognition. But the *Zivotofsky* Court observed that in all earlier instances, congressional action was consistent with,

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[47] *Zivotofsky*, slip op. at 9–10. The Court observed that records of the Constitutional Convention were largely silent on the recognition power, but that contemporary writings by prominent international legal scholars identified the act of receiving ambassadors as the virtual equivalent of recognizing the sovereignty of the sending state. *Id.* at 9.

[48] Justice Thomas, writing separately and concurring in part with the majority's judgment, would have located the primary source of the President's recognition power as the Vesting Clause. *Zivotofsky*, slip op. at 1 (Thomas, J., concurring and dissenting in part with the Court's judgment). The controlling five-Justice opinion declined to reach the issue of whether the Vesting Clause provided such support. *Zivotofsky*, slip op. at 10 (majority opinion).

[49] U.S. CONST., art. II, § 2, cl. 2.

[50] *Id.*

[51] *Zivotofsky*, slip op. at 11.

[52] *Id.* (quoting Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 424 (2003), and Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000)).

[53] *Id.*

[54] *Id.* at 20.

and deferential to, the President's recognition policy, and the Court characterized prior congressional involvement as indicating "no more than that some Presidents have chosen to cooperate with Congress, not that Congress itself has exercised the recognition power."[55] The Court also stated that a "fair reading" of its prior jurisprudence demonstrated a longstanding understanding of the recognition power as an executive function, notwithstanding "some isolated statements" in those cases that might have suggested a congressional role.[56]

Having determined that the Constitution assigns the President with exclusive authority over recognition of foreign sovereigns, the *Zivotofsky* Court ruled that the statutory directive that the State Department honor passport requests of Jerusalem-born U.S. citizens to have their birthplace identified as "Israel" was an impermissible intrusion on the President's recognition authority. According to the Court, Congress's authority to regulate the issuance of passports, though wide in scope, may not be exercised in a manner intended to compel the Executive "to contradict an earlier recognition determination in an official document of the Executive Branch" that is addressed to foreign powers.[57]

While the *Zivotofsky* decision establishes that the recognition power belongs exclusively to the President, its relevance to other foreign affairs issues remains unclear. The opinion applied a functionalist approach in assessing the exclusivity of executive power on the issue of recognition, but did not opine on whether this approach was appropriate for resolving other inter-branch disputes concerning the allocation of constitutional authority in the field of foreign affairs. The *Zivotofsky* Court also declined to endorse the Executive's broader claim of exclusive or preeminent presidential

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[55] *Id.* The Court observed that in no prior instance had Congress enacted a statute "contrary to the President's formal and considered statement concerning recognition." *Id.* at 21 (citing Zivotofsky v. Secretary of State, 725 F.3d 197, 203, 221 (D.C. Cir. 2013) (Tatel, J., concurring)).

[56] *See id.* at 14. The Court observed that earlier rulings touching on the recognition power had dealt with the division of power between the judicial and political branches of the federal government, or between the federal government and the states. *Id.* at 14–16 (citing Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 410 (1963) (involving the application of the act of state doctrine to the government of Cuba and stating that "[p]olitical recognition is exclusively a function of the Executive"); United States v. Pink, 315 U.S. 203 (1942) (concerning effect of executive agreement involving the recognition of the Soviet Union and settlement of claims disputes upon state law); United States v. Belmont, 301 U.S. 324 (1937) (similar to *Pink*); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839) (ruling that an executive determination concerning foreign sovereign claims to the Falkland Islands was conclusive upon the judiciary)).

[57] *See id.* at 29. The Court approvingly cited its description in *Urtetiqui v. D'Arcy*, 34 U.S. (9 Pet.) 692 (1835), of a passport as being, "from its nature and object . . . addressed to foreign powers." See *Zivotofsky*, slip op. at 27.

authority over foreign relations, and it appeared to minimize the reach of some of the Court's earlier statements in *Curtiss-Wright*[58] regarding the expansive scope of the President's foreign affairs power.[59] The Court also repeatedly noted Congress's ample power to legislate on foreign affairs, including on matters that precede and follow from the President's act of foreign recognition and in ways that could render recognition a "hollow act."[60] For example, Congress could institute a trade embargo, declare war upon a foreign government that the President had recognized, or decline to appropriate funds for an embassy in that country. While all of these actions could potentially be employed by the legislative branch to express opposition to executive policy, they would not impermissibly interfere with the President's recognition power.[61]

The Practice in the Presidential Office.—However contested the theory of expansive presidential powers, the practice in fact has been one of expansion of those powers, an expansion that a number of "weak" Presidents and the temporary ascendancy of Congress in the wake of the Civil War has not stemmed. Perhaps the point of no return in this area was reached in 1801 when the Jefferson-Madison "strict constructionists" came to power and, instead of diminishing executive power and federal power in general, acted rather to enlarge both, notably by the latitudinarian construction of implied federal powers to justify the Louisiana Purchase.[62] After a brief lapse into Cabinet government, the executive in the hands of Andrew Jackson stamped upon the presidency the outstanding features of its final character, thereby reviving, in the opinion of Henry Jones Ford, "the oldest political institution of the race, the elective Kingship."[63] Although the modern theory of presidential power was conceived primarily by Alexander Hamilton, the mod-

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[58] *See* United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936). For further discussion of this case, *see supra* Section 1. The President: Clause 1. Powers and Term of the President: Executive Power: Theory of the Presidential Office: The *Curtiss-Wright* Case.

[59] The majority opinion observed that *Curtiss-Wright* had considered the constitutionality of a congressional delegation of power to the President, and that its description of the Executive as the sole organ of foreign affairs was not essential to its holding in the case. *Zivotofsky*, slip op. at 18.

[60] *Id.* at 13.

[61] *Id.* at 13, 27.

[62] For the debates on the constitutionality of the Purchase, *see* E. Brown, The Constitutional History of the Louisiana Purchase, 1803–1812 (1920). The differences and similarities between the Jeffersonians and the Federalists can be seen by comparing L. White, The Jeffersonians: A Study in Administrative History 1801–1829 (1951), with L. White, The Federalists: A Study in Administrative History (1948). That the responsibilities of office did not turn the Jeffersonians into Hamiltonians may be gleaned from Madison's veto of an internal improvements bill. 2 Messages and Papers of the Presidents 569 (J. Richardson comp., 1897).

[63] H. Ford, The Rise and Growth of American Politics 293 (1898).

ern conception of the presidential office was the contribution primarily of Andrew Jackson.[64]

Executive Power: Separation-of-Powers Judicial Protection

In recent cases, the Supreme Court has pronouncedly protected the Executive Branch, applying separation-of-powers principles to invalidate what it perceived to be congressional usurpation of executive power, but its mode of analysis has lately shifted to permit Congress a greater degree of discretion.[65]

Significant change in the position of the Executive Branch respecting its position on separation of powers may be discerned in two briefs of the Department of Justice's Office of Legal Counsel, which may spell some measure of judicial modification of the formalist doctrine of separation and adoption of the functionalist approach to the doctrine.[66] The two opinions withdraw from the Department's earlier contention, following *Buckley v. Valeo*, that the execution of the laws is an executive function that may be carried out only by persons appointed pursuant to the Appointments Clause, thus precluding delegations to state and local officers and to private parties (as in *qui tam* actions), as well as providing glosses on the Take Care Clause (Article II, § 3) and other provisions of the Constitution. Whether these memoranda signal long-term change depends on several factors, including whether they are adhered to by subsequent administrations.

In striking down the congressional veto as circumventing Article I's bicameralism and presentment requirements attending the exercise of legislative power, the Court also suggested in *INS v. Chadha*[67] that the particular provision in question, involving veto of the Attorney General's decision to suspend deportation of an alien,

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[64] E. Corwin, The President: Office and Powers 1787–1957, ch. 1 (4th ed. 1957).

[65] Some cases also did so prior to the present period. *See* Myers v. United States, 272 U.S. 52 (1926). But a hallmark of previous disputes between President and Congress has been the use of political combat to resolve them, rather than a resort to the courts. The beginning of the present period was Buckley v. Valeo, 424 U.S. 1, 109–43 (1976).

[66] Memorandum for John Schmidt, Associate Attorney General, from Assistant Attorney General Walter Dellinger, re: Constitutional Limitations on Federal Government Participation in Binding Arbitration (Sept. 7, 1995); *Memorandum for the General Counsels of the Federal Government*, from Assistant Attorney General Walter Dellinger, re: The Constitutional Separation of Powers Between the President and Congress (May 7, 1996). The principles laid down in the memoranda depart significantly from previous positions of the Department of Justice. For conflicting versions of the two approaches, *see Constitutional Implications of the Chemical Weapons Convention: Hearings on the Constitution, Federalism, and Property Rights Before the Senate Judiciary Subcommittee*, 104th Cong., 2d Sess. (1996), 11–26, 107–10 (Professor John C. Woo), 80–106 (Deputy Assistant Attorney General Richard L. Shiffrin).

[67] 462 U.S. 919 (1983).

in effect allowed Congress impermissible participation in execution of the laws.[68] And, in *Bowsher v. Synar*,[69] the Court held that Congress had invalidly vested executive functions in a legislative branch official. Underlying both decisions was the premise, stated in Chief Justice Burger's opinion of the Court in *Chadha*, that "the powers delegated to the three Branches are functionally identifiable," distinct, and definable.[70] In a standing-to-sue case, Justice Scalia for the Court denied that Congress could by statute confer standing on citizens not suffering particularized injuries to sue the federal government to compel it to carry out a duty imposed by Congress, arguing that to permit this course would be to allow Congress to divest the President of his obligation under the Take Care Clause and to delegate the power to the judiciary.[71] On the other hand, in the independent counsel case, although acknowledging that the contested statute restricted a constitutionally delegated function (law enforcement), the Court upheld the statute, using a flexible analysis that emphasized that neither the legislative nor the judicial branch had aggrandized its power and that the incursion into executive power did not impermissibly interfere with the President's constitutionally assigned functions.[72]

At issue in *Synar* were the responsibilities vested in the Comptroller General by the "Gramm-Rudman-Hollings" Deficit Control Act,[73]

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[68] Although Chief Justice Burger's opinion of the Court described the veto decision as legislative in character, it also seemingly alluded to the executive nature of the decision to countermand the Attorney General's application of delegated power to a particular individual. "Disagreement with the Attorney General's decision on Chadha's deportation . . . involves determinations of policy that Congress can implement in only one way . . . . Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." 462 U.S. at 954–55. The Court's uncertainty is explicitly spelled out in Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[69] 478 U.S. 714 (1986).

[70] 462 U.S. at 951.

[71] Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–78 (1992). Evidently, however, although Justices Kennedy and Souter joined this part of the opinion, id. at 579 (concurring in part and concurring in the judgment), they do not fully subscribe to the apparent full reach of Justice Scalia's doctrinal position, leaving the position, if that be true, supported in full only by a plurality.

[72] Morrison v. Olson, 487 U.S. 654 (1988). The opinion by Chief Justice Rehnquist was joined by seven of the eight participating Justices. Only Justice Scalia dissented. In Mistretta v. United States, 488 U.S. 361, 390–91 (1989), the Court, approving the placement of the Sentencing Commission in the judicial branch, denied that executive powers were diminished because of the historic judicial responsibility to determine what sentence to impose on a convicted offender. Earlier, in Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987), the Court, in upholding the power of federal judges to appoint private counsel to prosecute contempt of court actions, rejected the assertion that the judiciary usurped executive power in appointing such counsel.

[73] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99–177, 99 Stat. 1038.

which set maximum deficit amounts for federal spending for fiscal years 1986 through 1991, and which directed across-the-board cuts in spending when projected deficits would exceed the target deficits. The Comptroller was to prepare a report for each fiscal year containing detailed estimates of projected federal revenues and expenditures, and specifying the reductions, if any, necessary to meet the statutory target. The President was required to implement the reductions specified in the Comptroller's report. The Court viewed these functions of the Comptroller "as plainly entailing execution of the law in constitutional terms. Interpreting a law . . . to implement the legislative mandate is the very essence of 'execution' of the law," especially where "exercise [of] judgment" is called for, and where the President is required to implement the interpretation.[74] Because Congress by earlier enactment had retained authority to remove the Comptroller General from office, the Court held, executive powers may not be delegated to him. "By placing the responsibility for execution of the [Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function."[75]

The Court in *Chadha* and *Synar* ignored or rejected assertions that its formalistic approach to separation of powers may bring into question the validity of delegations of legislative authority to the modern administrative state, sometimes called the "fourth branch." As Justice White asserted in dissent in *Chadha*, "by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments . . . . There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term."[76] Moreover, Justice White noted, "rules and adjudications by the agencies meet the Court's own definition of legislative action . . . ."[77] Justice Stevens, concurring in *Synar*, sounded the same chord in suggesting that the Court's holding should not depend on classification of "chameleon-like" powers as executive, legislative, or judicial.[78] The Court answered these assertions on two levels: that the bicameral protection "is not necessary" when legislative power has been delegated to another branch confined to implementing statutory standards set by Congress, and that "the Constitution does not so require."[79] In the same context, the Court acknowledged without disapproval that it had described some agency

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[74] 478 U.S. at 732–33.
[75] 478 U.S. at 734.
[76] 462 U.S. at 985–86.
[77] 462 U.S. at 989.
[78] 478 U.S. at 736, 750.
[79] 462 U.S. at 953 n.16.

action as resembling lawmaking.[80] Thus *Chadha* may not be read as requiring that all "legislative power" as the Court defined it must be exercised by Congress, and *Synar* may not be read as requiring that all "executive power" as the Court defined it must be exercised by the executive. A more limited reading is that when Congress elects to exercise legislative power itself rather than delegate it, it must follow the prescribed bicameralism and presentment procedures, and when Congress elects to delegate legislative power or assign executive functions to the executive branch, it may not control exercise of those functions by itself exercising removal (or appointment) powers.

A more flexible approach was followed in the independent counsel case. Here, there was no doubt that the statute limited the President's law enforcement powers. Upon a determination by the Attorney General that reasonable grounds exist for investigation or prosecution of certain high ranking government officials, he must notify a special, Article III court which appoints a special counsel. The counsel is assured full power and independent authority to investigate and, if warranted, to prosecute. Such counsel may be removed from office by the Attorney General only for cause as prescribed in the statute.[81] The independent counsel was assuredly more free from executive supervision than other federal prosecutors. Instead of striking down the law, however, the Court carefully assessed the degree to which executive power was invaded and the degree to which the President retained sufficient powers to carry out his constitutionally assigned duties. The Court also considered whether in enacting the statute Congress had attempted to aggrandize itself or had attempted to enlarge the judicial power at the expense of the executive.[82]

In the course of deciding that the President's action in approving the closure of a military base, pursuant to statutory authority, was not subject to judicial review, the Court enunciated a principle that may mean a great deal, constitutionally speaking, or that may not mean much of anything.[83] The lower court had held that, although review of presidential decisions on statutory grounds might be precluded, his decisions were reviewable for constitutionality; in that court's view, whenever the President acts in excess of his statutory authority, he also violates the Constitution's separation-of-powers doctrine. The Supreme Court found this analysis flawed. "Our

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[80] 462 U.S. at 953 n.16.

[81] Pub. L. 95–521, title VI, 92 Stat. 1867, as amended by Pub. L. 97–409, 96 Stat. 2039, and Pub. L. 100–191, 101 Stat. 1293, 28 U.S.C. §§ 49, 591 et seq.

[82] Morrison v. Olson, 487 U.S. at 693–96. *See also* Mistretta v. United States, 488 U.S. 361, 380–84, 390–91, 408–11 (1989).

[83] Dalton v. Specter, 511 U.S. 462 (1994).

cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority."[84] Thus, the Court distinguished between executive action undertaken without even the purported warrant of statutory authorization and executive action in excess of statutory authority. The former may violate separation of powers, but the latter will not.[85]

Doctrinally, the distinction is important and subject to unfortunate application.[86] Whether the brief, unilluminating discussion in *Dalton* will bear fruit in constitutional jurisprudence, however, is problematic.

TENURE

Formerly, the term of four years during which the President "shall hold office" was reckoned from March 4 of the alternate odd years beginning with 1789. This came about from the circumstance that under the act of September 13, 1788, of "the Old Congress," the first Wednesday in March, which was March 4, 1789, was fixed as the time for commencing proceedings under the Constitution. Although as a matter of fact Washington was not inaugurated until April 30 of that year, by an act approved March 1, 1792, it was provided that the presidential term should be reckoned from the fourth day of March next succeeding the date of election. And so things stood until the adoption of the Twentieth Amendment, by which the terms of President and Vice-President end at noon on the 20th of January.[87]

The prevailing sentiment of the Philadelphia Convention favored the indefinite eligibility of the President. It was Jefferson who raised the objection that indefinite eligibility would in fact be for

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[84] 511 U.S. at 472.

[85] *See The Supreme Court, Leading Cases, 1993 Term*, 108 HARV. L. REV. 139, 300–10 (1994).

[86] "As a matter of constitutional logic, the executive branch must have some warrant, either statutory or constitutional, for its actions. The source of all Federal Governmental authority is the Constitution and, because the Constitution contemplates that Congress may delegate a measure of its power to officials in the executive branch, statutes. The principle of separation of powers is a direct consequence of this scheme. Absent statutory authorization, it is unlawful for the President to exercise the powers of the other branches because the Constitution does not vest those powers in the President. The absence of statutory authorization is not merely a statutory defect; it is a constitutional defect as well." 108 HARV. L. REV. at 305–06 (footnote citations omitted).

[87] As to the meaning of "the fourth day of March," *see* Warren, *Political Practice and the Constitution*, 89 U. PA. L. REV. 1003 (1941).

life and degenerate into an inheritance. Prior to 1940, the idea that no President should hold office for more than two terms was generally thought to be a fixed tradition, although some quibbles had been raised as to the meaning of the word "term." The voters' departure from the tradition in electing President Franklin D. Roosevelt to third and fourth terms led to the proposal by Congress on March 24, 1947, of an amendment to the Constitution to embody the tradition in the Constitutional Document. The proposal became a part of the Constitution on February 27, 1951, in consequence of its adoption by the necessary thirty-sixth state, which was Minnesota.[88]

Clause 2. Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

Clause 3. The Electors shall meet in their respective States and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a majority of the whole Number of Electors appointed: and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Major-

[88] E. Corwin, supra at 34–38, 331–339.

ity, then from the five highest on the List the said House shall in like manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

Clause 4. The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

ELECTORAL COLLEGE

The electoral college was one of the compromises by which the delegates were able to agree on the document finally produced. "This subject," said James Wilson, referring to the issue of the manner in which the President was to be selected, "has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide."[89] Adoption of the electoral college plan came late in the Convention, which had previously adopted on four occasions provisions for election of the executive by the Congress and had twice defeated proposals for election by the people directly.[90] Itself the product of compromise, the electoral college probably did not work as any member of the Convention could have foreseen, because the development of political parties and nomination of presidential candidates through them and designation of electors by the parties soon reduced the concept of the elector as an independent force to the vanishing point in practice if not in theory.[91] But the college remains despite numerous

[89] 2 M. Farrand, supra, p. 501.

[90] 1 id. at 21, 68–69, 80–81, 175–76, 230, 244; 2 id. at 29–32, 57–59, 63–64, 95, 99–106, 108–15, 118–21, 196–97, 401–04, 497, 499–502, 511–15, 522–29.

[91] *See* J. Ceaser, Presidential Selection: Theory and Development (1979); N. Pierce, The Peoples President: The Electoral College in American History and the Direct-Vote Alternative (1968). The second presidential election, in 1792, saw the first party in-

efforts to adopt another method, a relic perhaps but still a significant one. Clause 3 has, of course, been superceded by the Twelfth Amendment.

"Appoint"

The word "appoint" as used in Clause 2 confers on state legislatures "the broadest power of determination."[92] Upholding a state law providing for selection of electors by popular vote from districts rather than statewide, the Court described the variety of permissible methods. "Therefore, on reference to contemporaneous and subsequent action under the clause, we should expect to find, as we do, that various modes of choosing the electors were pursued, as, by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people voting in districts and partly by the legislature; by choice by the legislature from candidates voted for by the people in districts; and in other ways, as, notably, by North Carolina in 1792, and Tennessee in 1796 and 1800. No question was raised as to the power of the State to appoint, in any mode its legislature saw fit to adopt, and none that a single method, applicable without exception, must be pursued in the absence of an amendment to the Constitution. The district system was largely considered the most equitable, and Madison wrote that it was that system which was contemplated by the framers of the Constitution, although it was soon seen that its adoption by some States might place them at a disadvantage by a division of their strength, and that a uniform rule was preferable."[93]

State Discretion in Choosing Electors

Although Clause 2 seemingly vests complete discretion in the states, certain older cases had recognized a federal interest in protecting the integrity of the process. Thus, the Court upheld the power of Congress to protect the right of all citizens who are entitled to vote to lend aid and support in any legal manner to the election of any legally qualified person as a presidential elector.[94] Its power to protect the choice of electors from fraud or corruption was sus-

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fluence on the electors, with the Federalists and the Jeffersonians organizing to control the selection of the Vice-President. Justice Jackson once noted: "As an institution the Electoral College suffered atrophy almost indistinguishable from *rigor mortis*." Ray v. Blair, 343 U.S. 214, 232 (1952). But, of course, the electors still do actually elect the President and Vice President.

[92] McPherson v. Blacker, 146 U.S. 1, 27 (1892).

[93] 146 U.S. at 28–29.

[94] *Ex parte* Yarbrough, 110 U.S. 651 (1884).

tained.[95] "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power it is helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption." [96]

More recently, substantial curbs on state discretion have been instituted by both the Court and the Congress. In *Williams v. Rhodes*,[97] the Court struck down a complex state system that effectively limited access to the ballot to the electors of the two major parties. In the Court's view, the system violated the Equal Protection Clause of the Fourteenth Amendment because it favored some and disfavored others and burdened both the right of individuals to associate together to advance political beliefs and the right of qualified voters to cast ballots for electors of their choice. For the Court, Justice Black denied that the language of Clause 2 immunized such state practices from judicial scrutiny.[98] Then, in *Oregon v. Mitchell*,[99] the Court upheld the power of Congress to reduce the voting age in presidential elections [100] and to set a thirty-day durational residency period as a qualification for voting in presidential elections.[101] Although the Justices were divided on the reasons, the rationale emerging from this case, considered with *Williams v. Rhodes*,[102] is that the Fourteenth Amendment limits state discretion in pre-

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[95] Burroughs & Cannon v. United States, 290 U.S. 534 (1934).

[96] *Ex parte* Yarbrough, 110 U.S. 651, 657–58 (1884) (quoted in Burroughs and Cannon v. United States, 290 U.S. 534, 546 (1934)).

[97] 393 U.S. 23 (1968).

[98] "There, of course, can be no question but that this section does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution . . . . [It cannot be] thought that the power to select electors could be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws. [citing the Fifteenth, Nineteenth, and Twenty-fourth Amendments]. . . . Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions." 393 U.S. at 29.

[99] 400 U.S. 112 (1970).

[100] The Court divided five-to-four on this issue. Of the majority, four relied on Congress's power under the Fourteenth Amendment, and Justice Black relied on implied and inherent congressional powers to create and maintain a national government. 400 U.S. at 119–24 (Justice Black announcing opinion of the Court).

[101] The Court divided eight-to-one on this issue. Of the majority, seven relied on Congress's power to enforce the Fourteenth Amendment, and Justice Black on implied and inherent powers.

[102] 393 U.S. 23 (1968).

scribing the manner of selecting electors and that Congress in enforcing the Fourteenth Amendment [103] may override state practices that violate that Amendment and may substitute standards of its own.

Whether state enactments implementing the authority to appoint electors are subject to the ordinary processes of judicial review within a state, or whether placement of the appointment authority in state legislatures somehow limits the role of state judicial review, became an issue during the controversy over the Florida recount and the outcome of the 2000 presidential election. The Supreme Court did not resolve this issue, but in a remand to the Florida Supreme Court, suggested that the role of state courts in applying state constitutions may be constrained by operation of Clause 2.[104] Three Justices elaborated on this view in *Bush v. Gore*,[105] but the Court ended the litigation—and the recount—on the basis of an equal protection interpretation, without ruling on the Article II argument.

Constitutional Status of Electors

Dealing with the question of the constitutional status of the electors, the Court said in 1890: "The sole function of the presidential electors is to cast, certify and transmit the vote of the State for President and Vice President of the nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the States when acting as electors of representatives in Congress. . . . In accord with the provisions of the Constitution, Congress has determined the time as of which the number of electors shall be ascertained, and the days on which they shall be appointed and shall meet and vote in the States, and on which their votes shall be counted in Congress; has provided for the filling by each State, in such manner as its legislature may prescribe, of vacancies in its college of electors; and has

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[103] *Cf.* Fourteenth Amendment, § 5.

[104] Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam) (remanding for clarification as to whether the Florida Supreme Court "saw the Florida Constitution as circumscribing the legislature's authority under Art. II, § 1, cl. 2").

[105] Bush v. Gore, 531 U.S. 98, 111 (2000) (opinion of Chief Justice Rehnquist, joined by Justices Scalia and Thomas). Relying in part on dictum in McPherson v. Blacker, 146 U.S. 1, 27 (1892), the three Justices reasoned that, because Article II confers the authority on a particular branch of state government (the legislature) rather than on a state generally, the customary rule requiring deference to state court interpretations of state law is not fully operative, and the Supreme Court "must ensure that postelection state-court actions do not frustrate" the legislature's policy as expressed in the applicable statute. 531 U.S. at 113.

regulated the manner of certifying and transmitting their votes to the seat of the national government, and the course of proceeding in their opening and counting them." [106] The truth of the matter is that the electors are not "officers" at all, by the usual tests of office.[107] They have neither tenure nor salary, and having performed their single function they cease to exist as electors.

This function is, moreover, "a federal function," [108] because electors' capacity to perform results from no power which was originally resident in the states, but instead springs directly from the Constitution of the United States.[109]

In the face of the proposition that electors are state officers, the Court has upheld the power of Congress to act to protect the integrity of the process by which they are chosen.[110] But, in *Ray v. Blair*,[111] the Court reasserted the conception of electors as state officers, with some significant consequences.

Electors as Free Agents

"No one faithful to our history can deny that the plan originally contemplated, what is implicit in its text, that electors would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices." [112] Writing in 1826, Senator Thomas Hart Benton admitted that the framers had intended electors to be men of "superior discernment, virtue, and information," who would select the President "according to their own will" and without reference to the immediate wishes of the people. "That this invention has failed of its objective in every election is a fact of such universal notoriety, that no one can dispute it. That it ought to have failed is equally uncontestable; for such independence in the electors was wholly incompatible with the safety of the people. [It] was, in fact, a chimerical and impractical idea in any community." [113]

Electors constitutionally remain free to cast their ballots for any person they wish and occasionally they have done so.[114] In 1968,

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[106] *In re* Green, 134 U.S. 377, 379–80 (1890).

[107] United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

[108] Hawke v. Smith, 253 U.S. 221 (1920).

[109] Burroughs and Cannon v. United States, 290 U.S. 534, 535 (1934).

[110] *Ex parte* Yarbrough, 110 U.S. 651 (1884); Burroughs and Cannon v. United States, 290 U.S. 534 (1934).

[111] 343 U.S. 214 (1952).

[112] 343 U.S. at 232 (Justice Jackson dissenting). *See* THE FEDERALIST, No. 68 (J. Cooke ed. 1961), 458 (Hamilton); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1457 (1833).

[113] S. REP. NO. 22, 19th Cong., 1st Sess. 4 (1826).

[114] All but the most recent instances are summarized in N. Pierce, supra, 122–124.

for example, a Republican elector in North Carolina chose to cast his vote not for Richard M. Nixon, who had won a plurality in the state, but for George Wallace, the independent candidate who had won the second greatest number of votes. Members of both the House of Representatives and of the Senate objected to counting that vote for Mr. Wallace and insisted that it should be counted for Mr. Nixon, but both bodies decided to count the vote as cast.[115]

The power either of Congress[116] or of the states to enact legislation binding electors to vote for the candidate of the party on the ticket of which they run has been the subject of much debate.[117] It remains unsettled and the Supreme Court has touched on the issue only once and then tangentially. In *Ray v. Blair*,[118] the Court upheld, against a challenge of invalidity under the Twelfth Amendment, a rule of the Democratic Party of Alabama, acting under delegated power of the legislature, that required each candidate for the office of presidential elector to take a pledge to support the nominees of the party's convention for President and Vice President. The state court had determined that the Twelfth Amendment, following language of Clause 3, required that electors be absolutely free to vote for anyone of their choice. Justice Reed wrote for the Court:

"It is true that the Amendment says the electors shall vote by ballot. But it is also true that the Amendment does not prohibit an elector's announcing his choice beforehand, pledging himself. The suggestion that in the early elections candidates for electors—contemporaries of the Founders—would have hesitated, because of constitutional limitations, to pledge themselves to support party nominees in the event of their selection as electors is impossible to accept. History teaches that the electors were expected to support the party nominees. Experts in the history of government recognize the longstanding practice. Indeed, more than twenty states do not print the names of the candidates for electors on the general election ballot. Instead, in one form or another, they allow a vote for the presidential candidate of the national conventions to be counted as a vote for his party's nominees for the electoral college. This long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the

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[115] 115 CONG. REC. 9–11, 145–171, 197–246 (1969).

[116] Congress has so provided in the case of electors of the District of Columbia, 75 Stat. 818 (1961), D.C. Code § 1–1108(g), but the reference in the text is to the power of Congress to bind the electors of the states.

[117] At least thirteen states have statutes binding their electors, but none has been tested in the courts.

[118] 343 U.S. 214 (1952).

constitutionality of a pledge, such as the one here required, in the primary."

"However, even if such promises of candidates for the electoral college are legally unenforceable because violative of an assumed constitutional freedom of the elector under the Constitution, Art. II, § 1, to vote as he may choose in the electoral college, it would not follow that the requirement of a pledge in the primary is unconstitutional. A candidacy in the primary is a voluntary act of the applicant. He is not barred, discriminatorily, from participating but must comply with the rules of the party. Surely one may voluntarily assume obligations to vote for a certain candidate. The state offers him opportunity to become a candidate for elector on his own terms, although he must file his declaration before the primary. Ala. Code, Tit. 17, § 145. Even though the victory of an independent candidate for elector in Alabama cannot be anticipated, the state does offer the opportunity for the development of other strong political organizations where the need is felt for them by a sizable block of voters. Such parties may leave their electors to their own choice."

"We conclude that the Twelfth Amendment does not bar a political party from requiring the pledge to support the nominees of the National Convention. Where a state authorizes a party to choose its nominees for elector in a party primary and to fix the qualifications for the candidates, we see no federal constitutional objection to the requirement of this pledge." [119] Justice Jackson, with Justice Douglas, dissented: "It may be admitted that this law does no more than to make a legal obligation of what has been a voluntary general practice. If custom were sufficient authority for amendment of the Constitution by Court decree, the decision in this matter would be warranted. Usage may sometimes impart changed content to constitutional generalities, such as 'due process of law,' 'equal protection,' or 'commerce among the states.' But I do not think powers or discretions granted to federal officials by the Federal Constitution can be forfeited by the Court for disuse. A political practice which has its origin in custom must rely upon custom for its sanctions." [120]

Clause 5. No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have at-

[119] 343 U.S. at 228–31.
[120] 343 U.S. at 233.

tained to the Age of thirty five Years, and been Fourteen Years a Resident within the United States.

QUALIFICATIONS

All Presidents from Martin Van Buren on were born in the United States subsequent to the Declaration of Independence. The principal issue with regard to the qualifications set out in this clause is whether a child born abroad of American parents is "a natural born citizen" in the sense of the clause. Such a child is a citizen as a consequence of statute.[121] Whatever the term "natural born" means, it no doubt does not include a person who is "naturalized." Thus, the answer to the question might be seen to turn on the interpretation of the first sentence of the first section of the Fourteenth Amendment, providing that "[a]ll persons born or naturalized in the United States" are citizens.[122] Significantly, however, Congress, in which a number of Framers sat, provided in the Naturalization act of 1790 that "the children of citizens of the United States, that may be born beyond the sea, . . . shall be considered as *natural born citizens* . . . ."[123] This phrasing followed the literal terms of British statutes, beginning in 1350, under which persons born abroad, whose parents were both British subjects, would enjoy the same rights of inheritance as those born in England; beginning with laws in 1709 and 1731, these statutes expressly provided that such persons were natural-born subjects of the crown.[124] There is reason to believe, therefore, that the phrase includes persons who become citizens at birth by statute because of their status in being born abroad of Ameri-

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[121] 8 U.S.C. § 1401.

[122] Reliance on the provision of an Amendment adopted subsequent to the constitutional provision being interpreted is not precluded by but is strongly militated against by the language in Freytag v. Commissioner, 501 U.S. 868, 886–87 (1991), in which the Court declined to be bound by the language of the 25th Amendment in determining the meaning of "Heads of Departments" in the Appointments Clause. *See also* id. at 917 (Justice Scalia concurring). If the Fourteenth Amendment is relevant and the language is exclusive, that is, if it describes the only means by which persons can become citizens, then, anyone born outside the United States would have to be considered naturalized in order to be a citizen, and a child born abroad of American parents is to be considered "naturalized" by being statutorily made a citizen at birth. Although dictum in certain cases supports this exclusive interpretation of the Fourteenth Amendment, United States v. Wong Kim Ark, 169 U.S. 649, 702–03 (1898); *cf.* Montana v. Kennedy, 366 U.S. 308, 312 (1961), the most recent case in its holding and language rejects it. Rogers v. Bellei, 401 U.S. 815 (1971).

[123] Act of March 26, 1790, 1 Stat. 103, 104 (emphasis supplied). *See* Weedin v. Chin Bow, 274 U.S. 657, 661–666 (1927); United States v. Wong Kim Ark, 169 U.S. 649, 672–675 (1898). With minor variations, this language remained law in subsequent reenactments until an 1802 Act, which omitted the italicized words for reasons not discernable. *See* Act of Feb. 10, 1855, 10 Stat. 604 (enacting same provision, for offspring of American-citizen fathers, but omitting the italicized phrase).

[124] 25 Edw. 3, Stat. 2 (1350); 7 Anne, ch. 5, § 3 (1709); 4 Geo. 2, ch. 21 (1731).

can citizens.[125] Whether the Supreme Court would decide the issue should it ever arise in a "case or controversy"—as well as how it might decide it—can only be speculated about.

Clause 6. In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President declaring what Officer shall then act as President, and such Officer shall act accordingly until the Disability be removed, or a President shall be elected.

PRESIDENTIAL SUCCESSION

When the President is disabled or is removed or has died, to what does the Vice President succeed: to the "powers and duties of the said office," or to the office itself? There is a reasonable amount of evidence from the proceedings of the convention from which to conclude that the Framers intended the Vice President to remain Vice President and to exercise the powers of the President until, in the words of the final clause, "a President shall be elected." Nonetheless, when President Harrison died in 1841, Vice President Tyler, after initial hesitation, took the position that he was automatically President,[126] a precedent which has been followed subsequently and which is now permanently settled by section 1 of the Twenty-fifth Amendment. That Amendment also settles a number of other pressing questions with regard to presidential inability and succession.

Clause 7. The President shall, at stated Times, receive for his Services, a Compensation which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

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[125] *See, e.g.*, Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968).

[126] E. Corwin, supra at 53–59, 344 n.46.

COMPENSATION AND EMOLUMENTS

Clause 7 may be advantageously considered in the light of the rulings and learning arising out of parallel provision regarding judicial salaries.[127]

Clause 8. Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

OATH OF OFFICE

What is the time relationship between a President's assumption of office and his taking the oath? Apparently, the former comes first, this answer appearing to be the assumption of the language of the clause. The Second Congress assumed that President Washington took office on March 4, 1789,[128] although he did not take the oath until the following April 30.

That the oath the President is required to take might be considered to add anything to the powers of the President, because of his obligation to "preserve, protect and defend the Constitution," might appear to be rather a fanciful idea. But in President Jackson's message announcing his veto of the act renewing the Bank of the United States there is language which suggests that the President has the right to refuse to enforce both statutes and judicial decisions based on his own independent decision that they were unwarranted by the Constitution.[129] The idea next turned up in a message by President Lincoln justifying his suspension of the writ of *habeas corpus* without obtaining congressional authorization.[130] And counsel to President Johnson during his impeachment trial adverted to the theory, but only in passing.[131] Beyond these isolated instances, it does not

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[127] *Cf.* 13 Ops. Atty. Gen. 161 (1869), holding that a specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would by law be payable as such salary, is a diminution of the compensation to be paid to him which, in the case of the President, would be unconstitutional if the act of Congress levying the tax was passed during his official term.

[128] Act of March 1, 1792, 1 Stat. 239, § 12.

[129] 2 J. Richardson, *supra*, at 576. Chief Justice Taney, who as a member of Jackson's Cabinet had drafted the message, later repudiated this possible reading of the message. 2 C. Warren, The Supreme Court in United States History 223–224 (1926).

[130] 6 J. Richardson, *supra*, at 25.

[131] 2 Trial of Andrew Johnson 200, 293, 296 (1868).

appear to be seriously contended that the oath adds anything to the President's powers.

SECTION 2. Clause 1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Office, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

COMMANDER-IN-CHIEF

Development of the Concept

Surprisingly little discussion of the Commander-in-Chief Clause is found in the Convention or in the ratifying debates. From the evidence available, it appears that the Framers vested the duty in the President because experience in the Continental Congress had disclosed the inexpediency of vesting command in a group and because the lesson of English history was that danger lurked in vesting command in a person separate from the responsible political leaders.[132] But the principal concern here is the nature of the power granted by the clause.

The Limited View.—The purely military aspects of the Commander-in-Chiefship were those that were originally stressed. Hamilton said the office "would amount to nothing more than the supreme command and direction of the Military and naval forces, as first general and admiral of the confederacy."[133] Story wrote in

[132] May, *The President Shall Be Commander in Chief*, in THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF (E. May ed., 1960), 1. In the Virginia ratifying convention, Madison, replying to Patrick Henry's objection that danger lurked in giving the President control of the military, said: "Would the honorable member say that the sword ought to be put in the hands of the representatives of the people, or in other hands independent of the government altogether?" 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 393 (1836). In the North Carolina convention, Iredell said: "From the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations can only be expected from one person." 4 id. at 107.

[133] THE FEDERALIST, No. 69 (J. Cooke ed. 1961), 465.

his Commentaries: "The propriety of admitting the president to be commander in chief, so far as to give orders, and have a general superintendency, was admitted. But it was urged, that it would be dangerous to let him command in person, without any restraint, as he might make a bad use of it. The consent of both houses of Congress ought, therefore, to be required, before he should take the actual command. The answer then given was, that though the president might, there was no necessity that he should, take the command in person; and there was no probability that he would do so, except in extraordinary emergencies, and when he was possessed of superior military talents." [134] In 1850, Chief Justice Taney, for the Court, wrote: "His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power. . . ."

"But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question." [135] Even after the Civil War, a powerful minority of the Court described the role of President as Commander-in-Chief simply as "the command of the forces and the conduct of campaigns." [136]

The Prize Cases.—The basis for a broader conception was laid in certain early acts of Congress authorizing the President to employ military force in the execution of the laws.[137] In his famous message to Congress of July 4, 1861,[138] Lincoln advanced the claim that the "war power" was his for the purpose of suppressing rebel-

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[134] 3 J. Story, Commentaries on the Constitution of the United States 1486 (1833).
[135] Fleming v. Page, 50 U.S. (9 How.) 603, 615, 618 (1850).
[136] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).
[137] 1 Stat. 424 (1795): 2 Stat. 443 (1807), now 10 U.S.C. §§ 331–334. *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32–33 (1827), asserting the finality of the President's judgment of the existence of a state of facts requiring his exercise of the powers conferred by the act of 1795.
[138] 7 J. Richardson, *supra*, at 3221, 3232.

lion, and in the *Prize Cases* [139] of 1863 a divided Court sustained this theory. The immediate issue was the validity of the blockade that the President, following the attack on Fort Sumter, had proclaimed of the Southern ports.[140] The argument was advanced that a blockade to be valid must be an incident of a "public war" validly declared, and that only Congress could, by virtue of its power "to declare war," constitutionally impart to a military situation this character and scope. Speaking for the majority of the Court, Justice Grier answered: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*.' Lord Stowell (1 Dodson, 247) observes, 'It is not the less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers of the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other.'"

"The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized '*a state of war as existing by the act of the Republic of Mexico*.' This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress."

"This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact. . . ."

"Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the government to which this power was entrusted. 'He must determine what

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[139] 67 U.S. (2 Bl.) 635 (1863).

[140] 7 J. Richardson, *supra*, at 3215, 3216, 3481.

degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." [141]

Impact of the Prize Cases on World Wars I and II.—In brief, the powers that may be claimed for the President under the Commander-in-Chief Clause at a time of widespread insurrection were equated with his powers under the clause at a time when the United States is engaged in a formally declared foreign war.[142] And, because, especially in the early months of the Civil War, Lincoln performed various acts, such as increasing the Army and Navy, that admittedly fell within Congress's constitutional province, it seems to have been assumed during World Wars I and II that the position of Commander-in-Chief carried with it the power to exercise like powers practically at discretion, not merely in wartime but even at a time when war became a strong possibility. No attention was given the fact that Lincoln had asked Congress to ratify and confirm his acts, which Congress promptly had,[143] with the exception of his suspension of *habeas corpus*, a power that many attributed to the President in the situation then existing, by virtue of his duty to take care that the laws be faithfully executed.[144] Nor was this the only respect in which war or the approach of war was deemed to operate to enlarge the scope of power claimable by the President as Commander-in-Chief in wartime.[145]

Presidential Theory of the Commander-in-Chiefship in World War II—And Beyond

In his message to Congress of September 7, 1942, in which he demanded that Congress forthwith repeal certain provisions of the

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[141] 67 U.S. (2 Bl.) at 668–70.

[142] *See generally*, E. Corwin, Total War and the Constitution (1946).

[143] 12 Stat. 326 (1861).

[144] J. Randall, Constitutional Problems Under Lincoln 118–139 (rev. ed. 1951).

[145] *E.g.*, Attorney General Biddle's justification of seizure of a plant during World War II: "As Chief Executive and as Commander-in-Chief of the Army and Navy, the President possesses an aggregate of powers that are derived from the Constitution and from various statutes enacted by the Congress for the purpose of carrying on the war. . . . In time of war when the existence of the nation is at stake, this aggregate of powers includes authority to take reasonable steps to prevent nation-wide labor disturbances that threaten to interfere seriously with the conduct of the war. The fact that the initial impact of these disturbances is on the production or distribution of essential civilian goods is not a reason for denying the Chief Executive and the Commander-in-Chief of the Army and Navy the power to take steps to protect the nation's war effort." 40 Ops. Atty. Gen. 312, 319–320 (1944). Prior to the actual beginning of hostilities, Attorney General Jackson asserted the same justification upon seizure of an aviation plant. E. Corwin, Total War and the Constitution 47–48 (1946).

Emergency Price Control Act of the previous January 30th,[146] President Roosevelt formulated his conception of his powers as "Commander in Chief in wartime" as follows:

"I ask the Congress to take this action by the first of October. Inaction on your part by that date will leave me with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos."

"In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act."

"At the same time that farm prices are stabilized, wages can and will be stabilized also. This I will do."

"The President has the powers, under the Constitution and under Congressional acts, to take measures necessary to avert a disaster which would interfere with the winning of the war."

"I have given the most thoughtful consideration to meeting this issue without further reference to the Congress. I have determined, however, on this vital matter to consult with the Congress. . . ."

"The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies in any part of the world where our own safety demands such defeat."

"When the war is won, the powers under which I act automatically revert to the people—to whom they belong." [147]

Presidential War Agencies.—While congressional compliance with the President's demand rendered unnecessary an effort on his part to amend the Price Control Act, there were other matters as to which he repeatedly took action within the normal field of congressional powers, not only during the war, but in some instances prior to it. Thus, in exercising both the powers which he claimed as Commander-in-Chief and those which Congress conferred upon him to meet the emergency, Mr. Roosevelt employed new emergency agencies, created by himself and responsible directly to him,

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[146] 56 Stat. 23 (1942).

[147] 88 CONG. REC. 7044 (1942). Congress promptly complied, 56 Stat. 765 (1942), so that the President was not required to act on his own. *But see* E. Corwin, supra, 65–66.

rather than the established departments or existing independent regulatory agencies.[148]

Constitutional Status of Presidential Agencies.—The question of the legal status of the presidential agencies was dealt with judicially but once. This was in the decision of the United States Court of Appeals for the District of Columbia in *Employers Group v. National War Labor Board*,[149] which was a suit to annul and enjoin a "directive order" of the War Labor Board. The Court refused the injunction on the ground that the time when the directive was issued any action of the Board was "informatory," "at most advisory." In support of this view the Court quoted approvingly a statement by the chairman of the Board itself: "These orders are in reality mere declarations of the equities of each industrial dispute, as determined by a tripartite body in which industry, labor, and the public share equal responsibility; and the appeal of the Board is to the moral obligation of employers and workers to abide by the nonstrike, no-lock-out agreement and . . . to carry out the directives of the tribunal created under that agreement by the Commander in Chief." [150] Nor, the Court continued, had the later War Labor Disputes Act vested War Labor Board orders with any greater authority, with the result that they were still judicially unenforceable and unreviewable. Following this theory, the War Labor Board was not an office wielding power, but a purely advisory body, such as Presidents have frequently created in the past without the aid or consent of Congress. Congress itself, nevertheless, both in its appropriation acts and in other legislation, treated the presidential agencies as in all respects offices.[151]

Evacuation of the West Coast Japanese.—On February 19, 1942, President Roosevelt issued an executive order, "by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy," providing, as a safeguard against subversion and sabotage, power for his military commanders to designate areas from which "any person" could be excluded or removed and to set up facilities for such persons elsewhere.[152] Pursuant to this order, more than 112,000 residents of the Western states, all of Japanese descent and more than two out of every three of whom were natural-born citizens, were removed from their homes

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[148] For a listing of the agencies and an account of their creation to the close of 1942, *see* Vanderbilt, *War Powers and Their Administration*, in 1942 ANNUAL SURVEY OF AMERICAN LAW 106 (New York Univ.).

[149] 143 F.2d 145 (D.C. Cir. 1944).

[150] 143 F.2d at 149.

[151] E. Corwin, supra at 244, 245, 459.

[152] E.O. 9066, 7 FED. REG. 1407 (1942).

and herded into temporary camps and later into "relocation centers" in several states.

It was apparently the original intention of the Administration to rely on the general principle of military necessity and the power of the Commander-in-Chief in wartime as authority for the relocations. But before any action of importance was taken under the order, Congress ratified and adopted it by the Act of March 21, 1942,[153] by which it was made a misdemeanor to knowingly enter, remain in, or leave prescribed military areas contrary to the orders of the Secretary of War or of the commanding officer of the area. The cases which subsequently arose in consequence of the order were decided under the order plus the Act. The question at issue, said Chief Justice Stone for the Court, "is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional . . . [power] to impose the curfew restriction here complained of."[154] This question was answered in the affirmative, as was the similar question later raised by an exclusion order.[155]

Presidential Government of Labor Regulations.—The most important segment of the home front regulated by what were in effect presidential edicts was the field of labor relations. Exactly six months before Pearl Harbor, on June 7, 1941, Mr. Roosevelt, citing his proclamation thirteen days earlier of an unlimited national emergency, issued an Executive Order seizing the North American Aviation Plant at Inglewood, California, where, on account of a strike, production was at a standstill.[156] Attorney General Jackson justified the seizure as growing out of the "duty constitutionally and inherently rested upon the President to exert his civil and military as well as his moral authority to keep the defense efforts of the United States a going concern," as well as "to obtain supplies for which Congress has appropriated the money, and which it has di-

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[153] 56 Stat. 173 (1942).

[154] Hirabayashi v. United States, 320 U.S. 81, 91–92 (1943).

[155] Korematsu v. United States, 323 U.S. 214 (1944). Long afterward, in 1984, a federal court granted a writ of *coram nobis* and overturned Korematsu's conviction, Korematsu v. United States, 584 F. Supp. 1406 (N.D.Cal. 1984), and in *1986*, a federal court vacated Hirabayashi's conviction for failing to register for evacuation but let stand the conviction for curfew violations. Hirabayashi v. United States, 627 F. Supp. 1445 (W.D.Wash. 1986). Other cases were pending, but Congress then implemented the recommendations of the Commission on Wartime Relocation and Internment of Civilians by acknowledging "the fundamental injustice of the evacuation, relocation and internment," and apologizing on behalf of the people of the United States. Pub. L. 100–383, 102 Stat. 903 (1988), 50 U.S.C. App. §§ 1989 *et seq*. Reparations were approved, and each living survivor of the internment was to be compensated in an amount roughly approximating $20,000.

[156] E.O. 8773, 6 Fed. Reg. 2777 (1941).

rected the President to obtain."[157] Other seizures followed, and on January 12, 1942, Mr. Roosevelt, by Executive Order 9017, created the National War Labor Board. "Whereas," the order read in part, "by reason of the state of war declared to exist by joint resolutions of Congress, . . . the national interest demands that there shall be no interruption of any work which contributes to the effective prosecution of the war; and Whereas as a result of a conference of representatives of labor and industry which met at the call of the President on December 17, 1941, it has been agreed that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by peaceful means, and that a National War Labor Board be established for a peaceful adjustment of such disputes. Now, therefore, by virtue of the authority vested in me by the Constitution and the statutes of the United States, it is hereby ordered: 1. There is hereby created in the Office for Emergency Management a National War Labor Board . . . ."[158] In this field, too, Congress intervened by means of the War Labor Disputes Act of June 25, 1943,[159] which, however, still left ample basis for presidential activity of a legislative character.[160]

Sanctions Implementing Presidential Directives.—To implement his directives as Commander-in-Chief in wartime, and especially those which he issued in governing labor disputes, President Roosevelt often resorted to "sanctions," which may be described as penalties lacking statutory authorization. Ultimately, the President sought to put sanctions in this field on a systematic basis. The order empowered the Director of Economic Stabilization, on receiving a report from the National War Labor Board that someone was not complying with its orders, to issue "directives" to the appropriate department or agency requiring that privileges, benefits, rights, or preferences enjoyed by the noncomplying party be withdrawn.[161]

Sanctions were also occasionally employed by statutory agencies, such as OPA, to supplement the penal provisions of the Emergency Price Control Act of January 30, 1942.[162] In *Steuart & Bro. v. Bowles*,[163] the Supreme Court had the opportunity to regularize this type of executive emergency legislation. Here, a retail dealer in fuel oil was charged with having violated a rationing order of OPA by obtaining large quantities of oil from its supplier without

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[157] E. Corwin, Total War and the Constitution 47–48 (1946).
[158] 7 Fed. Reg. 237 (1942).
[159] 57 Stat. 163 (1943).
[160] *See* Vanderbilt, *War Powers and their Administration*, in 1945 Annual Survey of American Law 254, 271–273 (N.Y. Univ.).
[161] E.O. 9370, 8 Fed. Reg. 11463 (1943).
[162] 56 Stat. 23 (1942).
[163] 322 U.S. 398 (1944).

surrendering ration coupons, by delivering many thousands of gallons of fuel oil without requiring ration coupons, and so on, and was prohibited by the agency from receiving oil for resale or transfer for the ensuing year. The offender conceded the validity of the rationing order in support of which the suspension order was issued but challenged the validity of the latter as imposing a penalty that Congress had not enacted and asked the district court to enjoin it.

The court refused to do so and was sustained by the Supreme Court in its position. Justice Douglas wrote for the Court: "[W]ithout rationing, the fuel tanks of a few would be full; the fuel tanks of many would be empty. Some localities would have plenty; communities less favorably situated would suffer. Allocation or rationing is designed to eliminate such inequalities and to treat all alike who are similarly situated. . . . But middlemen—wholesalers and retailers—bent on defying the rationing system could raise havoc with it. . . . These middlemen are the chief if not the only conduits between the source of limited supplies and the consumers. From the viewpoint of a rationing system a middleman who distributes the product in violation and disregard of the prescribed quotas is an inefficient and wasteful conduit. . . . Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. . . . From the point of view of the factory owner from whom the materials were diverted the action would be harsh. . . . But in times of war the national interest cannot wait on individual claims to preference. . . . Yet if the President has the power to channel raw materials into the most efficient industrial units and thus save scarce materials from wastage it is difficult to see why the same principle is not applicable to the distribution of fuel oil."[164] Sanctions were, therefore, constitutional when the deprivations they wrought were a reasonably implied amplification of the substantive power which they supported and were directly conservative of the interests which this power was created to protect and advance. It is certain, however, that sanctions not uncommonly exceeded this pattern.[165]

The Postwar Period.—The end of active hostilities did not terminate either the emergency or the Federal Government's response to it. President Truman proclaimed the termination of hostilities on December 31, 1946,[166] and, in July 1947, Congress enacted a joint resolution that repealed a great variety of wartime statutes and set

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[164] 322 U.S. at 405–06.
[165] E. Corwin, supra, at 249–250.
[166] Proc. 2714, 12 Fed. Reg. 1 (1947).

termination dates for others.[167] Signing the resolution, the President said that the emergencies declared in 1939 and 1940 continued to exist and that it was "not possible at this time to provide for terminating all war and emergency powers."[168] The hot war was giving way to the Cold War.

Congress thereafter enacted a new Housing and Rent Act to continue the controls begun in 1942[169] and continued the military draft.[170] With the outbreak of the Korean War, legislation was enacted establishing general presidential control over the economy again,[171] and by executive order the President created agencies to exercise the power.[172] The Court continued to assume the existence of a state of wartime emergency prior to Korea, but with misgivings. In *Woods v. Cloyd W. Miller Co.*,[173] the Court held constitutional the new rent control law on the ground that cessation of hostilities did not end the government's war power, but that the power continued to remedy the evil arising out of the emergency. Yet, Justice Douglas noted for the Court, "We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision."[174] Justice Jackson, though concurring, noted that he found the war power "the most dangerous one to free government in the whole catalogue of powers" and cautioned that its exercise "be scrutinized with care."[175] And, in *Ludecke v. Watkins*,[176] four dissenting Justices were prepared to hold that the presumption in the statute under review of continued war with Germany was "a pure fiction" and not to be used.

But the postwar period was a time of reaction against the wartime exercise of power by President Roosevelt, and President Truman was not permitted the same liberties. The Twenty-second Amendment, writing into permanent law the two-term custom, the "Great Debate" about our participation in NATO, the attempt to limit the

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[167] S.J. Res. 123, 61 Stat. 449 (1947).
[168] Woods v. Cloyd W. Miller Co., 333 U.S. 138, 140 n.3 (1948).
[169] 61 Stat. 193 (1947).
[170] 62 Stat. 604 (1948).
[171] Defense Production Act of 1950, 64 Stat. 798.
[172] E.O. 10161, 15 Fed. Reg. 6105 (1950).
[173] 333 U.S. 138 (1948).
[174] 333 U.S. at 143–44.
[175] 333 U.S. at 146–47.
[176] 335 U.S. 160, 175 (1948).

treaty-making power, and other actions, bespoke the reaction.[177] The Supreme Court signalized this reaction when it struck down the President's action in seizing the steel industry while it was struck during the Korean War.[178]

Nonetheless, the long period of the Cold War and of active hostilities in Korea and Indochina, in addition to the issue of the use of troops in the absence of congressional authorization, further created conditions for consolidation of powers in the President. In particular, a string of declarations of national emergencies, most, in whole or part, under the Trading with the Enemy Act,[179] undergirded the exercise of much presidential power. In the storm of response to the Vietnamese conflict, here, too, Congress reasserted legislative power to curtail what it viewed as excessive executive power, repealing the Trading with the Enemy Act and enacting in its place the International Emergency Economic Powers Act,[180] which did not alter most of the range of powers delegated to the President but which did change the scope of the power delegated to declare national emergencies.[181] Congress also passed the National Emergencies Act, prescribing procedures for the declaration of national emergencies, for their termination, and for presidential reporting to Congress in connection with national emergencies. To end the practice of declaring national emergencies for an indefinite duration, Congress provided that any emergency not otherwise terminated would expire one year after its declaration unless the President published in the Federal Register and transmitted to Congress a notice that the emergency would continue in effect.[182]

The Cold War and After: Presidential Power To Use Troops Overseas Without Congressional Authorization

Reaction after World War II did not persist, but soon ran its course, and the necessities, real and perceived, of the United States' role as world power and chief guarantor of the peace operated to expand the powers of the President and to diminish congressional powers in the foreign relations arena. President Truman did not seek congressional authorization before sending troops to Korea, and subsequent Presidents similarly acted on their own in putting troops

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[177] *See* A. Kelly & W. Harbison, The American Constitution: Its Origins and Development, ch. 31 (4th ed. 1970).

[178] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[179] § 301(1), 55 Stat. 838, 839–840 (1941).

[180] 91 Stat. 1626, 50 U.S.C. §§ 1701–1706.

[181] Congress authorized the declaration of a national emergency based only on "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or the economy of the United States . . . ." 50 U.S.C. § 1701.

[182] Pub. L. 94–412, 90 Stat. 1255 (1976).

into many foreign countries, including the Dominican Republic, Lebanon, Grenada, Panama, and the Persian Gulf, and most notably Indochina.[183] Eventually, public opposition precipitated another constitutional debate whether the President had the authority to commit troops to foreign combat without the approval of Congress, a debate that went on inconclusively between Congress and Executive[184] and one which the courts were content generally to consign to the exclusive consideration of those two bodies. The substance of the debate concerns many facets of the President's powers and responsibilities, including his obligations to protect the lives and property of United States citizens abroad, to execute the treaty obligations of the Nation, to further the national security interests of the Nation, and to deal with aggression and threats of aggression as they confront him. Defying neat summarization, the considerations nevertheless merit at least an historical survey and an attempted categorization of the arguments.

The Historic Use of Force Abroad.—In 1912, the Department of State published a memorandum prepared by its Solicitor which set out to justify the *Right to Protect Citizens in Foreign Countries by Landing Forces*.[185] In addition to the justification, the memorandum summarized 47 instances in which force had been used, in most of them without any congressional authorization. Twice revised and reissued, the memorandum was joined by a 1928 independent study and a 1945 work by a former government official in supporting conclusions that drifted away from the original justification of the use of United States forces abroad to the use of such forces at the discretion of the President and free from control by Congress.[186]

New lists and revised arguments were published to support the actions of President Truman in sending troops to Korea and of Presidents Kennedy and Johnson in sending troops first to Vietnam and

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[183] *See* the discussion in NATIONAL COMMITMENTS RESOLUTION, REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS, S. REP. NO. 91–129, 91st Congress, 1st sess. (1969); *U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations*, 90th Congress, 1st sess. (1967) at 16–19 (Professor Bartlett).

[184] *See* discussion under Article I, § 8, cls. 11–14.

[185] J. Clark, *Memorandum by the Solicitor for the Department of State*, in RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (1912).

[186] Id. (Washington: 1929; 1934); M. OFFUTT, THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES (1928); J. ROGERS, WORLD POLICING AND THE CONSTITUTION (1945). The burden of the last cited volume was to establish that the President was empowered to participate in United Nations peacekeeping actions without having to seek congressional authorization on each occasion; it may be said to be one of the earliest, if not the earliest, propoundings of the doctrine of inherent presidential powers to use troops abroad outside the narrow compass traditionally accorded those powers.

then to Indochina generally,[187] and new lists have been propounded.[188] The great majority of the instances cited involved fights with pirates, landings of small naval contingents on barbarous or semibarbarous coasts to protect commerce, the dispatch of small bodies of troops to chase bandits across the Mexican border, and the like, and some incidents supposedly without authorization from Congress did in fact have underlying statutory or other legislative authorization. Some instances, *e.g.*, President Polk's use of troops to precipitate war with Mexico in 1846, President Grant's attempt to annex the Dominican Republic, President McKinley's dispatch of troops into China during the Boxer Rebellion, involved considerable exercises of presidential power, but in general purposes were limited and congressional authority was sought for the use of troops against a sovereign state or in such a way as to constitute war. The early years of this century saw the expansion in the Caribbean and Latin America both of the use of troops for the furthering of what was perceived to be our national interests and of the power of the Presi-

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[187] *E.g.*, H. REP. NO. 127, 82d Congress, 1st Sess. (1951), 55–62; Corwin, *Who Has the Power to Make War?* NEW YORK TIMES MAGAZINE (July 31, 1949), 11; *Authority of the President to Repel the Attack in Korea*, 23 DEPT. STATE BULL. 173 (1950); Department of State, Historical Studies Division, *Armed Actions Taken by the United States Without a Declaration of War, 1789–1967* (Res. Proj. No. 806A (Washington: 1967)). That the compilation of such lists was more than a defense against public criticism can be gleaned from a revealing discussion in Secretary of State Acheson's memoirs detailing why the President did not seek congressional sanction for sending troops to Korea. "There has never, I believe, been any serious doubt—in the sense of nonpolitically inspired doubt—of the President's constitutional authority to do what he did. The basis for this conclusion in legal theory and historical precedent was fully set out in the State Department's memorandum of July 3, 1950, extensively published. But the wisdom of the decision not to ask for congressional approval has been doubted. . . ."

After discussing several reasons establishing the wisdom of the decision, the Secretary continued: "The President agreed, moved also, I think, by another passionately held conviction. His great office was to him a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige. This attitude would incline him strongly against any attempt to divert criticism from himself by action that might establish a precedent in derogation of presidential power to send our forces into battle. The memorandum that we prepared listed eighty-seven instances in the past century in which his predecessors had done this. And thus yet another decision was made." D. ACHESON, PRESENT AT THE CREATION 414, 415 (1969).

[188] *War Powers Legislation: Hearings Before the Senate Foreign Relations Committee*, 92d Congress, 1st Sess. (1971), 347, 354–355, 359–379 (Senator Goldwater); Emerson, *War Powers Legislation*, 74 W. VA. L. REV. 53 (1972). The most complete list as of the time prepared is Collier, *Instances of Use of United States Armed Forces Abroad, 1798–1989*, CONG. RES. SERV. (1989), which was cited for its numerical total in United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990). For an effort to reconstruct the development and continuation of the listings, *see* F. WORMUTH & E. FIRMAGE, TO CHAIN THE DOG OF WAR 142–145 (2d ed. 1989).

dent to deploy the military force of the United States without congressional authorization.[189]

The pre-war actions of Presidents Wilson and Franklin Roosevelt advanced in substantial degrees the fact of presidential initiative, although the theory did not begin to catch up with the fact until the "Great Debate" over the commitment of troops by the United States to Europe under the Atlantic Pact. While congressional authorization was obtained, that debate, the debate over the United Nations charter, and the debate over Article 5 of the North Atlantic Treaty of 1949, declaring that "armed attack" against one signatory was to be considered as "an attack" against all signatories, provided the occasion for the formulation of a theory of independent presidential power to use the armed forces in the national interest at his discretion.[190] Thus, Secretary of State Acheson told Congress: "Not only has the President the authority to use the armed forces in carrying out the broad foreign policy of the United States implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution." [191]

The Theory of Presidential Power.—The fullest expression of the presidential power proponents has been in defense of the course followed in Indochina. Thus, the Legal Adviser of the State Department, in a widely circulated document, contended: "Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the

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[189] Of course, considerable debate continues with respect to the meaning of the historical record. For reflections of the narrow reading, *see* NATIONAL COMMITMENTS RESOLUTION, Report of the Senate Committee on Foreign Relations, S. REP. NO. 91–129, 1st Sess. (1969); J. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993). On the broader reading and finding great presidential power, *see* A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976); Emerson, *Making War Without a Declaration*, 17 J. LEGIS. 23 (1990).

[190] For some popular defenses of presidential power during the "Great Debate," *see* Corwin, *Who Has the Power to Make War?* NEW YORK TIMES MAGAZINE (July 31, 1949), 11; Commager, *Presidential Power: The Issue Analyzed*, NEW YORK TIMES MAGAZINE (January 14, 1951), 11. *Cf.* Douglas, *The Constitutional and Legal Basis for the President's Action in Using Armed Forces to Repel the Invasion of South Korea*, 96 CONG. REC. 9647 (1950). President Truman and Secretary Acheson utilized the argument from the U.N. Charter in defending the United States actions in Korea, and the Charter defense has been made much of since. *See, e.g.*, Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L. J. 597 (1993).

[191] *Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Foreign Relations and Armed Services Committees*, 82d Congress, 1st Sess. (1951), 92.

President deems such action necessary to maintain the security and defense of the United States. . . .”

“In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation’s security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet Nam would endanger the peace and security of the United States.”

“Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Viet Nam is required, and that military measures against the source of Communist aggression in North Viet Nam are necessary, he is constitutionally empowered to take those measures.” [192]

Opponents of such expanded presidential powers have contended, however, that the authority to initiate war was not divided between the Executive and Congress but was vested exclusively in Congress. The President had the duty and the power to repeal sudden attacks and act in other emergencies, and in his role as Commander in Chief he was empowered to direct the armed forces for any purpose specified by Congress.[193] Though Congress asserted itself in some respects, it never really managed to confront the President’s power with any sort of effective limitation, until recently.

The Power of Congress to Control the President’s Discretion.—Over the President’s veto, Congress enacted the War Powers Resolution,[194] designed to redistribute the war powers between

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[192] Meeker, *The Legality of United States Participation in the Defense of Viet Nam*, 54 DEPT. STATE BULL. 474, 484–485 (1966). *See also* Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 NAVAL WAR COLLEGE REV. 28 (1969); Wright, *The Power of the Executive to Use Military Forces Abroad*, 10 VA. J. INT. L. 43 (1969); *Documents Relating to the War Powers of Congress, The President’s Authority as Commander-in-Chief and the War in Indochina*, Senate Committee on Foreign Relations, 91st Congress, 2d sess. (Comm. Print) (1970), 1 (Under Secretary of State Katzenbach), 90 (J. Stevenson, Legal Adviser, Department of State), 120 (Professor Moore), 175 (Assistant Attorney General Rehnquist).

[193] *E.g.*, F. WORMUTH & E. FIRMAGE, TO CHAIN THE DOG OF WAR (2d ed. 1989), F.; J. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); *U.S. Commitments to Foreign Powers: Hearings Before the Senate Committee on Foreign Relations*, 90th Congress, 1st sess. (1967), 9 (Professor Bartlett); *War Powers Legislation: Hearings Before the Senate Committee on Foreign Relations*, 92d Cong., 1st sess. (1971), 7 (Professor Commager), 75 (Professor Morris), 251 (Professor Mason).

[194] Pub. L. 93–148, 87 Stat. 555, 50 U.S.C. §§ 1541–1548. For the congressional intent and explanation, *see* H. REP. NO. 93–287, S. REP. NO. 93–220, and H. REP. NO.

the President and Congress. Although ambiguous in some respects, the Resolution appears to define restrictively the President's powers, to require him to report fully to Congress upon the introduction of troops into foreign areas, to specify a maximum time limitation on the engagement of hostilities absent affirmative congressional action, and to provide a means for Congress to require cessation of hostilities in advance of the time set.

The Resolution states that the President's power to commit United States troops into hostilities, or into situations of imminent involvement in hostilities, is limited to instances of (1) a declaration of war, (2) a specific statutory authorization, or (3) a national emergency created by an attack on the United States, its territories or possessions, or its armed forces.[195] In the absence of a declaration of war, a President must within 48 hours report to Congress whenever he introduces troops (1) into hostilities or situations of imminent hostilities, (2) into a foreign nation while equipped for combat, except in certain nonhostile situations, or (3) in numbers which substantially enlarge United States troops equipped for combat already located in a foreign nation.[196] If the President introduces troops in the first of these three situations, then he must terminate the use of troops within 60 days after his report was submitted or was required to be submitted to Congress, unless Congress (1) has declared war, (2) has extended the period, or (3) is unable to meet as a result of an attack on the United States, but the period can be extended another 30 days by the President's certification to Congress of unavoidable military necessity respecting the safety of the troops.[197] Congress may through the passage of a concurrent resolution require the President to remove the troops sooner.[198] The Resolution further states that no legislation, whether enacted prior to or subsequent to passage of the Resolution will be taken to empower the President to use troops abroad unless the legislation specifically does so and that no treaty may so empower the President

93–547 (Conference Report), all 93d Congress, 1st sess. (1973). The President's veto message is H. Doc. No. 93–171, 93d Congress. 1st Sess. (1973). All this material is collected in *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, House Committee on Foreign Affairs, 103d Cong., 2d Sess. (Comm. Print) (GPO: 1994), 1–46. For a narrative account of passage and an assessment of the disputed compliance to date, from the congressional point of view, *see The War Powers Resolution*, A Special Study of the House Committee on Foreign Affairs, 102d Cong., 2d Sess. (Comm. Print) (GPO: 1982).

[195] 87 Stat. 554, 2(c), 50 U.S.C. § 1541(c).

[196] 50 U.S.C. § 1543(a).

[197] 50 U.S.C. § 1544(b).

[198] Id. at § 1544(c). It is the general consensus that, following INS v. Chadha, 462 U.S. 919 (1983), this provision of the Resolution is unconstitutional.

unless it is supplemented by implementing legislation specifically addressed to the issue.[199]

Aside from its use as a rhetorical device, the War Powers Resolution has been of little worth in reordering presidential-congressional relations in the years since its enactment. All Presidents operating under it have expressly or implicitly considered it to be an unconstitutional infringement on presidential powers, and on each occasion of use abroad of United States troops the President in reporting to Congress has done so "consistent[ly] with" the reporting section but not pursuant to the provision.[200] Upon the invasion of Kuwait by Iraqi troops in 1990, President Bush sought not congressional authorization but a United Nations Security Council resolution authorizing the use of force by member Nations. Only at the last moment did the President seek authorization from Congress, he and his officials contending that he had the power to act unilaterally.[201] After intensive debate, Congress voted, 250 to 183 in the House of Representatives and 53 to 46 in the Senate, to authorize the President to use United States troops pursuant to the U.N. resolution and purporting to bring the act within the context of the War Powers Resolution.[202]

By contrast, President George W. Bush sought a resolution from Congress in 2002 to approve the eventual invasion of Iraq before seeking a U.N. Security Council resolution, all the while denying that express authorization from Congress, or for that matter, the U.N. Security Council, was necessary to renew hostilities in Iraq. Prior to adjourning for its midterm elections, Congress passed the Authorization for Use of Military Force against Iraq Resolution of 2002,[203] which it styled as "specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." On sign-

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[199] 50 U.S.C. § 1547(a).

[200] *See* the text of the reports in *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, supra at 47 (Pres. Ford on transport of refugees from Danang), 55 (Pres. Carter on attempted rescue of Iranian hostages), 73 (Pres. Reagan on use of troops in Lebanon), 113 (Pres. Reagan on Grenada), 144 (Pres. Bush on Panama), 147, 149 (Pres. Bush on Persian Gulf), 189 (Pres. Bush on Somalia), 262 (Pres. Clinton on Haiti).

[201] *See Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings Before the Senate Committee on Armed Services*, 101st Cong., 2d Sess. (1990), 701 (Secretary Cheney) (President did not require "any additional authorization from the Congress" before attacking Iraq). On the day following his request for supporting legislation from Congress, President Bush, in answer to a question about the requested action, stated: "I don't think I need it. . . . I feel that I have the authority to fully implement the United Nations resolutions." 27 WEEKLY COMP. PRES. DOC. 25 (Jan. 8, 1991).

[202] Pub. L. 102–1, 105 Stat. 3 (1991).

[203] Pub. L. 107–243; 116 Stat. 1498 (2002). The House approved the resolution by a vote of 296–133. The Senate passed the House version of H.J. Res. 114 by a vote of 77–23.

ing the measure, the President noted that he had sought "an additional resolution of support" from Congress, and expressed appreciation for receiving that support, but stated, "my request for it did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use force to deter, prevent, or respond to aggression or other threats to U.S. interests or on the constitutionality of the War Powers Resolution." [204] In the Bush administration's view, the primary benefit of receiving authorization from Congress seems to have been the message of political unity it conveyed to the rest of the world rather than the fulfillment of any constitutional requirements.

Although there is recurrent talk within Congress and without as to amending the War Powers Resolution to strengthen it, no consensus has emerged, and there is little evidence that there exists within Congress the resolve to exercise the responsibility concomitant with strengthening it.[205]

The President as Commander of the Armed Forces

While the President customarily delegates supreme command of the forces in active service, there is no constitutional reason why he should do so, and he has been known to resolve personally important questions of military policy. Lincoln early in 1862 issued orders for a general advance in the hopes of stimulating McClellan to action; Wilson in 1918 settled the question of an independent American command on the Western Front; Truman in 1945 ordered that the bomb be dropped on Hiroshima and Nagasaki.[206] As against an enemy in the field, the President possesses all the powers which are accorded by international law to any supreme commander. "He may invade the hostile country, and subject it to the sovereignty and authority of the United States." [207] In the absence of attempts by Congress to limit his power, he may establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States, and his authority to do this sometimes survives cessation of hostilities.[208] He may employ secret agents to

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[204] *See* President's Statement on Signing H.J. Res. 114, Oct. 16, 2002, available at [http://usinfo.state.gov/dhr/Archive/2003/Oct/09–906028.html].

[205] *See*, on proposals to amend and on congressional responsibility, J. Ely, War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath (1993).

[206] For a review of how several wartime Presidents have operated in this sphere, *see* The Ultimate Decision: The President as Commander in Chief (E. May ed., 1960).

[207] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

[208] Madsen v. Kinsella, 343 U.S. 341, 348 (1952). *See also* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

enter the enemy's lines and obtain information as to its strength, resources, and movements.[209] He may, at least with the assent of Congress, authorize commercial intercourse with the enemy.[210] He may also requisition property and compel services from American citizens and friendly aliens who are situated within the theater of military operations when necessity requires, thereby incurring for the United States the obligation to render "just compensation."[211] By the same warrant, he may bring hostilities to a conclusion by arranging an armistice, stipulating conditions that may determine to a great extent the ensuing peace.[212] He may not, however, effect a permanent acquisition of territory,[213] though he may govern recently acquired territory until Congress sets up a more permanent regime.[214]

The President is the ultimate tribunal for the enforcement of the rules and regulations that Congress adopts for the government of the forces, and that are enforced through courts-martial.[215] Indeed, until 1830, courts-martial were convened solely on the President's authority as Commander in Chief.[216] Such rules and regulations are, moreover, it seems, subject in wartime to his amendment at discretion.[217] Similarly, the power of Congress to "make rules for the government and regulation of the land and naval forces" (Art. I, § 8, cl. 14) did not prevent President Lincoln from promulgating, in April, 1863, a code of rules to govern the conduct in the field of the armies of the United States, which was prepared at his instance by a commission headed by Francis Lieber and which later became the basis of all similar codifications both here and abroad.[218] One important power that the President lacks is that of choosing his subordinates, whose grades and qualifications are determined by Congress and whose appointment is ordinarily made by and with

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[209] Totten v. United States, 92 U.S. 105 (1876).

[210] Hamilton v. Dillin, 88 U.S. (21 Wall.) 73 (1875); Haver v. Yaker, 76 U.S. (9 Wall.) 32 (1869).

[211] Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1852); United States v. Russell, 80 U.S. (13 Wall.) 623 (1871); Totten v. United States, 92 U.S. 105 (1876); 40 Ops. Atty. Gen. 250, 253 (1942).

[212] *Cf.* the Protocol of August 12, 1898, which largely foreshadowed the Peace of Paris, 30 Stat. 1742 and President Wilson's Fourteen Points, which were incorporated in the Armistice of November 11, 1918.

[213] Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850).

[214] Santiago v. Nogueras, 214 U.S. 260 (1909). As to temporarily occupied territory, *see* Dooley v. United States, 182 U.S. 222, 230–31 (1901).

[215] Swaim v. United States, 165 U.S. 553 (1897); and cases there reviewed. *See also* Givens v. Zerbst, 255 U.S. 11 (1921).

[216] 15 Ops. Atty. Gen. 297, n; *cf.* 1 Ops. Atty. Gen. 233, 234, where the contrary view is stated by Attorney General Wirt.

[217] *Ex parte* Quirin, 317 U.S. 1, 28–29 (1942).

[218] General Orders, No. 100, Official Records, War Rebellion, ser. III, vol. III; April 24, 1863.

the advice and consent of the Senate, though undoubtedly Congress could if it wished vest their appointment in "the President alone."[219] Also, the President's power to dismiss an officer from the service, once unlimited, is today confined by statute in time of peace to dismissal "in pursuance of the sentence of a general court-martial or in mitigation thereof."[220] But the provision is not regarded by the Court as preventing the President from displacing an officer of the Army or Navy by appointing with the advice and consent of the Senate another person in his place.[221] The President's power of dismissal in time of war Congress has never attempted to limit.

The Commander-in-Chief a Civilian Officer.—Is the Commander-in-Chiefship a military or a civilian office in the contemplation of the Constitution? Unquestionably the latter. An opinion by a New York surrogate deals adequately, though not authoritatively, with the subject: "The President receives his compensation for his services, rendered as Chief Executive of the Nation, not for the individual parts of his duties. No part of his compensation is paid from sums appropriated for the military or naval forces; and it is equally clear under the Constitution that the President's duties as Commander in Chief represent only a part of duties ex officio as Chief Executive [Article II, sections 2 and 3 of the Constitution] and that the latter's office is a civil office. [Article II, section 1 of the Constitution . . . .] The President does not enlist in, and he is not inducted or drafted into, the armed forces. Nor, is he subject to court-martial or other military discipline. On the contrary, Article II, section 4 of the Constitution provides that 'The President, [Vice President] and All Civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of Treason, Bribery or other high Crimes and Misdemeanors.' . . . The last two War Presidents, President Wilson and President Roosevelt, both clearly recognized the civilian nature of the President's position as Commander in Chief. President Roosevelt, in his Navy Day Campaign speech at Shibe Park, Philadelphia, on October 27, 1944, pronounced this principle as follows:–'It was due to no accident and no oversight that the framers of our Constitution put the command of our armed forces under civilian authority. It is the duty of the Commander in Chief to appoint the Secretaries of War and Navy and the Chiefs of Staff.' It is also to be noted that the Secretary of War,

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[219] *See*, *e.g.*, Mimmack v. United States, 97 U.S. 426, 437 (1878); United States v. Corson, 114 U.S. 619 (1885).

[220] 10 U.S.C. § 804.

[221] Mullan v. United States, 140 U.S. 240 (1891); Wallace v. United States, 257 U.S. 541 (1922).

who is the regularly constituted organ of the President for the administration of the military establishment of the Nation, has been held by the Supreme Court of the United States to be merely a civilian officer, not in military service. (*United States v. Burns*, 79 U.S. (12 Wall.) 246 (1871)). On the general principle of civilian supremacy over the military, by virtue of the Constitution, it has recently been said: 'The supremacy of the civil over the military is one of our great heritages.' *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1945)." [222]

Martial Law and Constitutional Limitations

Two theories of martial law are reflected in decisions of the Supreme Court. The first, which stems from the Petition of Right, 1628, provides that the common law knows no such thing as martial law; [223] that is to say, martial law is not established by official authority of any sort, but arises from the nature of things, being the law of paramount necessity, leaving the civil courts to be the final judges of necessity.[224] By the second theory, martial law can be validly and constitutionally established by supreme political authority in wartime. In the early years of the Supreme Court, the American judiciary embraced the latter theory as it held in *Luther v. Borden* [225] that state declarations of martial law were conclusive and therefore not subject to judicial review.[226] In this case, the Court found that the Rhode Island legislature had been within its rights in resorting to the rights and usages of war in combating insurrection in that state. The decision in the *Prize Cases*,[227] although not dealing directly with the subject of martial law, gave national scope to the same general principle in 1863.

The Civil War being safely over, however, a divided Court, in the elaborately argued *Milligan* case,[228] reverting to the older doctrine, pronounced President Lincoln's action void, following his suspension of the writ of *habeas corpus* in September, 1863, in ordering the trial by military commission of persons held in custody as

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[222] Surrogate's Court, Duchess County, New York, ruling July 25, 1950, that the estate of Franklin D. Roosevelt was not entitled to tax benefits under sections 421 and 939 of the Internal Revenue Code, which extends certain tax benefits to persons dying in the military services of the United States. New York Times, July 26, 1950, p. 27, col. 1.

[223] C. Fairman, The Law of Martial Rule 20–22 (1930); A. Dicey, Introduction to the Study of the Law of the Constitution 283, 290 (5th ed. 1923).

[224] Id. at 539–44.

[225] 48 U.S. (7 How.) 1 (1849). *See also* Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32–33 (1827).

[226] 48 U.S. (7 How.) at 45.

[227] 67 U.S. (2 Bl.) 635 (1863).

[228] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

"spies" and "abettors of the enemy." The salient passage of the Court's opinion bearing on this point is the following: "If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theater of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." [229] Four Justices, speaking by Chief Justice Chase, while holding Milligan's trial to have been void because it violated the Act of March 3, 1863, governing the custody and trial of persons who had been deprived of the *habeas corpus* privilege, declared their belief that Congress could have authorized Milligan's trial. The Chief Justice wrote: "Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions. . . ."

"We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists."

"Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety." [230] In short, only Congress can authorize the sub-

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[229] 71 U.S. at 127.

[230] 71 U.S. at 139–40. In *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243 (1864), the Court had held, while war was still flagrant, that it had no power to review by *certiorari* the proceedings of a military commission ordered by a general officer of the Army, commanding a military department.

stitution of military tribunals for civil tribunals for the trial of offenses; and Congress can do so only in wartime.

Early in the 20th century, however, the Court appeared to retreat from its stand in *Milligan* insofar as it held in *Moyer v. Peabody* [231] that "the Governor's declaration that a state of insurrection existed is conclusive of that fact. . . . [T]he plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. . . . So long as such arrests are made in good faith and in honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief." [232] The "good faith" test of *Moyer*, however, was superseded by the "direct relation" test of *Sterling v. Constantin*,[233] where the Court made it very clear that "[i]t does not follow . . . that every sort of action the Governor may take, no matter how justified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. . . . What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." [234]

Martial Law in Hawaii.—The question of the constitutional status of martial law was raised again in World War II by the proclamation of Governor Poindexter of Hawaii, on December 7, 1941, suspending the writ of *habeas corpus* and conferring on the local commanding General of the Army all his own powers as governor and also "all of the powers normally exercised by the judicial officers . . . of this territory . . . during the present emergency and until the danger of invasion is removed." Two days later the Governor's action was approved by President Roosevelt. The regime which the proclamation set up continued with certain abatements until October 24, 1944.

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[231] 212 U.S. 78 (1909).

[232] 212 U.S. at 83–85.

[233] 287 U.S. 378 (1932). "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decision, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." Id. at 399–400.

[234] 287 U.S. at 400–01. This holding has been ignored by states on numerous occasions. *E.g.*, Allen v. Oklahoma City, 175 Okla. 421, 52 P.2d 1054 (1935); Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1935); and Joyner v. Browning, 30 F. Supp. 512 (W.D. Tenn. 1939).

By section 67 of the Organic Act of April 30, 1900,[235] the Territorial Governor was authorized "in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, [to] suspend the privilege of the writ of *habeas corpus*, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known." By section 5 of the Organic Act, "the Constitution . . . shall have the same force and effect within the said Territory as elsewhere in the United States." In a brace of cases which reached it in February 1945, but which it contrived to postpone deciding till February 1946,[236] the Court, speaking by Justice Black, held that the term "martial law" as employed in the Organic Act, "while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals."[237]

The Court relied on the majority opinion in *Ex parte Milligan*. Chief Justice Stone concurred in the result. "I assume also," he said, "that there could be circumstances in which the public safety requires, and the Constitution permits, substitution of trials by military tribunals for trials in the civil courts,"[238] but added that the military authorities themselves had failed to show justifying facts in this instance. Justice Burton, speaking for himself and Justice Frankfurter, dissented. He stressed the importance of Hawaii as a military outpost and its constant exposure to the danger of fresh invasion. He warned that "courts must guard themselves with special care against judging past military action too closely by the inapplicable standards of judicial, or even military, hindsight."[239]

Articles of War: The Nazi Saboteurs.—In 1942 eight youths, seven Germans and one an American, all of whom had received training in sabotage in Berlin, were brought to this country aboard two German submarines and put ashore, one group on the Florida coast, the other on Long Island, with the idea that they would proceed forthwith to practice their art on American factories, military equipment, and installations. Making their way inland, the saboteurs were soon picked up by the FBI, some in New York, others in Chicago, and turned over to the Provost Marshal of the District of Columbia. On July 2, the President appointed a military commission to try them for violation of the laws of war, to wit: for not wearing

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[235] 31 Stat. 141, 153 (1900).
[236] Duncan v. Kahanamoku, 327 U.S. 304 (1946).
[237] 327 U.S. at 324.
[238] 327 U.S. at 336.
[239] 327 U.S. at 343.

fixed emblems to indicate their combatant status. In the midst of the trial, the accused petitioned the Supreme Court and the United States District Court for the District of Columbia for leave to bring *habeas corpus* proceedings. Their argument embraced the contentions: (1) that the offense charged against them was not known to the laws of the United States; (2) that it was not one arising in the land and naval forces; and (3) that the tribunal trying them had not been constituted in accordance with the requirements of the Articles of War.

The first argument the Court met as follows: The act of Congress in providing for the trial before military tribunals of offenses against the law of war is sufficiently definite, although Congress has not undertaken to codify or mark the precise boundaries of the law of war, or to enumerate or define by statute all the acts which that law condemns. ". . . [T]hose who during time of war pass surreptitiously from enemy territory into . . . [that of the United States], discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission."[240] The second argument it disposed of by showing that petitioners' case was of a kind that was never deemed to be within the terms of the Fifth and Sixth Amendments, citing in confirmation of this position the trial of Major Andre.[241] The third contention the Court overruled by declining to draw the line between the powers of Congress and the President in the premises,[242] thereby, in effect, attributing to the President the right to amend the Articles of War in a case of the kind before the Court *ad libitum*.

The decision might well have rested on the ground that the Constitution is without restrictive force in wartime in a situation of this sort. The saboteurs were invaders; their penetration of the boundary of the country, projected from units of a hostile fleet, was essentially a military operation, their capture was a continuation of that operation. Punishment of the saboteurs was therefore within the President's purely martial powers as Commander in Chief. Moreover, seven of the petitioners were enemy aliens, and so, strictly speaking, without constitutional status. Even had they been civilians properly domiciled in the United States at the outbreak of the war, they would have been subject under the statutes to restraint and other disciplinary action by the President without appeals to the courts. In any event, the Court rejected the jurisdictional challenge by one of the saboteurs on the basis of his claim to U.S. citi-

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[240] *Ex parte* Quirin, 317 U.S. 1, 29–30, 35 (1942).
[241] 317 U.S. at 41–42.
[242] 317 U.S. at 28–29.

zenship, finding U.S. citizenship wholly irrelevant to the determination of whether a wartime captive is an "enemy belligerent" within the meaning of the law of war.[243]

Articles of War: World War II Crimes.—As a matter of fact, in General Yamashita's case,[244] which was brought after the termination of hostilities for alleged "war crimes," the Court abandoned its restrictive conception altogether. In the words of Justice Rutledge's dissenting opinion in this case: "The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply." [245] And the adherence of the United States to the Charter of London in August 1945, under which the Nazi leaders were brought to trial, is explicable by the same theory. These individuals were charged with the crime of instigating aggressive war, which at the time of its commission was not a crime either under international law or under the laws of the prosecuting governments. It must be presumed that the President is not in his capacity as Supreme Commander bound by the prohibition in the Constitution of *ex post facto* laws, nor does international law forbid *ex post facto* laws.[246]

Articles of War: Response to the Attacks of September 11, 2001.—In response to the September 11, 2001, terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force," [247] which provided that the President may use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons." During a military action in Afghanistan pursuant to this authorization, a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had plenary authority under Article II to hold such an "enemy combatant" for the duration of hos-

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[243] *Ex parte* Quirin, 317 U.S. 1, 37–38 (1942) ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."). *See also* Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957) ("[T]he petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.").

[244] *In re* Yamashita, 327 U.S. 1 (1946).

[245] 327 U.S. at 81.

[246] *See* Gross, *The Criminality of Aggressive War*, 41 AM. POL. SCI. REV. 205 (1947).

[247] Pub. L. 107–40, 115 Stat. 224 (2001).

tilities, and to deny him meaningful recourse to the federal courts. In *Hamdi v. Rumsfeld*, the Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan, although a majority of the Court appeared to reject the notion that such power was inherent in the Presidency, relying instead on statutory grounds.[248] However, the Court did find that the government may not detain the petitioner indefinitely for purposes of interrogation, and must afford him the opportunity to offer evidence that he is not an enemy combatant.[249]

In *Rasul v. Bush*,[250] the Court rejected an Executive Branch argument that foreign prisoners being held at Guantanamo Bay were outside of federal court jurisdiction. The Court distinguished earlier case law arising during World War II that denied *habeas corpus* petitions from German citizens who had been captured and tried overseas by United States military tribunals.[251] In *Rasul*, the Court noted that the Guantanamo petitioners were not citizens of a country at war with the United States,[252] had not been afforded any form of tribunal, and were being held in a territory over which the United States exercised exclusive jurisdiction and control.[253] In addition, the Court found that statutory grounds existed for the extension of *habeas corpus* to these prisoners.[254]

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[248] 542 U.S. 507 (2004). There was no opinion of the Court. Justice O'Connor, joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer, avoided ruling on the Executive Branch argument that such detentions could be authorized by its Article II powers alone, and relied instead on the "Authorization for Use of Military Force" passed by Congress. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, although his dissenting opinion found that such detentions were authorized by Article II. Justice Souter, joined by Justice Ginsberg, rejected the argument that the Congress had authorized such detentions, while Justice Scalia, joined with Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*.

[249] At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decisionmaker, and must be allowed to consult an attorney. 542 U.S. at 533, 539.

[250] 542 U.S. 466 (2004).

[251] Johnson v. Eisentrager, 339 U.S. 763, 789 (1950).

[252] The petitioners were Australians and Kuwaitis.

[253] Rasul v. Bush, 542 U.S. at 467.

[254] The Court found that 28 U.S.C. § 2241, which had previously been construed to require the presence of a petitioner in a district court's jurisdiction, was now satisfied by the presence of a jailor-custodian. *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973). Another "enemy combatant" case, this one involving an American citizen arrested on American soil, was remanded after the Court found that a federal court's *habeas* jurisdiction under 28 U.S.C. § 2241 was limited to jurisdiction over the immediate custodian of a petitioner. Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal court's jurisdiction over Secretary of Defense Rumsfeld not sufficient to satisfy presence requirement under 28 U.S.C. § 2241). In Munaf v. Geren, 128 S. Ct. 2207 (2008), the Court held that the federal *habeas* statute, 28 U.S.C. § 2241, applied to American citizens held by the Multinational Force—Iraq, an inter-

In response to *Rasul*, Congress amended the *habeas* statute to eliminate all federal *habeas* jurisdiction over detainees, whether its basis was statutory or constitutional.[255] This amendment was challenged in *Boumediene v. Bush*,[256] as a violation of the Suspension Clause.[257] Although the historical record did not contain significant common-law applications of the writ to foreign nationals who were apprehended and detained overseas, the Court did not find this conclusive in evaluating whether *habeas* applied in this case.[258] Emphasizing a "functional" approach to the issue,[259] the Court considered (1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made; (2) the nature of the sites where apprehension and detention took place; and (3) any practical obstacles inherent in resolving the prisoner's entitlement to the writ. As in *Rasul*, the Court distinguished previous case law, noting that the instant detainees disputed their enemy status, that their ability to dispute their status had been limited, that they were held in a location (Guantanamo Bay, Cuba) under the *de facto* jurisdiction of the United States, and that complying with the demands of *habeas* petitions would not interfere with the government's military mission. Thus, the Court concluded that the Suspension Clause was in full effect regarding these detainees.

Martial Law and Domestic Disorder.—President Washington himself took command of state militia called into federal service to quell the Whiskey Rebellion, but there were not too many

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national coalition force operating in Iraq and composed of 26 different nations, including the United States. The Court concluded that the *habeas* statute extends to American citizens held overseas by American forces operating subject to an American chain of command, even when those forces are acting as part of a multinational coalition.

[255] Detainee Treatment Act of 2005, Pub. L. 109–148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay"). After the Court decided, in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), that this language of the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, the language was amended by the Military Commissions Act of 2006, Pub. L. 109–366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[256] 553 U.S. 723 (2008).

[257] U.S. Const. Art. I, § 9, cl. 2 provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In *Boumediene*, the government argued only that the Suspension Clause did not apply to the detainees; it did not argue that Congress had acted to suspend *habeas*.

[258] "[G]iven the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age, the common-law courts simply may not have confronted cases with close parallels to this one. We decline, therefore, to infer too much, one way or the other, from the lack of historical evidence on this point." 553 U.S. at 752.

[259] 553 U.S. at 764. "[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism." Id.

occasions subsequently in which federal troops or state militia called into federal service were required.[260] Since World War II, however, the President, by virtue of his own powers and the authority vested in him by Congress,[261] has used federal troops on a number of occasions, five of them involving resistance to desegregation decrees in the South.[262] In 1957, Governor Faubus employed the Arkansas National Guard to resist court-ordered desegregation in Little Rock, and President Eisenhower dispatched federal soldiers and brought the Guard under federal authority.[263] In 1962, President Kennedy dispatched federal troops to Oxford, Mississippi, when federal marshals were unable to control with rioting that broke out upon the admission of an African American student to the University of Mississippi.[264] In June and September of 1964, President Johnson sent troops into Alabama to enforce court decrees opening schools to blacks.[265] And, in 1965, the President used federal troops and federalized local Guardsmen to protect participants in a civil rights march. The President justified his action on the ground that there was a substantial likelihood of domestic violence because state authorities were refusing to protect the marchers.[266]

PRESIDENTIAL ADVISERS

The Cabinet

The authority in Article II, § 2, cl. 1 to require the written opinion of the heads of executive departments is the meager residue from a persistent effort in the Federal Convention to impose a coun-

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[260] United States Adjutant-General, *Federal Aid in Domestic Disturbances 1787–1903*, S. Doc. No. 209, 57th Congress, 2d sess. (1903); Pollitt, *Presidential Use of Troops to Enforce Federal Laws: A Brief History*, 36 N.C. L. Rev. 117 (1958). United States Marshals were also used on approximately 30 occasions. United States Commission on Civil Rights, *Law Enforcement: A Report on Equal Protection in the South* (Washington: 1965), 155–159.

[261] 10 U.S.C. §§ 331–334, 3500, 8500, deriving from laws of 1795, 1 Stat. 424; 1861, 12 Stat. 281; and 1871, 17 Stat. 14.

[262] The other instances were in domestic disturbances at the request of state governors.

[263] Proc. No. 3204, 22 Fed. Reg. 7628 (1957); E.O. 10730, 22 Fed. Reg. 7628. *See* 41 Ops. Atty. Gen. 313 (1957); *see also*, Cooper v. Aaron, 358 U.S. 1 (1958); Aaron v. McKinley, 173 F. Supp. 944 (E.D. Ark. 1959), *aff'd sub nom* Faubus v. Aaron, 361 U.S. 197 (1959); Faubus v. United States, 254 F.2d 797 (8th Cir. 1958), *cert. denied*, 358 U.S. 829 (1958).

[264] Proc. No. 3497, 27 Fed. Reg. 9681 (1962); E.O. 11053, 27 Fed. Reg. 9693 (1962). *See* United States v. Barnett, 346 F.2d 99 (5th Cir. 1965).

[265] Proc. 3542, 28 Fed. Reg. 5707 (1963); E.O. 11111, 28 Fed. Reg. 5709 (1963); Proc. No. 3554, 28 Fed. Reg. 9861; E.O. 11118, 28 Fed. Reg. 9863 (1963). *See* Alabama v. United States, 373 U.S. 545 (1963).

[266] Proc. No. 3645, 30 Fed. Reg. 3739 (1965); E.O. 11207, 30 Fed. Reg. 2743 (1965). *See* Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965).

cil on the President.[267] The idea ultimately failed, partly because of the diversity of ideas concerning the council's make-up. One member wished it to consist of "members of the two houses," another wished it to comprise two representatives from each of three sections, "with a rotation and duration of office similar to those of the Senate." The proposal with the strongest backing was that it should consist of the heads of departments and the Chief Justice, who should preside when the President was absent. Of this proposal the only part to survive was the above cited provision. The consultative relation here contemplated is an entirely one-sided affair, is to be conducted with each principal officer separately and in writing, and is to relate only to the duties of their respective offices.[268] The *Cabinet*, as we know it today, that is to say, the Cabinet *meeting*, was brought about solely on the initiative of the first President,[269] and may be dispensed with on presidential initiative at any time, being totally unknown to the Constitution. Several Presidents have in fact reduced the Cabinet meeting to little more than a ceremony with social trimmings.[270]

PARDONS AND REPRIEVES

The Legal Nature of a Pardon

In the first case to be decided concerning the pardoning power, Chief Justice Marshall, speaking for the Court, said: "As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institution ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it. A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the Court. . . . A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom

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[267] 1 M. Farrand, The Records of the Federal Convention of 1787 70, 97, 110 (rev. ed. 1937); 2 id. at 285, 328, 335–37, 367, 537–42. Debate on the issue in the Convention is reviewed in C. Thach, The Creation of the Presidency 1775–1789 82, 83, 84, 85, 109, 126 (1923).

[268] E. Corwin, supra at 82.

[269] L. White, The Federalists: A Study in Administrative History ch. 4 (1948).

[270] E. Corwin, supra at 19, 61, 79–85, 211, 295–99, 312, 320–23, 490–93.

it is tendered; and if it be rejected, we have discovered no power in a court to force it on him." Marshall continued to hold that to be noticed judicially this deed must be pleaded, like any private instrument.[271]

In *Burdick v. United States*,[272] Marshall's doctrine was put to a test that seems to have overtaxed it, perhaps fatally. Burdick, having declined to testify before a federal grand jury on the ground that his testimony would tend to incriminate him, was proffered by President Wilson "a full and unconditional pardon for all offenses against the United States," which he might have committed or participated in in connection with the matter he had been questioned about. Burdick, nevertheless, refused to accept the pardon and persisted in his contumacy with the unanimous support of the Supreme Court. "The grace of a pardon," remarked Justice McKenna sententiously, "may be only a pretense . . . involving consequences of even greater disgrace than those from which it purports to relieve. Circumstances may be made to bring innocence under the penalties of the law. If so brought, escape by confession of guilt implied in the acceptance of a pardon may be rejected . . . ."[273] Nor did the Court give any attention to the fact that the President had accompanied his proffer to Burdick with a proclamation, although a similar procedure had been held to bring President Johnson's amnesties to the Court's notice.[274] In 1927, however, in sustaining the right of the President to commute a sentence of death to one of life imprisonment, against the will of the prisoner, the Court abandoned this view. "A pardon in our days," it said, "is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."[275] Whether these words sound the death knell of the acceptance doctrine is perhaps doubtful.[276] They seem clearly to indicate that by substituting a commutation order for a deed of pardon, a President can always have his way in such matters, provided the substituted penalty is

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[271] United States v. Wilson, 32 U.S. (7 Pet.) 150, 160–61 (1833).

[272] 236 U.S. 79, 86 (1915).

[273] 236 U.S. at 90–91.

[274] Armstrong v. United States, 80 U.S. (13 Wall.) 154, 156 (1872). In Brown v. Walker, 161 U.S. 591 (1896), the Court had said: "It is almost a necessary corollary of the above propositions that, if the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed." Id. at 599, citing British cases.

[275] Biddle v. Perovich, 274 U.S. 480, 486 (1927).

[276] *Cf.* W. Humbert, The Pardoning Power of the President 73 (1941).

authorized by law and does not in common understanding exceed the original penalty.[277]

Scope of the Power

The pardon power embraces all "offences against the United States," except cases of impeachment, and includes the power to remit fines, penalties, and forfeitures, except as to money covered into the Treasury or paid an informer,[278] the power to pardon absolutely or conditionally, and the power to commute sentences, which, as seen above, is effective without the convict's consent.[279] It has been held, moreover, in face of earlier English practice, that indefinite suspension of sentence by a court of the United States is an invasion of the presidential prerogative, amounting as it does to a condonation of the offense.[280] It was early assumed that the power included the power to pardon specified classes or communities wholesale, in short, the power to amnesty, which is usually exercised by proclamation. General amnesties were issued by Washington in 1795, by Adams in 1800, by Madison in 1815, by Lincoln in 1863, by Johnson in 1865, 1867, and 1868, and by Theodore Roosevelt—to Aguinaldo's followers—in 1902.[281] Not until after the Civil War, however, was the point adjudicated, when it was decided in favor of presidential prerogative.[282]

The President cannot pardon by anticipation, or he would be invested with the power to dispense with the laws, King James II's claim to which was the principal cause of his forced abdication.[283]

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[277] Biddle v. Perovich, 274 U.S. 480, 486 (1927). In Schick v. Reed, 419 U.S. 256 (1976), the Court upheld the presidential commutation of a death sentence to imprisonment for life with no possibility of parole, the foreclosure of parole being contrary to the scheme of the Code of Military Justice. "The conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute." Id. at 264.

[278] 23 Ops. Atty. Gen. 360, 363 (1901); Illinois Cent. R.R. v. Bosworth, 133 U.S. 92 (1890).

[279] *Ex parte* William Wells , 59 U.S. (18 How.) 307 (1856). For the contrary view, *see* some early opinions of the Attorney General, 1 Ops. Atty. Gen. 341 (1820); 2 Ops. Atty. Gen. 275 (1829); 5 Ops. Atty. Gen. 687 (1795); *cf.* 4 Ops. Atty. Gen. 458 (1845); United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).

[280] *Ex parte* United States, 242 U.S. 27 (1916). Amendment of sentence, however, within the same term of court, by shortening the term of imprisonment, although defendant had already been committed, is a judicial act and no infringement of the pardoning power. United States v. Benz, 282 U.S. 304 (1931).

[281] *See* 1 J. Richardson, *supra*, at 173, 293; 2 id. at 543; 7 id. at 3414, 3508; 8 id. at 3853; 14 id. at 6690.

[282] United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872). *See also* United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870).

[283] F. Maitland, Constitutional History of England 302–306 (W.S. Hein 2006) (1908); 1 Ops. Atty. Gen. 342 (1820). That is, the pardon may not be in anticipation of the commission of the offense. "A pardon may be exercised at any time after its commis-

Offenses Against the United States: Contempt of Court.—The President may pardon criminal but not civil contempts of court. The Court "point[ed] out that it is not the fact of punishment but rather its character and purpose that makes the difference between the two kinds of contempts. For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions."[284] In upholding the President's power to pardon criminal contempt, Chief Justice Taft, speaking for the Court, resorted once more to English conceptions as being authoritative in construing this clause of the Constitution. He wrote: "The King of England before our Revolution, in the exercise of his prerogative, had always exercised the power to pardon contempts of court, just as he did ordinary crimes and misdemeanors and as he has done to the present day. In the mind of a common law lawyer of the eighteenth century the word pardon included within its scope the ending by the King's grace of the punishment of such derelictions, whether it was imposed by the court without a jury or upon indictment, for both forms of trial for contempts were had. [Citing cases.] These cases also show that, long before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the King, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. Blackstone IV, 285, 397, 398; Hawkins Pleas of the Crown, 6th Ed. (1787), Vol. 2, 553. The same distinction, nowadays referred to as the difference between civil and criminal contempts, is still maintained in English law."[285] Nor was any new or special danger to be apprehended from this view of the pardoning power. "If," the Chief Justice asked, "we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?" Although, he added, "[t]he power of a court to protect itself and its usefulness by punishing contemnors is of course necessary," in light of the fact that a

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sion, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867), as indeed President Ford's pardon of former President Nixon preceded institution of any action. On the Nixon pardon controversy, *see Pardon of Richard M. Nixon and Related Matters: Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93d Congress, 2d Sess. (1974).

[284] *Ex parte* Grossman, 267 U.S. 87, 113 (1925).

[285] 267 U.S. at 110–11.

court exercises this power "without the restraining influence of a jury and without many of the guaranties [sic] which the bill of rights offers[,] . . . [m]ay it not be fairly said that in order to avoid possible mistake, undue prejudice or needless severity, the chance of pardon should exist at least as much in favor of a person convicted by a judge without a jury as in favor of one convicted in a jury trial?" [286]

Effects of a Pardon: Ex parte Garland.—The leading case on this subject is *Ex parte Garland*,[287] which was decided shortly after the Civil War. By an act passed in 1865, Congress had prescribed that, before any person should be permitted to practice in a federal court, he must take oath asserting that he had "never voluntarily borne arms against the United States," had never given aid or encouragement "to persons engaged in armed hostilities" against the United States, and so forth.[288] Garland, who had "taken part in the Rebellion against the United States, by being in the Congress of the so-called Confederate States," and so was unable to take the oath, had, however, received from President Johnson "a full pardon 'for all offences by him committed, arising from participation, direct or implied, in the Rebellion,'" [289] The question before the Court was whether, armed with this pardon, Garland was entitled to practice in the federal courts despite the act of Congress just mentioned. Justice Field wrote for a divided Court: "[T]he inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." [290]

Justice Miller, speaking for the minority, protested that the act of Congress involved was not penal in character, but merely laid down an appropriate test of fitness to practice law. "The man who, by counterfeiting, by theft, by murder, or by treason, is rendered unfit to exercise the functions of an attorney or counselor-at-law,

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[286] 267 U.S. at 121, 122.
[287] 71 U.S. (4 Wall.) 333 (1867).
[288] 71 U.S. (4 Wall.) at 334–35.
[289] 71 U.S. (4 Wall.) at 336, 375.
[290] 71 U.S. at 380–81.

may be saved by the executive pardon from the penitentiary or the gallows, but he is not thereby restored to the qualifications which are essential to admission to the bar."[291] Justice Field's language must today be regarded as too sweeping in light of the 1914 decision in *Carlesi v. New York*.[292] Carlesi had been convicted several years before of committing a federal offense. In the instant case, he was being tried for a subsequent offense committed in New York. He was convicted as a second offender, although the President had pardoned him for the earlier federal offense. In other words, the fact of prior conviction by a federal court was considered in determining the punishment for a subsequent state offense. This conviction and sentence were upheld by the Supreme Court. Although this case involved offenses against different sovereignties, the Court declared in dictum that its decision "must not be understood as in the slightest degree intimating that a pardon would operate to limit the power of the United States in punishing crimes against its authority to provide for taking into consideration past offenses committed by the accused as a circumstance of aggravation even although for such past offenses there had been a pardon granted."[293]

Limits to the Efficacy of a Pardon.—But Justice Field's latitudinarian view of the effect of a pardon undoubtedly still applies ordinarily where the pardon is issued *before conviction*. He is also correct in saying that a full pardon restores a convict to his "civil rights," and this is so even though simple completion of the convict's sentence would not have had that effect. One such right is the right to testify in court, and in *Boyd v. United States*, the Court held that "[t]he disability to testify being a consequence, according to the principles of the common law, of the judgment of conviction, the pardon obliterated that effect."[294] But a pardon "does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offence being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force. If, for example, by the judgment

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[291] 71 U.S. at 397.
[292] 233 U.S. 51 (1914).
[293] 233 U.S. at 59.
[294] 142 U.S. 450, 453–54 (1892).

a sale of the offender's property has been had, the purchaser will hold the property notwithstanding the subsequent pardon. And if the proceeds of the sale have been paid to a party to whom the law has assigned them, they cannot be subsequently reached and recovered by the offender. The rights of the parties have become vested, and are as complete as if they were acquired in any other legal way. So, also, if the proceeds have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress. Moneys once in the treasury can only be withdrawn by an appropriation by law." [295]

Congress and Amnesty

Congress cannot limit the effects of a presidential amnesty. Thus the act of July 12, 1870, making proof of loyalty necessary to recover property abandoned and sold by the government during the Civil War, notwithstanding any executive proclamation, pardon, amnesty, or other act of condonation or oblivion, was pronounced void. Chief Justice Chase wrote for the majority: "[T]he legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The Court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the Court to be instrumental to that end." [296] On the other hand, Congress itself, under the Necessary and Proper Clause, may enact amnesty laws remitting penalties incurred under the national statutes.[297]

Clause 2. He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest

[295] Knote v. United States, 95 U.S. 149, 153–54 (1877).
[296] United States v. Klein, 80 U.S. (13 Wall.) 128, 143, 148 (1872).
[297] *The Laura*, 114 U.S. 411 (1885).

the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

THE TREATY-MAKING POWER

President and Senate

The plan that the Committee of Detail reported to the Federal Convention on August 6, 1787 provided that "the Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the Supreme Court." [298] Not until September 7, ten days before the Convention's final adjournment, was the President made a participant in these powers.[299] The constitutional clause evidently assumes that the President and Senate will be associated throughout the entire process of making a treaty, although Jay, writing in *The Federalist*, foresaw that the initiative must often be seized by the President without benefit of senatorial counsel.[300] Yet, so late as 1818 Rufus King, Senator from New York, who had been a member of the Convention, declared on the floor of the Senate: "In these concerns the Senate are the Constitutional and the only responsible counselors of the President. And in this capacity the Senate may, and ought to, look into and watch over every branch of the foreign affairs of the nation; they may, therefore, at any time call for full and exact information respecting the foreign affairs, and express their opinion and advice to the President respecting the same, when, and under whatever other circumstances, they may think such advice expedient." [301]

Negotiation, a Presidential Monopoly.—Actually, the negotiation of treaties had long since been taken over by the President; the Senate's role in relation to treaties is today essentially legislative in character.[302] "He alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it," declared Justice Sutherland for the Court in 1936.[303] The Senate must, moreover, content itself with such information as the

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[298] 2 M. Farrand, The Records of the Federal Convention of 1787 183 (rev. ed. 1937).

[299] Id. at 538–39.

[300] No. 64 (J. Cooke ed., 1961), 435–436.

[301] 31 Annals of Congress 106 (1818).

[302] Washington sought to use the Senate as a council, but the effort proved futile, principally because the Senate balked. For the details *see* E. Corwin, supra, at 207–217.

[303] United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).

President chooses to furnish it.[304] In performing the function that remains to it, however, it has several options. It may consent unconditionally to a proposed treaty, it may refuse its consent, or it may stipulate conditions in the form of amendments to the treaty, of reservations to the act of ratification, or of statements of understanding or other declarations, the formal difference between the first two and the third being that amendments and reservations, if accepted by the President must be communicated to the other parties to the treaty, and, at least with respect to amendments and often reservations as well, require reopening negotiations and changes, whereas the other actions may have more problematic results.[305] The act of ratification for the United States is the President's act, but it may not be forthcoming unless the Senate has consented to it by the required two-thirds of the Senators present, which signifies two-thirds of a quorum, otherwise the consent rendered would not be that of the Senate as organized under the Constitution to do business.[306] Conversely, the President may, if dissatisfied with amendments which have been affixed by the Senate to a proposed treaty or with the conditions stipulated by it to ratification, decide to abandon the negotiation, which he is entirely free to do.[307]

Treaties as Law of the Land

Treaty commitments of the United States are of two kinds. As Chief Justice Marshall wrote in 1829: "A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the

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[304] E. Corwin, supra, at 428–429.

[305] Treaties and Other International Agreements: The Role of the United States Senate, A Study Prepared for the Senate Committee on Foreign Relations by the Congressional Research Service, 103d Cong., 1st Sess. (Comm. Print) (1993), 96–98 (hereinafter CRS Study); *see also* American Law Institute, Restatement (Third) of the Law, The Foreign Relations Law of the United States § 314 (hereinafter Restatement, Foreign Relations) (1987). *See* Fourteen Diamond Rings v. United States, 183 U.S. 176, 183 (1901).

[306] *Cf.* Art. I, § 5, cl. 1; *see also* Missouri Pacific Ry. v. Kansas, 248 U.S. 276, 283–84 (1919).

[307] For instance, *see* S. Crandall, Treaties, Their Making and Enforcement 53 (2d ed. 1916); CRS Study, supra, 109–120.

judicial department; and the legislature must execute the contract, before it can become a rule for the court."[308]

To the same effect, but more accurate, is Justice Miller's language for the Court a half century later, in the *Head Money Cases*: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties of it. . . . But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country."[309]

The meaning of treaties, as of statutes, is determined by the courts. "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution."[310] Yet, "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight."[311] Decisions of the International Court of Justice (ICJ) interpreting treaties, however, have "*no binding force* except between

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[308] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 313–14 (1829). *See* THE FEDERALIST No. 75 (J. Cooke ed. 1961), 504–505.

[309] 112 U.S. 580, 598 (1884) (quoted with approval in Medellin v. Texas, 128 S. Ct. 1346, 1357, 1358–59 (2008)). For treaty provisions operative as "law of the land" (self-executing), *see* S. Crandall, supra, at 36–42, 49–62, 151, 153–163, 179, 238–239, 286, 321, 338, 345–346. For treaty provisions of an "executory" character, *see* id. at 162–63, 232, 236, 238, 493, 497, 532, 570, 589. *See also* CRS Study, supra, at 41–68; Restatement, Foreign Relations, supra, §§ 111–115.

[310] Sanchez-Llamas v. Oregon, 548 U.S. 331, 353–54 (2006), quoting Marbury v. Madison, 5 U.S. (1 Cr.) 137, 177 (1803). In *Sanchez-Llamas*, two foreign nationals were arrested in the United States, and, in violation of Article 36 of the Vienna Convention on Consular Relations, their nations' consuls were not notified that they had been detained by authorities in a foreign country (the U.S.). The foreign nationals were convicted in Oregon and Virginia state courts, respectively, and cited the violations of Article 36 in challenging their convictions. The Court did not decide whether Article 36 grants rights that may be invoked by individuals in a judicial proceeding (four justices would have held that it did grant such rights). The reason that the Court did not decide whether Article 36 grants rights to defendants was that it held, by a 6-to-3 vote, that, even if Article 36 does grant rights, the defendants in the two cases before it were not entitled to relief on their claims. It found, specifically, that "suppression of evidence is [not] a proper remedy for a violation of Article 36," and that "an Article 36 claim may be deemed forfeited under state procedural rules because a defendant failed to raise the claim at trial." Id. at 342.

[311] Sanchez-Llamas v. Oregon, 548 U.S. at 355, quoting Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

the parties and in respect of that particular case." [312] ICJ decisions "are therefore entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court." [313]

Even when an ICJ decision has binding force as between the governments of two nations, it is not necessarily enforceable by the individuals affected. If, for example, the ICJ finds that the United States violated a particular defendant's rights under international law, and such a decision "constitutes an *international* law obligation on the part of the United States," it does not necessarily "constitute binding federal law enforceable in United States courts. . . . [W]hile treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms." [314] A memorandum from the President of the United States directing that the United States would "discharge its international obligations" under an ICJ decision interpreting a non-self-executing treaty, "by having State courts give effect to the decision," is not sufficient to make the decision binding on state courts, unless the President's action is authorized by Congress.[315]

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[312] Sanchez-Llamas v. Oregon, 548 U.S. at 354, quoting Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 933 (1945) (emphasis added by the Court).

[313] Sanchez-Llamas v. Oregon, 548 U.S. at 355, quoting Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam).

[314] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008) (emphasis in the original, internal quotation marks omitted). As in the case of the foreign nationals in *Sanchez-Llamas*, Medellin's nation's consul had not been notified that he had been detained in the United States. Unlike the foreign nationals in *Sanchez-Llamas*, however, Medellin was named in an ICJ decision that found a violation of Article 36 of the Vienna Convention.

[315] Medellin v. Texas, 128 S. Ct. 1346, 1353 (2008). "[T]he non-self-executing character of a treaty constrains the President's ability to comply with treaty commitments by unilaterally making the treaty binding on domestic courts." Id. at 1371. The majority opinion in *Medellin* was written by Chief Justice Roberts. Justice Stevens, concurring, noted that, even though the ICJ decision "is not 'the supreme Law of the Land,' U.S. Const., Art VI, cl. 2," it constitutes an international law obligation not only on the part of the United States, but on the part of the State of Texas. Id. at 1374. This, of course, does not make it enforceable against Texas, but Justice Stevens found that "[t]he cost to Texas of complying with [the ICJ decision] would be minimal." Id. at 1375. Justice Breyer, joined by Justices Souter and Ginsburg, dissented, writing that "the consent of the United States to the ICJ's jurisdiction[ ] bind[s] the courts no less than would 'an act of the [federal] legislature.'" Id. at 1376. The dissent believed that, to find treaties non-self-executing "can threaten the application of provisions in many existing commercial and other treaties and make it more difficult to negotiate new ones." Id. at 1381–82. Moreover, Justice Breyer wrote, the Court's decision "place[s] the fate of an international promise made by the United States in the hands of a single State. . . . And that is precisely the situation that the Framers sought to prevent by enacting the Supremacy Clause." Id. at 1384. On

Origin of the Conception.—How did this distinctive feature of the Constitution come about, by virtue of which the treaty-making authority is enabled to stamp upon its promises the quality of municipal law, thereby rendering them enforceable by the courts without further action? The short answer is that Article VI, paragraph 2, makes treaties the supreme law of the land on the same footing with acts of Congress. The clause was a direct result of one of the major weaknesses of the Articles of Confederation. Although the Articles entrusted the treaty-making power to Congress, fulfillment of Congress's promises was dependent on the state legislatures.[316] Particularly with regard to provisions of the Treaty of Peace of 1783,[317] in which Congress stipulated to protect the property rights of British creditors of American citizens and of the former Loyalists,[318] the promises were not only ignored but were deliberately flouted by many legislatures.[319] Upon repeated British protests, John Jay, the Secretary for Foreign Affairs, suggested to Congress that it request state legislatures to repeal all legislation repugnant to the Treaty of Peace and to authorize their courts to carry the treaty into effect.[320] Although seven states did comply to some extent, the impotency of Congress to effectuate its treaty guarantees was obvious to the Framers who devised Article VI, paragraph 2, to take care of the situation.[321]

Treaties and the States.—As it so happened, the first case in which the Supreme Court dealt with the question of the effect of treaties on state laws involved the same issue that had prompted the drafting of Article VI, paragraph 2. During the Revolutionary War, the Virginia legislature provided that the Commonwealth's pa-

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August 5, 2008, the U.S. Supreme Court denied Medellin a stay of execution, Medellin v. Texas, 129 S. Ct. 360 (2008) (Justices Stevens, Souter, Ginsburg, and Breyer dissenting), and Texas executed him the same day.

316 S. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT ch. 3 (2d ed. 1916).

317 Id. at 30–32. For the text of the Treaty, *see* 1 *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States of America and Other Powers (1776–1909)*, 586 S. DOC. NO. 357, 61st Congress, 2d Sess. (W. Malloy ed., 1910).

318 Id. at 588.

319 R. MORRIS, JOHN JAY, THE NATION, AND THE COURT 73–84 (1967).

320 S. Crandall, supra, at 36–40.

321 The Convention at first leaned toward giving Congress a negative over state laws which were contrary to federal statutes or treaties, 1 M. Farrand, supra, at 47, 54, and then adopted the Paterson Plan which made treaties the supreme law of the land, binding on state judges, and authorized the Executive to use force to compel observance when such treaties were resisted. Id. at 245, 316, 2 id. at 27–29. In the draft reported by the Committee on Detail, the language thus adopted was close to the present Supremacy Clause; the draft omitted the authorization of force from the clause, id. at 183, but in another clause the legislative branch was authorized to call out the militia to, inter alia, "enforce treaties". Id. at 182. The two words were struck subsequently "as being superfluous" in view of the Supremacy Clause. Id. at 389–90.

per money, which was depreciating rapidly, was to be legal currency for the payment of debts and to confound creditors who would not accept the currency provided that Virginia citizens could pay into the state treasury debts owed by them to subjects of Great Britain, which money was to be used to prosecute the war, and that the auditor would give the debtor a certificate of payment which would discharge the debtor of all future obligations to the creditor.[322] The Virginia scheme directly contradicted the assurances in the peace treaty that no bars to collection by British creditors would be raised, and in *Ware v. Hylton* [323] the Court struck down the state law as violating the treaty that Article VI, paragraph 2, made superior. Justice Chase wrote: "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state . . . must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide." [324]

In *Hopkirk v. Bell*,[325] the Court further held that this same treaty provision prevented the operation of a Virginia statute of limitations to bar collection of antecedent debts. In numerous subsequent cases, the Court invariably ruled that treaty provisions superseded inconsistent state laws governing the right of aliens to inherit real estate.[326] An example is *Hauenstein v. Lynham*,[327] in which the Court upheld the right of a citizen of the Swiss Republic, under the treaty of 1850 with that country, to recover the estate of a relative dying intestate in Virginia, to sell the same, and to export the proceeds of the sale.[328]

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[322] 9 W. Hening, Statutes of Virginia 377–380 (1821).

[323] 3 U.S. (3 Dall.) 199 (1796).

[324] 3 U.S. at 236–37.

[325] 7 U.S. (3 Cr.) 454 (1806).

[326] *See* the discussion and cases cited in Hauenstein v. Lynham, 100 U.S. 483, 489–90 (1880).

[327] 100 U.S. 483 (1880). In Kolovrat v. Oregon, 366 U.S. 187, 197–98 (1961), the International Monetary Fund (Bretton Woods) Agreement of 1945, to which the United States and Yugoslavia were parties, and an Agreement of 1948 between these two nations, coupled with continued American observance of an 1881 treaty granting reciprocal rights of inheritance to Yugoslavian and American nations, were held to preclude Oregon from denying Yugoslavian aliens their treaty rights because of a fear that Yugoslavian currency laws implementing such Agreements prevented American nationals from withdrawing the proceeds from the sale of property inherited in the latter country.

[328] *See also* Geofroy v. Riggs, 133 U.S. 258 (1890); Sullivan v. Kidd, 254 U.S. 433 (1921); Nielsen v. Johnson, 279 U.S. 47 (1929); Kolovrat v. Oregon, 366 U.S. 187

Certain more recent cases stem from California legislation, most of it directed against Japanese immigrants. A statute that excluded aliens ineligible for American citizenship from owning real estate was upheld in 1923 on the ground that the treaty in question did not secure the rights claimed.[329] But, in *Oyama v. California*,[330] a majority of the Court opined that this legislation conflicted with the Equal Protection Clause of the Fourteenth Amendment, a view that has since been endorsed by the California Supreme Court by a narrow majority.[331] Meantime, California was informed that the rights of German nationals, under the Treaty of December 8, 1923, between the United States and the Reich, to whom real property in the United States had descended or been devised, to dispose of it, had survived the recent war and certain war legislation, and accordingly prevailed over conflicting state legislation.[332]

Treaties and Congress.—In the Convention, a proposal to require the adoption of treaties through enactment of a law before they should be binding was rejected.[333] But the years since have

(1961). But a right under treaty to acquire and dispose of property does not except aliens from the operation of a state statute prohibiting conveyances of homestead property by any instrument not executed by both husband and wife. Todok v. Union State Bank, 281 U.S. 449 (1930). Nor was a treaty stipulation guaranteeing to the citizens of each country, in the territory of the other, equality with the natives of rights and privileges in respect to protection and security of person and property, violated by a state statute which denied to a non-resident alien wife of a person killed within the State, the right to sue for wrongful death. Such right was afforded to native resident relatives. Maiorano v. Baltimore & Ohio R.R., 213 U.S. 268 (1909). The treaty in question having been amended in view of this decision, the question arose whether the new provision covered the case of death without fault or negligence in which, by the Pennsylvania Workmen's Compensation Act, compensation was expressly limited to resident parents; the Supreme Court held that it did not. Liberato v. Royer, 270 U.S. 535 (1926).

[329] Terrace v. Thompson, 263 U.S. 197 (1923).

[330] 332 U.S. 633 (1948). *See also* Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), in which a California statute prohibiting the issuance of fishing licenses to persons ineligible to citizenship was disallowed, both on the basis of the Fourteenth Amendment and on the ground that the statute invaded a field of power reserved to the National Government, namely, the determination of the conditions on which aliens may be admitted, naturalized, and permitted to reside in the United States. For the latter proposition, Hines v. Davidowitz, 312 U.S. 52, 66 (1941), was relied upon.

[331] This occurred in the much advertised case of Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952). A lower California court had held that the legislation involved was void under the United Nations Charter, but the California Supreme Court was unanimous in rejecting this view. The Charter provisions invoked in this connection [Arts. 1, 55 and 56], said Chief Justice Gibson, "[w]e are satisfied . . . were not intended to supersede domestic legislation." That is, the Charter provisions were not self-executing. RESTATEMENT, FOREIGN RELATIONS, supra, § 701, Reporters' Note 5, pp. 155–56.

[332] Clark v. Allen, 331 U.S. 503 (1947). *See also* Kolovrat v. Oregon, 366 U.S. 187 (1961).

[333] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 392–394 (rev. ed. 1937).

seen numerous controversies with regard to the duties and obligations of Congress, the necessity for congressional action, and the effects of statutes, in connection with the treaty power. For purposes of this section, the question is whether entry into and ratification of a treaty is sufficient in all cases to make the treaty provisions the "law of the land" or whether there are some types of treaty provisions that only a subsequent act of Congress can put into effect. The language quoted above [334] from *Foster v. Neilson* [335] early established that not all treaties are self-executing, for, as Marshall said in that decision, a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." [336]

Leaving aside the question of when a treaty is and is not self-executing,[337] the issue of the necessity of congressional implementation and the obligation to implement has frequently roiled congressional debates. The matter arose initially in 1796 in connection with the Jay Treaty,[338] certain provisions of which required appropriations to carry them into effect. In view of Article I, § 9, clause 7, which says that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ," it seems to have been universally conceded that Congress must be applied to if the treaty provisions were to be executed.[339] A bill was introduced in the House to appropriate the needed funds, and its supporters, within and without Congress, argued that, because the treaty was the law of the land, the legislative branch was bound to enact the bill without further ado; opponents led by Madison and Albert Gallatin contended that the House had complete discretion whether or not to carry into effect treaty provisions.[340] At the conclusion of the debate, the House voted not only the money but a resolution

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[334] "Treaties as Law of the Land," supra.

[335] 27 U.S. (2 Pet.) 253, 314 (1829).

[336] *Cf.* Whitney v. Robertson, 124 U.S. 190, 194 (1888): "When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect . . . . If the treaty contains stipulations which are self-executing that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment." *See* S. Crandall, supra, chs. 11–15.

[337] *See* infra, "When Is a Treaty Self-Executing."

[338] 8 Stat. 116 (1794).

[339] The story is told in numerous sources, including S. Crandall, supra, at 165–171. For Washington's message refusing to submit papers relating to the treaty to the House, *see* J. Richardson, *supra*, at 123.

[340] Debate in the House ran for more than a month. It was excerpted from the ANNALS separately published as DEBATES IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, DURING THE FIRST SESSION OF THE FOURTH CONGRESS UPON THE CONSTITUTIONAL POWERS OF THE HOUSE WITH RESPECT TO TREATIES (1796). A source of much valuable information on the views of the Framers and those who came after them on the treaty power, the debates are analyzed in detail in E. BYRD, TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES 35–59 (1960). Gallatin served in the United States Senate for two

offered by Madison stating that it did not claim any agency in the treaty-making process, "but that when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good."[341] This early precedent with regard to appropriations has apparently been uniformly adhered to.[342]

Similarly, with regard to treaties that modify commercial tariff arrangements, the practice has been that the House always insisted on and the Senate acquiesced in legislation to carry into effect the provisions of such treaties.[343] The earliest congressional dispute came over an 1815 Convention with Great Britain,[344] which provided for reciprocal reduction of duties. President Madison thereupon recommended to Congress such legislation as the convention might require for effectuation. The Senate and some members of the House believed that no implementing legislation was necessary because of a statute that already permitted the President to reduce duties on goods of nations that did not discriminate against United States goods; the House majority felt otherwise and compromise legislation was finally enacted acceptable to both points of view.[345] But subsequent cases have seen legislation enacted;[346] the Senate once refused to ratify a treaty that purported to reduce statutorily determined duties,[347] and congressional enactment of authority for the President to negotiate reciprocal trade agreements all seem to point to the necessity of some form of congressional implementation.

What other treaty provisions need congressional implementation is debatable. A 1907 memorandum approved by the Secretary of State stated that the limitations on the treaty power that necessitate legislative implementation may "be found in the provisions

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months in 1793–1794, the House of Representatives from 1795–1801, and as Secretary of the Treasury from 1801–1814.

[341] 5 ANNALS OF CONGRESS 771, 782 (1796). The House adopted a similar resolution in 1871. CONG. GLOBE, 42d Congress, 1st sess. (1871), 835.

[342] S. Crandall, supra, at 171–182; 1 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 549–552 (2d ed. 1929); *but see* RESTATEMENT, FOREIGN RELATIONS, supra, § 111, Reporters' Note 7, p. 57. *See also* H. REP. 4177, 49th Congress, 2d Sess. (1887). *Cf.* De Lima v. Bidwell, 182 U.S. 1, 198 (1901).

[343] S. Crandall, supra, at 183–199.

[344] 8 Stat. 228.

[345] 3 Stat. 255 (1816). *See* S. Crandall, supra, at 184–188.

[346] S. Crandall, supra, at 188–195; 1 W. Willoughby, supra, at 555–560.

[347] S. Crandall, supra, at 189–190.

of the Constitution which expressly confide in Congress or in other branches of the Federal Government the exercise of certain of the delegated powers. . . .”[348] The same thought has been expressed in Congress[349] and by commentators.[350] Resolution of the issue seems to be for legislative and executive branches rather than for the courts.

Congressional Repeal of Treaties.—Madison contended that, when Congress is asked to carry a treaty into effect, it has the constitutional right, and indeed the duty, to determine the matter according to its own ideas of what is expedient.[351] Developments have vindicated Madison in this regard. This is seen in the answer that the Court gave to the question: What happens when a treaty provision and an act of Congress conflict? The answer is that neither has any intrinsic superiority over the other and therefore the later one will prevail. In short, the treaty commitments of the United States do not diminish Congress’s constitutional powers. To be sure, legislative repeal of a treaty as law of the land may amount to its violation as an international contract. In such case, as the Court said, “its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.”[352]

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[348] Anderson, *The Extent and Limitations of the Treaty-Making Power*, 1 Am. J. Int’l L. 636, 641 (1907).

[349] At the conclusion of the 1815 debate, the Senate conferees noted in their report that some treaties might need legislative implementation, which Congress was bound to provide, but did not indicate what in their opinion made some treaties self-executing and others not. 29 Annals of Congress 160 (1816). The House conferees observed that they thought, and that in their opinion the Senate conferees agreed, that legislative implementation was necessary to carry into effect all treaties which contained “stipulations requiring appropriations, or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create States, or to cede territory. . . .” Id. at 1019. Much the same language was included in a later report, H. Rep. No. 37, 40th Congress, 2d Sess. (1868). Controversy with respect to the sufficiency of Senate ratification of the Panama Canal treaties to dispose of United States property therein to Panama was extensive. A divided Court of Appeals for the District of Columbia reached the question and held that Senate approval of the treaty alone was sufficient. Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978).

[350] T. Cooley, General Principles of Constitutional Law 175 (3d ed. 1898); Q. Wright, The Control of American Foreign Relations 353–356 (1922).

[351] *See*, *e.g.*, 5 Annals of Congress 493 (1796).

[352] *Head Money Cases*, 112 U.S. 580, 598 (1884). The repealability of treaties by act of Congress was first asserted in an opinion of the Attorney General in 1854. 6 Ops. Atty. Gen. 291. The year following the doctrine was adopted judicially in a lengthy and cogently argued opinion of Justice Curtis, speaking for a United States circuit court in Taylor v. Morton, 23 Fed. Cas. 784 (No. 13,799) (C.C.D. Mass 1855). *See also The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871); United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491, 496 (1883); Botiller v. Dominguez, 130 U.S. 238 (1889); *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); Whitney v. Rob-

Treaties Versus Prior Acts of Congress.—The Court has enforced numerous statutory provisions that it recognized as superseding prior treaty engagements. Chief Justice Marshall asserted that the converse would be true as well [353]—that a treaty that is self-executing is the law of the land and prevails over an earlier inconsistent statute—and this proposition has been repeated many times in dicta.[354] But there is dispute whether in fact a treaty has ever been held to have repealed or superseded an inconsistent statute. Willoughby, for example, writes: "In fact, however, there have been few (the writer is not certain that there has been any) instances in which a treaty inconsistent with a prior act of Congress has been given full force and effect as law in this country without the assent of Congress. There may indeed have been cases in which, by treaty, certain action has been taken without reference to existing Federal laws, as, for example, where by treaty certain populations have been collectively naturalized, but such treaty action has not operated to repeal or annul the existing law upon the subject." [355]

The one instance that may be an exception [356] is *Cook v. United States*,[357] in which a divided Court held that a 1924 treaty with Great Britain that allowed the inspection of British vessels for contraband liquor and seizure if any was found had superseded the

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ertson, 124 U.S. 190, 194 (1888); Fong Yue Ting v. United States, 149 U.S. 698, 721 (1893). "Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate." La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1899). *Cf.* Reichart v. Felps, 73 U.S. (6 Wall.) 160, 165–66 (1868), which states in dictum that "Congress is bound to regard the public treaties, and it had no power . . . to nullify [Indian] titles confirmed many years before by the authorized agents of the government."

[353] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314–15 (1829). In a later case, it was determined in a different situation that by its terms the treaty in issue, which had been assumed to be executory in the earlier case, was self-executing. United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

[354] *E.g.*, United States v. Lee Yen Tai, 185 U.S. 213, 220–21 (1902); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871); Johnson v. Browne, 205 U.S. 309, 320–21 (1907); Whitney v. Roberston, 124 U.S. 190, 194 (1888).

[355] 1 W. Willoughby, supra, at 555.

[356] Other cases, which are cited in some sources, appear distinguishable. United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801), applied a treaty entered into subsequent to enactment of a statute abrogating all treaties then in effect between the United States and France, so that it is inaccurate to refer to the treaty as superseding a prior statute. In United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876), the treaty with an Indian tribe in which the tribe ceded certain territory, later included in a state, provided that a federal law restricting the sale of liquor on the reservation would continue in effect in the territory ceded; the Court found the stipulation an appropriate subject for settlement by treaty and the provision binding. *See also* Charlton v. Kelly, 229 U.S. 447 (1913).

[357] 288 U.S. 102 (1933).

authority conferred by a section of the Tariff Act of 1922[358] The difficulty with this case is that the Tariff Act provision had been reenacted in 1930,[359] so that a simple application of the rule that the later enactment governs should have caused a different result. It may be suspected that the low estate to which Prohibition had fallen and a desire to avoid a diplomatic controversy should the seizure at issue have been upheld influenced the Court's decision.

When Is a Treaty Self-Executing.—Several references have been made above to a distinction between treaties as self-executing and as merely executory, in which case they are enforceable only after the enactment of "legislation to carry them into effect."[360] But what is it about a treaty that makes it the law of the land and gives a private litigant the right to rely on it in a court of law? As early as 1801, the Supreme Court took notice of a treaty, and, finding it applicable to the situation before it, gave judgment for the petitioner based on it.[361] In *Foster v. Neilson*,[362] Chief Justice Marshall explained that a treaty is to be regarded "as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision." A treaty will not be self-executing, however, "when the terms of the [treaty] stipulation import a contract—when either of the parties engages to perform a particular act. . . ." When this is the case, "the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."[363]

Sometimes the nature of a treaty will determine whether it requires legislative execution or "conveys an intention that it be 'self-executing' and is ratified on these terms."[364] One authority states

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[358] 42 Stat. 858, 979, § 581.

[359] 46 Stat. 590, 747, § 581.

[360] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008), quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[361] United States v. Schooner Peggy, 5 U.S. (1 Cr.) 103 (1801).

[362] 27 U.S. (2 Pet.) 253 (1829).

[363] 27 U.S. (2 Pet.) at 314. Generally, qualifications may have been inserted in treaties out of a belief in their constitutional necessity or because of some policy reason. In regard to the former, it has always apparently been the practice to insert in treaties affecting the revenue laws of the United States a proviso that they should not be deemed effective until the necessary laws to carry them into operation should be enacted by Congress. 1 W. Willoughby, supra, at 558. Perhaps of the same nature was a qualification that cession of certain property in the Canal Zone should be dependent upon action by Congress inserted in Article V of the 1955 Treaty with Panama. TIAS 3297, 6 U.S.T. 2273, 2278. In regard to the latter, it may be noted that Article V of the Webster-Ashburton Treaty, 8 Stat. 572, 575 (1842), providing for the transfer to Canada of land in Maine and Massachusetts was conditioned upon assent by the two states and payment to them of compensation. S. Crandall, *supra*, at 222–224.

[364] Medellin v. Texas, 128 S. Ct. 1346, 1356 (2008), quoting Ingartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc).

that whether a treaty is self-executing "depends upon whether the obligation is imposed on private individuals or on public authorities. . . ."

"Treaty provisions which define the rights and obligations of private individuals and lay down general principles for the guidance of military, naval or administrative officials in relation thereto are usually considered self-executing. Thus treaty provisions assuring aliens equal civil rights with citizens, defining the limits of national jurisdiction, and prescribing rules of prize, war and neutrality, have been so considered . . . ."

"On the other hand certain treaty obligations are addressed solely to public authorities, of which may be mentioned those requiring the payment of money, the cession of territory, the guarantee of territory or independence, the conclusion of subsequent treaties on described subjects, the participation in international organizations, the collection and supplying of information, and direction of postal, telegraphic or other services, the construction of buildings, bridges, lighthouses, etc." [365] It may well be that these two characteristics merge with each other at many points and the language of the Court is not always helpful in distinguishing them.[366]

Treaties and the Necessary and Proper Clause.—What power, or powers, does Congress exercise when it enacts legislation for the purpose of carrying treaties of the United States into effect? When the subject matter of the treaty falls within the ambit of Congress's enumerated powers, then it is these powers that it exercises in carrying the treaty into effect. But if the treaty deals with a subject that falls within the national jurisdiction because of its international character, then recourse is had to the Necessary and Proper Clause. Thus, of itself, Congress would have had no power to confer judicial powers upon foreign consuls in the United States, but the treaty-power can do this and has done it repeatedly and Congress has supplemented these treaties by appropriate legislation.[367] Congress could not confer judicial power upon American consuls abroad to be exercised over American citizens abroad, but the treaty-power can and has, and Congress has passed legislation perfecting such agreements, and the Supreme Court has upheld such legislation.[368]

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[365] Q. Wright, supra, at 207–208. *See also* L. Henkin, Foreign Affairs and the Constitution 156–162 (1972).

[366] *Compare* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314–15 (1829), *with* Cook v. United States, 288 U.S. 102, 118–19 (1933).

[367] Acts of March 2, 1829, 4 Stat. 359 and of February 24, 1855, 10 Stat. 614.

[368] *See In re* Ross, 140 U.S. 453 (1891), where the treaty provisions involved are given. The supplementary legislation, later reenacted at Rev. Stat. 4083–4091, was

Again, Congress of itself could not provide for the extradition of fugitives from justice, but the treaty-power can and has done so scores of times, and Congress has passed legislation carrying our extradition treaties into effect.[369] And Congress could not ordinarily penalize private acts of violence within a state, but it can punish such acts if they deprive aliens of their rights under a treaty.[370] Referring to such legislation, the Court has said: "The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in section 8 of Article I of the Constitution, as all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with foreign power." [371] In a word, the treaty-power cannot purport to amend the Constitution by adding to the list of Congress's enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures that independently of a treaty Congress could not enact; the only question that can be raised as to such measures is whether they are "necessary and proper" for the carrying of the treaty in question into operation.

The foremost example of this interpretation is *Missouri v. Holland*.[372] There, the United States and Great Britain had entered into a treaty for the protection of migratory birds,[373] and Congress had enacted legislation pursuant to the treaty to effectuate it.[374] Missouri objected that such regulation was reserved to the states

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repealed by the Joint Res. of August 1, 1956, 70 Stat. 774. The validity of the *Ross* case was subsequently questioned. *See* Reid v. Covert, 354 U.S. 1, 12, 64, 75 (1957).

[369] 18 U.S.C. §§ 3181–3195.

[370] Baldwin v. Franks, 120 U.S. 678, 683 (1887).

[371] Neely v. Henkel, 180 U.S. 109, 121 (1901). A different theory is offered by Justice Story in his opinion for the court in Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842): "Treaties made between the United States and foreign powers, often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfill all the obligations of treaties." Id. at 619. Story was here in quest of arguments to prove that Congress had power to enact a fugitive slave law, which he based on its power "to carry into effect rights expressly given and duties expressly enjoined" by the Constitution. Id. at 618–19. However, the treaty-making power is neither a right nor a duty, but one of the powers "vested by this Constitution in the Government of the United States." Art. I, § 8, cl. 18.

[372] 252 U.S. 416 (1920).

[373] 39 Stat. 1702 (1916).

[374] 40 Stat. 755 (1918).

by the Tenth Amendment and that the statute infringed on this reservation, pointing to lower court decisions voiding an earlier act not based on a treaty.[375] Noting that treaties "are declared the supreme law of the land," Justice Holmes for the Court said: "If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."[376] "It is obvious," he continued, "that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."[377] Because the treaty and thus the statute dealt with a matter of national and international concern, the treaty was proper and the statute was "necessary and proper" to effectuate the treaty.

Constitutional Limitations on the Treaty Power

A question growing out of the discussion above is whether the treaty power is bounded by constitutional limitations. By the Supremacy Clause, both statutes and treaties "are declared . . . to be the supreme law of the land, and no superior efficacy is given to either over the other."[378] As statutes may be held void because they contravene the Constitution, it should follow that treaties may be held void, the Constitution being superior to both. And indeed the Court has numerous times so stated.[379] It does not appear that the Court has ever held a treaty unconstitutional,[380] although there are cases in which the decision seemed to be compelled by constitu-

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[375] United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288 (D. Kan. 1915). The Court did not purport to decide whether those cases were correctly decided. Missouri v. Holland, 252 U.S. 416, 433 (1920). Today, there seems no doubt that Congress's power under the commerce clause would be deemed more than adequate, but at that time a majority of the Court had a very restrictive view of the commerce power. *Cf.* Hammer v. Dagenhart, 247 U.S. 251 (1918).

[376] Missouri v. Holland, 252 U.S. 416, 432 (1920).

[377] 252 U.S. at 433. The internal quotation is from Andrews v. Andrews, 188 U.S. 14, 33 (1903).

[378] Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[379] "The treaty is . . . a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States." Doe v. Braden, 57 U.S. (16 How.) 635, 656 (1853). "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." *The Cherokee Tobacco*, 78 U.S. (11 Wall.), 616, 620 (1871). *See also* Geofroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Wong Kim Ark, 169 U.S. 649, 700 (1898); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

[380] 1 W. Willoughby, supra, at 561; L. Henkin, supra, at 137. In Power Authority of New York v. FPC, 247 F.2d 538 (2d Cir. 1957), a reservation attached by the

tional considerations.[381] In fact, there would be little argument with regard to the general point were it not for dicta in Justice Holmes' opinion in *Missouri v. Holland*.[382] "Acts of Congress," he said, "are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention." Although he immediately followed this passage with a cautionary "[w]e do not mean to imply that there are no qualifications to the treaty-making power . . . ,"[383] the Justice's language and the holding by which it appeared that the reserved rights of the states could be invaded through the treaty power led in the 1950s to an abortive effort to amend the Constitution to restrict the treaty power.[384]

Controversy over Holmes' language apparently led Justice Black in *Reid v. Covert*[385] to deny that the difference in language of the Supremacy Clause with regard to statutes and with regard to treaties was relevant to the status of treaties as inferior to the Constitution. "There is nothing in this language which intimates that treaties do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States

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Senate to a 1950 treaty with Canada was held invalid. The court observed that the reservation was properly not a part of the treaty but that if it were it would still be void as an attempt to circumvent constitutional procedures for enacting amendments to existing federal laws. The Supreme Court vacated the judgment on mootness grounds. 355 U.S. 64 (1957). In United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), an executive agreement with Canada was held void as conflicting with existing legislation. The Supreme Court affirmed on nonconstitutional grounds. 348 U.S. 296 (1955).

[381] *Cf.* City of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Rocca v. Thompson, 223 U.S. 317 (1912).

[382] 252 U.S. 416 (1920).

[383] 252 U.S. at 433. Subsequently, he also observed: "The treaty in question does not contravene any prohibitory words to be found in the Constitution." Id.

[384] The attempt, the so-called "Bricker Amendment," was aimed at the expansion into reserved state powers through treaties as well as executive agreements. The key provision read: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." S.J. Res. 43, 82d Congress, 1st Sess. (1953), § 2. *See also* S.J. Res. 1, 84th Congress, 1st Sess. (1955), § 2. Extensive hearings developed the issues thoroughly but not always clearly. *Hearings on S.J. Res. 130: Before a Subcommittee of the Senate Judiciary Committee*, 82d Congress, 2d Sess. (1952). *Hearings on S.J. Res. 1 & 43: Before a Subcommittee of the Senate Judiciary Committee*, 83d Congress, 1st Sess. (1953).

[385] 354 U.S. 1 (1957) (plurality opinion).

under the Articles of Confederation, including the important treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V." [386]

Establishment of the general principle, however, is but the beginning; there is no readily agreed-upon standard for determining what the limitations are. The most persistently urged proposition in limitation has been that the treaty power must not invade the reserved powers of the states. In view of the sweeping language of the Supremacy Clause, it is hardly surprising that this argument has not prevailed.[387] Nevertheless, the issue, in the context of Congress's power under the Necessary and Proper Clause to effectuate a treaty dealing with a subject arguably within the domain of the states, was presented as recently as 1920, when the Court upheld a treaty and implementing statute providing for the protection of migratory birds.[388] "The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment." [389] The gist of the holding followed. "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers

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[386] 354 U.S. at 16–17. For discussions of the issue, *see* Restatement, Foreign Relations, § 302; Nowak & Rotunda, *A Comment on the Creation and Resolution of a "Non-Problem": Dames & Moore v. Regan, the Foreign Affairs Power, and the Role of the Courts*, 29 UCLA L. Rev. 1129 (1982); L. Henkin, supra, at 137–156.

[387] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cr.) 603 (1813); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817); Hauenstein v. Lynham, 100 U.S. 483 (1880). Jefferson, in his list of exceptions to the treaty power, thought the Constitution "must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way." Jefferson's Manual of Parliamentary Practice, § 594, reprinted in The Rules and Manual of the House of Representatives, H. Doc. 102–405, 102d Congress, 2d Sess. (1993), 298–299. But this view has always been the minority one. Q. Wright, supra, at 92 n.97. The nearest the Court ever came to supporting this argument appears to be Frederickson v. Louisiana, 64 U.S. (23 How.) 445, 448 (1860).

[388] Missouri v. Holland, 252 U.S. 416 (1920).

[389] 252 U.S. at 433–34.

to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed." [390]

The doctrine that seems to follow from this case and others is "that in all that properly relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded." [391] It is not, in other words, the treaty power that enlarges either the federal power or the congressional power, but the international character of the interest concerned that might be acted upon.

Dicta in some of the cases lend support to the argument that the treaty power is limited by the delegation of powers among the branches of the National Government [392] and especially by the delegated powers of Congress, although it is not clear what the limitation means. If it is meant that no international agreement could be constitutionally entered into by the United States within the sphere of such powers, the practice from the beginning has been to the contrary; [393] if it is meant that treaty provisions dealing with matters delegated to Congress must, in order to become the law of the land, receive the assent of Congress through implementing legislation, it states not a limitation on the power of making treaties as international conventions but rather a necessary procedure before certain conventions are cognizable by the courts in the enforcement of rights under them.

It has also been suggested that the prohibitions against governmental action contained in the Constitution, and the Bill of Rights in particular, limit the exercise of the treaty power. No doubt this is true, though again there are no cases which so hold.[394]

One other limitation of sorts may be contained in the language of certain court decisions that seem to say that only matters of "in-

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[390] 252 U.S. at 435.

[391] 1 W. Willoughby, supra, at 569. *See also* L. Henkin, supra, at 143–148; Restatement, Foreign Relations, § 302, Comment d, & Reporters' Note 3, pp. 154–157.

[392] *E.g.*, Geofroy v. Riggs, 133 U.S. 258, 266–267 (1890); Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872). Jefferson listed as an exception from the treaty power "those subjects of legislation in which [the Constitution] gave a participation to the House of Representatives," although he admitted "that it would leave very little matter for the treaty power to work on." Jefferson's Manual, supra, at 299.

[393] Q. Wright, supra, at 101–103. *See also*, L. Henkin, supra, at 148–151.

[394] *Cf.* Reid v. Covert, 354 U.S. 1 (1957). *See also* Geofroy v. Riggs, 133 U.S. 258, 267 (1890).

ternational concern" may be the subject of treaty negotiations.[395] Although this may appear to be a limitation, it does not take account of the elasticity of the concept of "international concern" by which the subject matter of treaties has constantly expanded over the years.[396] At best, any attempted resolution of the issue of limitations must be an uneasy one.[397]

In brief, the fact that all the foreign relations power is vested in the National Government and that no formal restriction is imposed on the treaty-making power in the international context[398] leaves little room for the notion of a limited treaty-making power with regard to the reserved rights of the states or in regard to the choice of matters concerning which the Federal Government may treat with other nations; protected individual rights appear to be sheltered by specific constitutional guarantees from the domestic effects of treaties, and the separation of powers at the federal level may require legislative action to give municipal effect to international agreements.

Interpretation and Termination of Treaties as International Compacts

The repeal by Congress of the "self-executing" clauses of a treaty as "law of the land" does not of itself terminate the treaty as an

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[395] "[I]t must be assumed that the framers of the Constitution intended that [the treaty power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty. . . ." Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872). With the exceptions noted, "it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." Geofroy v. Riggs, 133 U.S. 258, 267 (1890). "The treatymaking power of the United States . . . does extend to all proper subjects of negotiation between our government and other nations." Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

[396] *Cf.* L. Henkin, supra, at 151–56.

[397] Other reservations have been expressed. One contention has been that the territory of a state may not be ceded without such state's consent. Geofroy v. Riggs, 133 U.S. 258, 267 (1890), citing Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 541 (1885). *Cf.* the Webster-Ashburton Treaty, Article V, 8 Stat. 572, 575. *But see* S. Crandall, supra, at 220–229; 1 W. Willoughby, supra, at 572–576.

A further contention is that, although foreign territory may be annexed to the United States by the treaty power, it may not be incorporated with the United States except with the consent of Congress. Downes v. Bidwell, 182 U.S. 244, 310–344 (1901) (four Justices dissenting). This argument appears to be a variation of the one in regard to the correct procedure to give domestic effect to treaties.

Another argument grew out the XII Hague Convention of 1907, proposing an International Prize Court with appellate jurisdiction from national courts in prize cases. President Taft objected that no treaty could transfer to a tribunal not known to the Constitution any part of the judicial power of the United States, and a compromise was arranged. Q. Wright, supra, at 117–118; H. REP. NO. 1569, 68th Congress, 2d Sess. (1925).

[398] *Cf.* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575–576 (1840).

international contract, although it may very well provoke the other party to the treaty to do so. Hence, the questions arise where the Constitution lodges this power and where it lodges the power to interpret the contractual provisions of treaties. The first case of outright abrogation of a treaty by the United States occurred in 1798, when Congress by the Act of July 7 of that year, pronounced the United States freed and exonerated from the stipulations of the Treaties of 1778 with France.[399] This act was followed two days later by one authorizing limited hostilities against the same country; in *Bas v. Tingy*,[400] the Supreme Court treated the act of abrogation as simply one of a bundle of acts declaring "public war" upon the French Republic.

Termination of Treaties by Notice.—Typically, a treaty provides for its termination by notice of one of the parties, usually after a prescribed time from the date of notice. Of course, treaties may also be terminated by agreement of the parties, or by breach by one of the parties, or by some other means. But it is in the instance of termination by notice that the issue has frequently been raised: where in the Government of the United States does the Constitution lodge the power to unmake treaties?[401] Reasonable arguments may be made locating the power in the President alone, in the President and Senate, or in the Congress. Presidents generally have asserted the foreign relations power reposed in them under Article II and the inherent powers argument made in *Curtiss-Wright*. Because the Constitution requires the consent of the Senate for making a treaty, one can logically argue that its consent is also required for terminating it. Finally, because treaties are, like statutes, the supreme law of the land, it may well be argued that, again like statutes, they may be undone only through law-making by the entire Congress; additionally, since Congress may be required to implement treaties and may displace them through legislation, this argument is reenforced.

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[399] 1 Stat. 578 (1798).

[400] 4 U.S. (4 Dall.) 37 (1800). *See also* Gray v. United States, 21 Ct. Cl. 340 (1886), with respect to claims arising out of this situation.

[401] The matter was most extensively canvassed in the debate with respect to President Carter's termination of the Mutual Defense Treaty of 1954 with the Republic of China (Taiwan). *See, e.g.*, the various views argued in *Treaty Termination: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979). On the issue generally, *see* Restatement, Foreign Relations, § 339; CRS Study, supra, 158–167; L. Henkin, supra, at 167–171; Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties: The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1 (1979); Berger, *The President's Unilateral Termination of the Taiwan Treaty*, 75 NW. U. L. REV. 577 (1980).

Definitive resolution of this argument appears only remotely possible. Historical practice provides support for all three arguments and the judicial branch seems unlikely to essay any answer.

Although abrogation of the French treaty, mentioned above, is apparently the only example of termination by Congress through a public law, many instances may be cited of congressional actions mandating terminations by notice of the President or changing the legal environment so that the President is required to terminate. The initial precedent in the instance of termination by notice pursuant to congressional action appears to have occurred in 1846,[402] when by joint resolution Congress authorized the President at his discretion to notify the British government of the abrogation of the Convention of August 6, 1827, relative to the joint occupation of the Oregon Territory. As the President himself had requested the resolution, the episode is often cited to support the theory that international conventions to which the United States is a party, even those terminable on notice, are terminable only through action of Congress.[403] Subsequently, Congress has often passed resolutions denouncing treaties or treaty provisions, which by their own terms were terminable on notice, and Presidents have usually, though not invariably, carried out such resolutions.[404] By the La Follette-Furuseth Seaman's Act,[405] President Wilson was directed, "within ninety days after the passage of the act, to give notice to foreign governments that so much of any treaties as might be in conflict with the provisions of the act would terminate on the expiration of the periods of notice provided for in such treaties," and the required notice was given.[406] When, however, by section 34 of the Jones Merchant Marine Act of 1920, the same President was authorized and directed within ninety days to give notice to the other parties to certain treaties, with which the Act was not in conflict but which might restrict Congress in the future from enacting discriminatory tonnage duties, President Wilson refused to comply, asserting that he "did not deem the direction contained in section 34 . . . an exercise of any constitutional power possessed by Congress."[407] The same

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[402] *Compare* the different views of the 1846 action in *Treaty Termination: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979), 160–162 (memorandum of Hon. Herbert Hansell, Legal Advisor, Department of State), and in *Taiwan: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979), 300 (memorandum of Senator Goldwater).

[403] S. Crandall, supra, at 458–459.

[404] Id. at 459–62; Q. Wright, supra, at 258.

[405] 38 Stat. 1164 (1915).

[406] S. Crandall, supra, at 460. *See* Van der Weyde v. Ocean Transp. Co., 297 U.S. 114 (1936).

[407] 41 Stat. 1007. *See* Reeves, *The Jones Act and the Denunciation of Treaties*, 15 Am. J. Int'l. L. 33 (1921). In 1879, Congress passed a resolution requiring the

attitude toward section 34 was continued by Presidents Harding and Coolidge.[408]

Very few precedents exist in which the President terminated a treaty after obtaining the approval of the Senate alone. The first occurred in 1854–1855, when President Pierce requested and received Senate approval to terminate a treaty with Denmark.[409] When the validity of this action was questioned in the Senate, the Committee on Foreign Relations reported that the procedure was correct, that prior full-Congress actions were incorrect, and that the right to terminate resides in the treaty-making authorities, the President and the Senate.[410]

Examples of treaty terminations in which the President acted alone are much disputed with respect both to facts and to the underlying legal circumstances.[411] Apparently, President Lincoln was the first to give notice of termination in the absence of prior congressional authorization or direction, and Congress shortly thereafter by joint resolution ratified his action.[412] The first such action by the President, with no such subsequent congressional action, appears to be that of President McKinley in 1899, in terminating an 1850 treaty with Switzerland, but the action may be explainable as the treaty being inconsistent with a subsequently enacted law.[413] Other such renunciations by the President acting on his own have

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President to abrogate a treaty with China, but President Hayes vetoed it, partly on the ground that Congress as an entity had no role to play in ending treaties, only the President with the advice and consent of the Senate. 9 J. Richardson, *supra*, at 4466, 4470–4471. For the views of President Taft on the matter, *see* W. Taft, The Presidency, Its Duties, Its Powers, Its Opportunities and Its Limitations 112–113 (1916).

[408] Since this time, very few instances appear in which Congress has requested or directed termination by notice, but they have resulted in compliance. *E.g.*, 65 Stat. 72 (1951) (directing termination of most-favored-nation provisions with certain Communist countries in commercial treaties); 70 Stat. 773 (1956) (requesting renunciation of treaty rights of extraterritoriality in Morroco). The most recent example appears to be § 313 of the Anti-Apartheid Act of 1986, which required the Secretary of State to terminate immediately, in accordance with its terms, the tax treaty and protocol with South Africa that had been concluded on December 13, 1946. Pub. L. 99–440, 100 Stat. 3515 (1986), 22 U.S.C. § 5063.

[409] 5 J. Richardson, *supra*, at 279, 334.

[410] S. Rep. No. 97, 34th Congress, 1st Sess. (1856), 6–7. The other instance was President Wilson's request, which the Senate endorsed, for termination of the International Sanitary Convention of 1903. *See* 61 Cong. Rec. 1793–1794 (1921). *See* CRS Study, supra at 161–62.

[411] *Compare, e.g.*, *Treaty Termination: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979), 156–191 (memorandum of Hon. Herbert Hansell, Legal Advisor, Department of State), *with Taiwan: Hearings Before the Senate Committee on Foreign Relations*, 96th Congress, 1st Sess. (1979), 300–307 (memorandum of Senator Goldwater). *See* CRS Study, supra at 164–66.

[412] 13 Stat. 568 (1865).

[413] The treaty, *see* 11 C. Bevans, Treaties and Other International Agreements of the United States of America 894 (1970), was probably at odds with the Tariff Act of 1897. 30 Stat. 151.

been similarly explained and similarly the explanations have been controverted. Although the Department of State, in setting forth legal justification for President Carter's notice of termination of the treaty with Taiwan, cited many examples of a President's acting alone, many of these are ambiguous and may be explained away by, for example, conflicts with later statutes, changed circumstances, or the like.[414]

No such ambiguity accompanied President Carter's action on the Taiwan treaty,[415] and a somewhat lengthy Senate debate was provoked. In the end, the Senate on a preliminary vote approved a "sense of the Senate" resolution claiming for itself a consenting role in the termination of treaties, but no final vote was ever taken and the Senate thus did not place itself in conflict with the President.[416] However, several Members of Congress went to court to contest the termination, apparently the first time a judicial resolution of the question had been sought. A divided Court of Appeals, on the merits, held that presidential action was sufficient by itself to terminate treaties, but the Supreme Court, no majority agreeing on a common ground, vacated that decision and instructed the trial court to dismiss the suit.[417] Although no Court opinion bars future litigation, it appears that the political question doctrine or some other rule of judicial restraint will leave such disputes to the contending forces of the political branches.[418]

Determination Whether a Treaty Has Lapsed.—There is clear judicial recognition that the President may without consulting Congress validly determine the question whether specific treaty provisions have lapsed. The following passage from Justice Lurton's opin-

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[414] *Compare* the views expressed in the Hansell and Goldwater memoranda, supra. For expressions of views preceding the immediate controversy, *see, e.g.*, Riesenfeld, *The Power of Congress and the President in International Relations*, 25 CALIF. L. REV. 643, 658–665 (1937); Nelson, *The Termination of Treaties and Executive Agreements by the United States*, 42 MINN. L. REV. 879 (1958).

[415] Note that the President terminated the treaty in the face of an expression of the sense of Congress that prior consultation between President and Congress should occur. 92 Stat. 730, 746 (1978).

[416] Originally, S. Res. 15 had disapproved presidential action alone, but it was amended and reported by the Foreign Relations Committee to recognize at least 14 bases of presidential termination. S. REP. NO. 119, 96th Congress, 1st Sess. (1979). In turn, this resolution was amended to state the described sense of the Senate view, but the matter was never brought to final action. *See* 125 CONG. REC. 13672, 13696, 13711, 15209, 15859 (1979).

[417] Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated and remanded*, 444 U.S. 996 (1979). Four Justices found the case nonjusticiable because of the political question doctrine, id. at 1002, but one other Justice in the majority and one in dissent rejected this analysis. Id. at 998 (Justice Powell), 1006 (Justice Brennan). The remaining three Justices were silent on the doctrine.

[418] *Cf.* Baker v. Carr, 369 U.S. 186, 211–13, 217 (1962).

ion in *Charlton v. Kelly* [419] is pertinent: "If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. . . . That the political branch of the government recognizes the treaty obligation as still existing is evidenced by its action in this case. . . . The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land as affording authority for the warrant of extradition." [420] So also it is primarily for the political departments to determine whether certain provisions of a treaty have survived a war in which the other contracting state ceased to exist as a member of the international community.[421]

Status of a Treaty a Political Question.—It is clear that many questions which arise concerning a treaty are of a political nature and will not be decided by the courts. In the words of Justice Curtis in *Taylor v. Morton*: [422] It is not "a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty, has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise. . . . These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our government. They belong to diplomacy and legislation, and not to the administration of existing laws and it necessarily follows that if they are denied to Congress and the Executive, in the exercise of their legislative power, they can be found nowhere, in our

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[419] 229 U.S. 447 (1913).
[420] 229 U.S. at 473–76.
[421] Clark v. Allen, 331 U.S. 503 (1947).
[422] 23 Fed. Cas. 784 (No. 13,799) (C.C.D. Mass. 1855).

system of government." Chief Justice Marshall's language in *Foster v. Neilson* [423] is to the same effect.

Indian Treaties

In the early cases of *Cherokee Nation v. Georgia*,[424] and *Worcester v. Georgia*,[425] the Court, speaking by Chief Justice Marshall, held, first, that the Cherokee Nation was not a sovereign state within the meaning of that clause of the Constitution that extends the judicial power of the United States to controversies "between a State or the citizens thereof and foreign states, citizens or subjects." Second, it held: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, had adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense." [426]

Later cases established that the power to make treaties with the Indian tribes was coextensive with the power to make treaties with foreign nations,[427] that the states were incompetent to interfere with rights created by such treaties,[428] that as long as the United States recognized the national character of a tribe, its members were under the protection of treaties and of the laws of Congress and their property immune from taxation by a state,[429] that a stipulation in an Indian treaty that laws forbidding the introduction, of liquors into Indian territory was operative without legislation, and binding on the courts although the territory was within an organized county of a state,[430] and that an act of Congress contrary to a prior Indian treaty repealed it.[431]

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[423] 27 U.S. (2 Pet.) 253, 309 (1829). Baker v. Carr, 369 U.S. 186 (1962), qualifies this certainty considerably, and Goldwater v. Carter, 444 U.S. 996 (1979), prolongs the uncertainty. *See* L. Henkin, supra at 208–16; Restatement, Foreign Relations, § 326.

[424] 30 U.S. (5 Pet.) 1 (1831).

[425] 31 U.S. (6 Pet.) 515 (1832).

[426] 31 U.S. at 558.

[427] Holden v. Joy, 84 U.S. (17 Wall.) 211, 242 (1872); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 192 (1876); Dick v. United States, 208 U.S. 340, 355–56 (1908).

[428] The *New York Indians*, 72 U.S. (5 Wall.) 761 (1867).

[429] The *Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1867).

[430] United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 196 (1876).

[431] *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871). *See also* Ward v. Race Horse, 163 U.S. 504, 511 (1896); Thomas v. Gay, 169 U.S. 264, 270 (1898).

Present Status of Indian Treaties.—Today, the subject of Indian treaties is a closed account in the constitutional law ledger. By a rider inserted in the Indian Appropriation Act of March 3, 1871, it was provided "That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." [432] Subsequently, the power of Congress to withdraw or modify tribal rights previously granted by treaty has been invariably upheld.[433] Statutes modifying rights of members in tribal lands,[434] granting a right of way for a railroad through lands ceded by treaty to an Indian tribe,[435] or extending the application of revenue laws respecting liquor and tobacco over Indian territories, despite an earlier treaty exemption,[436] have been sustained.

When, on the other hand, definite property rights have been conferred upon individual Native Americans, whether by treaty or under an act of Congress, they are protected by the Constitution to the same extent and in the same way as the private rights of other residents or citizens of the United States. Hence, the Court held that certain Indian allottees, under an agreement according to which, in part consideration of their relinquishment of all their claim to tribal property, they were to receive in severalty allotments of lands that were to be nontaxable for a specified period, acquired vested rights of exemption from state taxation that were protected by the Fifth Amendment against abrogation by Congress.[437]

A regular staple of each Term's docket of the Court is one or two cases calling for an interpretation of the rights of Native Americans under some treaty arrangement vis-a-vis the Federal Government or the states. Thus, though no treaties have been negotiated for decades and none presumably ever will again, litigation concerning old treaties seemingly will go on.

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[432] 16 Stat. 566; Rev. Stat. § 2079, now contained in 25 U.S.C. § 71.
[433] Ward v. Race Horse, 163 U.S. 504 (1896).
[434] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[435] Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890).
[436] *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871).
[437] Choate v. Trapp, 224 U.S. 665, 677–78 (1912); Jones v. Meehan, 175 U.S. 1 (1899). *See also* Hodel v. Irving, 481 U.S. 704 (1987) (section of law providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract's total acreage violates Fifth Amendment's taking clause by completely abrogating rights of intestacy and devise).

INTERNATIONAL AGREEMENTS WITHOUT SENATE APPROVAL

The capacity of the United States to enter into agreements with other nations is not exhausted in the treaty-making power. The Constitution recognizes a distinction between "treaties" and "agreements" or "compacts" but does not indicate what the difference is.[438] The differences, which once may have been clearer, have been seriously blurred in practice within recent decades. Once a stepchild in the family in which treaties were the preferred offspring, the executive agreement has surpassed in number and perhaps in international influence the treaty formally signed, submitted for ratification to the Senate, and proclaimed upon ratification.

During the first half-century of its independence, the United States was party to sixty treaties but to only twenty-seven published executive agreements. By the beginning of World War II, there had been concluded approximately 800 treaties and 1,200 executive agreements. In the period 1940–1989, the Nation entered into 759 treaties and into 13,016 published executive agreements. Cumulatively, in 1989, the United States was a party to 890 treaties and 5,117 executive agreements. To phrase it comparatively, in the first 50 years of its history, the United States concluded twice as many treaties as executive agreements. In the 50-year period from 1839 to 1889, a few more executive agreements than treaties were entered into. From 1889 to 1939, almost twice as many executive agreements as treaties were concluded. Between 1939 and 1993, executive agreements comprised more than 90% of the international agreements concluded.[439]

One must, of course, interpret the raw figures carefully. Only a very small minority of all the executive agreements entered into were based solely on the powers of the President as Commander in Chief and organ of foreign relations; the remainder were authorized in advance by Congress by statute or by treaty provisions ratified by the Senate.[440] Thus, consideration of the constitutional significance of executive agreements must begin with a differentiation

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[438] *Compare* Article II, § 2, cl. 2, and Article VI, cl. 2, *with* Article I, 10, cls. 1 and 3. *Cf.* Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 570–72 (1840). And note the discussion in Weinberger v. Rossi, 456 U.S. 25, 28–32 (1982).

[439] CRS Study, xxxiv-xxxv, supra, 13–16. Not all such agreements, of course, are published, either because of national-security/secrecy considerations or because the subject matter is trivial. In a 1953 hearing exchange, Secretary of State Dulles estimated that about 10,000 executive agreements had been entered into in connection with the NATO treaty. "Every time we open a new privy, we have to have an executive agreement." *Hearing on S.J. Res. 1 and S.J. Res. 43: Before a Subcommittee of the Senate Judiciary Committee*, 83d Congress, 1st Sess. (1953), 877.

[440] One authority concluded that of the executive agreements entered into between 1938 and 1957, only 5.9 percent were based exclusively on the President's

among the kinds of agreements which are classed under this single heading.[441]

Executive Agreements by Authorization of Congress

Congress early authorized officers of the executive branch to enter into negotiations and to conclude agreements with foreign governments, authorizing the borrowing of money from foreign countries[442] and appropriating money to pay off the government of Algiers to prevent pirate attacks on United States shipping.[443] Perhaps the first formal authorization in advance of an executive agreement was enactment of a statute that permitted the Postmaster General to "make arrangements with the Postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post offices."[444] Congress has also approved, usually by resolution, other executive agreements, such as the annexing of Texas and Hawaii and the acquisition of Samoa.[445] A prolific source of executive agreements has been the authorization of reciprocal arrangements between the United States and other countries for the securing of protection for patents, copyrights, and trademarks.[446]

Reciprocal Trade Agreements.—The most copious source of executive agreements has been legislation which provided authority for entering into reciprocal trade agreements with other nations.[447] Such agreements in the form of treaties providing for the reciprocal reduction of duties subject to implementation by Congress were frequently entered into,[448] but beginning with the Tariff

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constitutional authority. McLaughlin, *The Scope of the Treaty Power in the United States—II*, 43 MINN. L. REV. 651, 721 (1959). Another, somewhat overlapping study found that in the period 1946–1972, 88.3% of executive agreements were based at least in part on statutory authority; 6.2% were based on treaties, and 5.5% were based solely on executive authority. *International Agreements: An Analysis of Executive Regulations and Practices*, Senate Committee on Foreign Relations, 95th Cong., 1st Sess. (Comm. Print) (1977), 22 (prepared by CRS).

441 "[T]he distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance." Harvard Research in International Law, *Draft Convention on the Law of Treaties*, 29 AMER. J. INT. L. 697 (Supp.) (1935). *See* E. Byrd, supra at 148–151. Many scholars have aggressively promoted the use of executive agreements, in contrast to treaties, as a means of enhancing the role of the United States, especially the role of the President, in the international system. *See* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy (Pts. I & II)*, 54 YALE L. J. 181, 534 (1945).

442 1 Stat. 138 (1790). *See* E. Byrd, supra at 53 n.146.

443 W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 41 (1941).

444 Id. at 38–40. The statute was 1 Stat. 232, 239, 26 (1792).

445 McClure at 62–70.

446 Id. at 78–81; S. Crandall, supra at 127–31; *see* CRS Study, supra at 52–55.

447 Id. at 121–27; W. McClure, supra at 83–92, 173–89.

448 Id. at 8, 59–60.

Act of 1890,[449] Congress began to insert provisions authorizing the Executive to bargain over reciprocity with no necessity of subsequent legislative action. The authority was widened in successive acts.[450] Then, in the Reciprocal Trade Agreements Act of 1934,[451] Congress authorized the President to enter into agreements with other nations for reductions of tariffs and other impediments to international trade and to put the reductions into effect through proclamation.[452]

The Constitutionality of Trade Agreements.—In *Field v. Clark*,[453] legislation conferring authority on the President to conclude trade agreements was sustained against the objection that it attempted an unconstitutional delegation "of both legislative and treaty-making powers." The Court met the first objection with an extensive review of similar legislation from the inauguration of government under the Constitution. The second objection it met with a curt rejection: "What has been said is equally applicable to the objection that the third section of the act invests the President with treaty-making power. The Court is of opinion that the third section of the act of October 1, 1890, is not liable to the objection that it transfers legislative and treaty-making power to the President."[454] Although two Justices disagreed, the question has never been revived. However, in *B. Altman & Co. v. United States*,[455] decided twenty years later, a collateral question was passed upon. This was whether an act of Congress that gave the federal circuit courts of appeal jurisdiction of cases in which "the validity or construction of any treaty . . . was drawn in question" embraced a case involving a trade agreement which had been made under the sanction of the Tariff Act of 1897. The Court answered: "While it may be true that this commercial agreement, made under authority of the Tariff Act of

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[449] § 3, 26 Stat. 567, 612.

[450] Tariff Act of 1897, § 3, 30 Stat. 15, 203; Tariff Act of 1909, 36 Stat. 11, 82.

[451] 48 Stat. 943, § 350(a), 19 U.S.C. §§ 1351–1354.

[452] *See* the continued expansion of the authority. Trade Expansion Act of 1962, 76 Stat. 872, § 201, 19 U.S.C. § 1821; Trade Act of 1974, 88 Stat. 1982, as amended, 19 U.S.C. §§ 2111, 2115, 2131(b), 2435. Congress has, with respect to the authorization to the President to negotiate multilateral trade agreements under the auspices of GATT, constrained itself in considering implementing legislation, creating a "fast-track" procedure under which legislation is brought up under a tight timetable and without the possibility of amendment. 19 U.S.C. §§ 2191–2194.

[453] 143 U.S. 649 (1892).

[454] 143 U.S. at 694. *See also* Dames & Moore v. Regan, 453 U.S. 654 (1981), in which the Court sustained a series of implementing actions by the President pursuant to executive agreements with Iran in order to settle the hostage crisis. The Court found that Congress had delegated to the President certain economic powers underlying the agreements and that his suspension of claims powers had been implicitly ratified over time by Congress's failure to set aside the asserted power. *Also see* Weinberger v. Rossi, 456 U.S. 25, 29–30 n.6 (1982).

[455] 224 U.S. 583 (1912).

1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless, it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court." [456]

The Lend-Lease Act.—The most extensive delegation of authority ever made by Congress to the President to enter into executive agreements occurred within the field of the cognate powers of the two departments, the field of foreign relations, and took place at a time when war appeared to be in the offing and was in fact only a few months away. The legislation referred to is the Lend-Lease Act of March 11, 1941,[457] by which the President was empowered for over two years—and subsequently for additional periods whenever he deemed it in the interest of the national defense to do so—to authorize "the Secretary of War, the Secretary of the Navy, or the head of any other department or agency of the Government," to manufacture in the government arsenals, factories, and shipyards, or "otherwise procure," to the extent that available funds made possible, "defense articles"—later amended to include foodstuffs and industrial products—and "sell, transfer title to, exchange, lease, lend, or otherwise dispose of," the same to the "government of any country whose defense the President deems vital to the defense of the United States," and on any terms that he "deems satisfactory." Under this authorization the United States entered into Mutual Aid Agreements under which the government furnished its allies in World War II with 40 billion dollars' worth of munitions of war and other supplies.

International Organizations.—Overlapping of the treaty-making power through congressional-executive cooperation in international agreements is also demonstrated by the use of resolutions approving the United States joining of international organizations [458] and participating in international conventions.[459]

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[456] 224 U.S. at 601.

[457] 55 Stat. 31.

[458] *E.g.*, 48 Stat. 1182 (1934), authorizing the President to accept membership for the United States in the International Labor Organization.

[459] *See* E. Corwin, supra at 216.

Executive Agreements Authorized by Treaties

Arbitration Agreements.—In 1904 and 1905, Secretary of State John Hay negotiated a series of treaties providing for the general arbitration of international disputes. Article II of the treaty with Great Britain, for example, provided as follows: "In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute and the scope of the powers of the Arbitrators, and fixing the periods for the formation of the Arbitral Tribunal and the several stages of the procedure."[460] The Senate approved the British treaty by the constitutional majority having, however, first amended it by substituting the word "treaty" for "agreement." President Theodore Roosevelt, characterizing the "ratification" as equivalent to rejection, sent the treaties to repose in the archives. "As a matter of historical practice," Dr. McClure comments, "the *compromise* under which disputes have been arbitrated include both treaties and executive agreements in goodly numbers,"[461] a statement supported by both Willoughby and Moore.[462]

Agreements Under the United Nations Charter.—Article 43 of the United Nations Charter provides: "1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided. 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."[463] This time the Senate did not boggle over the word "agreement."

The United Nations Participation Act of December 20, 1945, implements these provisions as follows: "The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appro-

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[460] W. McClure, supra at 13–14.

[461] Id. at 14.

[462] 1 W. Willoughby, supra at 543.

[463] A Decade of American Foreign Policy, S. Doc. No. 123, 81st Cong., 1st Sess., 126 (1950).

priate Act or joint resolution, providing for the numbers and types of armed forces, their degree of readiness and general location, and the nature of facilities and assistance, including rights of passage, to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with article 43 of said Charter. The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided for therein: Provided, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements." [464]

Status of Forces Agreements.—Status of Forces Agreements, negotiated pursuant to authorizations contained in treaties between the United States and foreign nations in the territory of which American troops and their dependents are stationed, afford the United States a qualified privilege, which may be waived, of trying by court martial soldiers and their dependents charged with commission of offenses normally within the exclusive criminal jurisdiction of the foreign signatory power. When the United States, in conformity with the waiver clause in such an Agreement, consented to the trial in a Japanese court of a soldier charged with causing the death of a Japanese woman on a firing range in that country, the Court could "find no constitutional barrier" to such action.[465] However, at least five of the Supreme Court Justices were persuaded to reject at length the contention that such Agreements could sustain, as necessary and proper for their effectuation, implementing legislation subsequently found by the Court to contravene constitutional guaranties set forth in the Bill of Rights.[466]

Executive Agreements on the Sole Constitutional Authority of the President

Many types of executive agreements comprise the ordinary daily grist of the diplomatic mill. Among these are such as apply to minor territorial adjustments, boundary rectifications, the policing of boundaries, the regulation of fishing rights, private pecuniary claims against another government or its nationals, in Story's words, "the

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[464] Id. at 158.

[465] Wilson v. Girard, 354 U.S. 524 (1957).

[466] Reid v. Covert, 354 U.S. 1, 16–17 (1957) (plurality opinion); id. at 66 (Justice Harlan concurring).

mere private rights of sovereignty."[467] Crandall lists scores of such agreements entered into with other governments by the authorization of the President.[468] Such agreements were ordinarily directed to particular and comparatively trivial disputes and by the settlement they effect of these cease *ipso facto* to be operative. Also, there are such time-honored diplomatic devices as the "protocol" which marks a stage in the negotiation of a treaty, and the *modus vivendi*, which is designed to serve as a temporary substitute for one. Executive agreements become of constitutional significance when they constitute a determinative factor of future foreign policy and hence of the country's destiny. In consequence particularly of our participation in World War II and our immersion in the conditions of international tension which prevailed both before and after the war, Presidents have entered into agreements with other governments some of which have approximated temporary alliances. It cannot be justly said, however, that in so doing they have acted without considerable support from precedent.

An early instance of executive treaty-making was the agreement by which President Monroe in 1817 defined the limits of armaments on the Great Lakes. The arrangement was effected by an exchange of notes, which nearly a year later were laid before the Senate with a query as to whether it was within the President's power, or whether advice and consent of the Senate was required. The Senate approved the agreement by the required two-thirds vote, and it was forthwith proclaimed by the President without there having been a formal exchange of ratifications.[469] Of a kindred type, and owing much to the President's capacity as Commander in Chief, was a series of agreements entered into with Mexico between 1882 and 1896 according each country the right to pursue marauding Indians across the common border.[470] Commenting on such an agreement, the Court remarked, a bit uncertainly: "While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander in chief of the military and naval forces of the United States. It may be doubted, however, whether such power could be extended to the apprehension of deserters [from foreign vessels] in the absence of positive legislation to that effect."[471] Jus-

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[467] 3 J. Story, Commentaries on the Constitution of the United States 1397 (1833).
[468] S. Crandall, supra, ch. 8; *see also* W. McClure, supra, chs. 1, 2.
[469] Id. at 49–50.
[470] Id. at 81–82.
[471] Tucker v. Alexandroff, 183 U.S. 424, 435 (1902).

tice Gray and three other Justices believed that such action by the President must rest upon express treaty or statute.[472]

Notable expansion of presidential power in this field first became manifest in the administration of President McKinley. At the outset of war with Spain, the President proclaimed that the United States would consider itself bound for the duration by the last three principles of the Declaration of Paris, a course which, as Professor Wright observes, "would doubtless go far toward establishing these three principles as international law obligatory upon the United States in future wars."[473] Hostilities with Spain were brought to an end in August, 1898, by an armistice the conditions of which largely determined the succeeding treaty of peace,[474] just as did the Armistice of November 11, 1918, determine in great measure the conditions of the final peace with Germany in 1918. It was also President McKinley who in 1900, relying on his own sole authority as Commander in Chief, contributed a land force of 5,000 men and a naval force to cooperate with similar contingents from other Powers to rescue the legations in Peking from the Boxers; a year later, again without consulting either Congress or the Senate, he accepted for the United States the Boxer Indemnity Protocol between China and the intervening Powers.[475] Commenting on the Peking protocol, Willoughby quotes with approval the following remark: "This case is interesting, because it shows how the force of circumstances compelled us to adopt the European practice with reference to an international agreement, which, aside from the indemnity question, was almost entirely political in character . . . purely political treaties are, under constitutional practice in Europe, usually made by the executive alone. The situation in China, however, abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Peking, the jealousies between the allies, and the shifting evasive tactics of the Chinese Government, would have made impossible anything but an agreement on the spot."[476]

It was also during this period that John Hay, as McKinley's Secretary of State, initiated his "Open Door" policy, by notes to Great Britain, Germany, and Russia, which were soon followed by similar notes to France, Italy and Japan. These in substance asked the recipients to declare formally that they would not seek to enlarge their respective interests in China at the expense of any of the others;

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[472] Id. at 467. The first of these conventions, signed July 29, 1882, had asserted its constitutionality in very positive terms. Q. Wright, supra at 239 (quoting Watts v. United States, 1 Wash. Terr. 288, 294 (1870)).

[473] Id. at 245.

[474] S. Crandall, supra at 103–04.

[475] Id. at 104.

[476] 1 W. Willoughby, supra at 539.

and all responded favorably.[477] Then, in 1905, the first Roosevelt, seeking to arrive at a diplomatic understanding with Japan, instigated an exchange of opinions between Secretary of War Taft, then in the Far East, and Count Katsura, amounting to a secret treaty, by which the Roosevelt administration assented to the establishment by Japan of a military protectorate in Korea.[478] Three years later, Secretary of State Root and the Japanese ambassador at Washington entered into the Root-Takahira Agreement to uphold the *status quo* in the Pacific and maintain the principle of equal opportunity for commerce and industry in China.[479] Meantime, in 1907, by a "Gentleman's Agreement," the Mikado's government had agreed to curb the emigration of Japanese subjects to the United States, thereby relieving the Washington government from the necessity of taking action that would have cost Japan loss of face. The final result of this series of executive agreements touching American relations in and with the Far East was the product of President Wilson's diplomacy. This was the Lansing-Ishii Agreement, embodied in an exchange of letters dated November 2, 1917, by which the United States recognized Japan's "special interests" in China, and Japan assented to the principle of the Open Door in that country.[480]

The Litvinov Agreement.—The executive agreement attained its modern development as an instrument of foreign policy under President Franklin D. Roosevelt, at times threatening to replace the treaty-making power, not formally but in effect, as a determinative element in the field of foreign policy. The President's first important utilization of the executive agreement device took the form of an exchange of notes on November 16, 1933, with Maxim M. Litvinov, the USSR Commissar for Foreign Affairs, whereby American recognition was extended to the Soviet Union and certain pledges made by each official.[481]

The Hull-Lothian Agreement.—With the fall of France in June, 1940, President Roosevelt entered into two executive agreements the total effect of which was to transform the role of the United States from one of strict neutrality toward the European war to one of semibelligerency. The first agreement was with Canada and provided for the creation of a Permanent Joint Board on Defense which would "consider in the broad sense the defense of the north half of the

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[477] W. McClure, supra at 98.
[478] Id. at 96–97.
[479] Id. at 98–99.
[480] Id. at 99–100.
[481] Id. at 140–44.

Western Hemisphere."[482] Second, and more important than the first, was the Hull-Lothian Agreement of September 2, 1940, under which, in return for the lease for ninety-nine years of certain sites for naval bases in the British West Atlantic, the United States handed over to the British Government fifty over-age destroyers which had been reconditioned and recommissioned.[483] And on April 9, 1941, the State Department, in consideration of the just-completed German occupation of Denmark, entered into an executive agreement with the Danish minister in Washington, whereby the United States acquired the right to occupy Greenland for purposes of defense.[484]

The Post-War Years.—Post-war diplomacy of the United States was greatly influenced by the executive agreements entered into at Cairo, Teheran, Yalta, and Potsdam.[485] For a period, the formal treaty—the signing of the United Nations Charter and the entry into the multinational defense pacts, like NATO, SEATO, CENTRO, and the like—re-established itself, but soon the executive agreement, as an adjunct of treaty arrangement or solely through presidential initiative, again became the principal instrument of United States foreign policy, so that it became apparent in the 1960s that the Nation was committed in one way or another to assisting over half the countries of the world protect themselves.[486] Congressional disquietude did not result in anything more substantial than passage of a "sense of the Senate" resolution expressing a desire that "national commitments" be made more solemnly in the future than in the past.[487]

The Domestic Obligation of Executive Agreements

When the President enters into an executive agreement, what sort of obligation does it impose on the United States? That it may impose international obligations of potentially serious conse-

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[482] Id. at 391.

[483] Id. at 391–93. Attorney General Jackson's defense of the presidential power to enter into the arrangement placed great reliance on the President's "inherent" powers under the Commander-in-Chief clause and as sole organ of foreign relations but ultimately found adequate statutory authority to take the steps deemed desirable. 39 Ops. Atty. Gen. 484 (1940).

[484] 4 Dept. State Bull. 443 (1941).

[485] *See A Decade of American Foreign Policy, Basic Documents 1941–1949*, S. Doc. No. 123, 81st Congress, 1st Sess. (1950), pt. 1.

[486] For a congressional attempt to evaluate the extent of such commitments, *see United States Security Agreements and Commitments Abroad: Hearings Before a Subcommittee of the Senate Foreign Relations Committee*, 91st Congress, 1st Sess. (1969), 10 pts.; *see also U.S. Commitments to Foreign Powers: Hearings on S. Res. 151 Before the Senate Foreign Relations Committee*, 90th Congress, 1st Sess. (1967).

[487] The "National Commitments Resolution," S. Res. 85, 91st Congress, 1st Sess., passed by the Senate June 25, 1969. *See also* S. REP. NO. 797, 90th Congress, 1st sess. (1967). *See* the discussion of these years in CRS study, supra at 169–202.

quences is obvious and that such obligations may linger for long periods of time is equally obvious.[488] Not so obvious is the nature of the domestic obligations imposed by executive agreements. Do treaties and executive agreements have the same domestic effect?[489] Treaties preempt state law through operation of the Supremacy Clause. Although it may be that executive agreements entered into pursuant to congressional authorization or treaty obligation also derive preemptive force from the Supremacy Clause, that textual basis for preemption is arguably lacking for executive agreements resting solely on the President's constitutional powers.

Initially, it was the view of most judges and scholars that executive agreements based solely on presidential power did not become the "law of the land" pursuant to the Supremacy Clause because such agreements are not "treaties" ratified by the Senate.[490] The Supreme Court, however, found another basis for holding state laws to be preempted by executive agreements, ultimately relying on the Constitution's vesting of foreign relations power in the national government.

A different view seemed to underlie the Supreme Court decision in *United States v. Belmont*,[491] giving domestic effect to the Litvinov Assignment. The Court's opinion by Justice Sutherland built on his *Curtiss-Wright*[492] opinion. A lower court had erred, the Court ruled, in dismissing an action by the United States, as assignee of the Soviet Union, for certain moneys which had once been the property of a Russian metal corporation the assets of which had been appropriated by the Soviet government. The President's act in recognizing the Soviet government, and the accompanying agreements, constituted, said the Justice, an international compact which the President, "as the sole organ" of international relations for the United States, was authorized to enter upon without consulting the Senate. Nor did state laws and policies make any difference in such a situation; while the supremacy of treaties is established by the

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[488] In 1918, Secretary of State Lansing assured the Senate Foreign Relations Committee that the Lansing-Ishii Agreement had no binding force on the United States, that it was simply a declaration of American policy so long as the President and State Department might choose to continue it. 1 W. Willoughby, supra at 547. In fact, it took the Washington Conference of 1921, two formal treaties, and an exchange of notes to eradicate it, while the "Gentlemen's Agreement" was finally ended after 17 years only by an act of Congress. W. McClure, supra at 97, 100.

[489] *See* E. Byrd, supra at 151–57.

[490] *E.g.*, United States v. One Bag of Paradise Feathers, 256 F. 301, 306 (2d Cir. 1919); 1 W. Willoughby, supra at 589. The State Department held the same view. G. Hackworth, 5 Digest of International Law 426 (1944).

[491] 301 U.S. 324 (1937). In B. Altman & Co. v. United States, 224 U.S. 583 (1912), the Court had recognized that a jurisdictional statute's reference to a "treaty" encompassed an executive agreement.

[492] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

Constitution in express terms, the same rule holds "in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the National Government and is not and cannot be subject to any curtailment or interference on the part of the several States." [493]

The Court elaborated on these principles five years later in *United States v. Pink*,[494] another case involving the Litvinov Assignment and recognition of the Soviet Government. The question presented was whether the United States was entitled to recover the assets of the New York branch of a Russian insurance company. The company argued that the Soviet Government's decrees of confiscation did not apply to its property in New York and could not apply consistently with the Constitution of the United States and that of New York. The Court, speaking by Justice Douglas, brushed these arguments aside. An official declaration of the Russian government itself settled the question of the extraterritorial operation of the Russian decree of nationalization and was binding on American courts. The power to remove such obstacles to full recognition as settlement of claims of our nationals was "a modest implied power of the President who is the 'sole organ of the Federal Government in the field of international relations'. . . . It was the judgment of the political department that full recognition of the Soviet Government required the settlement of outstanding problems including the claims of our nationals. . . . We would usurp the executive function if we held that the decision was not final and conclusive on the courts. . . ."

"It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy. . . . But state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty or of an international compact or agreement. . . . Then, the power of a State to refuse enforcement of rights based on foreign law which runs counter to the public policy of the forum . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement. . . ."

"The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a dangerous invasion of Federal authority. For it would 'imperil the amicable relations between governments and vex the peace of nations.'

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[493] 301 U.S. at 330–31.
[494] 315 U.S. 203 (1942).

. . . It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government has diligently endeavored to establish. . . .”

“No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.” [495]

This recognition of the preemptive reach of executive agreements was an element in the movement for a constitutional amendment in the 1950s to limit the President’s powers in this field, but that movement failed.[496]

Belmont and *Pink* were reinforced in *American Ins. Ass’n v. Garamendi*.[497] In holding that California’s Holocaust Victim Insurance Relief Act was preempted as interfering with the Federal Government’s conduct of foreign relations, as expressed in executive agreements, the Court reiterated that “valid executive agreements are fit to preempt state law, just as treaties are.” [498] The preemptive reach of executive agreements stems from “the Constitution’s allocation of the foreign relations power to the National Government.” [499] Because there was a “clear conflict” between the California law and policies adopted through the valid exercise of federal executive authority (settlement of Holocaust-era insurance claims being “well within the Executive’s responsibility for foreign affairs”), the state law was preempted.[500]

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[495] 315 U.S. at 229–31, 233–34.

[496] There were numerous variations in language for the Bricker Amendment, but typical was § 3 of S.J. Res. 1, as reported by the Senate Judiciary Committee, 83d Congress, 1st Sess. (1953), which provided: “Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.” The limitation relevant on this point was in § 2, which provided: “A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.”

[497] 539 U.S. 396 (2003). The Court’s opinion in Dames & Moore v. Regan, 453 U.S. 654 (1981), was rich in learning on many topics involving executive agreements, but the preemptive force of agreements resting solely on presidential power was not at issue, the Court concluding that Congress had either authorized various presidential actions or had long acquiesced in others.

[498] 539 U.S. at 416.

[499] 539 U.S. at 413.

[500] 539 U.S. at 420.

State Laws Affecting Foreign Relations—Dormant Federal Power and Preemption

If the foreign relations power is truly an exclusive federal power, with no role for the states, a logical consequence, the Supreme Court has held, is that some state laws impinging on foreign relations are invalid even in the absence of a relevant federal policy. There is, in effect, a "dormant" foreign relations power. The scope of this power remains undefined, however, and its constitutional basis is debated by scholars.

The exclusive nature of the federal foreign relations power has long been asserted by the Supreme Court. In 1840, for example, the Court declared that "it was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities." [501] A hundred years later the Court remained emphatic about federal exclusivity. "No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts." [502]

It was not until 1968, however, that the Court applied the general principle to invalidate a state law for impinging on the nation's foreign policy interests in the absence of an established federal policy. In *Zschernig v. Miller* [503] the Court invalidated an Oregon escheat law that operated to prevent inheritance by citizens of Communist countries. The law conditioned inheritance by nonresident aliens on a showing that U.S. citizens would be allowed to inherit estates in the alien's country, and that the alien heir would be allowed to receive payments from the Oregon estate "without confis-

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[501] Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 575–76 (1840). *See also* United States v. Belmont, 301 U.S. 324, 331 (1937) ("The external powers of the United States are to be exercised without regard to state laws or policies. . . . [I]n respect of our foreign relations generally, state lines disappear"); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist; but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"); Hines v. Davidowitz, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference").

[502] United States v. Pink, 315 U.S. 203, 233–34 (1942). Chief Justice Stone and Justice Roberts dissented.

[503] 389 U.S. 429 (1968).

cation."[504] Although a Justice Department *amicus* brief asserted that application of the Oregon law in this one case would not cause any "undu[e] interfer[ence] with the United States' conduct of foreign relations," the Court saw a "persistent and subtle" effect on international relations stemming from the "notorious" practice of state probate courts in denying payments to persons from Communist countries.[505] Regulation of descent and distribution of estates is an area traditionally regulated by states, but such "state regulations must give way if they impair the effective exercise of the Nation's foreign policy." If there are to be travel, probate, or other restraints on citizens of Communist countries, the Court concluded, such restraints "must be provided by the Federal Government."[506]

Zschernig lay dormant for some time, and, although it has been addressed recently by the Court, it remains the only holding in which the Court has applied a dormant foreign relations power to strike down state law. There was renewed academic interest in *Zschernig* in the 1990s, as some state and local governments sought ways to express dissatisfaction with human rights policies of foreign governments or to curtail trade with out-of-favor countries.[507] In 1999, the Court struck down Massachusetts' Burma sanctions law on the basis of statutory preemption, and declined to address the appeals court's alternative holding applying *Zschernig*.[508] Similarly, in 2003, the Court held that California's Holocaust Victim Insurance Relief Act was preempted as interfering with federal foreign policy reflected in executive agreements, and, although the Court discussed *Zschernig* at some length, it saw no need to resolve issues relating to its scope.[509]

Dictum in *Garamendi* recognizes some of the questions that can be raised about *Zschernig*. The *Zschernig* Court did not identify what language in the Constitution mandates preemption, and commentators have observed that a respectable argument can be made that the Constitution does not require a general foreign affairs preemp-

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[504] In Clark v. Allen, 331 U.S. 503 (1947), the Court had upheld a simple reciprocity requirement that did not have the additional requirement relating to confiscation.

[505] 389 U.S. at 440.

[506] 389 U.S. at 440, 441.

[507] *See*, *e.g.*, Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999); Carlos Manuel Vazquez, *Whither Zschernig?*, 46 VILL. L. REV. 1259 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999). *See also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 149–69 (2d ed. 1996).

[508] Crosby v. National Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000). For the appeals court's application of *Zschernig*, see National Foreign Trade Council v. Natsios, 181 F.3d 38, 49–61 (1st Cir. 1999).

[509] American Ins. Ass'n v. Garamendi, 539 U.S. at 419 & n.11 (2003).

tion not tied to the Supremacy Clause, and broader than and independent of the Constitution's specific prohibitions[510] and grants of power.[511] The *Garamendi* Court raised "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions." Instead, Justice Souter suggested for the Court, field preemption may be appropriate if a state legislates "simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," and conflict preemption may be appropriate if a state legislates within an area of traditional responsibility, "but in a way that affects foreign relations."[512] We must await further litigation to see whether the Court employs this distinction.[513]

THE EXECUTIVE ESTABLISHMENT

Office

"An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."[514]

Ambassadors and Other Public Ministers.—The term "ambassadors and other public ministers," comprehends "all officers having diplomatic functions, whatever their title or designation."[515] It was originally assumed that such offices were established by the Constitution itself, by reference to the Law of Nations, with the consequence that appointments might be made to them whenever the appointing authority—the President and Senate—deemed desir-

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[510] It is contended, for example, that Article I, § 10's specific prohibitions against states engaging in war, making treaties, keeping troops in peacetime, and issuing letters of marque and reprisal would have been unnecessary if a more general, dormant foreign relations power had been intended. Similarly, there would have been no need to declare treaties to be the supreme law of the land if a more generalized foreign affairs preemptive power existed outside of the Supremacy Clause. *See* Ramsey, supra.

[511] Arguably, part of the "executive power" vested in the President by Art. II, § 1 is a power to conduct foreign relations.

[512] 539 U.S. at 419 n.11.

[513] Justice Ginsburg's dissent in *Garamendi*, joined by the other three Justices, suggested limiting *Zschernig* in a manner generally consistent with Justice Souter's distinction. *Zschernig* preemption, Justice Ginsburg asserted, "resonates most audibly when a state action 'reflects a state policy critical of foreign governments and involve[s] sitting in judgment on them.'" 539 U.S. at 439 (quoting Henkin, supra, at 164). But Justice Ginsburg also voiced more general misgivings about judges' becoming "the expositors of the Nation's foreign policy." Id. at 442. In this context, see Goldsmith, supra, at 1631, describing *Zschernig* preemption as "a form of the federal common law of foreign relations."

[514] United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

[515] 7 Ops. Atty. Gen. 168 (1855).

able.[516] During the first sixty-five years of the Government, Congress passed no act purporting to create any diplomatic rank, the entire question of grades being left with the President. Indeed, during the administrations of Washington, Adams and Jefferson, and the first term of Madison, no mention occurs in any appropriation, even of ministers of a specified rank at this or that place, but the provision for the diplomatic corps consisted of so much money "for the expenses of foreign intercourse," to be expended at the discretion of the President. In Madison's second term, the practice was introduced of allocating special sums to the several foreign missions maintained by the Government, but even then the legislative provisions did not purport to curtail the discretion of the President in any way in the choice of diplomatic agents.

In 1814, however, when President Madison appointed, during a recess of the Senate, the Commissioners who negotiated the Treaty of Ghent, the theory on which the above legislation was based was drawn into question. Inasmuch, it was argued, as these offices had never been established by law, no vacancy existed to which the President could constitutionally make a recess appointment. To this argument, it was answered that the Constitution recognizes "two descriptions of offices altogether different in their nature, authorized by the constitution—one to be created by law, and the other depending for their existence and continuance upon contingencies. Of the first kind, are judicial, revenue, and similar offices. Of the second, are Ambassadors, other public Ministers, and Consuls. The first descriptions organize the government and give it efficacy. They form the internal system, and are susceptible of precise enumeration. When and how they are created, and when and how they become vacant, may always be ascertained with perfect precision. Not so with the second description. They depend for their original existence upon the law, but are the offspring of the state of our relations with foreign nations, and must necessarily be governed by distinct rules. As an independent power, the United States have relations with all other independent powers; and the management of those relations is vested in the Executive."[517]

By the opening section of the act of March 1, 1855, it was provided that "from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary," with a specified an-

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[516] It was so assumed by Senator William Maclay. THE JOURNAL OF WILLIAM MACLAY 109–10 (E. Maclay ed., 1890).

[517] 26 ANNALS OF CONGRESS 694–722 (1814) (quotation appearing at 699); 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 350–353 (1865).

nual compensation for each, "to the following countries. . . ." In the body of the act was also this provision: "The President shall appoint no other than citizens of the United States, who are residents thereof, or who shall be abroad in the employment of the government at the time of their appointment. . . ."[518] The question of the interpretation of the act having been referred to Attorney General Cushing, he ruled that its total effect, aside from its salary provisions, was recommendatory only. It was "to say, that if, and whenever, the President shall, by and with the advice and consent of the Senate, appoint an envoy extraordinary and minister plenipotentiary to Great Britain, or to Sweden, the compensation of that minister shall be so much and no more."[519]

This line of reasoning is only partially descriptive of the facts. The Foreign Service Act of 1946,[520] pertaining to the organization of the foreign service, diplomatic as well as consular, contains detailed provisions as to grades, salaries, promotions, and, in part, as to duties. Under the terms thereof the President, by and with the advice and consent of the Senate, appoints ambassadors, ministers, foreign service officers, and consuls, but in practice the vast proportion of the selections are made in conformance to recommendations of a Board of the Foreign Service.

Presidential Diplomatic Agents.—What the President may have lost in consequence of the intervention of Congress in this field of diplomatic appointments, he has made good through his early conceded right to employ, in the discharge of his diplomatic function, so-called "special," "personal," or "secret" agents without consulting the Senate. When President Jackson's right to resort to this practice was challenged in the Senate in 1831, it was defended by Edward Livingston, Senator from Louisiana, to such good purpose that Jackson made him Secretary of State. "The practice of appointing secret agents," said Livingston, "is coeval with our existence as a nation, and goes beyond our acknowledgment as such by other powers. All those great men who have figured in the history of our diplomacy, began their career, and performed some of their most important services in the capacity of secret agents, with full powers. Franklin, Adams, Lee, were only commissioners; and in negotiating a treaty with the Emperor of Morocco, the selection of the secret agent was left to the Ministers appointed to make the treaty; and, accordingly, in the year 1785, Mr. Adams and Mr. Jefferson

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[518] 10 Stat. 619, 623.

[519] 7 Ops. Atty. Gen. 186, 220 (1855).

[520] 60 Stat. 999, superseded by the Foreign Service Act of 1980, Pub. L. 96–465, 94 Stat. 2071, 22 U.S.C. §§ 3901 *et seq*.

appointed Thomas Barclay, who went to Morocco and made a treaty, which was ratified by the Ministers at Paris."

"These instances show that, even prior to the establishment of the Federal Government, secret plenipotentiaries were known, as well in the practice of our own country as in the general law of nations: and that these secret agents were not on a level with messengers, letter carriers, or spies, to whom it has been found necessary in argument to assimilate them. On the 30th March, 1795, in the recess of the Senate, by letters patent under the great broad seal of the United States, and the signature of their President, (that President being George Washington,) countersigned by the Secretary of State, David Humphreys was appointed commissioner plenipotentiary for negotiating a treaty of peace with Algiers. By instructions from the President, he was afterwards authorized to employ Joseph Donaldson as agent in that business. In May, of the same year, he did appoint Donaldson, who went to Algiers, and in September of the same year concluded a treaty with the Dey and Divan, which was confirmed by Humphreys, at Lisbon, on the 28th November in the same year, and afterwards ratified by the Senate, and an act passed both Houses on 6th May, 1796, appropriating a large sum, twenty-five thousand dollars annually, for carrying it into effect." [521]

The precedent afforded by Humphreys' appointment without reference to the Senate has since been multiplied many times,[522] as witness the mission of A. Dudley Mann to Hanover and other German states in 1846, of the same gentleman to Hungary in 1849, of Nicholas Trist to Mexico in 1848, of Commodore Perry to Japan in 1852, of J. H. Blount to Hawaii in 1893. The last named case is perhaps the most extreme of all. Blount, who was appointed while the Senate was in session but without its advice and consent, was given "paramount authority" over the American resident minister at Hawaii and was further empowered to employ the military and naval forces of the United States, if necessary to protect American lives and interests. His mission raised a vigorous storm of protest in the Senate, but the majority report of the committee which was created to investigate the constitutional question vindicated the President in the following terms: "A question has been made as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that

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[521] 11 T. Benton, Abridgement of the Debates of Congress 221 (1860).
[522] S. Misc. Doc, 109, 50th Congress, 1st Sess. (1888), 104.

such power has been exercised by the President on various occasions, without dissent on the part of Congress or the people of the United States. . . . These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents, ..."[523] The continued vitality of the practice is attested by such names as Colonel House, the late Norman H. Davis, who filled the role of "ambassador at large" for a succession of administrations of both parties, Professor Philip Jessup, Mr. Averell Harriman, and other "ambassadors at large" of the Truman Administration, and Professor Henry Kissinger of the Nixon Administration.

How is the practice to be squared with the express words of the Constitution? Apparently, by stressing the fact that such appointments or designations are ordinarily merely temporary and for special tasks, and hence do not fulfill the tests of "office" in the strict sense. In the same way the not infrequent practice of Presidents of appointing Members of Congress as commissioners to negotiate treaties and agreements with foreign governments may be regularized, notwithstanding the provision of Article I, § 6, clause 2 of the Constitution, which provides that "no Senator or Representative shall . . . be appointed to any civil Office under the Authority of the United States, which shall have been created," during his term; and no officer of the United States, "shall be a Member of either House during his Continuance in Office."[524] The Treaty of Peace with Spain, the treaty to settle the Bering Sea controversy, the treaty establishing the boundary line between Canada and Alaska, were negotiated by commissions containing Senators and Representatives.

Appointments and Congressional Regulation of Offices

It has never been questioned that the Constitution distinguishes between the creation of an office and appointment thereto. The former is *by law* and takes place by virtue of Congress's power to pass all laws necessary and proper for carrying into execution the powers which the Constitution confers upon the government of the United States and its departments and officers.[525] As an inci-

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[523] S. REP. NO. 227, 53d Congress, 2d Sess. (1894), 25. At the outset of our entrance into World War I President Wilson dispatched a mission to "Petrograd," as it was then called, without nominating the Members of it to the Senate. It was headed by Mr. Elihu Root, with "the rank of ambassador," while some of his associates bore "the rank of envoy extraordinary."

[524] *See* 2 G. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 48–51 (1903).

[525] However, "Congress's power . . . is inevitably bounded by the express language of Article II, cl. 2, and unless the method it provides comports with the latter, the holders of those offices will not be 'Officers of the United States.'" Buckley v. Valeo, 424 U.S. 1, 138–39 (1976) (quoted in Freytag v. Commissioner, 501 U.S. 868, 883 (1991)). The designation or appointment of military judges, who are "officers of

dent to the establishment of an office, Congress has also the power to determine the qualifications of the officer and in so doing necessarily limits the range of choice of the appointing power. First and last, it has laid down a great variety of qualifications, depending on citizenship, residence, professional attainments, occupational experience, age, race, property, sound habits, and so on. It has required that appointees be representative of a political party, of an industry, of a geographic region, or of a particular branch of the Government. It has confined the President's selection to a small number of persons to be named by others.[526] Indeed, it has contrived at times to designate a definite eligibility, thereby virtually usurping the appointing power.[527] Despite the record of the past, however, it is not at all clear that Congress may cabin the President's discretion, at least for offices that he considers important, by, for ex-

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the United States," does not violate the Appointments Clause. The judges are selected by the Judge Advocate General of their respective branch of the Armed Forces. These military judges, however, were already commissioned officers who had been appointed by the President with the advice and consent of the Senate, so that their designation simply and permissibly was an assignment to them of additional duties that did not need a second formal appointment. Weiss v. United States, 510 U.S. 163 (1994). However, the appointment of civilian judges to the Coast Guard Court of Military Review was impermissible and their actions were not salvageable under the *de facto* officer doctrine. Ryder v. United States, 515 U.S. 177 (1995).

[526] *See* Myers v. United States, 272 U.S. 52, 264–74 (1926) (Justice Brandeis dissenting). Chief Justice Taft in the opinion of the Court in *Myers* readily recognized the legislative power of Congress to establish offices, determine their functions and jurisdiction, fix the terms of office, and prescribe reasonable and relevant qualifications and rules of eligibility of appointees, always provided "that the qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation." Id. at 128–29. For reiteration of Congress's general powers, *see* Buckley v. Valeo, 424 U.S. 1, 134–35 (1976); Morrison v. Olson, 487 U.S. 654, 673–77 (1988). *See also* United States v. Ferreira, 54 U.S. (13 How.) 40, 51 (1851).

[527] *See* data in E. Corwin, supra at 363–65. Congress has repeatedly designated individuals, sometimes by name, more frequently by reference to a particular office, for the performance of specified acts or for posts of a nongovernmental character; *e.g.*, to paint a picture (Johnathan Trumbull), to lay out a town, to act as Regents of Smithsonian Institution, to be managers of Howard Institute, to select a site for a post office or a prison, to restore the manuscript of the Declaration of Independence, to erect a monument at Yorktown, to erect a statue of Hamilton, and so on and so forth. Note, *Power of Appointment to Public Office under the Federal Constitution*, 42 HARV. L. REV. 426, 430–31 (1929). In his message of April 13, 1822, President Monroe stated that, "as a general principle, . . . Congress have [sic] no right under the Constitution to impose any restraint by law on the power granted to the President so as to prevent his making a free selection of proper persons for these [newly created] offices from the whole body of his fellow-citizens." 2 J. Richardson supra at 698, 701. The statement is ambiguous, but its apparent intention is to claim for the President unrestricted power in determining who are proper persons to fill newly created offices. *See* the distinction drawn in Myers v. United States, 272 U.S. 52, 128–29 (1926), quoted supra. And note that in Public Citizen v. U.S. Department of Justice, 491 U.S. 440, 482–89 (1989) (concurring), Justice Kennedy suggested the President has *sole* and unconfined discretion in appointing).

ample, requiring him to choose from lists compiled by others. To be sure, there are examples, but they are not free of ambiguity.[528]

But when Congress contrived actually to participate in the appointment and administrative process and provided for selection of the members of the Federal Election Commission, two by the President, two by the Senate, and two by the House, with confirmation of all six members vested in both the House and the Senate, the Court unanimously held the scheme to violate the Appointments Clause and the principle of separation of powers. The term "officers of the United States" is a substantive one requiring that any appointee exercising significant authority pursuant to the laws of the United States be appointed in the manner prescribed by the Appointments Clause.[529] The Court did hold, however, that the Commission so appointed and confirmed could be delegated the powers Congress itself could exercise, that is, those investigative and informative functions that congressional committees carry out were properly vested in this body.

Congress is authorized by the Appointments Clause to vest the appointment of "inferior Officers," at its discretion, "in the President alone, in the Courts of Law, or in the Heads of Departments." The principal questions arising under this portion of the clause are "Who are 'inferior officers,'" and "what are the 'Departments'" whose heads may be given appointing power?[530] "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be ap-

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[528] The Sentencing Commission, upheld in Mistretta v. United States, 488 U.S. 361 (1989), numbered among its members three federal judges; the President was to select them "after considering a list of six judges recommended to the President by the Judicial Conference of the United States." Id. at 397 (quoting 28 U.S.C. § 991(a)). The Comptroller General is nominated by the President from a list of three individuals recommended by the Speaker of the House of Representatives and the President *pro tempore* of the Senate. Bowsher v. Synar, 478 U.S. 714, 727 (1986) (citing 31 U.S.C. § 703(a)(2)). In Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252, 268–69 (1991), the Court carefully distinguished these examples from the particular situation before it that it condemned, *but see* id. at 288 (Justice White dissenting), and in any event it never actually passed on the list devices in *Mistretta* and *Synar*. The fault in *Airports Authority* was not the validity of lists generally, the Court condemning the device there as giving Congress control of the process, in violation of Buckley v. Valeo.

[529] Buckley v. Valeo, 424 U.S. 1, 109–143 (1976). The Court took pains to observe that the clause was violated not only by the appointing process but by the confirming process, inclusion of the House of Representatives, as well. Id. at 137. *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[530] Concurrently, of course, although it may seem odd, the question of what is a "Court[] of Law" for purposes of the Appointments Clause is unsettled. *See* Freytag v. Commissioner, 501 U.S. 868 (1991) (Court divides 5-to-4 whether an Article I court is a court of law under the clause).

pointed in the manner prescribed by § 2, cl. 2, of [Article II]."[531] "The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."[532]

In *Edmond v. United States*,[533] the Court reviewed its pronouncements regarding the definition of "inferior officer" and, disregarding some implications of its prior decisions, seemingly settled, unanimously, on a pragmatic characterization. Thus, the importance of the responsibilities assigned an officer, the fact that duties were limited, that jurisdiction was narrow, and that tenure was limited, are only factors but are not definitive.[534] "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase 'lesser officer.' Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were ap-

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[531] Freytag v. Commissioner, 501 U.S.868, 881 (1991) (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

[532] United States v. Germaine, 99 U.S. 508, 509–510 (1879) (quoted in Buckley v. Valeo, 424 U.S. 1, 125 (1976)). The constitutional definition of an "inferior" officer is wondrously imprecise. *See* Freytag v. Commissioner, 501 U.S. 868, 880–882 (1991); Morrison v. Olson, 487 U.S. 654, 670–73 (1988). *See also* United States v. Eaton, 169 U.S. 331 (1898). There is another category, of course, employees, but these are lesser functionaries subordinate to officers of the United States. Ordinarily, the term "employee" denotes one who stands in a contractual relationship to her employer, but here it signifies all subordinate officials of the Federal Government receiving their appointments at the hands of officials who are not specifically recognized by the Constitution as capable of being vested by Congress with the appointing power. Auffmordt v. Hedden, 137 U.S. 310, 327 (1890). *See* Go-Bart Importing Co. v. United States, 282 U.S. 344, 352–53 (1931); Burnap v. United States, 252 U.S. 512, 516–17 (1920); *Germaine*, 99 U.S. at 511–12.

[533] 520 U.S. 651 (1997).

[534] 520 U.S. at 661–62.

pointed by Presidential nomination with the advice and consent of the Senate." [535]

Thus, officers who are not "inferior Officers" are principal officers who must be appointed by the President with the advice and consent of the Senate in order to make sure that all the business of the Executive will be conducted under the supervision of officers appointed by the President with Senate approval.[536] Further, the Framers intended to limit the "diffusion" of the appointing power with respect to inferior officers in order to promote accountability. "The Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. . . . The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint. The Clause reflects our Framers' conclusion that widely distributed appointment power subverts democratic government. Given the inexorable presence of the administrative state, a holding that every organ in the executive Branch is a department would multiply the number of actors eligible to appoint." [537]

Yet, even agreed on the principle, the *Freytag* Court split 5-to-4 on the reason for the permissibility of the Chief Judge of the Tax Court to appoint special trial judges. The entire Court agreed that the Tax Court had to be either a "department" or a "court of law" in order for the authority to be exercised by the Chief Judge, and it unanimously agreed that the statutory provision was constitutional. But there agreement ended. The majority was of the opinion that the Tax Court could not be a department, but it was unclear what those Justices thought a department comprehended. Seemingly, it started from the premise that departments were those

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[535] 520 U.S. at 662–63. The case concerned whether the Secretary of Transportation, a presidential appointee with the advice and consent of the Senate, could appoint judges of the Coast Guard Court of Military Appeals; necessarily, the judges had to be "inferior" officers. In related cases, the Court held that designation or appointment of military judges, who are "officers of the United States," does not violate the Appointments Clause. The judges are selected by the Judge Advocate General of their respective branch of the Armed Forces. These military judges, however, were already commissioned officers who had been appointed by the President with the advice and consent of the Senate, so that their designation simply and permissibly was an assignment to them of additional duties that did not need a second formal appointment. Weiss v. United States, 510 U.S. 163 (1994). However, the appointment of civilian judges to the Coast Guard Court of Military Review by the same method was impermissible; they had either to be appointed by an officer who could exercise appointment-clause authority or by the President, and their actions were not salvageable under the de facto officer doctrine. Ryder v. United States, 515 U.S. 177 (1995).

[536] Freytag v. Commissioner, 501 U.S. 868, 919 (1991) (Justice Scalia concurring).

[537] Freytag v. Commissioner, 501 U.S. 868, 884–85 (1991).

parts of the executive establishment called departments and headed by a cabinet officer.[538] Yet, the Court continued immediately to say: "Confining the term 'Heads of Departments' in the Appointments Clause to executive divisions *like* the Cabinet-level departments constrains the distribution of the appointment power just as the [IRS] Commissioner's interpretation, in contrast, would diffuse it. The Cabinet-level departments are limited in number and easily identified. The heads are subject to the exercise of political oversight and share the President's accountability to the people."[539] The use of the word "like" in this passage suggests that it is not just Cabinet-headed departments that are departments but also entities that are similar to them in some way, and its reservation of the validity of investing appointing power in the heads of some unnamed entities, as well as its observation that the term "Heads of Departments" does not embrace "inferior commissioners and bureau officers" all contribute to an amorphous conception of the term.[540] In the end, the Court sustained the challenged provision by holding that the Tax Court as an Article I court was a "Court of Law" within the meaning of the Appointments Clause.[541] The other four Justices concluded that the Tax Court, as an independent establishment in the executive branch, was a "department" for purposes of the Appointments Clause. In their view, in the context of text and practice, the term meant, not Cabinet-level departments, but "all independent executive establishments," so that "'Heads of Departments' includes the heads of all agencies immediately below the President in the organizational structure of the Executive Branch."[542]

The *Freytag* decision must be considered a tentative rather than a settled construction.[543]

As noted, the Appointments Clause also authorizes Congress to vest the power in "Courts of Law." Must the power to appoint when lodged in courts be limited to those officers acting in the judicial

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[538] 501 U.S. at 886 (citing *Germaine* and *Burnap*, the Opinion Clause (Article II, § 2), and the 25th Amendment, which, in its § 4, referred to "executive departments" in a manner that reached only cabinet-level entities). *But compare* id. at 915–22 (Justice Scalia concurring).

[539] 501 U.S. at 886 (emphasis added).

[540] 501 U.S. at 886–88. *Compare* id. at 915–19 (Justice Scalia concurring).

[541] 501 U.S. at 888–92. This holding was vigorously controverted by the other four Justices. Id. at 901–14 (Justice Scalia concurring).

[542] 501 U.S. at 918, 919 (Justice Scalia concurring).

[543] As the text suggested, *Freytag* seemed to be a tentative decision, and Edmond v. United States, 520 U.S. 651 (1997), a unanimous decision written by Justice Scalia, whose concurring opinion in *Freytag* challenged the Court's analysis, may easily be read as retreating considerably from it.

branch, as the Court first suggested?[544] No, the Court said subsequently. In *Ex parte Siebold*,[545] the Court sustained Congress's decision to vest in courts the appointment of federal election supervisors, charged with preventing fraud and rights violations in congressional elections in the South, and disavowed any thought that interbranch appointments could not be authorized under the clause. A special judicial division was authorized to appoint independent counsels to investigate and, if necessary, prosecute charges of corruption in the executive, and the Court, in near unanimity, sustained the law, denying that interbranch appointments, in and of themselves, and leaving aside more precise separation-of-powers claims, were improper under the clause.[546]

Congressional Regulation of Conduct in Office.—Congress has very broad powers in regulating the conduct in office of officers and employees of the United States, and this authority extends to regulation of political activities. By an act passed in 1876, it prohibited "all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, . . . from requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or other thing of value for political purposes."[547] The validity of this measure having been sustained,[548] the substance of it, with some elaborations, was incorporated in the Civil Service Act of 1883.[549] The Lloyd-La Follette Act in 1912 began the process of protecting civil servants from unwarranted or abusive removal by codifying "just cause" standards previously embodied in presidential orders, defining "just causes" as those that would promote the "efficiency of the service."[550] Substantial changes in the civil service system were in-

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[544] *In re* Hennen, 38 U.S. (13 Pet.) 230 (1839). The suggestion was that inferior officers are intended to be subordinate to those in whom their appointment is vested. Id. at 257–58; United States v. Germaine, 99 U.S. 508, 509 (1879).

[545] 100 U.S. 371 (1880).

[546] Morrison v. Olson, 487 U.S. 654, 673–77 (1988). *See also* Young v. United States ex rel. Vuitton, 481 U.S. 787 (1987) (appointment of private attorneys to act as prosecutors for judicial contempt judgments); Freytag v. Commissioner, 501 U.S. 868, 888–92 (1991) (appointment of special judges by Chief Judge of Tax Court).

[547] 19 Stat. 143, 169 (1876).

[548] *Ex parte* Curtis, 106 U.S. 371 (1882). Chief Justice Waite's opinion extensively reviews early congressional legislation regulative of conduct in office. Id. at 372–73.

[549] 22 Stat. 403 (the Pendleton Act). On this law and subsequent enactments that created the civil service as a professional cadre of bureaucrats insulated from politics, *see Developments in the Law: Public Employment*, 97 HARV. L. REV. 1611, 1619–1676 (1984).

[550] Act of Aug. 24, 1912, § 6, 37 Stat. 539, 555, codified as amended at 5 U.S.C. § 7513. The protection was circumscribed by the limited enforcement mechanisms under the Civil Service Commission, which were gradually strengthened. *See Developments*, *supra*, 97 HARV. L. REV., 1630–31.

stituted by the Civil Service Reform Act of 1978, which abolished the Civil Service Commission and delegated its responsibilities, its management, and its administrative duties to the Office of Personnel Management and its review and protective functions to the Merit Systems Protection Board.[551]

Until 1993, § 9(a) of the Hatch Act[552] prohibited any person in the executive branch, or any executive branch department or agency, except the President and the Vice President and certain "policy determining" officers, to "take an active part in political management or political campaigns," although employees had been permitted to "express their opinions on all political subjects and candidates." In *United Public Workers v. Mitchell*,[553] these provisions were upheld as "reasonable" against objections based on the First, Fifth, Ninth, and Tenth Amendments. The Hatch Act Reform Amendments of 1993, however, substantially liberalized the rules for political activities during off-duty hours for most executive branch employees, subject to certain limitations on off-duty hours activities and express prohibitions against on-the-job partisan political activities.[554]

The Loyalty Issue.—By section 9A of the Hatch Act of 1939, a federal employee was disqualified from accepting or holding any position in the Federal Government or the District of Columbia if he belonged to an organization that he knew advocated the overthrow of our constitutional form of government.[555] The 79th Congress followed up this provision with a rider to its appropriation acts forbidding the use of any appropriated funds to pay the salary of any person who advocated, or belonged to an organization which advocated the overthrow of the government by force, or of any person who engaged in a strike or who belonged to an organization which

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[551] 92 Stat. 1111 (codified in scattered sections of titles 5, 10, 15, 28, 31, 38, 39, and 42 U.S.C.). For the long development, *see*, *Developments*, *supra*, 97 HARV. L. REV. at 1632–1650.

[552] 53 Stat. 1147, 1148 (1939), then 5 U.S.C. § 7324(a). The 1940 law, § 12(a), 54 Stat. 767–768, applied the same broad ban to employees of federally funded state and local agencies, but this provision was amended in 1974 to restrict state and local government employees in only one respect: running for public office in partisan elections. Act of Oct. 15, 1974, Pub. L. 93–443, § 401(a), 88 Stat. 1290, 5 U.S.C. § 1502.

[553] 330 U.S. 75 (1947). *See also* Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), in which the constitutional attack was renewed, in large part based on the Court's expanding free speech jurisprudence, but the act was again sustained. A "little Hatch Act" of a state, applying to its employees, was sustained in Broadrick v. Oklahoma, 413 U.S. 601 (1973).

[554] Pub. L. 103–94, § 2(a), 107 Stat. 1001 (1993), 5 U.S.C. §§ 7321–7326. Executive branch employees (except those appointed by the President, by and with the advice and consent of the Senate) who are listed in § 7323(b)(2), which generally include those employed by agencies involved in law enforcement or national security, remain under restrictions similar to the those in the old Hatch Act on taking an active part in political management or political campaigns.

[555] 53 Stat. 1147, 5 U.S.C. § 7311.

asserted the right to strike against the government.[556] These provisos ultimately wound up in permanent law requiring all government employees to take oaths disclaiming either disloyalty or strikes as a device for dealing with the government as an employer.[557] Along with the loyalty-security programs initiated by President Truman[558] and carried forward by President Eisenhower,[559] these measures reflected the Cold War era and the fear of subversion and espionage following the disclosures of several such instances here and abroad.[560]

Financial Disclosure and Limitations.—The Ethics in Government Act of 1978[561] requires high-level federal personnel to make detailed, annual disclosures of their personal financial affairs.[562] The aims of the legislation are to enhance public confidence in government, to demonstrate the high level of integrity of government employees, to deter and detect conflicts of interest, to discourage individuals with questionable sources of income from entering government, and to facilitate public appraisal of government employees' performance in light of their personal financial interests.[563] Despite assertions that employee privacy interests are needlessly invaded by the breadth of disclosures, to date judicial challenges have been unsuccessful, with one exception.[564] The one provision that was invali-

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[556] *See* Report of the Special Committee on The Federal Loyalty-Security Program, The Association of the Bar of the City of New York (New York: 1956), 60.

[557] 5 U.S.C. § 3333. The loyalty disclaimer oath was declared unconstitutional in Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969), and the did not appeal. The strike disclaimer oath was voided in National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969); after noting probable jurisdiction, 397 U.S. 1062 (1970), the Court dismissed the appeal on the government's motion. 400 U.S. 801 (1970). The actual prohibition on strikes, however, has been sustained. United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C. 1971), aff'd per curiam, 404 U.S. 802 (1971).

[558] E.O. 9835, 12 Fed. Reg. 1935 (1947).

[559] E.O. 10450, 18 Fed. Reg. 2489 (1953).

[560] *See generally*, Report of the Special Committee on The Federal Loyalty-Security Program, The Association of the Bar of the City of New York (New York: 1956).

[561] Pub. L. 95–521, tits. I–III, 92 Stat. 1824–1861. The Act was originally codified in three different titles, 2, 5, and 28, corresponding to legislative, executive, and judicial branch personnel, but by Pub. L. 101–194, title II, 103 Stat. 1725 (1989), one comprehensive title, as amended, applying to all covered federal personnel was enacted. 5 U.S.C. App. §§ 101–111.

[562] *See Developments*, *supra*, 97 HARV. L. REV. at 1660–1669.

[563] 97 Harv. L. Rev. at 1661 (citing S. REP. 170, 95th Cong., 2d sess. (1978), 21–22).

[564] 97 Harv. L. Rev. at 1664–69. The Ethics in Government Act also expanded restrictions on post-employment by imposing bans on employment, varying from a brief period to an out-and-out lifetime ban in certain cases. Id. at 1669–76. The 1989 revision enlarged and expanded on these provisions. 103 Stat. 1716–1724, amending 18 U.S.C. § 207.

dated was section 501(b),[565] which prohibits Members of Congress and officers or employees of the government, regardless of salary level, from receiving any "honorarium," which the statute defines as "a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) . . . ."[566] The Supreme Court held that this prohibition, even interpreted in accordance with the standards applicable to speech restrictions on government employees, was overbroad, as "[t]he speculative benefits the honoraria ban may provide the government are not sufficient to justify this crudely crafted burden of respondents' freedom to engage in expressive activities."[567]

Legislation Increasing Duties of an Officer.—Finally, "Congress may increase the powers and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed."[568] Such legislation does not constitute an attempt by Congress to seize the appointing power.

Stages of Appointment Process

Nomination.—The Constitution appears to distinguish three stages in appointments by the President with the advice and consent of the Senate. The first is the "nomination" of the candidate by the President alone; the second is the assent of the Senate to the candidate's "appointment;" and the third is the final appointment and commissioning of the appointee, by the President.[569]

Senate Approval.—The fact that the power of nomination belongs to the President alone prevents the Senate from attaching conditions to its approval of an appointment, such as it may do to its approval of a treaty. In the words of an early opinion of the Attorney General: "The Senate cannot originate an appointment. Its constitutional action is confined to the simple affirmation or rejection of the President's nominations, and such nominations fail whenever it rejects them. The Senate may suggest conditions and limita-

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[565] 92 Stat. 1864 (1978), as amended, 103 Stat. 1760 (1989), as amended, 5 U.S.C. App. § 501(b).

[566] 5 U.S.C. App. § 505(3).

[567] United States v. NTEU, 513 U.S. 454, 477 (1995).

[568] Shoemaker v. United States, 147 U.S. 282, 301 (1893). The Court noted that the additional duties at issue were "germane to the offices." Id.

[569] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 155–56 (1803) (Chief Justice Marshall). Marshall's statement that the appointment "is the act of the President," conflicts with the more generally held and sensible view that when an appointment is made with its consent, the Senate shares the appointing power. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1525 (1833); *In re* Hennen, 38 U.S. (13 Pet.) 230, 259 (1839).

tions to the President, but it cannot vary those submitted by him, for no appointment can be made except on his nomination, agreed to without qualifications or alteration."[570] This view is borne out by early opinion,[571] as well as by the record of practice under the Constitution.

When Senate Consent Is Complete.—Early in January, 1931, the Senate requested President Hoover to return its resolution notifying him that it advised and consented to certain nominations to the Federal Power Commission. In support of its action the Senate invoked a long-standing rule permitting a motion to reconsider a resolution confirming a nomination within "the next two days of actual executive session of the Senate" and the recall of the notification to the President of the confirmation. The nominees involved having meantime taken the oath of office and entered upon the discharge of their duties, the President responded with a refusal, saying: "I cannot admit the power in the Senate to encroach upon the executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination." The Senate thereupon voted to reconsider the nominations in question, again approving two of the nominees, but rejecting the third, against whom it instructed the District Attorney of the District of Columbia to institute *quo warranto* proceedings in the Supreme Court of the District. In *United States v. Smith*,[572] the Supreme Court overruled the proceedings on the ground that the Senate had never before attempted to apply its rule in the case of an appointee who had already been installed in office on the faith of the Senate's initial consent and notification to the President. In 1939, President Roosevelt rejected a similar demand by the Senate, an action that went unchallenged.[573]

The Removal Power

The Myers Case.—Save for the provision which it makes for a power of impeachment of "civil officers of the United States," the Constitution contains no reference to a power to remove from office, and until its decision in *Myers v. United States*,[574] on October 25, 1926, the Supreme Court had contrived to sidestep every occasion for a decisive pronouncement regarding the removal power, its extent, and location. The point immediately at issue in the *Myers* case was the effectiveness of an order of the Postmaster General,

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[570] 3 Ops. Atty. Gen. 188 (1837).

[571] 3 J. Story, supra at 1525–26; 5 Works of Thomas Jefferson 161–62 (P. Ford ed., 1904); 9 Writings of James Madison 111–13 (G. Hunt ed., 1910).

[572] 286 U.S. 6 (1932).

[573] E. Corwin, supra at 77.

[574] 272 U.S. 52 (1926).

acting by direction of the President, to remove from office a first-class postmaster, in the face of the following provision of an act of Congress passed in 1876: "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law."[575]

A divided Court, speaking through Chief Justice Taft, held the order of removal valid and the statutory provision just quoted void. The Chief Justice's relied mainly on the so-called "decision of 1789," which referred to Congress's that year inserting in the act establishing the Department of State a proviso that was meant to imply recognition that the Secretary would be removable by the President at will. The proviso was especially urged by Madison, who invoked in support of it the opening words of Article II and the President's duty to "take Care that the Laws be faithfully executed."

Succeeding passages of the Chief Justice's opinion erected on this basis a highly selective account of doctrine and practice regarding the removal power down to the Civil War, which was held to yield the following results: "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that Article II excludes the exercise of legislative power by Congress to provide for appointments and removals, except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President, in case of political or other differences with the

[575] 19 Stat. 78, 80.

Senate or Congress, to take care that the laws be faithfully executed." [576]

The holding in *Myers* boils down to the proposition that the Constitution endows the President with an illimitable power to remove all officers in whose appointment he has participated, with the exception of federal judges. The motivation of the holding was not, it may be assumed, any ambition on the Chief Justice's part to set history aright—or awry.[577] Rather, it was the concern that he voiced in the following passage in his opinion: "There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him." [578]

Thus spoke the former President Taft, and the result of his prepossession was a rule that, as was immediately pointed out, ex-

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[576] 272 U.S. at 163–64.

[577] The reticence of the Constitution respecting removal left room for four possibilities: first, the one suggested by the common law doctrine of "estate in office," from which the conclusion followed that the impeachment power was the only power of removal intended by the Constitution; second, that the power of removal was an incident of the power of appointment and hence belonged, at any rate in the absence of legal or other provision to the contrary, to the appointing authority; third, that Congress could, by virtue of its power "to make all laws which shall be necessary and proper," etc., determine the location of the removal power; fourth, that the President by virtue of his "executive power" and his duty "to take Care that the Laws be faithfully executed," possesses the power of removal over all officers of the United States except judges. In the course of the debate on the act to establish a Department of Foreign Affairs (later changed to Department of State) all of these views were put forward, with the final result that a clause was incorporated in the measure that implied, as pointed out above, that the head of the department would be removable by the President at his discretion. Contemporaneously, and indeed until after the Civil War, this action by Congress, in other words "the decision of 1789," was interpreted as establishing "a practical construction of the Constitution" with respect to executive officers appointed without stated terms. However, in the dominant opinion of those best authorized to speak on the subject, the "correct interpretation" of the Constitution was that the power of removal was always an incident of the power of appointment, and that therefore in the case of officers appointed by the President with the advice and consent of the Senate the removal power was exercisable by the President only with the advice and consent of the Senate. For an extensive review of the issue at the time of *Myers*, *see* Corwin, *The President's Removal Power Under the Constitution*, in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1467 (1938).

[578] 272 U.S. at 134. Note the parallelism of the arguments from separation-of-powers and the President's ability to enforce the laws in the decision rendered on Congress's effort to obtain a role in the actual appointment of executive officers in Buckley v. Valeo, 424 U.S. 1, 109–43 (1976), and in many of the subsequent separation-of-powers decisions.

posed the so-called "independent agencies"—the Interstate Commerce Commission, the Federal Trade Commission, and the like—to presidential domination. Unfortunately, the Chief Justice, while professing to follow Madison's leadership, had omitted to weigh properly the very important observation that the latter had made at the time regarding the office of Comptroller of the Treasury. "The Committee," said Madison, "has gone through the bill without making any provision respecting the tenure by which the comptroller is to hold his office. I think it is a point worthy of consideration, and shall, therefore, submit a few observations upon it. It will be necessary to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are of a judiciary quality as well as the executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government."[579] In *Humphrey's Executor v. United States*,[580] the Court seized upon "the nature of the office" concept and applied it as a corrective to the overbroad *Myers* holding.

The Humphrey Case.—The material element of *Humphrey's Executor* was that Humphrey, a member of the Federal Trade Commission, was on October 7, 1933, notified by President Roosevelt that he was "removed" from office, the reason being their divergent views of public policy. In due course, Humphrey sued for salary. Distinguishing the *Myers* case, Justice Sutherland, speaking for the unanimous Court, said: "A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the *Myers* case finds support in the theory that such an office is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aide he is. . . . It goes no farther; much less does it include an officer who occupies

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[579] ANNALS OF CONGRESS 611–612 (1789).

[580] 295 U.S. 602 (1935). The case is also styled *Rathbun, Executor v. United States*, Humphrey having, like Myers before him, died in the course of his suit for salary. Proponents of strong presidential powers long argued that *Humphrey's Executor*, like A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), both cases argued and decided contemporaneously, reflected the anti-New Deal views of a conservative Court and wrongfully departed from *Myers*. *See* Scalia, *Historical Anomalies in Administrative Law*, 1985 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 103, 106–10. Now-Justice Scalia continues to adhere to his views and to *Myers*. Morrison v. Olson, 487 U.S. 654, 697, 707–11, 723–27 (1988) (dissenting).

no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President."

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute. . . . Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. . . . We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named, [the Interstate Commerce Commission, the Federal Trade Commission, the Court of Claims]. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will. . . ."

"The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute."[581]

The Wiener Case.—Curtailment of the President's power of removal, so liberally delineated in the *Myers* decision, was not to end with the *Humphrey* case. Unresolved by the latter was the question whether the President, absent a provision expressly delimiting his authority in the statute creating an agency endowed with quasi-judicial functions, remained competent to remove members serving

[581] 295 U.S. at 627–29, 631–32. Justice Sutherland's statement, quoted above, that a Federal Trade Commissioner "occupies no place in the executive department" was not necessary to the decision of the case, was altogether out of line with the same Justice's reasoning in Springer v. Philippine Islands, 277 U.S. 189, 201–202 (1928), and seems later to have caused the author of it much perplexity. *See* R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSION 447–48 (1941). As Professor Cushman adds: "Every officer and agency created by Congress to carry laws into effect is an arm of Congress. . . . The term may be a synonym; it is not an argument." Id. at 451.

thereon. To this query the Court supplied a negative answer in *Wiener v. United States*.[582] Emphasizing that the duties of the War Claims Commission were wholly adjudicatory and its determinations, final and exempt from review by any other official or judicial body, the Court unanimously concluded that inasmuch as the President was unable to supervise its activities, he lacked the power, independently of statutory authorization, to remove a commissioner whose term expired with the life of that agency.

The Watergate Controversy.—A dispute arose regarding the discharge of the Special Prosecutor appointed to investigate and prosecute violations of law in the Watergate matter. Congress vested in the Attorney General the power to conduct the criminal litigation of the Federal Government,[583] and it further authorized him to appoint subordinate officers to assist him in the discharge of his duties.[584] Pursuant to presidential direction, the Attorney General designated a Watergate Special Prosecutor with broad power to investigate and prosecute offenses arising out of the Watergate break-in, the 1972 presidential election, and allegations involving the President, members of the White House staff, or presidential appointees. He was to remain in office until a date mutually agreed upon between the Attorney General and himself, and the regulations provided that the Special Prosecutor "will not be removed from his duties except for extraordinary improprieties on his part."[585] On October 20, following the resignations of the Attorney General and the Deputy Attorney General, the Solicitor General as Acting Attorney General formally dismissed the Special Prosecutor[586] and three days later rescinded the regulation establishing the office.[587] In subsequent litigation, a federal district court held that the firing by the Acting Attorney General had violated the regulations, which were in force at the time and which had to be followed until they were rescinded.[588] The Supreme Court in *United States v. Nixon*[589] seemed to confirm this analysis by the district court in upholding the au-

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[582] 357 U.S. 349 (1958).

[583] 28 U.S.C. § 516.

[584] 28 U.S.C. §§ 509, 510, 515, 533.

[585] 38 Fed. Reg. 14688 (1973). The Special Prosecutor's status and duties were the subject of negotiation between the Administration and the Senate Judiciary Committee. *Nomination of Elliot L. Richardson to be Attorney General: Hearings Before the Senate Judiciary Committee*, 93d Congress, 1st Sess. (1973), 143 *passim*.

[586] The formal documents effectuating the result are set out in 9 Weekly Comp. Pres. Doc. 1271–1272 (1973).

[587] 38 Fed. Reg. 29466 (1973). The Office was shortly recreated and a new Special Prosecutor appointed. 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805. *See Nomination of William B. Saxbe to be Attorney General: Hearings Before the Senate Judiciary Committee*, 93d Congress, 1st Sess. (1973).

[588] Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973).

[589] 418 U.S. 683, 692–97 (1974).

thority of the new Special Prosecutor to take the President to court to obtain evidence in the President's possession. Left unsettled were two questions, the power of the President himself to go over the heads of his subordinates and to fire the Special Prosecutor himself, whatever the regulations said, and the power of Congress to enact legislation establishing an Office of Special Prosecutor free from direction and control of the President.[590] When Congress acted to create an office, first called the Special Prosecutor and then the Independent Counsel, resolution of the question became necessary.

The Removal Power Rationalized.—The tension that had long been noticed between *Myers* and *Humphrey's Executor*, at least in terms of the language used in those cases but also to some extent in their holdings, appears to have been ameliorated by two decisions, which purport to reconcile the cases but, more important, purport to establish, in the latter case, a mode of analysis for resolving separation-of-powers disputes respecting the removal of persons appointed under the Appointments Clause.[591] *Myers* actually struck down only a law involving the Senate in the removal of postmasters, but the broad-ranging opinion had long stood for the proposition that inherent in the President's obligation to see to the faithful execution of the laws was his right to remove any executive officer as a means of discipline. *Humphrey's Executor* had qualified this proposition by upholding "for cause" removal restrictions for members of independent regulatory agencies, at least in part on the assertion that they exercised "quasi-" legislative and adjudicative functions as well as some form of executive function. Maintaining the holding of the latter case was essential to retaining the independent agencies, but the emphasis upon the execution of the laws as a core executive function in recent cases had cast considerable doubt on the continuing validity of *Humphrey's Executor*.

In *Bowsher v. Synar*,[592] the Court held that when Congress itself retains the power to remove an official it could not vest him with the exercise of executive power. Invalidated in *Synar* were pro-

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[590] The first question remained unstated, but the second issue was extensively debated in *Special Prosecutor: Hearings Before the Senate Judiciary Committee*, 93d Congress, 1st Sess. (1973); *Special Prosecutor and Watergate Grand Jury Legislation: Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93d Congress, 1st Sess. (1973).

[591] Bowsher v. Synar, 478 U.S. 714 (1986); Morrison v. Olson, 487 U.S. 654 (1988). This is not to say that the language and analytical approach of *Synar* are not in conflict with that of *Morrison*; it is to say that the results are consistent and the analytical basis of the latter case does resolve the ambiguity present in some of the reservations in *Synar*.

[592] 478 U.S. 714 (1986).

visions of the 1985 "Gramm-Rudman-Hollings" Deficit Control Act[593] vesting in the Comptroller General authority to prepare a detailed report on projected federal revenue and expenditures and to determine mandatory across-the-board cuts in federal expenditures necessary to reduce the projected budget deficit by statutory targets. By a 1921 statute, the Comptroller General was removable by joint congressional resolution for, *inter alia*, "inefficiency," "neglect of duty," or "malfeasance." "These terms are very broad," the Court noted, and "could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will." Consequently, the Court determined, "the removal powers over the Comptroller General's office dictate that he will be subservient to Congress."[594]

Relying expressly upon *Myers*, the Court concluded that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."[595] But *Humphrey's Executor* was also cited with approval, and to the contention that invalidation of this law would cast doubt on the status of the independent agencies the Court rejoined that the statutory measure of the independence of those agencies was the assurance of "for cause" removal by the President rather than congressional involvement as in the instance of the Comptroller General.[596] This reconciliation of *Myers* and *Humphrey's Executor* was made clear and express in *Morrison v. Olson*.[597]

That case sustained the independent counsel statute.[598] Under that law, the independent counsel, appointed by a special court upon application by the Attorney General, may be removed by the Attorney General "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." Because the counsel was clearly exercising "purely" executive duties, in the sense that

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[593] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99–177, 99 Stat. 1038.

[594] 478 U.S. at 729, 730. "By placing the responsibility for execution of the . . . Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function." Id. at 734. Because the Act contained contingency procedures for implementing the budget reductions in the event that the primary mechanism was invalidated, the Court rejected the suggestion that it should invalidate the 1921 removal provision rather than the Deficit Act's conferral of executive power in the Comptroller General. To do so would frustrate congressional intention and significantly alter the Comptroller General's office. Id. at 734–36.

[595] 478 U.S. at 726.

[596] 478 U.S. at 725 n.4.

[597] 487 U.S. 654 (1988).

[598] Pub. L. 95–521, title VI, 92 Stat. 1867, as amended by Pub. L. 97–409, 96 Stat. 2039, and Pub. L. 100–191, 101 Stat. 1293, 28 U.S.C. §§ 49, 591 *et seq*.

term was used in *Myers*, it was urged that *Myers* governed and required the invalidation of the statute. The Court, however, said that *Myers* stood only for the proposition that Congress could not involve itself in the removal of executive officers. Its broad dicta that the President must be able to remove at will officers performing "purely" executive functions had not survived *Humphrey's Executor*.

It was true, the Court admitted, that, in the latter case, it had distinguished between "purely" executive officers and officers who exercise "quasi-legislative" and "quasi-judicial" powers in marking the line between officials who may be presidentially removed at will and officials who can be protected through some form of good cause removal limits. "[B]ut our present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.' The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role. . . . At the other end of the spectrum from *Myers*, the characterization of the agencies in *Humphrey's Executor* and *Wiener* as 'quasi-legislative' or 'quasi-judicial' in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." [599]

The Court discerned no compelling reason to find the good cause limit to interfere with the President's performance of his duties. The independent counsel did exercise executive, law-enforcement functions, but the jurisdiction and tenure of each counsel were limited in scope and policymaking, or significant administrative authority was lacking. On the other hand, the removal authority did afford

[599] 487 U.S. at 689–91.

the President through the Attorney General power to ensure the "faithful execution" of the laws by assuring that the counsel is competently performing the statutory duties of the office.

It is now thus reaffirmed that Congress may not involve itself in the removal of officials performing executive functions. It is also established that, in creating offices in the executive branch and in creating independent agencies, Congress has considerable discretion in statutorily limiting the power to remove of the President or another appointing authority. It is evident on the face of the opinion that the discretion is not unbounded, that there are offices which may be essential to the President's performance of his constitutionally assigned powers and duties, so that limits on removal would be impermissible. There are no bright lines marking off one office from the other, but decision requires close analysis.[600]

As a result of these cases, the long-running controversy with respect to the legitimacy of the independent agencies appears to have been settled,[601] although it appears likely that the controversies with respect to congressional-presidential assertions of power in executive agency matters are only beginning.

Inferior Officers.—In the case of inferior officers, Congress may "limit and restrict the power of removal as it deems best for the public interest," [602] and when Congress has vested the power to appoint these officers in heads of departments, it is ordinarily the department head, rather than the President, who enjoys the power of removal. However, in the case of *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*,[603] the Court considered whether an inferior officer can be twice insulated from the President's removal authority—in other words, can a principal officer whom Congress has protected from at will removal by the President in turn have his or her power to remove an inferior officer restricted? [604] The Court

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[600] But notice the analysis followed by three Justices in Public Citizen v. Department of Justice, 491 U.S. 440, 467, 482–89 (1989) (concurring), and consider the possible meaning of the recurrence to formalist reasoning in Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, (1989). *See also* Justice Scalia's use of the Take Care Clause in pronouncing limits on Congress's constitutional power to confer citizen standing in Lujan v. Defenders of Wildlife, 505 U.S. 555, 576–78 (1992), although it is not clear that he had a majority of the Court with him.

[601] Indeed, the Court explicitly analogized the civil enforcement powers of the independent agencies to the prosecutorial powers wielded by the independent counsel. Morrison v. Olson, 487 U.S. 654, 692 n.31 (1988).

[602] United States v. Perkins, 116 U.S. 483 (1886), cited with approval in Myers v. United States, 272 U.S. 52, 161–163, 164 (1926), and Morrison v. Olson, 487 U.S. 654, 689 n.27 (1988).

[603] 561 U.S. ___, No. 08–861, slip op. (2010).

[604] The case involved the Public Company Accounting Oversight Board, a private non-profit entity with a five-member board, that has significant authority over accounting firms that participate in auditing public companies. The board members

held that such multilevel protection from removal is contrary to the President's executive authority. First, even if the President determines that the inferior officer is neglecting his duties or discharging them improperly, the President does not have the power to remove that officer. Then, if the President seeks to have the principal officer remove the inferior officer, the principal officer may not agree with the President's determination, and the President generally cannot remove the principal officer simply because of this disagreement.[605]

In the absence of specific legislative provision to the contrary, the President may at his discretion remove an inferior officer whose term is limited by statute,[606] or one appointed with the consent of the Senate.[607] He may remove an officer of the army or navy at any time by nominating to the Senate the officer's successor, provided the Senate approves the nomination.[608] In 1940, the President was sustained in removing Dr. E. A. Morgan from the chairmanship of TVA for refusal to produce evidence in substantiation of charges which he had leveled at his fellow directors.[609] Although no such cause of removal by the President was stated in the act creating TVA, the President's action, being reasonably required to promote the smooth functioning of TVA, was held to be within his duty to "take Care that the Laws be faithfully executed." So interpreted, the removal did not violate the principle of administrative independence.

The Presidential Aegis: Demands for Papers

Presidents have more than once had occasion to stand in a protective relation to their subordinates, assuming their defense in litigation brought against them[610] or pressing litigation in their behalf,[611] refusing a congressional call for papers which might be used, in their absence from the seat of government, to their disadvan-

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are appointed to staggered 5-year terms by the Securities and Exchange Commission, and can only be removed for "good cause shown," which requires a finding of either a violation of securities laws or board rules, willful abuse of power, or failure to enforce compliance with the rules governing registered public accounting firms. 15 U.S.C. § 7217(d)(3). The members of the Commission, in turn, can only be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

[605] 561 U.S. ___, No. 08–861, slip op. at 14–15 (2010).

[606] Parsons v. United States, 167 U.S. 324 (1897).

[607] Shurtleff v. United States, 189 U.S. 311 (1903).

[608] Blake v. United States, 103 U.S. 227 (1881); Quackenbush v. United States, 177 U.S. 20 (1900); Wallace v. United States, 257 U.S. 541 (1922).

[609] Morgan v. TVA, 28 F. Supp. 732 (E.D. Tenn. 1939), *aff'd*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941).

[610] *E.g.*, 6 Ops. Atty. Gen. 220 (1853); *In re* Neagle, 135 U.S. 1 (1890).

[611] United States v. Lovett, 328 U.S. 303 (1946).

tage,[612] challenging the constitutional validity of legislation deemed detrimental to their interests.[613] Presidents throughout our history have attempted to spread their own official immunity to their subordinates by resisting actions of the courts or of congressional committees to require subordinates to divulge communications from or to the President that Presidents choose to regard as confidential. Only recently, however, has the focus of the controversy shifted from protection of presidential or executive interests to protection of the President himself, and the locus of the dispute shifted to the courts.

Following years in which claims of executive privilege were resolved in primarily interbranch disputes on the basis of the political strengths of the parties, the issue finally became subject to judicial elaboration. The doctrine of executive privilege was at once recognized as existing and having a constitutional foundation while at the same time it was definitely bounded in its assertion by the principle of judicial review. Because of these cases, because of the intensified congressional-presidential dispute, and especially because of the introduction of the issue into an impeachment proceeding, a somewhat lengthy treatment of the doctrine is called for.

Conceptually, the doctrine of executive privilege may well reflect different considerations in different factual situations. Congress may seek information within the possession of the President, either in effectuation of its investigatory powers to oversee the conduct of officials of the Executive Branch or in effectuation of its power to impeach the President, Vice President, or civil officers of the Government. Private parties may seek information in the possession of the President either in civil litigation with the Government or in a criminal proceeding brought by government prosecutors. Generally, the categories of executive privilege have been the same whether it is Congress or a private individual seeking the information, but it is possible that the congressional assertion of need may overbalance the presidential claim to a greater degree than that of a private individual. The judicial precedents are so meager that it is not yet possible so to state, however.

The doctrine of executive privilege defines the authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the government. The Constitution does not expressly confer upon the Executive Branch any such privilege, but it has been claimed that the privilege derives from the constitutional provision of separation of powers and from

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[612] *E.g.*, 2 J. Richardson, supra at 847.
[613] United States v. Lovett, 328 U.S. 303, 313 (1946).

a necessary and proper concept respecting the carrying out of the duties of the presidency imposed by the Constitution. Historically, assertion of the doctrine has been largely confined to the areas of foreign relations, military affairs, pending investigations, and intragovernmental discussions.[614] During the Nixon Administration, the litigation involved, of course, the claim of confidentiality of conversations between the President and his aides.

Private Access to Government Information.—Private parties may seek to obtain information from the government either to assist in defense to criminal charges brought by the government or in civil cases to use in either a plaintiff's or defendant's capacity in suits with the government or between private parties.[615] In criminal cases, a defendant is guaranteed compulsory process to obtain witnesses by the Sixth Amendment and by the due process clause is guaranteed access to relevant exculpatory information in the possession of the prosecution.[616] Generally speaking, when the prosecu-

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[614] For a good statement of the basis of the doctrine, the areas in which it is asserted, and historical examples, *see Executive Privilege: The Withholding of Information by the Executive: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 92d Congress, 1st Sess. (1971), 420–43, (then-Assistant Attorney General Rehnquist). Former Attorney General Rogers, in stating the position of the Eisenhower Administration, identified five categories of executive privilege: (1) military and diplomatic secrets and foreign affairs, (2) information made confidential by statute, (3) information relating to pending litigation, and investigative files and reports, (4) information relating to internal government affairs privileged from disclosure in the public interest, and (5) records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates, and informal working papers. *The Power of the President To Withhold Information from the Congress*, Memorandum of the Attorney General, Senate Judiciary Subcommittee on Constitutional Rights, 85th Congress, 2d Sess. (Comm. Print) (1958), reprinted as Rogers, *Constitutional Law: The Papers of the Executive Branch*, 44 A.B.A.J. 941 (1958). In the most expansive version of the doctrine, Attorney General Kleindienst argued that the President could assert the privilege as to any employee of the Federal Government to keep secret any information at all. *Executive Privilege, Secrecy in Government, Freedom of Information: Hearings Before the Senate Government Operations Subcommittee on Intergovernmental Relations*, 93d Congress, 1st Sess. (1973), I:18 passim. For a strong argument that the doctrine lacks any constitutional or other legal basis, *see* R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974). The book, however, precedes the Court decision in *Nixon*.

[615] There are also, of course, instances of claimed access for other purposes, for which the Freedom of Information Act, 80 Stat. 383 (1966), 5 U.S.C. § 552, provides generally for public access to governmental documents. In 522(b), however, nine types of information are exempted from coverage, several of which relate to the types as to which executive privilege has been asserted, such as matter classified pursuant to executive order, interagency or intra-agency memoranda or letters, and law enforcement investigatory files. *See, e.g.*, EPA v. Mink, 410 U.S. 73 (1973); FTC v. Grolier, Inc., 462 U.S. 19 (1983); CIA v. Sims, 471 U.S. 159 (1985); John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

[616] *See* Brady v. Maryland, 373 U.S. 83 (1963), and Rule 16, Federal Rules of Criminal Procedure. The earliest judicial dispute involving what later became known as executive privilege arose in United States v. Burr, 25 F. Cas. 30 and 187 (C.C.D.

tion is confronted with a judicial order to turn over to a defendant information that it does not wish to make available, the prosecution has the option of dropping the prosecution and thus avoiding disclosure.[617] But that alternative may not always be available; in the Watergate prosecution, only by revoking the authority of the Special Prosecutor and bringing the cases back into the confines of the Department of Justice could this possibility have been realized.[618]

In civil cases the government may invoke the state secrets privilege against revealing military or other secrets. In *United States v. Reynolds*,[619] a tort claim brought against the United States for compensation for the deaths of civilians in the crash of an Air Force plane testing secret electronics equipment, plaintiffs sought discovery of the Air Force's investigation report on the accident, and the government resisted on a claim of privilege as to the nondisclosure of military secrets. The Court accepted the Government's claim, holding that courts must determine whether under the circumstances the claim of privilege was appropriate without going so far as to force disclosure of the thing the privilege is designed to protect. The private litigant's showing of necessity for the information should govern in each case how far the trial court should probe. Where the necessity is strong, the court should require a strong showing of the appropriateness of the privilege claim, but once the court is satisfied of the appropriateness the privilege must prevail no matter how compelling the need.[620]

Va. 1807), in which defendant sought certain exculpatory material from President Jefferson. Dispute continues with regard to the extent of presidential compliance, but it appears that the President was in substantial compliance with outstanding orders if not in full compliance.

[617] *E.g.*, Alderman v. United States, 394 U.S. 165 (1968).

[618] Thus, defendant in United States v. Ehrlichman, 376 F. Supp. 29 (D.D.C. 1974), was held entitled to access to material in the custody of the President wherein the President's decision to dismiss the prosecution would probably have been unavailing.

[619] 345 U.S. 1 (1953).

[620] 345 U.S. at 7–8, 9–10, 11. Withholding of information relating to governmental employees' clearances, disciplines, or discharges often raises claims of such privilege. *E.g.*, Webster v. Doe, 486 U.S. 592 (1988); Department of the Navy v. Egan, 484 U.S. 518 (1988). After the Court approved a governmental secrecy agreement imposed on CIA employees, Snepp v. United States, 444 U.S. 507 (1980), the government expanded its secrecy program with respect to classified and "classifiable" information. When Congress sought to curb this policy, the Reagan Administration convinced a federal district judge to declare the restrictions void as invasive of the President's constitutional power to manage the executive. National Fed'n of Fed. Employees v. United States, 688 F. Supp. 671 (D.D.C. 1988), *vacated and remanded sub nom.* American Foreign Service Ass'n v. Garfinkel, 490 U.S. 153 (1989). For similar assertions in the context of plaintiffs suing the government for interference with their civil and political rights during the protests against the Vietnam War, in which the plaintiffs were generally denied the information in the possession of the govern-

Reynolds dealt with an evidentiary privilege. There are other circumstances, however, in which cases must be "dismissed on the pleadings without ever reaching the question of evidence." [621] In holding that federal courts should refuse to entertain a breach of contract action seeking enforcement of an agreement to compensate someone who performed espionage services during the Civil War, the Court in *Totten v. United States* declared that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." [622]

Prosecutorial and Grand Jury Access to Presidential Documents.—Rarely will there be situations when federal prosecutors or grand juries seek information under the control of the President, since he has ultimate direction of federal prosecuting agencies, but the Watergate Special Prosecutor, being in a unique legal situation, was held able to take the President to court to enforce subpoenas for tape recordings of presidential conversations and other documents relating to the commission of criminal actions.[623] While holding that the subpoenas were valid and should be obeyed, the Supreme Court recognized the constitutional status of executive privilege, insofar as the assertion of that privilege relates to presidential conversations and indirectly to other areas as well.

Presidential communications, the Court said, have "a presumptive privilege." "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." The operation of government is furthered by the protection accorded communications between high government officials and those who advise and assist them in the performance of their duties. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." The separation of powers basis derives from the conferral upon each of the branches of the Federal Government of powers to be exercised by each of them in great measure indepen-

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ment under the state-secrets privilege, *see* Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978); Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983). For review and analysis, *see* Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 875–80 (1984).

[621] *Reynolds*, 345 U.S. at 11, n.26.

[622] 92 U.S. 105, 107 (1875). *See also* Tenet v. Doe, 544 U.S. 1, 9 (2005) (reiterating and applying *Totten's* "broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden"). The Court in *Tenet* distinguished Webster v. Doe on the basis of "an obvious difference . . . between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy." Id. at 10.

[623] United States v. Nixon, 418 U.S. 683, 692–97 (1974).

dent of the other branches. The confidentiality of presidential conversations flows then from the effectuation of enumerated powers.[624]

However, the Court continued, the privilege is not absolute. The federal courts have the power to construe and delineate claims arising under express and implied powers. Deference is owed the constitutional decisions of the other branches, but it is the function of the courts to exercise the judicial power, "to say what the law is." The Judicial Branch has the obligation to do justice in criminal prosecutions, which involves the employment of an adversary system of criminal justice in which all the probative facts, save those clearly privileged, are to be made available. Thus, although the President's claim of privilege is entitled to deference, the courts must balance two sets of interests when the claim depends solely on a broad, undifferentiated claim of confidentiality.

"In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution."

"On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. . . ."

"We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based

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[624] 418 U.S. at 707–08. Presumably, the opinion recognizes a similar power in the federal courts to preserve the confidentiality of judicial deliberations, *cf.* New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971) (Chief Justice Burger dissenting), and in each house of Congress to treat many of its papers and documents as privileged. *Cf.* Soucie v. David, 448 F.2d 1067, 1080, 1081–1982 (C.A.D.C. 1971) (Judge Wilkey concurring); *Military Cold War Escalation and Speech Review Policies: Hearings Before the Senate Committee on Armed Services*, 87th Congress, 2d Sess. (1962), 512 (Senator Stennis). *See* Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976); United States v. Ehrlichman, 389 F. Supp. 95 (D.D.C. 1974).

only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." [625]

Obviously, *United States v. Nixon* left much unresolved. It did recognize the constitutional status of executive privilege as a doctrine. It did affirm the power of the courts to resolve disputes over claims of the privilege. But it left unsettled just how much power the courts have to review claims of privilege to protect what are claimed to be military, diplomatic, or sensitive national security secrets. It did not indicate what the status of the claim of confidentiality of conversations is when it is raised in civil cases, nor did it touch upon denial of information to Congress, or public disclosure of information.

The Court's decision in *Nixon v. Administrator of General Services* [626] did not elucidate any of these questions to any great degree. In upholding the Presidential Recordings and Materials Preservation Act, which directed the government to take custody of former President Nixon's records so that they could be screened, catalogued, and processed by professional archivists in GSA, the Court viewed the assertion of privilege as directed only to the facial validity of the requirement of screening by executive branch professionals, and not at all related to the possible public disclosure of some of the records. The decision did recognize "adequate justifications" for enactment of the law, and termed them cumulatively "comparable" to those held to justify in camera inspection in *United States v. Nixon*.[627] Congress's purposes cited by the Court included the preservation of the materials for legitimate historical and governmental purposes, the rationalization of preservation and access to public needs as well as each President's wishes, the preservation of the materials as a source for facilitating a full airing of the events leading to the former President's resignation for public and congressional understanding, and preservation for the light shed upon issues in civil or criminal litigation. Although interestingly instructive, the decision may be so attuned to the narrow factual circumstances that led to the Act's passage as to leave the case of little precedential value.

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[625] 418 U.S. 683, 711–13. Essentially the same decision had been arrived at in the context of subpoenas of tapes and documentary evidence for use before a grand jury in Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

[626] 433 U.S. 425, 446–55 (1977). *See* id. at 504, 545 (Chief Justice Burger and Justice Rehnquist dissenting). The decision does resolve one outstanding question: assertion of the privilege is not limited to incumbent Presidents. Id. at 447–49. Subsequently, a court held that former-President Nixon had had such a property expectancy in his papers that he was entitled to compensation for their seizure under the Act. Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992).

[627] 433 U.S. at 452.

Public disclosure was at issue in 2004 when the Court weighed a claim of executive privilege asserted as a bar to discovery orders for information disclosing the identities of individuals who served on an energy task force chaired by the Vice President.[628] Although the case was remanded on narrow technical grounds, the Court distinguished *United States v. Nixon*,[629] and, in instructing the appeals court on how to proceed, emphasized the importance of confidentiality for advice tendered the President.[630]

Congressional Access to Executive Branch Information.—Presidents and Congresses have engaged in protracted disputes over provision of information from the former to the latter, but the basic thing to know is that most congressional requests for information are complied with. The disputes, however, have been colorful and varied.[631] The basic premise of the concept of executive privilege, as it is applied to resist requests for information from Congress as from private parties with or without the assistance of the courts, is found in the doctrine of separation of powers, the prerogative of each coequal branch to operate within its own sphere independent of control or direction of the other branches. In this context, the President then asserts that phase of the claim of privilege relevant to the moment, such as confidentiality of communications, protection of diplomatic and military secrets, or preservation of investigative records. Counterposed against this assertion of presidential privilege is the power of Congress to obtain information upon which to legislate, to oversee the carrying out of its legislation, to check and root out corruption and wrongdoing in the Executive Branch, involving both the legislating and appropriating function of Congress, and in the final analysis to impeach the President, the Vice President, and all civil officers of the Federal Government.

Until quite recently, all disputes between the President and Congress with regard to requests for information were settled in the political arena, with the result that few if any lasting precedents were created and only disputed claims were left to future argu-

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628 Cheney v. United States District Court, 542 U.S. 367 (2004).

629 Although the information sought in *Nixon* was important to "the constitutional need for production of relevant evidence in a criminal proceeding," the suit against the Vice President was civil, and withholding the information "does not hamper another branch's ability to perform its 'essential functions.'" 542 U.S. at 383, 384.

630 The Court recognized "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." 542 U.S. at 382. *But cf.* Clinton v. Jones, 520 U.S. 681, 702 (1997).

631 *See* the extensive discussion in Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987).

ment. The Senate Select Committee on Presidential Campaign Activities, however, elected to seek a declaratory judgment in the courts with respect to the President's obligations to obey its subpoenas. The Committee lost its case, but the courts based their rulings upon prudential considerations rather than upon questions of basic power, inasmuch as by the time the case was considered impeachment proceedings were pending in the House of Representatives.[632] The House Judiciary Committee subpoenas were similarly rejected by the President, but instead of going to the courts for enforcement, the Committee adopted as one of its Articles of Impeachment the refusal of the President to honor its subpoenas.[633] Congress has considered bills by which Congress would authorize congressional committees to go to court to enforce their subpoenas; the bills did not purport to define executive privilege, although some indicate a standard by which the federal court is to determine whether the material sought is lawfully being withheld from Congress.[634] The controversy gives little indication at the present time of abating, and it may be assumed that whenever the Executive and Congress are controlled by different political parties there will be persistent conflicts. One may similarly assume that the alteration of this situation would only reduce but not remove the disagreements.

Clause 3. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

RECESS APPOINTMENTS

The Recess Appointments Clause was adopted by the Constitutional Convention without dissent and without debate regarding the intent and scope of its terms. In Federalist No. 67, Alexander Hamilton refers to the recess appointment power as "nothing more than

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[632] Senate Select Committee on Presidential Campaign Activities v. Nixon, 370 F. Supp. 521 (D.D.C.), *aff'd*, 498 F.2d 725 (D.C. Cir. 1974).

[633] President Nixon's position was set out in a June 9, 1974, letter to the Chairman of the House Judiciary Committee. 10 Wkly. Comp. Pres. Docs. 592 (1974). The impeachment article and supporting material are set out in H. REP. NO. 93–1305, 93d Cong., 2d Sess. (1974).

[634] For consideration of various proposals by which Congress might proceed, *see* Hamilton & Grabow, *A Legislative Proposal for Resolving Executive Privilege Disputes Precipitated by Congressional Subpoenas*, 21 HARV. J. LEGIS. 145 (1984); Brand & Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials*, 36 CATH. U. L. REV. 71 (1986); Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L. J. 1333.

a supplement . . . for the purpose of establishing an auxiliary method of appointment, in cases to which the general method was inadequate." It is generally accepted that the clause was designed to enable the President to ensure the unfettered operation of the government during periods when the Senate was not in session and therefore unable to perform its advice and consent function. In addition to fostering administrative continuity, Presidents have exercised authority under the Recess Appointments Clause for political purposes, appointing officials who might have difficulty securing Senate confirmation.

Two fundamental textual issues arise when interpreting the Recess Appointments Clause. The first is the meaning of the phrase "the Recess of the Senate." The Senate may recess both between and during its annual sessions, but the time period during which the President may make a recess appointment is not clearly answered by the text of the Constitution. The second fundamental textual issue is what constitutes a vacancy that "may happen" during the recess of the Senate. If the words "may happen" are interpreted to refer only to vacancies that arise during a recess, then the President would lack authority to make a recess appointment to a vacancy that existed before the recess began. For over two centuries the Supreme Court did not address either of these issues,[635] leaving it to the lower courts and other branches of government to interpret the scope of the Recess Appointments Clause.[636]

The Supreme Court ultimately adopted a relatively broad interpretation of the Clause in *National Labor Relations Board v. Noel Canning*.[637] With respect to the meaning of the phrase "Recess of the Senate," the Court concluded that the phrase applied to both

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[635] *See* NLRB v. Noel Canning, 573 U.S. ___, No. 12–1281, slip op. at 9 (2014).

[636] For lower court decisions on the Recess Appointments Clause, see, e.g., Evans v. Stephens, 387 F.3d 1220, 1226–27 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005); United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704, 712 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963); *In re* Farrow, 3 Fed. 112 (C.C.N.D. Ga. 1880). For prior executive branch interpretations of the Recess Appointments Clause, see 25 Op. OLC 182 (2001); 20 Op. OLC 124, 161 (1996); 16 Op. OLC 15 (1992); 13 Op. OLC 271 (1989); 6 Op. OLC 585, 586 (1982); 3 Op. OLC 314, 316 (1979); 41 Op. Att'y Gen. 463 (1960); 33 Op. Att'y Gen. 20 (1921); 30 Op. Att'y Gen. 314 (1914); 26 Op. Att'y Gen. 234 (1907); 23 Op. Att'y Gen. 599 (1901); 22 Op. Att'y Gen. 82 (1898); 19 Op. Att'y Gen. 261 (1889); 18 Op. Att'y Gen. 28 (1884); 16 Op. Att'y Gen. 523 (1880); 15 Op. Att'y Gen. 207 (1877); 14 Op. Att'y Gen. 563 (1875); 12 Op. Att'y Gen. 455 (1868); 12 Op. Att'y Gen. 32 (1866); 11 Op. Att'y Gen. 179 (1865); 10 Op. Att'y Gen. 356 (1862); 4 Op. Att'y Gen. 523 (1846); 4 Op. Att'y Gen. 361 (1845); 3 Op. Att'y Gen. 673 (1841); 2 Op. Att'y Gen. 525 (1832); 1 Op. Att'y Gen. 631, 633–34 (1823). For the early practice on recess appointments, see G. Haynes, The Senate of the United States 772–78 (1938).

[637] *Noel Canning*, slip op. at 5–33 (2014).

inter-session recesses and intra-session recesses. In so holding, the Court, finding the text of the Constitution ambiguous,[638] relied on (1) a pragmatic interpretation of the Clause that would allow the President to ensure the "continued functioning" of the federal government when the Senate is away,[639] and (2) "long settled and established [historical] practice" of the President making intra-session recess appointments.[640] The Court declined, however, to say how long a recess must be to fall within the Clause, instead holding that historical practice counseled that a recess of more than three days but less than ten days is "presumptively too short" to trigger the President's appointment power under the Clause.[641] With respect to the phrase "may happen," the majority, again finding ambiguity in the text of the Clause,[642] held that the Clause applied both to vacancies that first come into existence during a recess and to vacancies that initially occur before a recess but continue to exist during the recess.[643] In so holding, the Court again relied on both pragmatic concerns[644] and historical practice.[645]

Even under a broad interpretation of the Recess Appointments Clause, the Senate may limit the ability to make recess appointments by exercising its procedural prerogatives. The Court in *Noel*

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[638] *Id.* at 9–11. More specifically, the Court found nothing in dictionary definitions or common usage contemporaneous to the Constitution that would suggest that an intra-session recess was not a recess. The Court noted that, while the phrase "the Recess" might suggest limiting recess appointments to the single break between sessions of Congress, the word "the" can also be used "generically or universally," *see, e.g.*, U.S. CONST. art. I, sec. 3, cl. 5 (directing the Senate to choose a President pro tempore "in the Absence of the Vice-President"), and that there were examples of "the Recess" being used in the broader manner at the time of the founding. *Noel Canning*, slip op. at 9–11.

[639] *Noel Canning*, slip op. at 11. ("The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.").

[640] The Court noted that Presidents have made "thousands" of intra-session recess appointments and that presidential legal advisors had been nearly unanimous in determining that the clause allowed these appointments. *Id.* at 12.

[641] *Id.* at 21. The Court left open the possibility that some very unusual circumstance, such as a national catastrophe that renders the Senate unavailable, could require the exercise of the recess appointment power during a shorter break. *Id.*

[642] The Court noted, for instance, that Thomas Jefferson thought the phrase in question could point to both vacancies that "*may happen to be*" during a recess as well as those that "*may happen to fall*" during a recess. *Id.* at 22 (emphasis added).

[643] *Id.* at 1–2.

[644] *Id.* at 26 ("[W]e believe the narrower interpretation risks undermining constitutionally conferred powers [in that] . . . [i]t would prevent the President from making any recess appointment that arose before a recess, no matter who the official, no matter how dire the need, no matter how uncontroversial the appointment, and no matter how late in the session the office fell vacant.").

[645] *Id.* at 34 ("Historical practice over the past 200 years strongly favors the broader interpretation. The tradition of applying the Clause to pre-recess vacancies dates at least to President James Madison.").

Canning held that, for the purposes of the Recess Appointments Clause, the Senate is in session when the Senate says it is, provided that, under its own rules, it retains the capacity to transact Senate business.[646] In this vein, *Noel Canning* provides the Senate with the means to prevent recess appointments by a President who attempts to employ the "subsidiary method" for appointing officers of the United States (i.e., recess appointments) to avoid the "norm"[647] for appointment (i.e., appointment pursuant to the Article II, sec. 2, cl. 2).[648]

Judicial Appointments

Federal judges clearly fall within the terms of the Recess Appointments Clause. But, unlike with other offices, a problem exists. Article III judges are appointed "during good behavior," subject only to removal through impeachment. A judge, however, who is given a recess appointment may be "removed" by the Senate's failure to advise and consent to his appointment; moreover, on the bench, prior to Senate confirmation, he or she may be subject to influence not felt by other judges. Nonetheless, a constitutional attack upon the status of a federal district judge, given a recess appointment and then withdrawn as a nominee, was rejected by a federal court.[649]

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[646] *Id.* In the context of *Noel Canning*, the Court held that the Senate was in session even during a pro forma session, a brief meeting of the Senate, often lasting minutes, in which no legislative business is conducted. *Id.* at 38–39. Because the Journal of the Senate (and the Congressional Record) declared the Senate in session during those periods, and because the Senate could, under its rules, have conducted business under unanimous consent (a quorum being presumed), the Court concluded that the Senate was indeed in session. In so holding, the Court deferred to the authority of Congress to "determine the Rules of its Proceedings," *see* U.S. CONST. art. I, sec. 5, cl. 2, relying on previous case law in which the Court refused to question the validity of a congressional record. *Noel Canning*, slip op. at 39 (citing United States v. Ballin, 144 U.S. 1, 5 (1892)).

[647] *Noel Canning*, slip op. at 40.

[648] It should be noted that, by an act of Congress, if a vacancy existed when the Senate was in session, the ad interim appointee, subject to certain exceptions, may receive no salary until he has been confirmed by the Senate. 5 U.S.C. § 5503 (2012). By targeting the compensation of appointees, as opposed to the President's recess appointment power itself, this limitation acts as an indirect control on recess appointments, but its constitutionality has not been adjudicated. A federal district court noted that "if any and all restrictions on the President's recess appointment power, however limited, are prohibited by the Constitution," restricting payment to recess appointees might be invalid. Staebler v. Carter, 464 F. Supp. 585, 596 n.24 (D.D.C. 1979).

[649] United States v. Woodley, 751 F.2d 1008, 1012 (9th Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1048 (1986). The opinions in the court of appeals provide a wealth of data on the historical practice of giving recess appointments to judges, including the developments in the Eisenhower Administration, when three Justices, Warren, Brennan, and Stewart, were so appointed and later confirmed after participation on the Court. The Senate in 1960 adopted a "sense of the Senate" resolution suggesting that the practice was not a good idea. 106 CONG. REC. 18130–18145 (1960). Other cases holding that the President's power under the Recess Appointments Clause ex-

Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President

Ad Interim Designations

To be distinguished from the power to make recess appointments is the power of the President to make temporary or *ad interim* designations of officials to perform the duties of other absent officials. Usually such a situation is provided for in advance by a statute that designates the inferior officer who is to act in place of his immediate superior. But, in the absence of such a provision, both theory and practice concede the President the power to make the designation.[650]

SECTION 3. He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

LEGISLATIVE ROLE OF THE PRESIDENT

The clause directing the President to report to the Congress on the state of the union imposes a duty rather than confers a power, and is the formal basis of the President's legislative leadership. The President's legislative role has attained great proportions since 1900. This development, however, represents the play of political and social forces rather than any pronounced change in constitutional interpretation. Especially is it the result of the rise of parties and the accompanying recognition of the President as party leader, of the appearance of the National Nominating Convention and the Party

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tends to filling judicial vacancies in Article III courts include United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963), and Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004), *cert. denied*, 544 U.S. 942 (2005). In the latter case, however, Justice Stevens, although concurring in the denial of the petition of certiorari, wrote that "it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession 'recesses.'" 544 U.S. at 943.

[650] *See* the following Ops. Att'y Gen.: 6:358 (1854); 12:32, 41 (1866); 25:258 (1904); 28:95 (1909); 38:298 (1935).

Platform, and of the introduction of the Spoils System, an ever present help to Presidents in times of troubled relations with Congress.[651] It is true that certain pre-Civil War Presidents, mostly of Whig extraction, professed to entertain nice scruples on the score of "usurping" legislative powers,[652] but still earlier ones, Washington, Jefferson, and Jackson among them, took a very different line, albeit less boldly and persistently than their later imitators.[653] Today, there is no subject on which the President may not appropriately communicate to Congress, in as precise terms as he chooses, his conception of its duty. Conversely, the President is not obliged by this clause to impart information which, in his judgment, should in the public interest be withheld.[654] The President has frequently summoned both Houses into "extra" or "special sessions" for legislative purposes, and the Senate alone for the consideration of nominations and treaties. His power to adjourn the Houses has never been exercised.

THE CONDUCT OF FOREIGN RELATIONS

The Right of Reception: Scope of the Power

"Ambassadors and other public ministers" embraces not only "all possible diplomatic agents which any foreign power may accredit to the United States,"[655] but also, as a practical construction of the Constitution, all foreign consular agents, who therefore may not exercise their functions in the United States without an *exequatur* from the President.[656] The power to "receive" ambassadors, *et cetera*, includes, moreover, the right to refuse to receive them, to request their recall, to dismiss them, and to determine their eligibility under our laws.[657] Furthermore, this power makes the President the sole mouthpiece of the nation in its dealing with other nations.

The Presidential Monopoly

Wrote Jefferson in 1790: "The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially

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[651] N. Small, Some Presidential Interpretations of the Presidency (1932); W. Binkley, The President and Congress (2d ed. 1962); E. Corwin, supra, chs. 1, 7.

[652] The first Harrison, Polk, Taylor, and Fillmore all fathered sentiments to this general effect. *See* 4 J. Richardson, supra at 1860, 1864; 6 id. at 2513–19, 2561–62, 2608, 2615.

[653] *See* sources cited supra.

[654] Warren, *Presidential Declarations of Independence*, 10 B.U.L. Rev. 1 (1930); 3 W. Willoughby, supra at 1488–1492.

[655] 7 Ops. Atty. Gen. 186, 209 (1855).

[656] 5 J. Moore, International Law Digest 15–19 (1906).

[657] Id. at 4:473–548; 5:19–32.

submitted to the Senate. Exceptions are to be construed strictly."[658] So when Citizen Genet, envoy to the United States from the first French Republic, sought an *exequatur* for a consul whose commission was addressed to the Congress of the United States, Jefferson informed him that "as the President was the only channel of communication between the United States and foreign nations, it was from him alone 'that foreign nations or their agents are to learn what is or has been the will of the nation'; that whatever he communicated as such, they had a right and were bound to consider 'as the expression of the nation'; and that no foreign agent could be 'allowed to question it,' or 'to interpose between him and any other branch of government, under the pretext of either's transgressing their functions.' Mr. Jefferson therefore declined to enter into any discussion of the question as to whether it belonged to the President under the Constitution to admit or exclude foreign agents. 'I inform you of the fact,' he said, 'by authority from the President.' Mr. Jefferson returned the consul's commission and declared that the President would issue no *exequatur* to a consul except upon a commission correctly addressed."[659]

The Logan Act.—When in 1798 a Philadelphia Quaker named Logan went to Paris on his own to undertake a negotiation with the French Government with a view to averting war between France and the United States, his enterprise stimulated Congress to pass "An Act to Prevent Usurpation of Executive Functions,"[660] which, "more honored in the breach than the observance," still survives on the statute books.[661] The year following, John Marshall, then a Member of the House of Representatives, defended President John Adams for delivering a fugitive from justice to Great Britain under the 27th article of the Jay Treaty, instead of leaving the business to the courts. He said: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by

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[658] *Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions*, April 24, 1790, 5 WRITINGS OF THOMAS JEFFERSON 161, 162 (P. Ford ed., 1895).

[659] 4 J. Moore, supra at 680–81.

[660] This measure is now contained in 18 U.S.C. § 953.

[661] *See Memorandum on the History and Scope of the Law Prohibiting Correspondence with a Foreign Government*, S. Doc. No. 696, 64th Congress, 2d Sess. (1917). The author was Mr. Charles Warren, then Assistant Attorney General. Further details concerning the observance of the "Logan Act" are given in E. Corwin, supra at 183–84, 430–31.

the force of the nation is to be performed through him."[662] Ninety-nine years later, a Senate Foreign Relations Committee took occasion to reiterate Marshall's doctrine with elaboration.[663]

A Formal or a Formative Power.—In his attack, instigated by Jefferson, upon Washington's Proclamation of Neutrality in 1793 at the outbreak of war between France and Great Britain, Madison advanced the argument that all large questions of foreign policy fell within the ambit of Congress, by virtue of its power "to declare war" In support of this proposition he disparaged the presidential function of reception: "I shall not undertake to examine, what would be the precise extent and effect of this function in various cases which fancy may suggest, or which time may produce. It will be more proper to observe, in general, and every candid reader will second the observation, that little, if anything, more was intended by the clause, than to provide for a particular mode of communication, almost grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the constitution, it would be highly improper to magnify the function into an important prerogative, even when no rights of other departments could be affected by it."[664]

The President's Diplomatic Role.—Hamilton, although he had expressed substantially the same view in *The Federalist* regarding the power of reception,[665] adopted a very different conception of it in defense of Washington's proclamation. Writing under the pseudonym, "Pacificus," he said: "The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is acknowledged, the trea-

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[662] 10 ANNALS OF CONGRESS 596, 613–14 (1800). Marshall's statement is often cited, *e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 319 (1936), as if he were claiming sole or inherent executive power in foreign relations, but Marshall carefully propounded the view that Congress could provide the rules underlying the President's duty to extradite. When, in 1848, Congress did enact such a statute, the Court sustained it. Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893).

[663] S. Doc. No. 56, 54th Congress, 2d Sess. (1897).

[664] 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 611 (1865).

[665] No. 69 (J. Cooke ed. 1961), 468.

ties between the nations, so far at least as regards public rights, are of course suspended. This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive, to decide upon the obligations of the country with regard to foreign nations. To apply it to the case of France, if there had been a treaty of alliance, offensive and defensive, between the United States and that country, the unqualified acknowledgment of the new government would have put the United States in a condition to become as an associate in the war with France, and would have laid the legislature under an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war. This serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision. The division of the executive power in the Constitution, creates a concurrent authority in the cases to which it relates." [666]

Jefferson's Real Position.—Nor did Jefferson himself officially support Madison's point of view, as the following extract from his "minutes of a Conversation," which took place July 10, 1793, between himself and Citizen Genet, show: "He asked if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the judiciary in construing them where they related to their department. 'But,' said he, 'at least, Congress are bound to see that the treaties are observed.' I told him no; there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. 'If he decides against the treaty, to whom is a nation to appeal?' I told him the Constitution had made the President the last appeal. He made me a bow, and said, that indeed he would not make me his compliments on such a Constitution, expressed the utmost astonishment at it, and seemed never before to have had such an idea." [667]

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[666] Letter of Pacificus, No. 1, 7 WORKS OF ALEXANDER HAMILTON 76, 82–83 (J. Hamilton ed., 1851).

[667] 4 J. Moore, supra at 680–81.

Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President

The Power of Recognition

In his endeavor in 1793 to minimize the importance of the President's power of reception, Madison denied that it involved cognizance of the question, whether those exercising the government of the accrediting state had the right along with the possession. He said: "This belongs to the nation, and to the nation alone, on whom the government operates. . . . It is evident, therefore, that if the executive has a right to reject a public minister, it must be founded on some other consideration than a change in the government, or the newness of the government; and consequently a right to refuse to acknowledge a new government cannot be implied by the right to refuse a public minister. It is not denied that there may be cases in which a respect to the general principles of liberty, the essential rights of the people, or the overruling sentiments of humanity, might require a government, whether new or old, to be treated as an illegitimate despotism. Such are in fact discussed and admitted by the most approved authorities. But they are great and extraordinary cases, by no means submitted to so limited an organ of the national will as the executive of the United States; and certainly not to be brought by any torture of words, within the right to receive ambassadors."[668]

Hamilton, with the case of Genet before him, had taken the contrary position, which history has ratified. In consequence of his power to receive and dispatch diplomatic agents, but more especially the former, the President possesses the power to recognize new states, communities claiming the status of belligerency, and changes of government in established states; also, by the same token, the power to decline recognition, and thereby decline diplomatic relations with such new states or governments. The affirmative precedents down to 1906 are succinctly summarized by John Bassett Moore in his famous Digest, as follows: "In the preceding review of the recognition, respectively, of the new states, new governments, and belligerency, there has been made in each case a precise statement of facts, showing how and by whom the recognition was accorded. In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish-American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and cooperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other

[668] Letters of Helvidius, 5 WRITINGS OF JAMES MADISON 133 (G. Hunt ed., 1905).

cases, the recognition was given by the Executive solely on his own responsibility." [669]

An examination of this historical practice, along with other functional considerations, led the Supreme Court to hold in *Zivotofsky v. Kerry* that the Executive retains exclusive authority over the recognition of foreign sovereigns and their territorial bounds.[670] Although Congress, pursuant to its enumerated powers in the field of foreign affairs, may properly legislate on matters which precede and follow a presidential act of recognition, including in ways which may undercut the policies that inform the President's recognition decision, it may not alter the President's recognition decision.[671]

The Case of Cuba.—The question of Congress's right also to recognize new states was prominently raised in connection with Cuba's successful struggle for independence. Beset by numerous legislative proposals of a more or less mandatory character, urging recognition upon the President, the Senate Foreign Relations Committee, in 1897, made an elaborate investigation of the whole subject and came to the following conclusions as to this power: "The 'recognition' of independence or belligerency of a foreign power, technically speaking, is distinctly a diplomatic matter. It is properly evidenced either by sending a public minister to the government thus recognized, or by receiving a public minister therefrom. The latter is the usual and proper course. Diplomatic relations with a new power are properly, and customarily inaugurated at the request of that power, expressed through an envoy sent for the purpose. The reception of this envoy, as pointed out, is the act of the President alone. The next step, that of sending a public minister to the nation thus recognized, is primarily the act of the President. The Senate can take no part in it at all, until the President has sent in a nomination. Then it acts in its executive capacity, and, customarily, in 'executive session.' The legislative branch of the government can exercise no influence over this step except, very indirectly, by withholding appropriations. . . . Nor can the legislative branch of the government hold any communications with foreign nations. The executive

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[669] 1 J. Moore, *supra*, 243–44. *See* Restatement, Foreign Relations §§ 204, 205.

[670] Zivotofsky v. Kerry, 576 U.S. ___, No. 13–628, slip op. (2015). The Court identified the Reception Clause, along with additional provisions in Article II, as providing the basis for the Executive's power over recognition. *Id.* at 9–10. *See supra* Clause 1. Powers and Term of the President: Nature and Scope of Presidential Power: Executive Power: Theory of the Presidential Office: The *Zivotofsky* Case.

[671] *See Zivotofsky*, slip op. at 27. While observing that Congress may not enact a law that "directly contradicts" a presidential recognition decision, the Court stated that Congress could still express its disagreement in multiple ways: "For example, it may enact an embargo, decline to confirm an ambassador, or even declare war. But none of these acts would alter the President's recognition decision." *Id.*

branch is the sole mouthpiece of the nation in communication with foreign sovereignties."

"Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity. . . . Congress can help the Cuban insurgents by legislation in many ways, but it cannot help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct. That it is correct . . . [is] shown by the opinions of jurists and statesmen of the past."[672] Congress was able ultimately to bundle a clause recognizing the independence of Cuba, as distinguished from its government, into the declaration of war of April 11, 1898, against Spain. For the most part, the sponsors of the clause defended it by the following line of reasoning. Diplomacy, they said, was now at an end, and the President himself had appealed to Congress to provide a solution for the Cuban situation. In response, Congress was about to exercise its constitutional power of declaring war, and it has consequently the right to state the purpose of the war which it was about to declare.[673] The recognition of the Union of Soviet Socialist Republics in 1933 was an exclusively presidential act.

The Power of Nonrecognition.—The potentialities of nonrecognition were conspicuously illustrated by President Woodrow Wilson when he refused, early in 1913, to recognize Provisional President Huerta as the *de facto* government of Mexico, thereby contributing materially to Huerta's downfall the year following. At the same time, Wilson announced a general policy of nonrecognition in the case of any government founded on acts of violence, and while he observed this rule with considerable discretion, he consistently refused to recognize the Union of Soviet Socialist Republics, and his successors prior to President Franklin D. Roosevelt did the same. The refusal of the Hoover administration to recognize the independence of the Japanese puppet state of Manchukuo early in 1932 was based on kindred grounds. Similarly, the nonrecognition of the Chinese Communist Government from the Truman Administration to President Nixon's *de facto* recognition through a visit in 1972—not long after

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[672] S. Doc. No. 56, 54th Congress, 2d Sess. (1897), 20–22.

[673] Senator Nelson of Minnesota said: "The President has asked us to give him the right to make war to expel the Spaniards from Cuba. He has asked us to put that power in his hands; and when we are asked to grant that power—the highest power given under the Constitution—we have the right, the intrinsic right, vested in us by the Constitution, to say how and under what conditions and with what allies that war-making power shall be exercised." 31 CONG. REC. 3984 (1898).

the People's Republic of China was admitted to the United Nations and Taiwan excluded—proved to be an important part of American foreign policy during the Cold War.[674]

Congressional Implementation of Presidential Policies

No President was ever more jealous of his prerogative in the realm of foreign relations than Woodrow Wilson. When, however, strong pressure was brought to bear upon him by Great Britain respecting his Mexican Policy, he was constrained to go before Congress and ask for a modification of the Panama Tolls Act of 1911, which had also aroused British ire. Addressing Congress, he said, "I ask this of you in support of the foreign policy of the Administration. I shall not know how to deal with other matters of even greater delicacy and nearer consequence if you do not grant it to me in ungrudging measure." [675]

The fact is, of course, that Congress has enormous powers that are indispensable to any foreign policy. In the long run, Congress is the body that lays and collects taxes for the common defense, that creates armies and maintains navies, although it does not direct them, that pledges the public credit, that declares war, that defines offenses against the law of nations, that regulates foreign commerce; and it has the further power "to make all laws which shall be necessary and proper"—that is, which it deems to be such—for carrying into execution not only its own powers but all the powers "of the government of the United States and of any department or officer thereof." Moreover, its laws made "in pursuance" of these powers are "supreme law of the land," and the President is bound constitutionally to "take Care that" they "be faithfully executed." In point of fact, congressional legislation has operated to augment presidential powers in the foreign field much more frequently than it has to curtail them. The Lend-Lease Act of March 11, 1941 [676] is the classic example, although it only brought to culmination a whole series of enactments with which Congress had aided and abetted the administration's foreign policy in the years between 1934 and 1941.[677] Disillusionment with presidential policies in the context of the Vietnamese conflict led Congress to legislate restrictions, not only with respect to the discretion of the President to use troops

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[674] President Carter's termination of the Mutual Defense Treaty with Taiwan, which precipitated a constitutional and political debate, was perhaps an example of nonrecognition or more appropriately derecognition. On recognition and nonrecognition policies in the post-World War II era, *see* Restatement, Foreign Relations, §§ 202, 203.

[675] 1 Messages and Papers of Woodrow Wilson 58 (A. Shaw ed., 1924).

[676] 55 Stat. 31 (1941).

[677] E. Corwin, supra at 184–93, 423–25, 435–36.

abroad in the absence of a declaration of war, but also limiting his economic and political powers through curbs on his authority to declare national emergencies.[678] The lesson of history, however, appears to be that congressional efforts to regain what is deemed to have been lost to the President are intermittent, whereas the presidential exercise of power in today's world is unremitting.[679]

The Doctrine of Political Questions

It is not within the province of the courts to inquire into the policy underlying action taken by the "political departments"—Congress and the President—in the exercise of their conceded powers. This commonplace maxim is, however, sometimes given an enlarged application, so as to embrace questions as to the existence of facts and even questions of law, that the Court would normally regard as falling within its jurisdiction. Such questions are termed "political questions," and are especially common in the field of foreign relations. The leading case is *Foster v. Neilson*,[680] where the matter in dispute was the validity of a grant made by the Spanish Government in 1804 of land lying to the east of the Mississippi River, and in which there was also raised the question whether the region between the Perdido and Mississippi Rivers belonged in 1804 to Spain or the United States.

Chief Justice Marshall's opinion for the Court held that the Court was bound by the action of the political departments, the President and Congress, in claiming the land for the United States. He wrote: "If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its right of dominion over a country of which it is in possession, and which it claims un-

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[678] Legislation includes the War Powers Resolution, Pub. L. 93–148, 87 Stat. 555 (1953), 50 U.S.C. §§ 1541–1548; the National Emergencies Act, Pub. L. 94–412, 90 Stat. 1255 (1976), 50 U.S.C. §§ 1601–1651 (establishing procedures for presidential declaration and continuation of national emergencies and providing for a bicameral congressional veto); the International Emergency Economic Powers Act, Pub. L. 95–223, 91 Stat. 1626 (1977), 50 U.S.C. §§ 1701–1706 (limiting the great economic powers conferred on the President by the Trading with the Enemy Act of 1917, 40 Stat. 415, 50 U.S.C. App. § 5(b), to times of declared war, and providing new and more limited powers, with procedural restraints, for nonwartime emergencies); *see also* the Foreign Sovereign Immunities Act of 1976, Pub. L. 94–583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1602–1611 (removing from executive control decisions concerning the liability of foreign sovereigns to suit).

[679] "We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Justice Jackson concurring). For an account of how the President usually prevails, *see* H. Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affairs (1990).

[680] 27 U.S. (2 Pet.) 253 (1829).

der a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature." [681]

The doctrine thus clearly stated is further exemplified, with particular reference to presidential action, by *Williams v. Suffolk Ins. Co.*[682] In this case the underwriters of a vessel which had been confiscated by the Argentine Government for catching seals off the Falkland Islands, contrary to that Government's orders, sought to escape liability by showing that the Argentinian Government was the sovereign over these islands and that, accordingly, the vessel had been condemned for willful disregard of legitimate authority. The Court decided against the company on the ground that the President had taken the position that the Falkland Islands were not a part of Argentina. "[C]an there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view, it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he had decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union."

"If this were not the rule, cases might often arise, in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character." [683] Thus, the right to determine the boundaries of the country is a political function,[684] as is also the right to determine what country is sovereign of a particular region,[685] to determine whether a community is entitled under international law to be considered a belligerent or an independent state,[686] to deter-

[681] 27 U.S. at 309.
[682] 38 U.S. (13 Pet.) 415 (1839).
[683] 38 U.S. at 420.
[684] Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).
[685] Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839).
[686] United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).

mine whether the other party has duly ratified a treaty,[687] to determine who is the *de jure* or *de facto* ruler of a country,[688] to determine whether a particular person is a duly accredited diplomatic agent to the United States,[689] to determine how long a military occupation shall continue in fulfillment of the terms of a treaty,[690] to determine whether a treaty is in effect or not, although doubtless an extinguished treaty could be constitutionally renewed by tacit consent.[691]

Recent Statements of the Doctrine.—The assumption underlying the refusal of courts to intervene in cases involving conduct of foreign relations is well stated in *Chicago & S. Air Lines v. Waterman S.S. Corp.*[692] Here, the Court refused to review orders of the Civil Aeronautics Board granting or denying applications by citizen carriers to engage in overseas and foreign air transportation, which by the terms of the Civil Aeronautics Act were subject to approval by the President and therefore impliedly beyond those provisions of the act authorizing judicial review of board orders. Elaborating on the necessity of judicial abstinence in the conduct of foreign relations, Justice Jackson declared for the Court: "The President, both as Commander in Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution on the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."[693]

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[687] Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853).

[688] Jones v. United States, 137 U.S. 202 (1890); Oetjen v. Central Leather Co., 246 U.S. 297 (1918).

[689] *In re* Baiz, 135 U.S. 403 (1890).

[690] Neely v. Henkel, 180 U.S. 109 (1901).

[691] Terlinden v. Ames, 184 U.S. 270 (1902); Charlton v. Kelly, 229 U.S. 447 (1913).

[692] 333 U.S. 103 (1948).

[693] 333 U.S. at 111. *See also* Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918). Analogous to and arising out of

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To the same effect are the Court's holding and opinion in *Ludecke v. Watkins*,[694] where the question at issue was the power of the President to order the deportation under the Alien Enemy Act of 1798 of a German alien enemy after the cessation of hostilities with Germany. Said Justice Frankfurter for the Court: "War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. . . . The Court would be assuming the functions of the political agencies of the government to yield to the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without a government capable of negotiating a treaty of peace. It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subject for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility." [695]

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the same considerations as the political question doctrine is the "act of state" doctrine under which United States courts will not examine the validity of the public acts of foreign governments done within their own territory, typically, but not always, in disputes arising out of nationalizations. *E.g.*, Underhill v. Hernandez, 168 U.S. 250 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). For succinct analysis of this amorphous doctrine, *see* Restatement, Foreign Relations, §§ 443–44. Congress has limited the reach of the doctrine in foreign expropriation cases by the Hickenlooper Amendments. 22 U.S.C. § 2370(e)(2). Consider, also, Dames & Moore v. Regan, 453 U.S. 654 (1981). Similar, also, is the doctrine of sovereign immunity of foreign states in United States courts, under which jurisdiction over the foreign state, at least after 1952, turned upon the suggestion of the Department of State as to the applicability of the doctrine. *See* Alfred Dunhill of London v. Republic of Cuba, 425 U.S. at 698–706 (plurality opinion), *but see* id. at 725–28 (Justice Marshall dissenting). For the period prior to 1952, *see* Z. & F. Assets Corp. v. Hull, 311 U.S. 470, 487 (1941). Congress in the Foreign Sovereign Immunities Act of 1976, Pub. L. 94–583, 90 Stat. 2891, 28 U.S.C. §§ 1330, 1332(a)(2)(3)(4), 1391(f), 1441(d), 1602–1611, provided for judicial determination of applicability of the doctrine but did adopt the executive position with respect to no applicability for commercial actions of a foreign state. *E.g.*, Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). *See* Restatement, Foreign Relations, §§ 451–63 (including Introductory Note, pp. 390–396).

[694] 335 U.S. 160 (1948).

[695] 335 U.S. at 167, 170. Four Justices dissented, by Justice Black, who said: "The Court . . . holds, as I understand its opinion, that the Attorney General can deport him whether he is dangerous or not. The effect of this holding is that any unnaturalized person, good or bad, loyal or disloyal to this country, if he was a citizen of Germany before coming here, can be summarily seized, interned and deported from the United States by the Attorney General, and that no court of the United States has any power whatever to review, modify, vacate, reverse, or in any

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The Court reviewed the political question doctrine in *Baker v. Carr*.[696] There, Justice Brennan noted and elaborated the factors which go into making a question political and inappropriate for judicial decision.[697] On the matter at hand, he said: "There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."[698] However, the Court came within one vote of creating a broad application of the political question doctrine in foreign relations disputes, at least in the context of a dispute between Congress and the President with respect to a proper allocation of constitutional powers.[699] In any event, the Court, in

manner affect the Attorney General's deportation order. . . . I think the idea that we are still at war with Germany in the sense contemplated by the statute controlling here is a pure fiction. Furthermore, I think there is no act of Congress which lends the slightest basis to the claim that after hostilities with a foreign country have ended the President or the Attorney General, one or both, can deport aliens without a fair hearing reviewable in the courts. On the contrary, when this very question came before Congress after World War I in the interval between the Armistice and the conclusion of formal peace with Germany, Congress unequivocally required that enemy aliens be given a fair hearing before they could be deported." Id. at 174–75. *See also* Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948), where the continuation of rent control under the Housing and Rent Act of 1947, enacted after the termination of hostilities, was unanimously held to be a valid exercise of the war power, but the constitutional question raised was asserted to be a proper one for the Court. Said Justice Jackson, in a concurring opinion: "Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care." Id. at 146–47.

[696] 369 U.S. 186 (1962).

[697] 369 U.S. at 217.

[698] 369 U.S. at 211–12. A case involving "a purely legal question of statutory interpretation" is not a political question simply because the issues have significant political and foreign relations overtones. Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 229–30 (1986) (Fisherman's Protective Act does not completely remove Secretary of Commerce's discretion in certifying that foreign nationals are "diminishing the effectiveness of" an international agreement by taking whales in violation of quotas set pursuant to the agreement).

[699] Goldwater v. Carter, 444 U.S. 996, 1002–06 (Justices Rehnquist, Stewart, and Stevens and Chief Justice Burger). The doctrine was applied in just such a dispute in Dole v. Carter, 569 F.2d 1109 (10th Cir. 1977).

adjudicating on the merits disputes in which the foreign relations powers are called into question, follows a policy of such deference to executive and congressional expertise that the result may not be dissimilar to a broad application of the political question doctrine.[700]

THE PRESIDENT AS LAW ENFORCER

Powers Derived From The "Take Care" Duty

The Constitution does not say that the President shall execute the laws, but that "he shall take Care that the Laws be faithfully executed," i.e., by others, who are commonly, but not always with strict accuracy, termed his subordinates. What powers are implied from this duty? In this connection, five categories of executive power should be distinguished: first, there is that executive power which the Constitution confers directly upon the President by the opening clause of article II and, in more specific terms, by succeeding clauses of the same article; secondly, there is the sum total of the powers which acts of Congress at any particular time confer upon the President; thirdly, there is the sum total of discretionary powers which acts of Congress at any particular time confer upon heads of departments and other executive ("administrative") agencies of the National Government; fourthly, there is the power which stems from the duty to enforce the criminal statutes of the United States; finally, there are so-called "ministerial duties" which admit of no discretion as to the occasion or the manner of their discharge. Three principal questions arise: first, how does the President exercise the powers which the Constitution or the statutes confer upon him; second, in what relation does he stand by virtue of the Take Care Clause to the powers of other executive or administrative agencies; third, in what relation does he stand to the enforcement of the criminal laws of the United States? [701]

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[700] "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280, 292 (1981). *See also* Dames & Moore v. Regan, 453 U.S. 654, 688 (1981); Rostker v. Goldberg, 453 U.S. 57, 64–68 (1981); Greer v. Spock, 424 U.S. 828, 837–838 (1976); Parker v. Levy, 417 U.S. 733, 756, 758 (1974); Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952). Neither may private claimants seek judicial review of executive actions denying constitutional rights "in such sensitive areas as national security and foreign policy" in suits for damages against offending officials, inasmuch as the President is absolutely immune, Nixon v. Fitzgerald, 457 U.S. 731 (1982), and the Court has strongly hinted that in these areas the immunity of presidential aides and other executive officials "entrusted with discretionary authority" will be held to be absolute rather than qualified. Harlow v. Fitzgerald, 457 U.S. 800, 812–13 (1982).

[701] In Lujan v. Defenders of Wildlife, 504 U.S. 555, 576–78 (1992), the Court purported to draw from the Take Care Clause the principle that Congress could not authorize citizens with only generalized grievances to sue to compel governmental

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Whereas the British monarch is constitutionally under the necessity of acting always through agents if his acts are to receive legal recognition, the President is presumed to exercise certain of his constitutional powers personally. In the words of an opinion by Attorney General Cushing in 1855: "It may be presumed that he, the man discharging the presidential office, and he alone, grants reprieves and pardons for offenses against the United States. . . . So he, and he alone, is the supreme commander in chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. That is a power constitutionally inherent in the person of the President. No act of Congress, no act even of the President himself, can, by constitutional possibility, authorize or create any military officer not subordinate to the President." [702] Moreover, the obligation to act personally may be sometimes enlarged by statute, as, for example, by the act organizing the President with other designated officials into "an Establishment by name of the Smithsonian Institute." Here, says the Attorney General, "the President's name of office is *designatio personae*." He was also of opinion that expenditures from the "secret service" fund, in order to be valid, must be vouched for by the President personally.[703] On like grounds the Supreme Court once held void a decree of a court martial, because, though it has been confirmed by the Secretary of War, it was not specifically stated to have received the sanction of the President as required by the 65th Article of War.[704] This case has, however, been virtually overruled, and at any rate such cases are exceptional.[705]

The general rule, as stated by the Court, is that when any duty is cast by law upon the President, it may be exercised by him through the head of the appropriate department, whose acts, if performed within the law, thus become the President's acts.[706] *Williams v. United*

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compliance with the law, inasmuch as permitting that would be "to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" Id. at 577.

[702] 7 Ops. Atty. Gen. 453, 464–65 (1855).

[703] *Cf.* 2 Stat. 78. The provision has long since dropped out of the statute book.

[704] Runkle v. United States, 122 U.S. 543 (1887).

[705] *Cf. In re* Chapman, 166 U.S. 661, 670–671 (1897), where it was held that presumptions in favor of official action "preclude collateral attack on the sentences of courts-martial." *See also* United States v. Fletcher, 148 U.S. 84, 88–89 (1893); Bishop v. United States, 197 U.S. 334, 341–42 (1905), both of which in effect repudiate *Runkle*.

[706] The President, in the exercise of his executive power under the Constitution, "speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." The heads of the departments are his authorized assistants in the performance of his executive duties, and their official acts, promulgated in the regular course of business, are presumptively his acts. Wilcox v. McConnel, 38 U.S. (13 Pet.) 498, 513 (1839). *See also* United States

States [707] involved an act of Congress that prohibited the advance of public money in any case whatever to disbursing officers of the United States, except under special direction by the President.[708] The Supreme Court held that the act did not require the personal performance by the President of this duty. Such a practice, said the Court, if it were possible, would absorb the duties of the various departments of the government in the personal acts of one chief executive officer, and be fraught with mischief to the public service. The President's duty in general requires his superintendence of the administration; yet he cannot be required to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform.[709] As a matter of administrative practice, in fact, most orders and instructions emanating from the heads of the departments, even though in pursuance of powers conferred by statute on the President, do not even refer to the President.[710]

Impoundment of Appropriated Funds

In his Third Annual Message to Congress, President Jefferson established the first faint outline of what years later became a major controversy. Reporting that $50,000 in funds which Congress had appropriated for fifteen gunboats on the Mississippi remained unexpended, the President stated that a "favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of the law unnecessary. . . ." But he was not refusing to expend the money, only delaying action to obtain improved gunboats; a year later, he told Congress that the money was being spent and gunboats were being obtained.[711] A few other instances of deferrals or refusals to spend occurred in the Nineteenth and early Twentieth Centuries, but it was only with the Administration of President Franklin Roosevelt that a President refused to spend moneys for the pur-

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v. Eliason, 41 U.S. (16 Pet.) 291 (1842); Williams v. United States, 42 U.S. (1 How.) 290, 297 (1843); United States v. Jones, 59 U.S. (18 How.) 92, 95 (1856); *The Confiscation Cases*, 87 U.S. (20 Wall.) 92 (1874); United States v. Farden, 99 U.S. 10 (1879); Wolsey v. Chapman, 101 U.S. 755 (1880).

[707] 42 U.S. (1 How.) 290 (1843).

[708] 3 Stat. 723 (1823), now covered in 31 U.S.C. § 3324.

[709] 42 U.S. (1 How.) at 297–98.

[710] 38 Ops. Atty. Gen. 457, 458 (1936). And, of course, if the President exercises his duty through subordinates, he must appoint them or appoint the officers who appoint them, Buckley v. Valeo, 424 U.S. 1, 109–143 (1976), and he must have the power to discharge those officers in the Executive Branch, Myers v. United States, 272 U.S. 52 (1926), although the Court has now greatly qualified *Myers* to permit congressional limits on the removal of some officers. Morrison v. Olson, 487 U.S. 654 (1988).

[711] 1 J. Richardson, supra at 348, 360.

poses appropriated. Succeeding Presidents expanded upon these precedents, and in the Nixon Administration a well-formulated plan of impoundments was executed in order to reduce public spending and to negate programs established by congressional legislation.[712]

Impoundment[713] was defended by Administration spokesmen as being a power derived from the President's executive powers and particularly from his obligation to see to the faithful execution of the laws, i.e., his discretion in the manner of execution. The President, the argument went, is responsible for deciding when two conflicting goals of Congress can be harmonized and when one must give way, when, for example, congressional desire to spend certain moneys must yield to congressional wishes to see price and wage stability. In some respects, impoundment was said or implied to flow from certain inherent executive powers that repose in any President. Finally, statutory support was sought; certain laws were said to confer discretion to withhold spending, and it was argued that congressional spending programs are discretionary rather than mandatory.[714]

On the other hand, it was argued that Congress's powers under Article I, § 8, were fully adequate to support its decision to authorize certain programs, to determine the amount of funds to be spent on them, and to mandate the Executive to execute the laws. Permitting the President to impound appropriated funds allowed him the power of item veto, which he does not have, and denied Congress the opportunity to override his veto of bills enacted by Congress. In particular, the power of Congress to compel the President to spend appropriated moneys was said to derive from Congress's power "to make all Laws which shall be necessary and proper for

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[712] History and law is much discussed in *Executive Impoundment of Appropriated Funds: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 92d Congress, 1st Sess. (1971); *Impoundment of Appropriated Funds by the President: Hearings Before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds*, 93d Congress, 1st Sess. (1973). The most thorough study of the legal and constitutional issues, informed through historical analysis, is Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L. J. 1549 (1974); Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Response*, 63, id. at 149 (1974). *See generally* L. FISHER, PRESIDENTIAL SPENDING POWER (1975).

[713] There is no satisfactory definition of impoundment. Legislation enacted by Congress uses the phrase "deferral of budget authority" which is defined to include: "(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law." 2 U.S.C. § 682(1).

[714] *Impoundment of Appropriated Funds by the President: Hearings Before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds*, 93d Congress, 1st Sess. (1973), 358 (then-Deputy Attorney General Sneed).

carrying into Execution" the enumerated powers of Congress and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof." [715]

The President's decision to impound large amounts of appropriated funds led to two approaches to curtail the power. First, many persons and organizations, with a reasonable expectation of receipt of the impounded funds upon their release, brought large numbers of suits; with a few exceptions, these suits resulted in decisions denying the President either constitutional or statutory power to decline to spend or obligate funds, and the Supreme Court, presented with only statutory arguments by the Administration, held that no discretion existed under the particular statute to withhold allotments of funds to the states.[716] Second, Congress in the course of revising its own manner of appropriating funds in accordance with budgetary responsibility provided for mandatory reporting of impoundments to Congress, for congressional disapproval of impoundments, and for court actions by the Comptroller General to compel spending or obligation of funds.[717]

Generally speaking, the law recognized two types of impoundments: "routine" or "programmatic" reservations of budget authority to provide for the inevitable contingencies that arise in administering congressionally-funded programs and "policy" decisions that are ordinarily intended to advance the broader fiscal or other policy objectives of the executive branch contrary to congressional wishes in appropriating funds in the first place.

Routine reservations were to come under the terms of a revised Anti-Deficiency Act.[718] Prior to its amendment, this law had permitted the President to "apportion" funds "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appro-

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[715] Id. at 1–6 (Senator Ervin). Of course, it was long ago established that Congress could direct the expenditure of at least some moneys from the Treasury, even over the opposition of the President. Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).

[716] Train v. City of New York, 420 U.S. 35 (1975); Train v. Campaign Clean Water, 420 U.S. 136 (1975). *See also* State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973); Pennsylvania v. Lynn, 501 F.2d 848 (D.C. Cir. 1974) (the latter case finding statutory discretion not to spend).

[717] Congressional Budget and Impoundment Control Act, Pub. L. 93–344, title X, §§ 1001–1017, 88 Stat. 332 (1974), as amended, 2 U.S.C. §§ 681–88.

[718] Originally passed as the Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 48. The provisions as described in the text were added in the General Appropriations Act of 1951, ch. 896, § 1211(c)(2), 64 Stat. 595, 765. The amendments made by the Impoundment Control Act, were § 1002, 88 Stat. 332, 31 U.S.C. §§ 1341, 1512. On the Anti-Deficiency Act generally, *see* Stith, *Congress's Power of the Purse*, 97 YALE L. J. 1343, 1370–1377 (1988).

priation was made available." President Nixon had relied on this "other developments" language as authorization to impound, for what in essence were policy reasons.[719] Congress deleted the controverted clause and retained the other language to authorize reservations to maintain funds for contingencies and to effect savings made possible in carrying out the program; it added a clause permitting reserves "as specifically provided by law."[720]

"Policy" impoundments were to be reported to Congress by the President as permanent rescissions and, perhaps, as temporary deferrals.[721] Rescissions are merely recommendations or proposals of the President and must be authorized by a bill or joint resolution, or, after 45 days from the presidential message, the funds must be made available for obligation.[722] Temporary deferrals of budget authority for less than a full fiscal year, as provided in the 1974 law, were to be effective unless either the House of Representatives or the Senate passed a resolution of disapproval.[723] With the decision in *INS v. Chadha*,[724] voiding as unconstitutional the one-House legislative veto, it was evident that the veto provision in the deferral section of the Impoundment Control Act was no longer viable. An Administration effort to utilize the section, minus the veto device, was thwarted by court action, in which, applying established severability analysis, the court held that Congress would not have enacted the deferral provision in the absence of power to police its exercise through the veto.[725] Thus, the entire deferral section was inoperative. Congress, in 1987, enacted a more restricted authority, limited to deferrals only for those purposes set out in the Anti-Deficiency Act.[726]

With passage of the Act, the constitutional issues faded into the background; Presidents regularly reported rescission proposals, and Congress responded by enacting its own rescissions, usually topping the Presidents'. The entire field was, of course, confounded by the application of the other part of the 1974 law, the Budget Act, which restructured how budgets were received and acted on in Con-

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[719] L. Fisher, supra at 154–57.

[720] 31 U.S.C. § 1512(c)(1) (present version). Congressional intent was to prohibit the use of apportionment as an instrument of policymaking. 120 CONG. REC. 7658 (1974) (Senator Muskie); id. at 20472–20473 (Senators Ervin and McClellan).

[721] §§ 1011(1), 1012, 1013, 88 Stat. 333–34, 2 U.S.C. §§ 628(1), 683, 684.

[722] 2 U.S.C. § 683.

[723] § 1013, 88 Stat. 334. Because the Act was a compromise between the House of Representatives and the Senate, numerous questions were left unresolved; one important one was whether the President could use the deferral avenue as a means of effectuating policy impoundments or whether rescission proposals were the sole means. The subsequent events described in the text mooted that argument.

[724] 462 U.S. 919 (1983).

[725] City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987).

[726] Pub. L. 100–119, title II, § 206(a), 101 Stat. 785, 2 U.S.C. § 684.

gress, and by the Balanced Budget and Emergency Deficit Control Act of 1985.[727] This latter law was designed as a deficit-reduction forcing mechanism, so that unless President and Congress cooperate each year to reduce the deficit by prescribed amounts, a "sequestration" order would reduce funds down to a mandated figure.[728] Dissatisfaction with the amount of deficit reduction continues to stimulate discussion of other means, such as "expedited" rescission and the line-item veto, many of which may raise some constitutional issues.

Power and Duty of the President in Relation to Subordinate Executive Officers

If the law casts a duty upon a head of department *eo nomine*, does the President thereupon become entitled by virtue of his duty to "take Care that the Laws be faithfully executed," to substitute his own judgment for that of the principal officer regarding the discharge of such duty? In the debate in the House in 1789 on the location of the removal power, Madison argued that it ought to be attributed to the President alone because it was "the intention of the Constitution, expressed especially in the faithful execution clause, that the first magistrate should be responsible for the executive department," and this responsibility, he held, carried with it the power to "inspect and control" the conduct of subordinate executive officers. "Vest," said he, "the power [of removal] in the Senate jointly with the President, and you abolish at once the great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good." [729]

But this was said with respect to the office of the Secretary of State, and when shortly afterward the question arose as to the power of Congress to regulate the tenure of the Comptroller of the Treasury, Madison assumed a very different attitude, conceding in effect that this office was to be an arm of certain of Congress's own powers and should therefore be protected against the removal power.[730] And in *Marbury v. Madison*,[731] Chief Justice Marshall traced a parallel distinction between the duties of the Secretary of State under the original act which had created a "Department of Foreign Affairs" and those which had been added by the later act changing the designation of the department to its present one. The former

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[727] Pub. L. 99–177, 99 Stat. 1037, codified as amended in titles 2, 31, and 42 U.S.C., with the relevant portions to this discussion at 2 U.S.C. §§ 901 *et seq*.

[728] *See* Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593 (1988).

[729] 1 ANNALS OF CONG. 495, 499 (1789).

[730] Id. at 611–612.

[731] 5 U.S. (1 Cr.) 137 (1803).

were, he pointed out, entirely in the "political field," and hence for their discharge the Secretary was left responsible absolutely to the President. The latter, on the other hand, were exclusively of statutory origin and sprang from the powers of Congress. For these, therefore, the Secretary was "an officer of the law" and "amenable to the law for his conduct." [732]

Administrative Decentralization Versus Jacksonian Centralism.—An opinion rendered by Attorney General Wirt in 1823 asserted the proposition that the President's duty under the Take Care Clause required of him scarcely more than that he should bring a criminally negligent official to book for his derelictions, either by removing him or by setting in motion against him the processes of impeachment or of criminal prosecutions.[733] The opinion entirely overlooked the important question of the location of the power to interpret the law, which is inevitably involved in any effort to enforce it. The diametrically opposed theory that Congress is unable to vest any head of an executive department, even within the field of Congress's specifically delegated powers, with any legal discretion which the President is not entitled to control was first asserted in unambiguous terms in President Jackson's Protest Message of April 15, 1834,[734] defending his removal of Duane as Secretary of the Treasury, because of the latter's refusal to remove the deposits from the Bank of the United States. Here it is asserted "that the entire executive power is vested in the President;" that the power to remove those officers who are to aid him in the execution of the laws is an incident of that power; that the Secretary of the Treasury was such an officer; that the custody of the public property and money was an executive function exercised through the Secretary of the Treasury and his subordinates; that in the performance of these duties the Secretary was subject to the supervision and control of the President; and finally that the act establishing the Bank of the United States "did not, as it could not change the relation between the President and Secretary—did not release the former from his obligation to see the law faithfully executed nor the latter from the President's supervision and control." [735] In short, the President's removal power, in this case unqualified, was the sanction provided by the Constitution for his power and duty to control his "subordinates" in all their official actions of public consequence.

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[732] 5 U.S. (1 Cr.) at 165–66.
[733] 1 Ops. Atty. Gen. 624 (1823).
[734] 3 J. Richardson, supra at 1288.
[735] Id. at 1304.

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Congressional Power Versus Presidential Duty to the Law.—The Court's 1838 decision in *Kendall v. United States ex rel. Stokes*,[736] shed more light on congressional power to mandate actions by executive branch officials. The United States owed Stokes money, and when Postmaster General Kendall, at Jackson's instigation, refused to pay it, Congress passed a special act ordering payment. Kendall, however, still proved noncompliant, whereupon Stokes sought and obtained a mandamus in the United States circuit court for the District of Columbia, and on appeal this decision was affirmed by the Supreme Court. Although *Kendall*, like *Marbury v. Madison*, involved the question of the responsibility of a head of a department for the performance of a ministerial duty, the discussion by counsel before the Court and the Court's own opinion covered the entire subject of the relation of the President to his subordinates in the performance by them of statutory duties. The lower court had asserted that the duty of the President under the faithful execution clause gave him no other control over the officer than to see that he acts honestly, with proper motives, but no power to construe the law and see that the executive action conforms to it. Counsel for Kendall attacked this position vigorously, relying largely upon statements by Hamilton, Marshall, James Wilson, and Story having to do with the President's power in the field of foreign relations.

The Court rejected the implication with emphasis. There are, it pointed out, "certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character."[737] In short, the Court recognized the underlying question of the case to be whether the President's duty to "take Care that the Laws be faithfully executed" made it constitutionally impossible for Congress ever to entrust the construction of its statutes to anybody but the President, and it answered this in the negative.

Myers Versus Morrison.—How does this issue stand today? The answer to this question, so far as there is one, is to be sought in a comparison of the Court's decision in *Myers*, on the one hand, and

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[736] 37 U.S. (12 Pet.) 524 (1838).
[737] 37 U.S. (12 Pet.) at 610.

its decision in *Morrison*, on the other.[738] The first decision is still valid to support the President's right to remove, and hence to control the decisions of, all officials through whom he exercises the great political powers which he derives from the Constitution, and also to remove many but not all officials—usually heads of departments—through whom he exercises powers conferred upon him by statute. *Morrison*, however, recasts *Myers* to be about the constitutional inability of Congress to participate in removal decisions. It permits Congress to limit the removal power of the President, and those acting for him, by imposition of a "good cause" standard, subject to a balancing test. That is, the Court now regards the critical issue not as what officials do, whether they perform "purely executive" functions or "quasi" legislative or judicial functions, though the duties and functions must be considered. Rather, the Courts must "ensure that Congress does not interfere with the President's exercise of the 'executive power'" and his constitutionally appointed duty under Article II to take care that the laws be faithfully executed.[739] Thus, the Court continued, *Myers* was correct in its holding and in its suggestion that there are some executive officials who must be removable by the President if he is to perform his duties.[740] On the other hand, Congress may believe that it is necessary to protect the tenure of some officials, and if it has good reasons not limited to invasion of presidential prerogatives, it will be sustained, provided the removal restrictions are not of such a nature as to impede the President's ability to perform his constitutional duties.[741] The officer in *Morrison*, the independent counsel, had investigative and prosecutorial functions, purely executive ones, but there were good reasons for Congress to secure her tenure and no showing that the restriction "unduly trammels" presidential powers.[742]

The "bright-line" rule previously observed no longer holds. Now, Congress has a great deal more leeway in regulating executive officials, but it must articulate its reasons carefully and observe the fuzzy lines set by the Court.

Power of the President to Guide Enforcement of the Penal Law.—This matter also came to a head in "the reign of Andrew Jackson," preceding, and indeed foreshadowing, the Duane episode by some months. "At that epoch," Wyman relates in his Principles of Administrative Law, "the first amendment of the doctrine of cen-

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[738] Myers v. United States, 272 U.S. 52 (1926); Morrison v. Olson, 487 U.S. 654 (1988).

[739] Morrison v. Olson, 487 U.S. at 689–90.

[740] 487 U.S. at 690–91.

[741] 487 U.S. at 691.

[742] 487 U.S. at 691–92.

tralism in its entirety was set forth in an obscure opinion upon an unimportant matter—The Jewels of the Princess of Orange, 2 Opin. 482 (1831). These jewels . . . were stolen from the Princess by one Polari and were seized by the officers of the United States Customs in the hands of the thief. Representations were made to the President of the United States by the Minister of the Netherlands of the facts in the matter, which were followed by a request for return of the jewels. In the meantime the District Attorney was prosecuting condemnation proceedings in behalf of the United States which he showed no disposition to abandon. The President felt himself in a dilemma, whether if it was by statute the duty of the District Attorney to prosecute or not, the President could interfere and direct whether to proceed or not. The opinion was written by Taney, then Attorney General; it is full of pertinent illustrations as to the necessity in an administration of full power in the chief executive as the concomitant of his full responsibility. It concludes: If it should be said that, the District Attorney having the power to discontinue the prosecution, there is no necessity for inferring a right in the President to direct him to exercise it—I answer that the direction of the President is not required to communicate any new authority to the District Attorney, but to direct him in the execution of a power he is admitted to possess. The most valuable and proper measure may often be for the President to order the District Attorney to discontinue prosecution. The District Attorney might refuse to obey the President's order; and if he did refuse, the prosecution, while he remained in office, would still go on; because the President himself could give no order to the court or to the clerk to make any particular entry. He could only act through his subordinate officer, the District Attorney, who is responsible to him and who holds his office at his pleasure. And if that officer still continues a prosecution which the President is satisfied ought not to continue, the removal of the disobedient officer and the substitution of one more worthy in his place would enable the President through him faithfully to execute the law. And it is for this among other reasons that the power of removing the District Attorney resides in the President."[743]

The President as Law Interpreter

The power accruing to the President from his function of law interpretation preparatory to law enforcement is daily illustrated in relation to such statutes as the Anti-Trust Acts, the Taft-Hartley Act, the Internal Security Act, and many lesser statutes. Nor is this the whole story. Not only do all presidential regulations and orders

[743] B. Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers 231–32 (1903).

based on statutes that vest power in him or on his own constitutional powers have the force of law, provided they do not transgress the Court's reading of such statutes or of the Constitution,[744] but he sometimes makes law in a more special sense. In the famous *Neagle* case,[745] an order of the Attorney General to a United States marshal to protect a Justice of the Supreme Court whose life has been threatened by a suitor was attributed to the President and held to be "a law of the United States" in the sense of section 753 of the Revised Statutes, and as such to afford basis for a writ of *habeas corpus* transferring the marshal, who had killed the attacker, from state to national custody. Speaking for the Court, Justice Miller inquired: "Is this duty [the duty of the President to take care that the laws be faithfully executed] limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?" [746] Obviously, an affirmative answer is assumed to the second branch of this inquiry, an assumption that is borne out by numerous precedents. And, in *United States v. Midwest Oil Co.*,[747] the Court ruled that the President had, by dint of repeated assertion of it from an early date, acquired the right to withdraw, via the Land Department, public lands, both mineral and non-mineral, from private acquisition, Congress having never repudiated the practice.

Military Power in Law Enforcement: The Posse Comitatus

"Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion."

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[744] United States v. Eliason, 41 U.S. (16 Pet.) 291, 301–02 (1842); Kurtz v. Moffitt, 115 U.S. 487, 503 (1885); Smith v. Whitney, 116 U.S. 167, 180–81 (1886). For an analysis of the approach to determining the validity of presidential, or other executive, regulations and orders under purported congressional delegations or implied executive power, *see* Chrysler Corp. v. Brown, 441 U.S. 281, 301–16 (1979).

[745] *In re* Neagle, 135 U.S. 1 (1890).

[746] 135 U.S. at 64. The phrase, "a law of the United States," came from the Act of March 2, 1833 (4 Stat. 632). However, in the Act of June 25, 1948, 62 Stat. 965, 28 U.S.C. § 2241(c)(2), the phrase is replaced by the term, "an act of Congress," thereby eliminating the basis of the holding in *Neagle*.

[747] 236 U.S. 459 (1915). *See also* Mason v. United States, 260 U.S. 545 (1923).

Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President

"The President, by using the militia or the armed forces, or both . . . shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law . . . ."[748]

These quoted provisions of the United States Code consolidate a course of legislation that began at the time of the Whiskey Rebellion of 1792.[749] In *Martin v. Mott*,[750] which arose out of the War of 1812, the Court held that the authority to decide whether the exigency had arisen belonged exclusively to the President.[751] Even before that time, Jefferson had, in 1808, in the course of his efforts to enforce the Embargo Acts, issued a proclamation ordering "all officers having authority, civil or military, who shall be found in the vicinity" of an unruly combination, to aid and assist "by all means in their power, by force of arms or otherwise" the suppression of such combination.[752] Forty-six years later, Attorney General Cushing advised President Pierce that in enforcing the Fugitive Slave Act of 1850, marshals of the United States had authority when opposed by unlawful combinations to summon to their aid not only bystanders and citizens generally, but armed forces within their precincts, both state militia and United States officers, soldiers, sailors, and marines,[753] a doctrine that Pierce himself improved upon

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[748] 10 U.S.C. §§ 332, 333. The provisions were invoked by President Eisenhower when he dispatched troops to Little Rock, Arkansas, in 1957 to counter resistance to Federal district court orders pertaining to desegregation of certain public schools in the Little Rock School District. Although the validity of his action was never expressly reviewed, the Court, in Cooper v. Aaron, 358 U.S. 1, 4, 18–19 (1958), rejected a contention advanced by critics of the legality of his conduct, namely, that the President's constitutional duty to see to the faithful execution of the laws, as implemented by the provisions quoted above, does not permit the use of troops to enforce decrees of federal courts, because the latter are not statutory enactments, which alone are comprehended within the phrase, "laws of the United States." According to the Court, a judicial decision interpreting a constitutional provision, specifically "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case [Brown v. Board of Education, 347 U.S. 483 (1954)] is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States . . . ."

[749] 1 Stat. 264 (1792); 1 Stat. 424 (1794); 2 Stat. 443 (1807); 12 Stat. 281 (1861); now covered by 10 U.S.C. §§ 332–334.

[750] 25 U.S. (12 Wheat.) 19 (1827).

[751] 25 U.S. at 31–32.

[752] Wilson, *Federal Aid in Domestic Disturbances*, S. Doc. No. 209, 57th Congress, 2d Sess. (1907), 51.

[753] 6 Ops. Atty. Gen. 446 (1854). By the Posse Comitatus Act of 1878, 20 Stat. 152, 18 U.S.C. § 1385, it was provided that "it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the

two years later by asserting, with reference to the civil war then raging in Kansas, that it lay within his obligation to take care that the laws be faithfully executed to place the forces of the United States in Kansas at the disposal of the marshal there, to be used as a portion of the *posse comitatus*. Lincoln's call of April 15, 1861, for 75,000 volunteers was, on the other hand, a fresh invocation, though of course on a vastly magnified scale, of Jefferson's conception of a *posse comitatus* subject to presidential call.[754] The provisions above extracted from the United States Code ratified this conception with regard to the state militias and the national forces.

Suspension of Habeas Corpus by the President

See Article I, § 9.

Preventive Martial Law

The question of executive power in the presence of civil disorder is dealt with in modern terms in *Moyer v. Peabody*,[755] to which the *Debs* case[756] may be regarded as an addendum. Moyer, a labor leader, sued Peabody for having ordered his arrest during a labor dispute that had occurred while Peabody was governor of Colorado. Speaking for a unanimous Court (with one Justice absent), Justice Holmes said: "Of course the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. . . . The facts that we are to assume are that a state of insurrection existed and that the Governor, without sufficient reason but in good faith, in the course of putting the insurrection down held the plaintiff until he thought that he safely could release him."

". . . In such a situation we must assume that he had a right under the state constitution and laws to call out troops, as was held by the Supreme Court of the State. . . . That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for pun-

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purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress. . . ." The effect of this prohibition, however, was largely nullified by a ruling of the Attorney General "that by Revised Statutes 5298 and 5300 [10 U.S.C. §§ 332, 334] the military forces, under the direction of the President, could be used to assist a marshal. 16 Ops. Atty. Gen. 162." B. Rich, The Presidents and Civil Disorder 196 n.21 (1941).

[754] 12 Stat. (app.) 1258.

[755] 212 U.S. 78 (1909).

[756] *In re* Debs, 158 U.S. 564 (1895).

ishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief."

". . . When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process." [757]

The Debs Case.—The *Debs* case of 1895 arose out of a railway strike which had caused the President to dispatch troops to Chicago the previous year. Coincidentally with this move, the United States district attorney stationed there, acting upon orders from Washington, obtained an injunction from the United States circuit court forbidding the strike because of its interference with the mails and with interstate commerce. The question before the Supreme Court was whether this injunction, for violation of which Debs had been jailed for contempt of court, had been granted with jurisdiction. Conceding, in effect, that there was no statutory warrant for the injunction, the Court nevertheless validated it on the ground that the government was entitled thus to protect its property in the mails, and on a much broader ground which is stated in the following passage of Justice Brewer's opinion for the Court: "Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other. . . . While it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its granted powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it

[757] 212 U.S. at 84–85. *See also* Sterling v. Constantin, 287 U.S. 378 (1932), which endorses Moyer v. Peabody, while emphasizing the fact that it applies only to a condition of disorder.

from taking measures therein to fully discharge those constitutional duties." [758]

Present Status of the Debs Case.—Insofar as the use of injunctive relief in labor disputes is concerned, enactment of the Norris-LaGuardia Act [759] placed substantial restrictions on the power of federal courts to issue injunctions in such situations. Though, in *United States v. UMW*,[760] the Court held that the Norris-LaGuardia Act did not apply where the government brought suit as operator of mines, language in the opinion appeared to go a good way toward repudiating the present viability of *Debs*, though more in terms of congressional limitations than of revised judicial opinion.[761] It should be noted that in 1947 Congress authorized the President to seek injunctive relief in "national emergency" labor disputes, which would seem to imply absence of authority to act in situations not meeting the statutory definition.[762]

With regard to the power of the President to seek injunctive relief in other situations without statutory authority, there is no clear precedent. In *New York Times Co. v. United States*,[763] the government sought to enjoin two newspapers from publishing classified material given to them by a dissident former governmental employee. Though the Supreme Court rejected the Government's claim, five of the six majority Justices relied on First Amendment grounds, apparently assuming basic power to bring the action in the first place, and three dissenters were willing to uphold the constitutionality of the Government's action and its basic power on the premise that the President was authorized to protect the secrecy of gov-

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[758] 158 U.S., 584, 586. Some years earlier, in United States v. San Jacinto Tin Co., 125 U.S. 273, 279 (1888), the Court sustained the right of the Attorney General and his assistants to institute suits simply by virtue of their general official powers. "If," the Court said, "the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief . . . the question of appealing to them must primarily be decided by the Attorney General . . . and if restrictions are to be placed upon the exercise of this authority it is for Congress to enact them." *Cf. Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), in which the Court rejected Attorney General Randolph's contention that he had the right *ex officio* to move for a writ of mandamus ordering the United States circuit court for Pennsylvania to put the Invalid Pension Act into effect.

[759] 47 Stat. 170 (1932), 29 U.S.C. §§ 101–115.

[760] 330 U.S. 258 (1947). In reaching the result, Chief Justice Vinson invoked the "rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect." Id. at 272.

[761] Thus, the Chief Justice noted that "we agree" that the debates on Norris-LaGuardia "indicate that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes." Of course, he continued, "whether Congress so intended or not is a question different from the one before us now." 330 U.S. at 278.

[762] 61 Stat. 136, 155 (1947), 29 U.S.C. §§ 176–180. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), with regard to the exclusivity of proceeding.

[763] 403 U.S. 713 (1971).

ernmental documents. Only one Justice denied expressly that power was lacking altogether to sue.[764]

The President's Duty in Cases of Domestic Violence in the States

See Article IV, § 4, Guarantee of Republican Form of Government, and discussion of "Martial Law and Domestic Disorder" under Article II, § 2, cl. 1.

The President as Executor of the Law of Nations

Illustrative of the President's duty to discharge the responsibilities of the United States in international law with a view to avoiding difficulties with other governments was the action of President Wilson in closing the Marconi Wireless Station at Siasconset, Massachusetts, on the outbreak of the European War in 1914, the company having refused assurance that it would comply with naval censorship regulations. Justifying this drastic invasion of private rights, Attorney General Gregory said: "The President of the United States is at the head of one of the three great coordinate departments of the Government. He is Commander in Chief of the Army and the Navy. . . . If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be endangered, by action deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restrictions, he may act through such executive office or department as appears best adapted to effectuate the desired end. . . . I do not hesitate, in view of the extraordinary conditions existing, to advise that the President, through the Secretary of the Navy or any appropriate department, close down, or take charge of and operate, the plant . . . should he deem it necessary in securing obedience to his proclamation of neutrality."[765]

PROTECTION OF AMERICAN RIGHTS OF PERSON AND PROPERTY ABROAD

In 1854, one Lieutenant Hollins, in command of a United States warship, bombarded the town of Greytown, Nicaragua because of the refusal of local authorities to pay reparations for an attack by a mob on the United States consul.[766] Upon his return to the United States, Hollins was sued in a federal court by Durand for the value

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[764] On Justice Marshall's view on the lack of authorization, *see* 403 U.S. at 740–48 (concurring opinion); for the dissenters on this issue, *see* id. at 752, 755–59 (Justice Harlan, with whom Chief Justice Burger and Justice Blackmun joined); *see also* id. at 727, 729–30 (Justice Stewart, joined by Justice White, concurring).

[765] 30 Ops. Atty. Gen. 291 (1914).

[766] 7 J. Moore, Digest of International Law 346–54 (1906).

of certain property which was alleged to have been destroyed in the bombardment. His defense was based upon the orders of the President and Secretary of the Navy and was sustained by Justice Nelson, on circuit.[767] "As the Executive head of the nation, the President is made the only legitimate organ of the General Government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole Executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different Departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a Department of State and a Department of the Navy."

"Now, as it respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of Government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any Government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving." [768]

This incident and this case were but two items in the 19th century advance of the concept that the President had the duty and the responsibility to protect American lives and property abroad through the use of armed forces if deemed necessary.[769] The duty could be said to grow out of the inherent powers of the Chief Executive [770] or perhaps out of his obligation to "take Care that the Laws be faithfully executed." [771] Although there were efforts made at times to limit this presidential power narrowly to the protection of persons and property rather than to the promotion of broader national

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[767] Durand v. Hollins, 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

[768] 8 Fed. Cas. at 112.

[769] *See* UNITED STATES SOLICITOR OF THE DEPARTMENT OF STATE, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES (3d rev. ed. 1934); M. OFFUTT, THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES (1928).

[770] Durand v. Hollins, 8 Fed. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

[771] M. Offutt, supra at 5.

interests,[772] no such distinction was observed in practice and so grew the concepts which have become the source of serious national controversy in the 1960s and 1970s, the power of the President to use troops abroad to observe national commitments and protect the national interest without seeking prior approval from Congress.

Congress and the President versus Foreign Expropriation

Congress has asserted itself in one area of protection of United States property abroad, making provision against uncompensated expropriation of property belonging to United States citizens and corporations. The problem of expropriation of foreign property and the compensation to be paid therefor remains an unsettled area of international law, of increasing importance because of the changes and unsettled conditions following World War II.[773] It has been the position of the Executive Branch that just compensation is owed all United States property owners dispossessed in foreign countries and the many pre-World War II disputes were carried on between the President and the Department of State and the nation involved. But commencing with the Marshall Plan in 1948, Congress has enacted programs of guaranties to American investors in specified foreign countries.[774] More relevant to discussion here is that Congress has attached to United States foreign assistance programs various amendments requiring the termination of assistance and imposing other economic inducements where uncompensated expropriations have been instituted.[775] And when the Supreme Court in 1964 applied the "act of state" doctrine so as not to examine the validity of a taking of property by a foreign government recognized by the United States but to defer to the decision of the foreign government,[776] Congress reacted by attaching another amendment to the foreign assistance act reversing the Court's application of the doctrine, except in certain circumstances, a reversal which was applied on remand of the case.[777]

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[772] E. Corwin, supra at 198–201.

[773] *Cf.* Metzger, *Property in International Law*, 50 VA. L. REV. 594 (1964); Vaughn, *Finding the Law of Expropriation: Traditional v. Quantitative Research*, 2 TEXAS INTL. L. FORUM 189 (1966).

[774] 62 Stat. 143 (1948), as amended, 22 U.S.C. § 2191 et seq. *See also* 22 U.S.C. § 1621 et seq.

[775] 76 Stat. 260 (1962), 22 U.S.C. § 2370(e)(1).

[776] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[777] 78 Stat. 1013 (1964), as amended, 22 U.S.C. § 2370(e)(2), applied on remand in Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd* 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

PRESIDENTIAL ACTION IN THE DOMAIN OF CONGRESS: THE STEEL SEIZURE CASE

To avert a nationwide strike of steel workers that he believed would jeopardize the national defense, President Truman, on April 8, 1952, issued an executive order directing the Secretary of Commerce to seize and operate most of the steel industry of the country.[778] The order cited no specific statutory authorization but invoked generally the powers vested in the President by the Constitution and laws of the United States. The Secretary issued the appropriate orders to steel executives. The President promptly reported his action to Congress, conceding Congress's power to supersede his order, but Congress did not do so, either then or a few days later when the President sent up a special message.[779] The steel companies sued, a federal district court enjoined the seizure,[780] and the Supreme Court brought the case up prior to decision by the court of appeals.[781] Six-to-three, the Court affirmed the district court order, each member of the majority, however, contributing an individual opinion as well as joining in some degree the opinion of the Court by Justice Black.[782] The holding and the multiple opinions represent a setback for the adherents of "inherent" executive powers,[783] but they raise difficult conceptual and practical problems with regard to presidential powers.

The Doctrine of the Opinion of the Court

The chief points urged in the Black opinion are the following: There was no statute that expressly or impliedly authorized the President to take possession of the property involved. On the contrary, in its consideration of the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method

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[778] E.O. 10340, 17 Fed. Reg. 3139 (1952).

[779] H. Doc. No. 422, 82d Congress, 2d sess. (1952), 98 CONG. REC. 3912 (1952); H. Doc. No. 496, 82d Congress, 2d sess. (1952), 98 CONG. REC. 6929 (1952).

[780] 103 F. Supp. 569 (D.D.C. 1952).

[781] The court of appeals had stayed the district court's injunction pending appeal. 197 F.2d 582 (D.C. Cir. 1952). The Supreme Court decision bringing the action up is at 343 U.S. 937 (1952). Justices Frankfurter and Burton dissented.

[782] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In the majority with Justice Black were Justices Frankfurter, Douglas, Jackson, Burton, and Clark. Dissenting were Chief Justice Vinson and Justices Reed and Minton. For critical consideration of the case, *see* Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953); Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, 5 WEST. POL. Q. 592 (1952). For a comprehensive account, *see* M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

[783] Indeed, the breadth of the Government's arguments in the district court may well have contributed to the defeat, despite the much more measured contentions set out in the Supreme Court. *See* A. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE 56–65 (1958) (argument in district court).

of preventing work stoppages and settling labor disputes. Authority to issue such an order in the circumstances of the case was not deducible from the aggregate of the President's executive powers under Article II of the Constitution; nor was the order maintainable as an exercise of the President's powers as Commander in Chief of the Armed Forces. The power sought to be exercised was the lawmaking power, which the Constitution vests in the Congress alone. Even if it were true that other Presidents have taken possession of private business enterprises without congressional authority in order to settle labor disputes, Congress was not thereby divested of its exclusive constitutional authority to make the laws necessary and proper to carry out all powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof." [784]

The Doctrine Considered

The pivotal proposition of the opinion of the Court is that, inasmuch as Congress could have directed the seizure of the steel mills, the President had no power to do so without prior congressional authorization. To this reasoning, not only the dissenters but Justice Clark, in a concurring opinion, would not concur, and in fact they stated baldly that the reasoning was contradicted by precedent, both judicial and presidential and congressional practice. One of the earliest pronouncements on presidential power in this area was that of Chief Justice Marshall in *Little v. Barreme*.[785] There, a United States vessel under orders from the President had seized a United States merchant ship bound *from* a French port allegedly carrying contraband material; Congress had, however, provided for seizure only of such vessels bound *to* French ports.[786] The Chief Justice wrote: "It is by no means clear, that the President of the United States, whose high duty it is to 'take care that the laws be faithfully executed,' and who is commander-in-chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited, by being engaged in this illicit commerce. But when it is observed, that [an act of Congress] . . . gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound, or sailing *to*, a French port, the legislature seems to have prescribed that the manner in which this

[784] 343 U.S. at 585–89.
[785] 6 U.S. (2 Cr.) 170 (1804).
[786] 1 Stat. 613 (1799).

law shall be carried into execution, was to exclude a seizure of any vessel not bound *to* a French port." [787]

Other examples are at hand. In 1799, President Adams, in order to execute the extradition provisions of the Jay Treaty, issued a warrant for the arrest of one Robbins, and the action was challenged in Congress on the ground that no statutory authority existed by which the President could act; John Marshall defended the action in the House of Representatives, the practice continued, and it was not until 1848 that Congress enacted a statute governing this subject.[788] Again, in 1793, President Washington issued a neutrality proclamation; the following year, Congress enacted the first neutrality statute and since then proclamations of neutrality have been based on acts of Congress.[789] Repeatedly, acts of the President have been in areas in which Congress could act as well.[790]

Justice Frankfurter's concurring opinion [791] listed 18 statutory authorizations for seizures of industrial property, all but one of which were enacted between 1916 and 1951, and summaries of seizures of industrial plants and facilities by Presidents without definite statutory warrant, eight of which occurred during World War I—justified in presidential orders as being done pursuant to "the Constitution and laws" generally—and eleven of which occurred in World War II.[792] The first such seizure in this period had been justified by then Attorney General Jackson as being based upon an "aggregate" of presidential powers stemming from his duty to see the laws faithfully executed, his commander-in-chiefship, and his general executive powers.[793] Chief Justice Vinson's dissent dwelt liberally upon this opinion,[794] which reliance drew a disclaimer from Justice Jackson, concurring.[795]

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[787] Little v. Barreme, 6 U.S. (2 Cr.) 170, 177–78 (1804).

[788] 10 ANNALS OF CONG. 596, 613–14 (1800). The argument was endorsed in Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893). The presence of a treaty, of which this provision was self-executing, is sufficient to distinguish this example from the steel seizure situation.

[789] *Cf.* E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS ch. 1 (1916).

[790] E. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 58–59 (1953).

[791] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952).

[792] 343 U.S. at 611–13, 620.

[793] 89 CONG. REC. 3992 (1943).

[794] 343 U.S. at 695–96 (dissenting opinion).

[795] Thus, Justice Jackson noted of the earlier seizure, that "[i]ts superficial similarities with the present case, upon analysis, yield to distinctions so decisive that it cannot be regarded as even a precedent, much less an authority for the present seizure." 343 U.S. at 648–49 (concurring opinion). His opinion opens with the sentence: "That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety." Id. at 634.

Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President

The dissent was also fortunate in that the steel companies' chief counsel, John W. Davis, a former Solicitor General of the United States, had filed a brief in 1914 in defense of Presidential action, which had taken precisely the view that the dissent now presented.[796] "Ours," the brief read, "is a self-sufficient Government within its sphere. (*Ex parte Siebold*, 100 U.S. 371, 395; *in re Debs*, 158 U.S. 564, 578.) 'Its means are adequate to its ends' (*McCulloch v. Maryland*, 4 Wheat., 316, 424), and it is rational to assume that its active forces will be found equal in most things to the emergencies that confront it. While perfect flexibility is not to be expected in a Government of divided powers, and while division of power is one of the principal features of the Constitution, it is the plain duty of those who are called upon to draw the dividing lines to ascertain the essential, recognize the practical, and avoid a slavish formalism which can only serve to ossify the government and reduce its efficiency without any compensating good. The function of making laws is peculiar to Congress, and the Executive can not exercise that function to any degree. But this is not to say that all of the *subjects* concerning which laws might be made are perforce removed from the possibility of Executive influence. The Executive may act upon things and upon men in many relations which have not, though they might have, been actually regulated by Congress. In other words, just as there are fields which are peculiar to Congress and fields which are peculiar to the Executive, so there are fields which are common to both, in the sense that the Executive may move within them until they shall have been occupied by legislative action. These are not the fields of legislative prerogative, but fields within which the lawmaking power may enter and dominate whenever it chooses. This situation results from the fact that the President is the active agent, not of Congress, but of the Nation. As such he performs the duties which the Constitution lays upon him immediately, and as such, also, he executes the laws and regulations adopted by Congress. He is the agent of the people of the United States, deriving all his powers from them and responsible directly to them. In no sense is he the agent of Congress. He obeys and executes the laws of Congress, not because Congress is enthroned in authority over him, but because the Constitution directs him to do so."

"Therefore it follows that in ways short of making laws or disobeying them, the Executive may be under a grave constitutional duty to act for the national protection in situations not covered by the acts of Congress, and in which, even, it may not be said that

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[796] Brief for the United States at 11, 75–77, United States v. Midwest Oil Co., 236 U.S. 459 (1915).

his action is the direct expression of any particular one of the independent powers which are granted to him specifically by the Constitution. Instances wherein the President has felt and fulfilled such a duty have not been rare in our history, though, being for the public benefit and approved by all, his acts have seldom been challenged in the courts." [797]

Power Denied by Congress

Justice Black's opinion of the Court in *Youngstown Sheet and Tube Co. v. Sawyer* notes that Congress had refused to give the President seizure authority and had authorized other actions, which had not been taken.[798] This statement led him to conclude merely that, since the power claimed did not stem from Congress, it had to be found in the Constitution. But four of the concurring Justices made considerably more of the fact that Congress had considered seizure and had refused to authorize it. Justice Frankfurter stated: "We must . . . put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period, to be terminated automatically unless Congressional approval were given." [799] He then reviewed the proceedings of Congress that attended the enactment of the Taft-Hartley Act and concluded that "Congress has expressed its will to withhold this power [of seizure] from the President as though it had said so in so many words." [800]

Justice Jackson attempted a schematic representation of presidential powers, which "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Thus, there are essentially three possibilities. "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possess in his own right plus all that Congress can delegate. . . . 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . . 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any consti-

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[797] Quoted in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 689–91 (1952) (dissenting opinion).

[798] 343 U.S. at 585–87.

[799] 343 U.S. at 597.

[800] 343 U.S. at 602.

tutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject."[801] The seizure in question was placed in the third category "because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure." Therefore, "we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress."[802] That holding was not possible.

Justice Burton, referring to the Taft-Hartley Act, said that "the most significant feature of that Act is its omission of authority to seize," citing debate on the measure to show that the omission was a conscious decision.[803] Justice Clark relied on *Little v. Barreme*,[804] in that Congress had laid down specific procedures for the President to follow, which he had declined to follow.[805]

Despite the opinion of the Court, therefore, it seems clear that four of the six Justices in the majority were more moved by the fact that the President had acted in a manner considered and rejected by Congress in a field in which Congress was empowered to establish the rules—rules the President is to see faithfully executed—than with the fact that the President's action was a form of "lawmaking" in a field committed to the province of Congress. The opinion of the Court, therefore, and its doctrinal implications must be considered with care, as it is doubtful that the opinion lays down a constitutional rule. Whatever the implications of the opinions of the individual Justices for the doctrine of "inherent" presidential powers—and they are significant—the implications for the area here under consideration are cloudy and have remained so from the time of the decision.[806]

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[801] 343 U.S. at 635–38. In Hamdan v. Rumsfeld, 548 U.S. 557, 638 (2006), Justice Kennedy, in a concurring opinion joined by three other Justices, endorsed "the three-part scheme used by Justice Jackson" as "[t]he proper framework for assessing whether Executive actions are authorized." The Court in this case found "that the military commission convened [by the President, in Guantanamo Bay, Cuba] to try Hamdan lacks power to proceed because its structure and procedures violate [the Uniform Code of Military Justice]." Id. at 567. Thus, as Justice Kennedy noted, "the President has acted in a field with a history of congressional participation and regulation." Id. at 638.

[802] 343 U.S. at 639, 640.

[803] 343 U.S. at 657.

[804] 6 U.S. (2 Cr.) 170 (1804).

[805] 343 U.S. at 662, 663.

[806] In Dames & Moore v. Regan, 453 U.S. 654, 668–69 (1981), the Court recurred to the *Youngstown* analysis for resolution of the presented questions, but one must observe that it did so saying that "the parties and the lower courts . . . have all agreed that much relevant analysis is contained in" *Youngstown*. *See also* id. at 661–62, quoting Justice Jackson's *Youngstown* concurrence, "which both parties agree

Sec. 3—Legislative, Diplomatic, and Law Enforcement Duties of the President

PRESIDENTIAL IMMUNITY FROM JUDICIAL DIRECTION

In *Mississippi v. Johnson*,[807] in 1867, the Court placed the President beyond the reach of judicial direction, either affirmative or restraining, in the exercise of his powers, whether constitutional or statutory, political or otherwise, save perhaps for what must be a small class of powers that are purely ministerial.[808] An application for an injunction to forbid President Johnson to enforce the Reconstruction Acts, on the ground of their unconstitutionality, was answered by Attorney General Stanberg, who argued, *inter alia*, the absolute immunity of the President from judicial process.[809] The Court refused to permit the filing, using language construable as meaning that the President was not reachable by judicial process but which more fully paraded the horrible consequences were the Court to act. First noting the limited meaning of the term "ministerial," the Court observed that "[v]ery different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. . . . The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political."

"An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'"

"It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion." . . .

"The Congress is the legislative department of the government; the President is the executive department. Neither can be re-

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brings together as much combination of analysis and common sense as there is in this area."

[807] 71 U.S. (4 Wall.) 475 (1867).

[808] The Court declined to express an opinion "whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime." 71 U.S. at 498. *See* Franklin v. Massachusetts, 505 U.S. 788, 825–28 (1992) (Justice Scalia concurring). In NTEU v. Nixon, 492 F.2d 587 (D.C. Cir. 1974), the court held that a writ of mandamus could issue to compel the President to perform a ministerial act, although it said that if any other officer were available to whom the writ could run it should be applied to him.

[809] Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 484–85 (1867) (argument of counsel).

strained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."

"The impropriety of such interference will be clearly seen upon consideration of its possible consequences."

"Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?" [810]

Rare has been the opportunity for the Court to elucidate its opinion in *Mississippi v. Johnson*, and, in the Watergate tapes case,[811] it held the President amenable to subpoena to produce evidence for use in a criminal case without dealing, except obliquely, with its prior opinion. The President's counsel had argued the President was immune to judicial process, claiming "that the independence of the Executive Branch within its own sphere . . . insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications." [812] However, the Court held, "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, with-

[810] 71 U.S. at 499, 500–01. One must be aware that the case was decided in the context of congressional predominance following the Civil War. The Court's restraint was pronounced when it denied an effort to file a bill of injunction to enjoin enforcement of the same acts directed to cabinet officers. Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867). Before and since, however, the device to obtain review of the President's actions has been to bring suit against the subordinate officer charged with carrying out the President's wishes. Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Congress has not provided process against the President. In Franklin v. Massachusetts, 505 U.S. 788 (1992), resolving a long-running dispute, the Court held that the President is not subject to the Administrative Procedure Act and his actions, therefore, are not reviewable in suits under the Act. Inasmuch as some agency action, the acts of the Secretary of Commerce in this case, is preliminary to presidential action, the agency action is not "final" for purposes of APA review. Constitutional claims would still be brought, however. *See also*, following *Franklin*, Dalton v. Specter, 511 U.S. 462 (1994).

[811] United States v. Nixon, 418 U.S. 683 (1974).

[812] 418 U.S. at 706.

out more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances."[813] The primary constitutional duty of the courts "to do justice in criminal prosecutions" was a critical counterbalance to the claim of presidential immunity, and to accept the President's argument would disturb the separation-of-powers function of achieving "a workable government" as well as "gravely impair the role of the courts under Art. III."[814]

Present throughout the Watergate crisis, and unresolved by it, was the question of the amenability of the President to criminal prosecution prior to conviction upon impeachment.[815] It was argued that the Impeachment Clause necessarily required indictment and trial in a criminal proceeding to follow a successful impeachment and that a President in any event was uniquely immune from indictment, and these arguments were advanced as one ground to deny enforcement of the subpoenas running to the President.[816] Assertion of the same argument by Vice President Agnew was controverted by the government, through the Solicitor General, but, as to the President, it was argued that for a number of constitutional and practical reasons he was not subject to ordinary criminal process.[817]

Finally, most recently, the Court has definitively resolved one of the intertwined issues of presidential accountability. The President is absolutely immune in actions for civil damages for all acts within the "outer perimeter" of his official duties.[818] The Court's close decision was premised on the President's "unique position in the

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[813] Id.

[814] 418 U.S. at 706–07. The issue was considered more fully by the lower courts. *In re* Grand Jury Subpoena to Richard M. Nixon, 360 F. Supp. 1, 6–10 (D.D.C. 1973) (Judge Sirica), *aff'd sub nom.*, Nixon v. Sirica, 487 F.2d 700, 708–712 (D.C. Cir. 1973) (en banc) (refusing to find President immune from process). Present throughout was the conflicting assessment of the result of the subpoena of President Jefferson in the *Burr* trial. United States v. Burr, 25 Fed. Cas. 187 (No. 14,694) (C.C.D.Va. 1807). For the history, *see* Freund, *Foreword: On Presidential Privilege, The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 23–30 (1974).

[815] The Impeachment Clause, Article I, § 3, cl. 7, provides that the party convicted upon impeachment shall nonetheless be liable to criminal proceedings. Morris in the Convention, 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 500 (rev. ed. 1937), and Hamilton in THE FEDERALIST, Nos. 65, 69 (J. Cooke ed. 1961), 442, 463, asserted that criminal trial would follow a successful impeachment.

[816] Brief for the Respondent, United States v. Nixon, 418 U.S. 683 (1974), 95–122; Nixon v. Sirica, 487 F.2d 700, 756–58 (D.C. Cir. 1973) (en banc) (Judge MacKinnon dissenting). The Court had accepted the President's petition to review the propriety of the grand jury's naming him as an unindicted coconspirator, but it dismissed that petition without reaching the question. United States v. Nixon, 418 U.S. at 687 n.2.

[817] Memorandum for the United States, Application of Spiro T. Agnew, Civil No. 73–965 (D.Md., filed October 5, 1973).

[818] Nixon v. Fitzgerald, 457 U.S. 731 (1982).

constitutional scheme," that is, it was derived from the Court's inquiry of a "kind of 'public policy' analysis" of the "policies and principles that may be considered implicit in the nature of the President's office in a system structured to achieve effective government under a constitutionally mandated separation of powers."[819] Although the Constitution expressly afforded Members of Congress immunity in matters arising from "speech or debate," and although it was silent with respect to presidential immunity, the Court nonetheless considered such immunity "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."[820] Although the Court relied in part upon its previous practice of finding immunity for officers, such as judges, as to whom the Constitution is silent, although a long common-law history exists, and in part upon historical evidence, which it admitted was fragmentary and ambiguous,[821] the Court's principal focus was upon the fact that the President was distinguishable from all other executive officials. He is charged with a long list of "supervisory and policy responsibilities of utmost discretion and sensitivity,"[822] and diversion of his energies by concerns with private lawsuits would "raise unique risks to the effective functioning of government."[823] Moreover, the presidential privilege is rooted in the separation-of-powers doctrine, counseling courts to tread carefully before intruding. Some interests are important enough to require judicial action; "merely private suit[s] for damages based on a President's official acts" do not serve this "broad public interest" necessitating the courts to act.[824] Finally, qualified immunity would not adequately protect the President, because judicial inquiry into a functional analysis of his actions would bring with it the evil immunity was to prevent; absolute immunity was required.[825]

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[819] 457 U.S. at 748.
[820] 457 U.S. at 749.
[821] 457 U.S. at 750–52 n.31.
[822] 457 U.S. at 750.
[823] 457 U.S. at 751.
[824] 457 U.S. at 754.
[825] 457 U.S. at 755–57. Justices White, Brennan, Marshall, and Blackmun dissented. The Court reserved decision whether Congress could expressly create a damages action against the President and abrogate the immunity, id. at 748–49 n.27, thus appearing to disclaim that the decision is mandated by the Constitution; Chief Justice Burger disagreed with the implication of this footnote, id. at 763–64 n.7 (concurring opinion), and the dissenters noted their agreement on this point with the Chief Justice. Id. at 770 & n.4.

Unofficial Conduct

In *Clinton v. Jones*,[826] the Court, in a case of first impression, held that the President did not have qualified immunity from civil suit for conduct alleged to have taken place prior to his election, and therefore denied the President's request to delay both the trial and discovery. The Court held that its precedents affording the President immunity from suit for his official conduct—primarily on the basis that he should be enabled to perform his duties effectively without fear that a particular decision might give rise to personal liability—were inapplicable in this kind of case. Moreover, the separation-of-powers doctrine did not require a stay of all private actions against the President. Separation of powers is preserved by guarding against the encroachment or aggrandizement of one of the coequal branches of the government at the expense of another. However, a federal trial court tending to a civil suit in which the President is a party performs only its judicial function, not a function of another branch. No decision by a trial court could curtail the scope of the President's powers. The trial court, the Supreme Court observed, had sufficient powers to accommodate the President's schedule and his workload, so as not to impede the President's performance of his duties. Finally, the Court stated its belief that allowing such suits to proceed would not generate a large volume of politically motivated harassing and frivolous litigation. Congress has the power, the Court advised, if it should think necessary to legislate, to afford the President protection.[827]

The President's Subordinates

While the courts may be unable to compel the President to act or to prevent him from acting, his acts, when performed, are in proper cases subject to judicial review and disallowance. Typically, the subordinates through whom he acts may be sued, in a form of legal fiction, to enjoin the commission of acts which might lead to irreparable damage[828] or to compel by writ of mandamus the performance of a duty definitely required by law.[829] Such suits are usu-

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[826] 520 U.S. 681 (1997).

[827] The Court observed at one point that it doubted that defending the suit would much preoccupy the President, that his time and energy would not be much taken up by it. "If the past is any indicator, it seems unlikely that a deluge of such litigation will ever engulf the Presidency." 520 U.S. at 702.

[828] *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (suit to enjoin Secretary of Commerce to return steel mills seized on President's order); Dames & Moore v. Regan, 453 U.S. 654 (1981) (suit against Secretary of Treasury to nullify presidential orders on Iranian assets). *See also* Noble v. Union River Logging Railroad, 147 U.S. 165 (1893); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912).

[829] *E.g.*, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803) (suit against Secretary of State to compel delivery of commissions of office); Kendall v. United States ex rel.

ally brought in the United States District Court for the District of Columbia.[830] In suits under the common law, a subordinate executive officer may be held personally liable in damages for any act done in excess of authority,[831] although immunity exists for anything, even malicious wrongdoing, done in the course of his duties.[832]

Different rules prevail when such an official is sued for a "constitutional tort" for wrongs allegedly in violation of our basic charter,[833] although the Court has hinted that in some "sensitive" areas officials acting in the "outer perimeter" of their duties may be ac-

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Stokes, 37 U.S. (12 Pet.) 524 (1838) (suit against Postmaster General to compel payment of money owed under act of Congress); Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840) (suit to compel Secretary of Navy to pay a pension).

[830] This was originally on the theory that the Supreme Court of the District of Columbia had inherited, via the common law of Maryland, the jurisdiction of the King's Bench "over inferior jurisdictions and officers." Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 614, 620–21 (1838). Congress has now authorized federal district courts outside the District of Columbia also to entertain such suits. 76 Stat. 744 (1962), 28 U.S.C. § 1361.

[831] *E.g.*, Little v. Barreme, 6 U.S. (2 Cr.) 170 (1804); Bates v. Clark, 95 U.S. 204 (1877); United States v. Lee, 106 U.S. 196 (1882); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 269 (1885); Belknap v. Schild, 161 U.S. 10 (1896).

[832] Spalding v. Vilas, 161 U.S. 483 (1896); Barr v. Matteo, 360 U.S. 564 (1959). *See* Westfall v. Erwin, 484 U.S. 292 (1988) (action must be discretionary in nature as well as being within the scope of employment, before federal official is entitled to absolute immunity). Following the *Westfall* decision, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Westfall Act), which authorized the Attorney General to certify that an employee was acting within the scope of his office or employment at the time of the incident out of which a suit arose; upon certification, the employee is dismissed from the action, and the United States is substituted, the Federal Tort Claims Act (FTCA) then governing the action, which means that sometimes the action must be dismissed against the government because the FTCA has not waived sovereign immunity. United States v. Smith, 499 U.S. 160 (1991) (Westfall Act bars suit against federal employee even when an exception in the FTCA bars suit against the government). Cognizant of the temptation of the government to immunize both itself and its employee, the Court in Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995), held that the Attorney General's certification is subject to judicial review.

[833] An implied cause of action against officers accused of constitutional violations was recognized in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In Butz v. Economou, 438 U.S. 478 (1978), a *Bivens* action, the Court distinguished between common-law torts and constitutional torts and denied high federal officials, including cabinet secretaries, absolute immunity, in favor of the qualified immunity previously accorded high state officials under 42 U.S.C. § 1983. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court denied presidential aides derivative absolute presidential immunity, but it modified the rules of qualified immunity, making it more difficult to hold such aides, other federal officials, and indeed state and local officials, liable for constitutional torts. In Mitchell v. Forsyth, 472 U.S. 511 (1985), the Court extended qualified immunity to the Attorney General for authorizing a warrantless wiretap in a case involving domestic national security. Although the Court later held such warrantless wiretaps violated the Fourth Amendment, at the time of the Attorney General's authorization this interpretation was not "clearly established," and the *Harlow* immunity protected officials exercising discretion on such open questions. *See also* Anderson v.

corded an absolute immunity from liability.[834] Jurisdiction to reach such officers for acts for which they can be held responsible must be under the general "federal question" jurisdictional statute, which, as recently amended, requires no jurisdictional amount.[835]

COMMISSIONING OFFICERS

The power to commission officers, as applied in practice, does not mean that the President is under constitutional obligation to commission those whose appointments have reached that stage, but merely that it is he and no one else who has the power to commission them, and that he may do so at his discretion. Under the doctrine of *Marbury v. Madison*, the sealing and delivery of the commission is a purely ministerial act which has been lodged by statute with the Secretary of State, and which may be compelled by mandamus unless the appointee has been in the meantime validly removed.[836] By an opinion of the Attorney General many years later, however, the President, even after he has signed a commission, still has a *locus poenitentiae* and may withhold it; nor is the appointee in office till he has this commission.[837] This is probably the correct doctrine.[838]

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

IMPEACHMENT

The impeachment provisions of the Constitution[839] were derived from English practice, but there are important differences. In

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Creighton, 483 U.S. 635 (1987) (in an exceedingly opaque opinion, the Court extended similar qualified immunity to FBI agents who conducted a warrantless search).

[834] Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982).

[835] *See* 28 U.S.C. § 1331. On deleting the jurisdictional amount, *see* Pub. L. 94–574, 90 Stat. 2721 (1976), and Pub. L. 96–486, 94 Stat. 2369 (1980). If such suits are brought in state courts, they can be removed to federal district courts. 28 U.S.C. § 1442(a).

[836] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 157–58, 173 (1803). The doctrine applies to presidential appointments regardless of whether Senate confirmation is required.

[837] 12 Ops. Atty. Gen. 306 (1867).

[838] For various reasons, Marbury got neither commission nor office. The case assumes, in fact, the necessity of possession of his commission by the appointee.

[839] Impeachment is the subject of several other provisions of the Constitution. Article I, § 2, cl. 5, gives to the House of Representatives "the sole power of impeachment." Article I, § 3, cl. 6, gives to the Senate "the sole power to try all impeachments," requires that Senators be under oath or affirmation when sitting for that purpose, stipulates that the Chief Justice of the United States is to preside when the President of the United States is tried, and provides for conviction on the vote

England, impeachment had a far broader scope. While impeachment was a device to remove from office one who abused his office or misbehaved but who was protected by the Crown, it could be used against anyone—office holder or not—and was penal in nature, with possible penalties of fines, imprisonment, or even death.[840] By contrast, the American impeachment process is remedial, not penal: it is limited to office holders, and judgments are limited to no more than removal from office and disqualification to hold future office.

Impeachment was a device that figured from the first in the plans proposed to the Convention; discussion addressed such questions as what body was to try impeachments and what grounds were to be stated as warranting impeachment.[841] The attention of the Framers was for the most part fixed on the President and his removal, and the results of this narrow frame of reference are reflected in the questions unresolved by the language of the Constitution.

Persons Subject to Impeachment

During the debate in the First Congress on the "removal" controversy, it was contended by some members that impeachment was the exclusive way to remove any officer of the government from his post,[842] but Madison and others contended that this position was destructive of sound governmental practice,[843] and the view did not prevail. Impeachment, said Madison, was to be used to reach a bad officer sheltered by the President and to remove him "even against the will of the President; so that the declaration in the Constitution was intended as a supplementary security for the good behav-

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of two-thirds of the members present. Article I, § 3, cl. 7, limits the judgment after impeachment to removal from office and disqualification from future federal office holding, but it allows criminal trial following conviction upon impeachment. Article II, § 2, cl. 1, deprives the President of the power to grant pardons or reprieves in cases of impeachment. Article III,§ 2, cl. 3, excepts impeachment cases from the jury trial requirement.

Although the word "impeachment" is sometimes used to refer to the process by which any member of the House may "impeach" an officer of the United States under a question of constitutional privilege (see 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2398 (impeachment of President John Tyler by a member) and 2469 (impeachment of Judge John Swayne by a member) (1907), the word as used in Article II, § 4 refers to impeachment by vote of the House, the consequence of which is that the Senate may then try the impeached officer.

[840] 1 W. HOLDSWORTH, HISTORY OF ENGLISH COURTS 379–85 (7th ed. 1956); Clarke, *The Origin of Impeachment*, in OXFORD ESSAYS IN MEDIEVAL HISTORY, PRESENTED TO HERBERT EDWARD SALTER 164 (1934); Alex Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV. 651 (1916).

[841] Alex Simpson, Jr., *Federal Impeachments*, 64 U. PA. L. REV.at 653–67 (1916).

[842] 1 ANNALS OF CONG. 457, 473, 536 (1789).

[843] Id. at 375, 480, 496–97, 562.

ior of the public officers."[844] While the language of section 4 covers any "civil officer" in the executive branch,[845] and covers judges as well,[846] it excludes military officers,[847] and the precedent was early established that it does not apply to members of Congress.[848]

Judges.—Article III, section 1 specifically provides judges with "good behavior" tenure, but the Constitution nowhere expressly vests the power to remove upon bad behavior, and it has been assumed that judges are made subject to the impeachment power through being labeled "civil officers."[849] The records in the Convention make this a plausible though not necessary interpretation.[850] And, in fact,

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[844] Id. at 372.

[845] The term "civil officers of the United States" is not defined in the Constitution, although there may be a parallel with "officers of the United States" under the Appointments Clause, Art. II, § 2, cl. 2, and it may be assumed that not all executive branch employees are "officers." For precedents relating to the definition, see 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 1785, 2022, 2486, 2493, and 2515 (1907). *See also* Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L. REV. 707, 715–18 (1988).

[846] See the following section on Judges.

[847] 3 W. Willoughby, supra at 1448.

[848] This point was established by a vote of the Senate holding a plea to this effect good in the impeachment trial of Senator William Blount in 1797. 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2294–2318 (1907); F. WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 200–321 (1849); BUCKNER F. MELTON, JR., THE FIRST IMPEACHMENT: THE CONSTITUTION'S FRAMERS AND THE CASE OF SENATOR WILLIAM BLOUNT (1998).

[849] *See* NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT OF THE NATIONAL COMM'N ON JUDICIAL DISCIPLINE & REMOVAL 9–11 (1993). The Commission was charged by Congress with investigating and studying problems and issues relating to discipline and removal of federal judges, to evaluate the advisability of developing alternatives to impeachment, and to report to the three Government Branches. Pub. L. 101–650, 104 Stat. 5124. The report and the research papers produced for it contain a wealth of information on the subject.

[850] For practically the entire Convention, the plans presented and adopted provided that the Supreme Court was to try impeachments. 1 M. Farrand, *supra*, at 22, 244, 223–24, 231; 2 id. at 186. On August 27, it was successfully moved that the provision in the draft of the Committee on Detail giving the Supreme Court jurisdiction of trials of impeachment be postponed, id. at 430, 431, which was one of the issues committed to the Committee of Eleven. Id. at 481. That Committee reported the provision giving the Senate power to try all impeachments, id. at 497, which the Convention thereafter approved. Id. at 551. It may be assumed that so long as trial was in the Supreme Court, the Framers did not intend that the Justices, at least, were to be subject to the process.

The Committee of Five on August 20 was directed to report "a mode for trying the supreme Judges in cases of impeachment," id. at 337, and it returned a provision making Supreme Court Justices triable by the Senate on impeachment by the House. Id. at 367. Consideration of this report was postponed. On August 27, it was proposed that all federal judges should be removable by the executive upon the application of both houses of Congress, but the motion was rejected. Id. at 428–29. The matter was not resolved by the report of the Committee on Style, which left in the "good behavior" tenure but contained nothing about removal. Id. at 575. Therefore, unless judges were included in the term "civil officers," which had been added without comment on September 8 to the impeachment clause, id. at 552, they were not made removable.

eleven of the fifteen impeachments reaching trial in the Senate have been directed at federal judges, and all seven of those convicted in impeachment trials have been judges.[851] So settled apparently is this interpretation that the major arguments, scholarly and political, have concerned the question of whether judges, as well as others, are subject to impeachment for conduct that does not constitute an indictable offense, and the question of whether impeachment is the exclusive removal device for judges.[852]

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[851] The following judges faced impeachment trials in the Senate: John Pickering, District Judge, 1803 (convicted), 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2319–2341 (1907); Justice Samuel Chase, 1804 (acquitted), id. at §§ 2342–2363; James H. Peck, District Judge, 1830 (acquitted), id. at 2364–2384; West H. Humphreys, District Judge, 1862 (convicted), id. at §§ 2385–2397; Charles Swayne, District Judge, 1904 (acquitted), id. at §§ 2469–2485; Robert W. Archbald, Judge of Commerce Court, 1912 (convicted), 6 CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 498–512 (1936); Harold Louderback, District Judge, 1932 (acquitted), id. at §§ 513–524; Halsted L. Ritter, District Judge, 1936 (convicted), *Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter*, S. Doc. No. 200, 74th Congress, 2d Sess. (1936); Harry Claiborne, District Judge, 1986 (convicted), *Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne*, S. Doc. 99–48, 99th Cong., 2d Sess. (1986); Alcee Hastings, District Judge, 1989 (convicted), *Proceedings of the United States Senate in the Impeachment Trial of Alcee L. Hastings*, S. Doc. 101–18, 101st Cong., 1st Sess. (1989); Walter Nixon, District Judge, 1989 (convicted), *Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr.*, S. Doc. 101–22, 101st Cong., 1st Sess. (1989). In addition, impeachment proceedings against district judge George W. English were dismissed in 1926 following his resignation six days prior to the scheduled start of his Senate trial. 68 CONG. REC. 344, 348 (1926). *See also* ten Broek, *Partisan Politics and Federal Judgeship Impeachments Since 1903*, 23 MINN. L. REV. 185, 194–96 (1939). The others who have faced impeachment trials in the Senate are Senator William Blount (acquitted); Secretary of War William Belknap (acquitted); President Andrew Johnson (acquitted); and President William J. Clinton (acquitted). For summary and discussion of the earlier cases, *see* CONSTITUTIONAL ASPECTS OF WATERGATE: DOCUMENTS AND MATERIALS (A. Boyan ed., 1976); and Paul S. Fenton, *The Scope of the Impeachment Power*, 65 NW. U. L. REV. 719 (1970) (appendix), *reprinted in* Staff of the House Committee on the Judiciary, 105th Cong., Impeachment: Selected Materials 1818 (Comm. Print. 1998).

[852] It has been argued that the impeachment clause of Article II is a limitation on the power of Congress to remove judges and that Article III is a limitation on the executive power of removal, but that it is open to Congress to define "good behavior" and establish a mechanism by which judges may be judicially removed. Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, 28 MICH. L. REV. 485, 723, 870 (1930). Proposals to this effect were considered in Congress in the 1930s and 1940s and revived in the late 1960s, stimulating much controversy in scholarly circles. *E.g.*, Kramer & Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior,"* 35 GEO. WASH. L. REV. 455 (1967); Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135; Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L. J. 1475 (1970). Congress did in the Judicial Conduct and Disability Act of 1980, Pub. L. 96–458, 94 Stat. 2035, 28 U.S.C. § 1 note, 331, 332, 372, 604, provide for disciplinary powers over federal judges, but it specifically denied any removal power. The National Commission, supra at 17–26, found impeachment to be the exclusive means of removal and recommended against adoption of an alternative. Congress repealed 28 U.S.C. § 372 in the Judicial Improvements Act of 2002,

Judgment—Removal and Disqualification

Article II, section 4 provides that officers impeached and convicted "shall be removed from office"; Article I, section 3, clause 7 provides further that "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States." These restrictions on judgment, both of which relate to capacity to hold public office, emphasize the non-penal nature of impeachment, and help to distinguish American impeachment from the open-ended English practice under which criminal penalties could be imposed.[853]

The plain language of section 4 seems to require removal from office upon conviction, and in fact the Senate has removed those persons whom it has convicted. In the 1936 trial of Judge Ritter, the Senate determined that removal is automatic upon conviction, and does not require a separate vote.[854] This practice has continued. Because conviction requires a two-thirds vote, this means that removal can occur only as a result of a two-thirds vote. Unlike removal, disqualification from office is a discretionary judgment, and there is no explicit constitutional linkage to the two-thirds vote on conviction. Although an argument can be made that disqualification should nonetheless require a two-thirds vote,[855] the Senate has determined that disqualification may be accomplished by a simple majority vote.[856]

Pub. L. 107–273 and created a new chapter (28 U.S.C. §§ 351–64) dealing with judicial discipline short of removal for Article III judges, and authorizing discipline including removal for magistrate judges. The issue was obliquely before the Court as a result of a judicial conference action disciplining a district judge, but it was not reached, Chandler v. Judicial Council, 382 U.S. 1003 (1966); 398 U.S. 74 (1970), except by Justices Black and Douglas in dissent, who argued that impeachment was the exclusive power.

[853] *See* discussion supra of the differences between English and American impeachment.

[854] 3 Deschler's Precedents of the United States House of Representatives ch. 14, § 13.9.

[855] *See* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 77–79 (2d ed. 2000).

[856] The Senate imposed disqualification twice, on Judges Humphreys and Archbald. In the Humphreys trial the Senate determined that the issues of removal and disqualification are divisible, 3 Hinds' Precedents of the House of Representatives § 2397 (1907), and in the Archbald trial the Senate imposed judgment of disqualification by vote of 39 to 35. 6 Cannon's Precedents of the House of Representatives § 512 (1936). During the 1936 trial of Judge Ritter, a parliamentary inquiry as to whether a two-thirds vote or a simple majority vote is required for disqualification was answered by reference to the simple majority vote in the Archbald trial. 3 Deschler's Precedents ch. 14, § 13.10. The Senate then rejected disqualification of Judge Ritter by vote of 76–0. 80 Cong. Rec. 5607 (1936).

Sec. 4—Impeachment

Impeachable Offenses

The Convention came to its choice of words describing the grounds for impeachment after much deliberation, but the phrasing derived directly from the English practice. On June 2, 1787, the framers adopted a provision that the executive should "be removable on impeachment & conviction of mal-practice or neglect of duty."[857] The Committee of Detail reported as grounds "Treason (or) Bribery or Corruption."[858] And the Committee of Eleven reduced the phrase to "Treason, or bribery."[859] On September 8, Mason objected to this limitation, observing that the term did not encompass all the conduct that should be grounds for removal; he therefore proposed to add "or maladministration" following "bribery." Upon Madison's objection that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate," Mason suggested "other high crimes & misdemeanors," which was adopted without further recorded debate.[860]

The phrase "high crimes and misdemeanors" in the context of impeachments has an ancient English history, first turning up in the impeachment of the Earl of Suffolk in 1388.[861] Treason is defined in the Constitution.[862] Bribery is not, but it had a clear common law meaning and is now well covered by statute.[863] "High crimes and misdemeanors," however, is an undefined and indefinite phrase, which, in England, had comprehended conduct not constituting indictable offenses.[864] Use of the word "other" to link "high crimes and misdemeanors" with "treason" and "bribery" is arguably indicative of the types and seriousness of conduct encompassed by "high crimes and misdemeanors." Similarly, the word "high" apparently carried with it a restrictive meaning.[865]

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[857] 1 M. Farrand, *supra*, at 88.

[858] 2 M. Farrand at 172, 186.

[859] Id. at 499.

[860] Id. at 550.

[861] 1 T. Howell, State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Present Times 90, 91 (1809); A. Simpson, Treatise on Federal Impeachments 86 (1916).

[862] Article III, § 3.

[863] The use of a technical term known in the common law would require resort to the common law for its meaning, United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630 (1818) (per Chief Justice Marshall); United States v. Jones, 26 Fed. Cas. 653, 655 (No. 15,494) (C.C.Pa. 1813) (per Justice Washington), leaving aside the issue of the cognizability of common law crimes in federal courts. *See* Act of April 30, 1790, § 21, 1 Stat. 117.

[864] Berger, *Impeachment for "High Crimes and Misdemeanors,"* 44 S. Cal. L. Rev. 395, 400–415 (1971).

[865] The extradition provision reported by the Committee on Detail had provided for the delivering up of persons charged with "Treason[,] Felony or high Misdemeanors." 2 M. Farrand, *supra*, at 174. But the phrase "high Misdemeanors" was re-

Debate prior to adoption of the phrase[866] and comments thereafter in the ratifying conventions[867] were to the effect that the President (all the debate was in terms of the President) should be removable by impeachment for commissions or omissions in office which were not criminally cognizable. And in the First Congress's "removal" debate, Madison maintained that the wanton dismissal of meritorious officers would be an act of maladministration which would render the President subject to impeachment.[868] Other comments, especially in the ratifying conventions, tend toward a limitation of the term to criminal, perhaps gross criminal, behavior.[869] The scope of the power has been the subject of continuing debate.[870]

The Chase Impeachment

The issue of the scope of impeachable offenses was early joined as a consequence of the Jefferson Administration's efforts to rid itself of some of the Federalist judges who were propagandizing the country through grand jury charges and other means. The theory of extreme latitude was enunciated by Senator Giles of Virginia during the impeachment trial of Justice Chase. "The power of impeachment was given without limitation to the House of Representatives; and the power of trying impeachments was given equally without limitation to the Senate. . . . A trial and removal of a judge upon impeachment need not imply any criminality or corruption in him . . . [but] nothing more than a declaration of Congress to this effect: You hold dangerous opinions, and if you are suffered to carry them into effect you will work the destruction of the nation. We want your offices, for the purpose of giving them to men who will fill them

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placed with "other crimes" "in order to comprehend all proper cases: it being doubtful whether 'high misdemeanor' had not a technical meaning too limited." Id. at 443.

[866] *See* id. at 64–69, 550–51.

[867] *E.g.*, 3 J. Elliot, Debates in the Several State Conventions on Adoption of the Constitution 341, 498, 500, 528 (1836) (Madison); 4 id. at 276, 281 ©. C. Pinckney: Rutledge): 3 id. at 516 (Corbin): 4 id. at 263 (Pendleton). *Cf.* The Federalist, No. 65 (J. Cooke ed. 1961), 439–45 (Hamilton).

[868] 1 Annals of Cong. 372–73 (1789).

[869] 4 J. Elliot, supra at 126 (Iredell); 2 id. at 478 (Wilson). For a good account of the debate at the Constitutional Convention and in the ratifying conventions, see Alex Simpson, Jr., *Federal Impeachments*, 64 U. Pa. L. Rev. 651, 676–95 (1916)

[870] *See generally* Charles L. Black, Impeachment: A Handbook (1974); Raoul Berger, Impeachment: The Constitutional Problems (1973); Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis (2d ed. 2000); Peter Charles Hoffer and N.E.H. Hull, Impeachment in America, 1635–1805 (1984); John R. Labovitz, Presidential Impeachment (1978); 3 Deschler's Precedents of the House of Representatives, ch. 14, § 3 "Grounds for Impeachments," H.R. Doc. No. 661, 94th Cong. 2d Sess. (1977); Charles Doyle, Impeachment Grounds: A Collection of Selected Materials, CRS Report for Congress 98–882A (1998); and Elizabeth B. Bazan, Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice, CRS Report for Congress 98–186A (1998).

better."[871] Chase's counsel responded that to be impeachable, conduct must constitute an indictable offense.[872] The issue was left unresolved, Chase's acquittal owing more to the political divisions in the Senate than to the merits of the arguments.[873]

Other Impeachments of Judges

The 1803 impeachment and conviction of Judge Pickering as well as several successful 20th century impeachments of judges appear to establish that judges may be removed for seriously questionable conduct that does not violate a criminal statute.[874] The articles on which Judge Pickering was impeached and convicted focused on allegations of mishandling a case before him and appearing on the bench in an intemperate and intoxicated state.[875] Both Judge Archbald and Judge Ritter were convicted on articles of impeachment that charged questionable conduct probably not amounting to indictable offenses.[876]

Of the three most recent judicial impeachments, Judges Claiborne and Nixon had previously been convicted of criminal offenses, and Judge Hastings had been acquitted of criminal charges after trial. The impeachment articles against Judge Hastings charged both the

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[871] 1 J. Q. Adams, Memoirs 322 (1874). *See also* 3 Hinds' Precedents of the House of Representatives of the United States §§ 2356–2362 (1907).

[872] 3 Hinds' Precedents at § 2361.

[873] The full record is Trial of Samuel Chase, An Associate Justice of the Supreme Court of the United States (S. Smith & T. Lloyd eds., 1805). For analysis of the trial and acquittal, *see* Lillich, *The Chase Impeachment*, 4 Amer. J. Legal Hist. 49 (1960); and William H. Rehnquist, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson (1992). The proceedings against Presidents Tyler and Johnson and the investigation of Justice Douglas are also generally viewed as precedents that restrict the use of impeachment as a political weapon.

[874] Some have argued that the constitutional requirement of "good behavior" and "high crimes and misdemeanors" conjoin to allow the removal of judges who have engaged in non-criminal conduct inconsistent with their responsibilities, or that the standard of "good behavior"—not that of "high crimes and misdemeanors"—should govern impeachment of judges. See 3 Deschler's Precedents of the House of Representatives, ch. 14, §§ 3.10 and 3.13, H.R. Doc. No. 661, 94th Cong. 2d Sess. (1977) (summarizing arguments made during the impeachment investigation of Justice William O. Douglas in 1970). For a critique of these views, see Paul S. Fenton, *The Scope of the Impeachment Power*, 65 Nw. U. L. Rev.719 (1970), *reprinted in* Staff of the House Committee on the Judiciary, 105th Cong., Impeachment: Selected Materials 1801–03 (Comm. Print. 1998).

[875] *See* 3 Hinds' Precedents of the House of Representatives §§ 2319–2341 (1907)

[876] Ten Broek, *Partisan Politics and Federal Judgeship Impeachments Since 1903*, 23 Minn. L. Rev. 185 (1939). Judge Ritter was acquitted on six of the seven articles brought against him, but convicted on a seventh charge that summarized the first six articles and charged that the consequence of that conduct was "to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge." This seventh charge was challenged unsuccessfully on a point of order, but was ruled to be a separate charge of "general misbehavior."

conduct for which he had been indicted and trial conduct. A separate question was what effect the court acquittal should have had.[877]

Although the language of the Constitution makes no such distinction, some argue that, because of the different nature of their responsibilities and because of different tenure, different standards should govern impeachment of judges and impeachment of executive officers.[878]

The Johnson Impeachment

President Andrew Johnson was impeached by the House on the ground that he had violated the "Tenure of Office" Act[879] by dismissing a Cabinet chief. The theory of the proponents of impeachment was succinctly put by Representative Butler, one of the managers of the impeachment in the Senate trial. "An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose."[880] Former Justice Benjamin Curtis controverted this argument, saying: "My first position is, that when the Constitution speaks of 'treason, bribery, and other high crimes and misdemeanors,' it refers to, and includes only, high criminal offences against the United States, made so by some law of the United States existing when the acts complained of were done, and I say that this is plainly to be inferred from each and every provision of the Constitution on the subject of impeachment."[881] The President's acquittal by a single vote was no doubt not the result of a choice between the two theories, but the result may be said to have

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[877] Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. Rev. 1209, 1229–1233 (1991).

[878] *See, e.g.*, Frank O. Bowman, III and Stephen L. Sepinuck, *"High Crimes and Misdemeanors": Defining the Constitutional Limits on Presidential Impeachment*, 72 S. Cal. L. Rev. 1517, 1534–38 (1999). Congressional practice may reflect this view. Judges Ritter and Claiborne were convicted on charges of income tax evasion, while the House Judiciary Committee voted not to press such charges against President Nixon. So too, the convictions of Judges Hastings and Nixon on perjury charges may be contrasted with President Clinton's acquittal on a perjury charge.

[879] Act of March 2, 1867, ch. 154, 14 Stat. 430.

[880] 1 Trial of Andrew Johnson, President of the United States on Impeachment 88, 147 (1868).

[881] Id. at 409.

placed a gloss on the impeachment language approximating the theory of the defense.[882]

The Nixon Impeachment Proceedings

For the first time in more than a hundred years,[883] Congress moved to impeach the President of the United States, a move forestalled only by the resignation of President Nixon on August 9, 1974.[884] Three articles of impeachment were approved by the House Judiciary Committee, charging obstruction of the investigation of the "Watergate" burglary inquiry, misuse of law enforcement and intelligence agencies for political purposes, and refusal to comply with the Judiciary Committee's subpoenas.[885] Following President Nixon's resignation, the House adopted a resolution to "accept" the House Judiciary Committee's report recommending impeachment,[886] but there was no vote adopting the articles and thereby impeaching the former President, and consequently there was no Senate trial.

In the course of the proceedings, there was strenuous argument about the nature of an impeachable offense, whether only criminally-indictable actions qualify for that status or whether the definition is broader.[887] The three articles approved by the Judi-

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[882] For an account of the Johnson proceedings, see WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992).

[883] The only occasion before the Johnson impeachment when impeachment of a President had come to a House vote was the House's rejection in 1843 of an impeachment resolution against President John Tyler. The resolution, which listed nine separate counts and which was proposed by a member rather than by a committee, was defeated by vote of 127 to 84. *See* 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2398 (1907); CONG. GLOBE, 27th Cong. 3d Sess. 144–46 (1843).

[884] The President's resignation did not necessarily require dismissal of the impeachment charges. Judgment upon conviction can include disqualification as well as removal. Art. I, § 3, cl. 7. Precedent from the 1876 impeachment of Secretary of War William Belknap, who had resigned prior to his impeachment by the House, suggests that impeachment can proceed even after a resignation. *See* 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, § 2445 (1907). The Belknap precedent may be somewhat weakened, however, by the fact that his acquittal was based in part on the views of some Senators that impeachment should not be applied to someone no longer in office, id. at § 2467, although the Senate had earlier rejected (by majority vote of 37–29) a resolution disclaiming jurisdiction, and had adopted by vote of 35–22 a resolution affirming that result See id. at § 2007 for an extensive summary of the Senate's consideration of the issue. *See also* id, § 2317 (it had been conceded during the 1797 proceedings against Senator William Blount, who had been sequestered from his seat in the Senate, that an impeached officer could not escape punishment by resignation).

[885] H.R. REP. NO. 93–1305.

[886] 120 CONG. REC. 29361–62 (1974).

[887] Analyses of the issue from different points of view are contained in Impeachment Inquiry Staff, House Judiciary Committee, 93d Cong., *Constitutional Grounds for Presidential Impeachments*, (Comm. Print 1974); J. St. Clair, et al., Legal Staff of the President, *Analysis of the Constitutional Standard for Presidential Impeachment* (Washington: 1974); Office of Legal Counsel, Department of Justice, *Legal As-*

ciary Committee were all premised on abuse of power, although the first article, involving obstruction of justice, also involved a criminal violation.[888] A second issue arose that apparently had not been considered before: whether persons subject to impeachment could be indicted and tried prior to impeachment and conviction or whether indictment could occur only after removal from office. In fact, the argument was really directed only to the status of the President, as it was argued that he embodied the Executive Branch itself, while lesser executive officials and judges were not of that calibre.[889] That issue also remained unsettled, the Supreme Court declining to provide guidance in the course of deciding a case on executive privilege.[890]

The Clinton Impeachment

President Clinton was impeached by the House, but acquitted by vote of the Senate. The House approved two articles of impeachment against the President stemming from the President's response to a sexual harassment civil lawsuit and to a subsequent grand jury investigation instigated by an Independent Counsel. The first article charged the President with committing perjury in testifying before the grand jury about his sexual relationship with a White House intern and his efforts to cover it up;[891] the second article charged the President with obstruction of justice relating both to

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pects of Impeachment: An Overview, and Appendix I (Washington: 1974). *See also* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973), which preceded the instant controversy; and MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 103–06 (2d ed. 2000).

[888] Indeed, the Committee voted not to recommend impeachment for alleged income tax fraud, an essentially private crime not amounting to an abuse of power.

[889] The question first arose during the grand jury investigation of former Vice President Agnew, during which the United States, through the Solicitor General, argued that the Vice President and all civil officers were not immune from the judicial process and could be indicted prior to removal, but that the President for a number of constitutional and practical reasons was not subject to the ordinary criminal process. *Memorandum for the United States*, Application of Spiro T. Agnew, Civil No. 73–965 (D.Md., filed October 5, 1973). Courts have held that a federal judge was indictable and could be convicted prior to removal from office. United States v. Claiborne, 727 F.2d 842, 847–848 (9th Cir.), *cert. denied*, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706, 710–711 (11th Cir.), *cert. denied*, 459 U.S. 1203 (1983); United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied sub nom*. Kerner v. United States, 417 U.S. 976 (1974).

[890] The grand jury had named the President as an unindicted coconspirator in the case of United States v. Mitchell, *et al.*, No. 74–110 (D.D.C. 1974), apparently in the belief that he was not actually indictable while in office. The Supreme Court agreed to hear the President's claim that the grand jury acted outside its authority, but finding that resolution of the issue was unnecessary to decision of the executive privilege claim it dismissed as improvidently granted the President's petition for *certiorari*. United States v. Nixon, 418 U.S. 683, 687 n.2 (1974).

[891] Approved by a vote of 228–206. 144 CONG. REC. H12,040 (daily ed. Dec. 19, 1998).

the civil lawsuit and to the grand jury proceedings.[892] Two additional articles of impeachment had been approved by the House Judiciary Committee but were rejected by the full House.[893] The Senate trial resulted in acquittal on both articles.[894]

A number of legal issues surfaced during congressional consideration of the Clinton impeachment.[895] Although the congressional votes on the different impeachment articles were not neatly divided between legal and factual matters and therefore cannot be said to have resolved the legal issues,[896] several aspects of the proceedings merit consideration for possible precedential significance. The House's acceptance of the grand jury perjury charge and its rejection of the civil deposition perjury charge may reflect a belief among some members that perjury in the criminal context is more serious than perjury in the civil context. Acceptance of the obstruction of justice charge may also have been based in part on an assessment of the seriousness of the charge. On the other hand, the House's rejection of the article relating to President Clinton's alleged non-cooperation with the Judiciary Committee's interrogatories can be contrasted with the House's 1974 "acceptance" of the Judiciary Committee's report recommending[897] a similar type of charge against President Nixon, and raises the issue of whether the differ-

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[892] Approved by a vote of 221–212. 144 CONG. REC. H12,041 (daily ed. Dec. 19, 1998).

[893] An article charging the President with perjury in the civil sexual harassment suit brought against him was defeated by a vote of 229–205; another article charging him with abuse of office by false responses to the House Judiciary Committee's written request for factual admissions was defeated by vote of 285 to 148. 144 CONG. REC. H12,042 (daily ed. Dec. 19, 1998).

[894] The vote for acquittal was 55 to 45 on the grand jury perjury charge, and 50 to 50 on the obstruction of justice charge. 145 CONG. REC. S1458–59 (daily ed. Feb. 12, 1999).

[895] For analysis and different perspectives on the Clinton impeachment, see *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. (1998); and Staff of the House Comm. on the Judiciary, 105th Cong., Impeachment: Selected Materials (Comm. Print 1998). *See also* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS (2d ed. 2000); RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999); LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 181–202 (3d ed. 2000); and Michael Stokes Paulsen, Impeachment (Update), 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1340–43 (2d ed. 2000). Much of the documentation can be found in Impeachment of William Jefferson Clinton, President of the United States, H.R. REP. NO. 105–380 (1998); Staff of the House Comm. on the Judiciary, 105th Cong., 2d Sess., Impeachment Inquiry: William Jefferson Clinton, President of the United States; Consideration of Articles of Impeachment (Comm. Print 1998); and Impeachment of President William Jefferson Clinton: The Evidentiary Record Pursuant to S. Res. 16, S. Doc. No. 106–3 (1999) (21-volume set).

[896] Following the trial, a number of Senators placed statements in the record explaining their votes. *See* 145 CONG. REC. S1462–1637 (daily ed. Feb. 12, 1999).

[897] Note that the Judiciary Committee deleted from the article a charge based on President Clinton's allegedly frivolous assertions of executive privilege in re-

ent circumstances (*e.g.*, the relative importance of the information sought, and the nature and extent of the responses) may account for the different approaches. So too, the acquittal of President Clinton on the perjury charge can be contrasted with convictions of Judges Hastings and Nixon on perjury charges, and presents the issue of whether different standards should govern Presidents and judges. The role of the Independent Counsel in complying with a statutory mandate to refer to the House "any substantial and credible information . . . that may constitute grounds for an impeachment" occasioned commentary.[898] The relationship of censure to impeachment was another issue that arose. Some members advocated censure of President Clinton as an alternative to impeachment, as an alternative to trial, or as a post-trial means for those Senators who voted to acquit to register their disapproval of the President's conduct, but there was no vote on censure.[899]

Finally, the Clinton impeachment raised the issue of what the threshold is for "high crimes and misdemeanors." While the Nixon charges were premised on the assumption that an abuse of power need not be a criminal offense to be an impeachable offense,[900] the Clinton proceedings—or at least the perjury charge—raised the issue of whether criminal offenses that do not rise to the level of an abuse of power may nonetheless be impeachable offenses.[901] The House's vote to impeach President Clinton arguably amounted to

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sponse to subpoenas from the Office of Independent Counsel. Similarly, the Committee in 1974 distinguished between President Nixon's refusal to respond to congressional subpoenas and his refusal to respond to those of the special prosecutor; only the refusal to provide information to the impeachment inquiry was cited as an impeachable abuse of power.

[898] The requirement was contained in the Ethics in Government Act, since lapsed, and codified at 28 U.S.C. § 595(c). For commentary, see Ken Gormley, *Impeachment and the Independent Counsel: A Dysfunctional Union*, 51 STAN. L. REV. 309 (1999).

[899] For analysis of the issue, see Jack Maskell, *Censure of the President by Congress*, CRS Report for Congress 98–843.

[900] According to one scholar, the three articles of impeachment against President Nixon epitomized the "paradigm" for presidential impeachment—abuse of power in which there is "not only serious injury to the constitutional order but also a nexus between the misconduct of an impeachable official and the official's formal duties." Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 617 (1999).

[901] Although committing perjury in a judicial proceeding—regardless of purpose or subject matter—impedes the proper functioning of the judiciary both by frustrating the search for truth and by breeding disrespect for courts, and consequently may be viewed as an (impeachable) "offense against the state" (see 145 CONG. REC. S1556 (daily ed. Feb. 12, 1999) (statement of Sen. Thompson)), such perjury arguably constitutes an abuse of power only if the purpose or subject matter of the perjury relates to official duties or to aggrandizement of power. Note that one of the charges against President Clinton recommended by the House Judiciary Committee but rejected by the full House—providing false responses to the Committee's interrogatories—was squarely premised on an abuse of power.

an affirmative answer,[902] but the Senate's acquittal leaves the matter somewhat unsettled.[903] There appeared to be broad consensus in the Senate that some private crimes not involving an abuse of power (*e.g.*, murder for personal reasons) are so outrageous as to constitute grounds for removal,[904] but there was no consensus on where the threshold for outrageousness lies, and there was no consensus that the perjury and obstruction of justice with which President Clinton was charged were so outrageous as to impair his ability to govern, and hence to justify removal.[905] Similarly, the almost evenly divided Senate vote to acquit meant that there was no consensus that removal was justified on the alternative theory that the alleged perjury and obstruction of justice so damaged the judiciary as to constitute an impeachable "offense against the state."[906]

Judicial Review of Impeachments

It was long assumed that no judicial review of the impeachment process was possible, that impeachment presents a true "political question" case, i.e., that the Constitution's conferral on the Senate of the "sole" power to try impeachments is a textually de-

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[902] The House vote can be viewed as rejecting the views of a number of law professors, presented in a letter to the Speaker entered into the Congressional Record, arguing that high crimes and misdemeanors must involve "grossly derelict exercise of official power." 144 CONG. REC. H9649 (daily ed. Oct. 6, 1998).

[903] Some Senators who explained their acquittal votes rejected the idea that the particular crimes that President Clinton was alleged to have committed amounted to impeachable offenses (*see*, *e.g.*, 145 CONG. REC. S1560 (daily ed. Feb. 12, 1999) (statement of Sen. Moynihan); id. at 1601 (statement of Sen. Lieberman)), some alleged failure of proof (*see*, *e.g.*, id. at 1539 (statement of Sen. Specter); id. at 1581 (statement of Sen. Akaka)), and some cited both grounds (*see*, *e.g.*, id. at S1578–91 (statement of Sen. Leahy), and id. at S1627 (statement of Sen. Hollings)).

[904] *See*, *e.g.*, 145 CONG. REC. S1525 (daily ed. Feb. 12, 1999) (statement of Sen. Cleland) (accepting the proposition that murder and other crimes would qualify for impeachment and removal, but contending that "the current case does not reach the necessary high standard"); id. at S1533 (statement of Sen. Kyl) (impeachment cannot be limited to wrongful official conduct, but must include murder); and id. at S1592 (statement of Sen. Leahy) (acknowledging that "heinous" crimes such as murder would warrant removal). This idea, incidentally, was not new; one Senator in the First Congress apparently assumed that impeachment would be the first recourse if a President were to commit a murder. IX DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789–1790, THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 168 (Kenneth R. Bowling and Helen E. Veit, eds. 1988).

[905] One commentator, analogizing to the impeachment and conviction of Judge Claiborne for income tax evasion, viewed the basic issue in the Clinton case as whether his alleged misconduct was so outrageous as to "effectively rob[ ] him of the requisite moral authority to continue to function as President." Gerhardt, supra n.817, at 619. Under this view, the Claiborne conviction established that income tax evasion by a judge, although unrelated to official duties, reveals the judge as lacking the unquestioned integrity and moral authority necessary to preside over criminal trials, especially those involving tax evasion.

[906] Senator Thompson propounded this theory in arguing that "abuse of power" is too narrow a category to encompass all forms of subversion of government that should be grounds for removal. 145 CONG. REC. S1556 (daily ed. Feb. 12, 1999).

monstrable constitutional commitment of trial procedures to the Senate to decide without court review. That assumption was not contested until very recently, when Judges Nixon and Hastings challenged their Senate convictions.[907]

In the Judge Nixon case, the Court held that a claim to judicial review of an issue arising in an impeachment trial in the Senate presents a nonjusticiable "political question."[908] Specifically, the Court rejected a claim that the Senate had departed from the meaning of the word "try" in the impeachment clause by relying on a special committee to take evidence, including testimony. But the Court's "political question" analysis has broader application, and appears to place the whole impeachment process off limits to judicial review.[909]

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[907] Both judges challenged the use under Rule XI of a trial committee to hear the evidence and report to the full Senate, which would then carry out the trial. The rule was adopted in the aftermath of an embarrassingly sparse attendance at the trial of Judge Louderback in 1935. National Comm. Report, *supra* at 50–53, 54–57; Grimes, *supra* at 1233–37. In the Nixon case, the lower courts held the issue to be non-justiciable (Nixon v. United States, 744 F. Supp. 9 (D.D.C. 1990), *aff'd*, 938 F.2d 239 (D.C. Cir. 1991), but a year later a district court initially ruled in Judge Hastings' favor. Hastings v. United States, 802 F. Supp. 490 (D.D.C. 1992), vacated, 988 F.2d 1280 (D.C. Cir. 1993).

[908] Nixon v. United States, 506 U.S. 224 (1993). Nixon at the time of his conviction and removal from office was a federal district judge in Mississippi.

[909] The Court listed "reasons why the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments," and elsewhere agreed with the appeals court that "opening the door of judicial review to the procedures used by the Senate in trying impeachments would expose the political life of the country to months, or perhaps years, of chaos." 506 U.S. at 234, 236.

ARTICLE III

JUDICIAL DEPARTMENT

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JUDICIAL DEPARTMENT

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

ORGANIZATION OF COURTS, TENURE, AND COMPENSATION OF JUDGES

The Constitution is almost completely silent concerning the organization of the federal judiciary. "That there should be a national judiciary was readily accepted by all."[1] But whether it was to consist of one high court at the apex of a federal judicial system or a high court exercising appellate jurisdiction over state courts that would initially hear all but a minor fraction of cases raising national issues was a matter of considerable controversy.[2] The Virginia Plan provided for a "National judiciary [to] be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature . . . ."[3] In the Committee of the Whole, the proposition "that a national judiciary be established" was unanimously adopted,[4] but the clause "to consist of One supreme tribunal, and of one or more inferior tribunals"[5] was first agreed to, then reconsidered. The provision for inferior tribunals was ultimately stricken out, it being argued that state courts could adequately adjudicate all necessary matters while the supreme tribunal would protect the national interest and assure uniformity.[6] Wil-

[1] M. FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 79 (1913).

[2] The most complete account of the Convention's consideration of the judiciary is J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. 1 ch. 5 (1971).

[3] 1 M. Farrand, supra at 21–22. It is possible that this version may not be an accurate copy, *see* 3 id. at 593–94.

[4] 1 id. at 95, 104.

[5] Id. at 95, 105. The words "One or more" were deleted the following day without recorded debate. Id. at 116, 119.

[6] Id. at 124–25.

son and Madison thereupon moved to authorize Congress "to appoint inferior tribunals,"[7] which carried the implication that Congress could in its discretion either designate the state courts to hear federal cases or create federal courts. The word "appoint" was then adopted, but over the course of the Convention the phrasing was changed again so as to suggest somewhat more of an obligation to vest such powers in inferior federal courts.[8]

The requirement that judges hold their Officer during "good behavior" excited no controversy during the Convention,[9] although the lack of an enforcement mechanism for this provision resulted in impeachment under Article II becoming the primary mechanism for removal of a federal judge.[10] And finally, the only substantial dispute that arose regarding the denial to Congress of the power to reduce judicial salaries (a power which could be used to intimidate judges) came on Madison's motion to bar increases as well as decreases.[11]

One Supreme Court

While the Convention specified that the Chief Justice of the Supreme Court would preside over any Presidential impeachment trial in the Senate,[12] decisions on the size and composition of the Supreme Court, the time and place for sitting, its internal organization, and other matters were left to the Congress. The Congress soon provided these details in the Judiciary Act of 1789, one of the seminal statutes of the United States.[13] Originally, the Court consisted

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[7] Madison's notes use the word "institute" in place of "appoint," id. at 125, but the latter appears in the Convention Journal, id. at 118, and in Yates' notes, id. at 127, and when the Convention took up the draft reported by the Committee of the Whole "appoint" is used even in Madison's notes. 2 id. at 38, 45.

[8] On offering their motion, Wilson and Madison "observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them." 1 id. at 125. The Committee on Detail provided for the vesting of judicial power in one Supreme Court "and in such inferior Courts as shall, when necessary, from time to time, be constituted by the legislature of the United States." 2 id. at 186. Its draft also authorized Congress "[t]o constitute tribunals inferior to the Supreme Court." Id. at 182. No debate is recorded when the Convention approved these two clauses, Id. at 315, 422–23, 428–30. The Committee on Style left the clause empowering Congress to "constitute" inferior tribunals as was, but it deleted "as shall, when necessary" from the Judiciary article, so that the judicial power was vested "in such inferior courts as Congress may from time to time"—and here deleted "constitute" and substituted the more forceful—"ordain and establish." Id. at 600.

[9] The provision was in the Virginia Plan and was approved throughout, 1 id. at 21.

[10] *See* Article II, Judges, *supra*.

[11] Id. at 121; 2 id. at 44–45, 429–430.

[12] Article I, § 3, cl. 6.

[13] Act of September 24, 1789, 1 Stat. 73. The authoritative works on the Act and its working and amendments are FELIX FRANKFURTER & JAMES LANDIS, THE BUSI-

of a Chief Justice and five Associate Justices.[14] The number was gradually increased until it reached a total of ten under the act of March 3, 1863.[15] As one of the Reconstruction Congress's restrictions on President Andrew Johnson, the number was reduced to seven as vacancies should occur.[16] The number actually never fell below eight before the end of Johnson's term, and Congress thereupon made the number nine.[17]

Proposals have been made at various times for an organization of the Court into sections or divisions. No authoritative judicial expression is available, but Chief Justice Hughes, in a letter to Senator Wheeler in 1937, expressed doubts concerning the validity of such a device and stated that "the Constitution does not appear to authorize two or more Supreme Courts functioning in effect as separate courts." [18] Congress has also determined the time and place of sessions of the Court. It exercised this power once to change the Court's term to forestall a constitutional attack on the repeal of the Judiciary Act of 1801, with the result that the Court did not convene for fourteen months.[19]

Inferior Courts

Congress also provided in the Judiciary Act of 1789 for the creation of courts inferior to the Supreme Court. Thirteen district courts were constituted to have four sessions annually,[20] and three circuit courts were established. The circuit courts were to consist of two Supreme Court justices each and one of the district judges of such districts, and were to meet twice annually in the various districts comprising the circuit.[21] This system had substantial faults in operation, not the least of which was the burden imposed on the Justices, who were required to travel thousands of miles each year under bad conditions.[22] Despite numerous efforts to change this system,

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NESS OF THE SUPREME COURT (1928); Charles Warren, *New Light on the History of the Federal Judicial Act of 1789*, 37 HARV. L. REV. 49 (1923); *see also* J. Goebel, supra at ch. 11.

[14] Act of September 24, 1789, 1 Stat. 73, § 1.

[15] 12 Stat. 794, § 1.

[16] Act of July 23, 1866, 14 Stat. 209, § 1.

[17] Act of April 10, 1869, 16 Stat. 44.

[18] *Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judiciary Committee*, 75th Congress, 1st Sess. (1937), pt. 3, 491. For earlier proposals to have the Court sit in divisions, *see* F. Frankfurter & J. Landis, supra at 74–85.

[19] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 222–224 (rev. ed. 1926).

[20] Act of September 24, 1789, 1 Stat. 73, §§ 2–3.

[21] Id. at 74, §§ 4–5

[22] *Cf.*Frankfurter & Landis, supra at chs. 1–3; J. Goebel, supra at 554–560, 565–569. Upon receipt of a letter from President Washington soliciting suggestions regarding the judicial system, WRITINGS OF GEORGE WASHINGTON, (J. Fitzpatrick ed., 1943),

it persisted, except for one brief period, until 1891.[23] Since then, the federal judicial system has consisted of district courts with original jurisdiction, intermediate appellate courts, and the Supreme Court.

Abolition of Courts.—That Congress "may from time to time ordain and establish" inferior courts would seem to imply that the system may be reoriented from time to time and that Congress is not restricted to the *status quo* but may expand and contract the units of the system. But if the judges are to have life tenure, what is to be done with them when the system is contracted? Unfortunately, the first exercise of the power occurred in a highly politicized situation, and no definite answer emerged. By the Judiciary Act of February 13, 1801,[24] passed in the closing weeks of the Adams Administration, the districts were reorganized, and six circuit courts consisting of three circuit judges each were created. Although Adams appointed deserving Federalists to these so-called "midnight judge" positions just before the change in administration, the Jeffersonians soon set in motion plans to repeal the Act, which were carried out.[25] No provision was made for the displaced judges, however, apparently under the theory that if there were no courts there could be no judges to sit on them.[26] The validity of the repeal was questioned on related grounds in *Stuart v. Laird*,[27] but Justice Paterson rejected the challenge without directly addressing the issue of the displaced judges.

Not until 1913 did Congress again exercise its power to abolish a federal court, this time the unfortunate Commerce Court, which

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31, Chief Justice Jay prepared a letter for the approval of the other Justices, declining to comment on the policy questions but raising several issues of constitutionality, that the same man should not be appointed to two offices, that the offices were incompatible, and that the act invaded the prerogatives of the President and Senate. 2 G. McRee, Life and Correspondence of James Iredell 293–296 (1858). The letter was apparently never forwarded to the President. Writings of Washington, supra at 31–32 n.58. When the constitutional issue was raised in Stuart v. Laird, 5 U.S. (1 Cr.) 299, 309 (1803), it was passed over with the observation that the practice was too established to be questioned.

[23] Act of March 3, 1891, 26 Stat. 826. The temporary relief came in the Act of February 13, 1801, 2 Stat. 89, which was repealed by the Act of March 8, 1802, 2 Stat. 132.

[24] Act of February 13, 1801, 2 Stat. 89.

[25] Act of March 8, 1802, 2 Stat. 132. Frankfurter & Landis, supra at 25–32; 1 C. Warren, supra at 185–215.

[26] This was the theory of John Taylor of Caroline, upon whom the Jeffersonians in Congress relied. W. Carpenter, Judicial Tenure in the United States 63–64 (1918). The controversy is recounted fully in id. at 58–78.

[27] 5 U.S. (1 Cr.) 299 (1803) (sustaining both the transfer of suits between circuits and the sitting of Supreme Court Justices on circuit courts without confirmation to those courts).

had disappointed the expectations of most of its friends.[28] But this time Congress provided for the redistribution of the Commerce Court judges among the circuit courts as well as a transfer of its jurisdiction to the district courts.

Compensation

Diminution of Salaries.—"The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."[29] Thus, once a salary figure has gone into effect, Congress may not reduce it nor rescind any part of an increase, although prior to the time of its effectiveness Congress may repeal a promised increase. This latter holding was rendered in the context of a statutory salary plan for all federal officers and employees under which increases went automatically into effect on a specified date. Four years running, Congress interdicted the pay increases, but in two instances the increases had become effective, raising the barrier of this clause.[30]

Also implicating this clause was a Depression-era appropriations act reducing "the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office)," by a fixed amount. Although this provision presented no constitutional questions, it required an interpretation as to which judges were excepted. Judges in the District of Columbia were held protected by Article III,[31] but the salaries of the judges of the Court of Claims, a legislative court, were held subject to the reduction.[32]

In *Evans v. Gore*,[33] the Court invalidated the application of a 1919 income tax law to a sitting federal judge, over the strong dis-

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[28] The Court was created by the Act of June 18, 1910, 36 Stat. 539, and repealed by the Act of October 22, 1913, 38 Stat. 208, 219. *See* Frankfurter & Landis, supra at 153–174; W. Carpenter, supra at 78–94.

[29] United States v. Will, 449 U.S. 200, 217–18 (1980). Hamilton, writing in THE FEDERALIST, No. 79 (J. Cooke ed., 1961), 531, emphasized that "[i]n the general course of human nature, a power over a man's subsistence amounts to a power over his will."

[30] United States v. Will, 449 U.S. 200, 224–30 (1980). In one year, the increase took effect on October 1, although the President signed the bill reducing the amount during the day of October 1. The Court held that the increase had gone into effect by the time the reduction was signed. *Will* is also authority for the proposition that a general, nondiscriminatory reduction, affecting judges but not aimed solely at them, is covered by the clause. Id. at 226.

[31] O'Donoghue v. United States, 289 U.S. 516 (1933).

[32] Williams v. United States, 289 U.S. 553 (1933). *But see* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[33] 253 U.S. 245 (1920).

sent of Justice Holmes, joined by Justice Brandeis. This ruling was extended in *Miles v. Graham* [34] to exempt the salary of a judge of the Court of Claims appointed subsequent to the enactment of the taxing act. *Evans v. Gore* was disapproved and *Miles v. Graham* was in effect overruled in *O'Malley v. Woodrough*,[35] where the Court upheld section 22 of the Revenue Act of 1932, which extended the application of the income tax to salaries of judges taking office after June 6, 1932. Such a tax was regarded neither as an unconstitutional diminution of the compensation of judges nor as an encroachment on the independence of the judiciary.[36] To subject judges who take office after a stipulated date to a nondiscriminatory tax laid generally on an income, said the Court, "is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." [37]

Formally overruling *Evans v. Gore*, the Court in *United States v. Hatter* reaffirmed the principle that judges should "share the tax burdens borne by all citizens." [38] "[T]he potential threats to judicial independence that underlie [the Compensation Clause] cannot justify a special judicial exemption from a commonly shared tax." [39] The Medicare tax, extended to all federal employees in 1982, is such a non-discriminatory tax that may be applied to federal judges, the Court held. The 1983 extension of a Social Security tax to then-sitting judges was "a different matter," however, because the judges were required to participate while almost all other federal employees were given a choice about participation.[40] Congress had not cured the constitutional violation by a subsequent enactment that raised judges' salaries by an amount greater than the amount of Social Security taxes that they were required to pay.[41]

Courts of Specialized Jurisdiction

By virtue of its power "to ordain and establish" courts, Congress has occasionally created courts under Article III to exercise a specialized jurisdiction. These tribunals are like other Article III courts in that they exercise "the judicial power of the United States," and only that power, that their judges must be appointed by the Presi-

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[34] 268 U.S. 501 (1925).
[35] 307 U.S. 277 (1939).
[36] 307 U.S. at 278–82.
[37] 307 U.S. at 282.
[38] 532 U.S. 557, 571 (2001).
[39] 532 U.S. at 571.
[40] 532 U.S. at 572.
[41] 532 U.S. at 578–81.

dent and the Senate and must hold office during good behavior subject to removal by impeachment only, and that the compensation of their judges cannot be diminished during their continuance in office. One example of such a court was the Commerce Court created by the Mann-Elkins Act of 1910,[42] which was given exclusive jurisdiction to enforce, *inter alia*, orders of the Interstate Commerce Commission (except those involving money penalties and criminal punishment). This court actually functioned for less than three years, being abolished in 1913.

Another court of specialized jurisdiction, but created for a limited time only, was the Emergency Court of Appeals organized by the Emergency Price Control Act of January 30, 1942.[43] By the terms of the statute, this court consisted of three or more judges designated by the Chief Justice from the judges of the United States district courts and circuit courts of appeal. The Court was vested with jurisdiction and the powers of a district court to hear appeals filed within thirty days against denials of protests by the Price Administrator. The Court had exclusive jurisdiction to set aside regulations, orders, or price schedules, in whole or in part, or to remand the proceeding, but the court was tightly constrained in its treatment of regulations. There was interplay with the district courts, which were charged with authority to enforce orders issued under the Act, although only the Emergency Court had jurisdiction to determine the validity of such orders.[44]

Other specialized courts are the Court of Appeals for the Federal Circuit, which is in many respects like the geographic circuits. Created in 1982,[45] this court has exclusive jurisdiction to hear appeals from the United States Court of Federal Claims, from the Federal Merit System Protection Board, the Court of International Trade,

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[42] Ch. 309, 36 Stat. 539.

[43] 56 Stat. 23, §§ 31–33.

[44] In Lockerty v. Phillips, 319 U.S. 182 (1943), the limitations on the use of injunctions, except the prohibition against interlocutory decrees, was unanimously sustained.

A similar court was created to be used in the enforcement of the economic controls imposed by President Nixon in 1971. Pub. L. 92–210, 85 Stat. 743, 211(b). Although controls ended in 1974, *see* 12 U.S.C. § 1904 note, Congress continued the Temporary Emergency Court of Appeals and gave it new jurisdiction. Emergency Petroleum Allocation Act of 1973, Pub. L. 93–159, 87 Stat. 633, 15 U.S.C. § 754, incorporating judicial review provisions of the Economic Stabilization Act. The Court was abolished, effective March 29, 1993, by Pub. L. 102–572, 106 Stat. 4506.

Another similar specialized court was created by § 209 of the Regional Rail Reorganization Act, Pub. L. 93–226, 87 Stat. 999, 45 U.S.C. § 719, to review the final system plan under the Act. Regional Rail Reorganization Act Cases (Blanchette v. Connecticut Gen. Ins. Corp.), 419 U.S. 102 (1974).

[45] By the Federal Courts Improvement Act of 1982, Pub. L. 97–164, 96 Stat. 37, 28 U.S.C. § 1295. Among other things, this Court assumed the appellate jurisdiction of the Court of Claims and the Court of Customs and Patent Appeals.

the Patent Office in patent and trademark cases, and in various contract and tort cases. One of those courts, the Court of International Trade, began life as the Board of General Appraisers, became the United States Customs Court in 1926, was declared an Article III court in 1956, and came to its present form and name in 1980.[46] Finally, the Judicial Panel on Multidistrict Litigation, staffed by federal judges from other courts, is authorized to transfer actions pending in different districts to a single district for trial.[47]

To facilitate the gathering of foreign intelligence information, through electronic surveillance, search and seizure, as well as other means, Congress in 1978 authorized a special court, composed of seven regular federal judges appointed by the Chief Justice, to receive applications from the United States and to issue warrants for intelligence activities.[48] Even greater specialization was provided by the special court created by the Ethics in Government Act;[49] the court was charged, upon the request of the Attorney General, with appointing an independent counsel to investigate and prosecute charges of illegality in the Executive Branch. The court also had certain supervisory powers over the independent counsel.

Legislative Courts

Legislative courts, so-called because they are created by Congress pursuant to its general legislative powers, have comprised a significant part of the federal judiciary.[50] The distinction between constitutional courts and legislative courts was first made in *American Ins. Co. v. Canter*,[51] which involved the question of the admiralty jurisdiction of the territorial court of Florida, the judges of which were limited to a four-year term in office. Chief Justice Marshall wrote for the Court: "These courts, then, are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in

[46] Pub. L. 96–417, 94 Stat. 1727.

[47] 28 U.S.C. § 1407.

[48] Pub. L. 95–511, 92 Stat. 1788, 50 U.S.C. § 1803.

[49] Ethics in Government Act, Title VI, Pub. L. 95–521, 92 Stat. 1867, as amended, 28 U.S.C. §§ 591–599. The court is a "Special Division" of the United States Court of Appeals for the District of Columbia; composed of three regular federal judges, only one of whom may be from the D. C. Circuit, who are designated by the Chief Justice. 28 U.S.C. § 49. The constitutionality of the Special Division was upheld in Morrison v. Olson, 487 U.S. 654, 670–85 (1988). Authority for the court expired in 1999 under a sunset provision. Pub. L. 103–270, § 2, 108 Stat. 732 (1994).

[50] In Freytag v. Commissioner, 501 U.S. 868 (1991), the Court held Article I courts to be "Courts of Law" for purposes of the appointments clause. Art. II, § 2, cl. 2. *See id.* at 888–892 (majority opinion), and 901–914 (Justice Scalia dissenting).

[51] 26 U.S. (1 Pet.) 511 (1828).

virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States."[52] The Court went on to hold that admiralty jurisdiction can be exercised in the states only in those courts that are established pursuant to Article III, but that the same limitation does not apply to the territorial courts, for in legislating for them "Congress exercises the combined powers of the general, and of a state government."[53]

Canter postulated a simple proposition: "Constitutional courts exercise the judicial power described in Art. III of the Constitution; legislative courts do not and cannot."[54] A two-fold difficulty attended this proposition, however. Admiralty jurisdiction is included within the "judicial power of the United States" specifically in Article III, requiring an explanation how this territorial court could receive and exercise it. Second, if territorial courts could not exercise Article III power, how might their decisions be subjected to appellate review in the Supreme Court, or indeed in other Article III courts, which could exercise only Article III judicial power?[55] Moreover, if in fact some "judicial power" may be devolved upon courts not having the constitutional security of tenure and salary, what prevents Congress from undermining those values intended to be protected by Article III's guarantees by giving jurisdiction to unprotected entities that, being subjected to influence, would be bent to the popular will?

Attempts to explain or to rationalize the predicament or to provide a principled limiting point have resulted from *Canter* to the present in "frequently arcane distinctions and confusing precedents" spelled out in cases comprising "landmarks on a judicial 'darkling plain' where ignorant armies have clashed by night, as Justice

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[52] 26 U.S. at 546.

[53] 26 U.S. at 546. In Glidden Co. v. Zdanok, 370 U.S. 530, 544–45 (1962), Justice Harlan asserted that Chief Justice Marshall in *Canter* "did not mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. . . . All the Chief Justice meant . . . is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article. . . ."

[54] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 106 (1982) (Justice White dissenting).

[55] That the Supreme Court could review the judgments of territorial courts was established in Durousseau v. United States, 10 U.S. (6 Cr.) 307 (1810). *See also* Benner v. Porter, 50 U.S. (9 How.) 235, 243 (1850); Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434 (1872); Balzac v. Porto Rico, 258 U.S. 298 (1922).

White apparently believes them to be."[56] Nonetheless, Article I courts are quite common entities in our judicial system.[57]

Power of Congress Over Legislative Courts.—In creating legislative courts, Congress is not limited by the restrictions imposed in Article III concerning tenure during good behavior and the prohibition against diminution of salaries. Congress may limit tenure to a term of years, as it has done in acts creating territorial courts and the Tax Court; it may subject the judges of legislative courts to removal by the President;[58] and it may reduce their salaries during their terms.[59] Similarly, it follows that Congress can vest in legislative courts nonjudicial functions of a legislative or advisory nature and deprive their judgments of finality. Thus, in *Gordon v. United States*,[60] there was no objection to the power of the Secretary of the Treasury and Congress to revise or suspend the early judgments of the Court of Claims. Likewise, in *United States v. Ferreira*,[61] the Court sustained the act conferring powers on the Florida territorial court to examine claims rising under the Spanish treaty and to report its decisions and the evidence on which they were based to the Secretary of the Treasury for subsequent action. "A power of this description," the Court said, "may constitutionally be conferred on a Secretary as well as on a commissioner. But [it] is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States."[62]

Review of Legislative Courts by Supreme Court.—Chief Justice Taney's view, which would have been expressed in *Gordon*,[63] that the judgments of legislative courts could never be reviewed by

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[56] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 90, 91 (1982) (Justice Rehnquist concurring).

[57] In addition to the local courts of the District of Columbia, the bankruptcy courts, and the U.S. Court of Federal Claims, considered *infra*, these include the United States Tax Court, formerly an independent agency in the Treasury Department, but by the Tax Reform Act of 1969, § 951, 83 Stat. 730, 26 U.S.C. § 7441, made an Article I court of record, the Court of Veterans Appeals, Act of Nov. 18, 1988, 102 Stat. 4105, 38 U.S.C. § 4051, and the courts of the territories of the United States. Magistrate judges are adjuncts of the District Courts, *see* infra, and perform a large number of functions, usually requiring the consent of the litigants. *See* Gomez v. United States, 490 U.S. 858 (1989); Peretz v. United States, 501 U.S. 923 (1991). The U.S. Court of Military Appeals, strictly speaking, is not part of the judiciary but is a military tribunal, 10 U.S.C. § 867, although Congress designated it an Article I tribunal and has given the Supreme Court *certiorari* jurisdiction over its decisions.

[58] McAllister v. United States, 141 U.S. 174 (1891).

[59] United States v. Fisher, 109 U.S. 143 (1883); Williams v. United States, 289 U.S. 553 (1933).

[60] 69 U.S. (2 Wall.) 561 (1864).

[61] 54 U.S. (13 How.) 40 (1852).

[62] 54 U.S. at 48.

[63] The opinion in Gordon v. United States, 69 U.S. (2 Wall.) 561 (1864), had originally been prepared by Chief Justice Taney, but, following his death and reargu-

the Supreme Court, was tacitly rejected in *De Groot v. United States*,[64] in which the Court took jurisdiction from a final judgment of the Court of Claims. Since the decision in this case, the authority of the Court to exercise appellate jurisdiction over legislative courts has turned not upon the nature or status of such courts but rather upon the nature of the proceeding before the lower court and the finality of its judgment. The Supreme Court will neither review the administrative proceedings of legislative courts nor entertain appeals from the advisory or interlocutory decrees of such a body.[65] But, in proceedings before a legislative court that are judicial in nature, admit of a final judgment, and involve the performance of judicial functions and therefore the exercise of judicial power, the Court may be vested with appellate jurisdiction.[66]

The "Public Rights" Distinction.—A major delineation of the distinction between Article I courts and Article III courts appears in *Murray's Lessee v. Hoboken Land & Improvement Co.*[67] At issue was a summary procedure, without benefit of the courts, for the collection by the United States of moneys claimed to be due from one of its own customs collectors. It was argued that the assessment and collection was a judicial act carried out by nonjudicial officers and was thus invalid under Article III. Accepting that the acts complained of were judicial, the Court nonetheless sustained the act by distinguishing between any act, "which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty," which, in other words, is inherently judicial, and other acts that Congress may vest in courts or in other agencies. "[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."[68]

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ment of the case, the Court issued the cited opinion. The Court later directed the publishing of Taney's original opinion at 117 U.S. 697. *See also* United States v. Jones, 119 U.S. 477, 478 (1886), in which the Court noted that the official report of Chief Justice Chase's *Gordon* opinion and the Court's own record showed differences and quoted the record.

[64] 72 U.S. (5 Wall.) 419 (1867). *See also* United States v. Jones, 119 U.S. 477 (1886).

[65] *E.g.*, Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927); Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930); D. C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). *See* Glidden Co. v. Zdanok, 370 U.S. 530, 576, 577–579 (1962).

[66] Pope v. United States, 323 U.S. 1, 14 (1944); D. C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

[67] 59 U.S. (18 How.) 272 (1856).

[68] 59 U.S. at 284.

In essence, the Court distinguished between those acts that historically had been determined by courts and those that had both been historically resolved by executive or legislative acts and comprehended matters that arose between the government and others. Thus, Article I courts "may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control." [69] Among the matters susceptible of judicial determination, but not requiring it, are claims against the United States,[70] the disposal of public lands and claims arising therefrom,[71] questions concerning membership in the Indian tribes,[72] and questions arising out of the administration of the customs and internal revenue laws.[73] Other courts similar to territorial courts, such as consular courts and military courts martial, may be justified on like grounds.[74]

The impact of the "public rights" distinction, however, has varied dramatically over time. In *Crowell v. Benson*,[75] the Court approved an administrative scheme for determining, subject to judicial review, maritime employee compensation claims, although it acknowledged that the case involved "one of private right, that is, of the liability of one individual to another under the law as defined." [76] This scheme was permissible, the Court said, because in cases arising out of congressional statutes, an administrative tribunal could make findings of fact and render an initial decision on legal and constitutional questions, as long as there is adequate review in a constitutional court.[77] The "essential attributes" of decisions must remain in an Article III court, but so long as it does, Congress may use administrative decisionmakers in those private rights cases that arise in the context of a comprehensive federal

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[69] *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929).

[70] Gordon v. United States, 117 U.S. 697 (1864) (published 1885); McElrath v. United States, 102 U.S. 426 (1880); Williams v. United States, 289 U.S. 553 (1933). On the status of the then-existing Court of Claims, *see* Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

[71] United States v. Coe, 155 U.S. 76 (1894) (Court of Private Land Claims).

[72] Wallace v. Adams, 204 U.S. 415 (1907); Stephens v. Cherokee Nation, 174 U.S. 445 (1899) (Choctaw and Chickasaw Citizenship Court).

[73] Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929); *Ex parte* Bakelite Corp., 279 U.S. 438 (1929).

[74] *See In re* Ross, 140 U.S. 453 (1891) (consular courts in foreign countries). Military courts may, on the other hand, be a separate entity of the military having no connection to Article III. Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858).

[75] 285 U.S. 22 (1932).

[76] 285 U.S. at 51. On the constitutional problems of assignment to an administrative agency, *see* Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937).

[77] 301 U.S. at 51–65.

statutory scheme.[78] In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, discussed *infra*, the Court reasserted that the distinction between "public rights" and "private rights" was still important in determining which matters could be assigned to legislative courts and administrative agencies and those that could not be, but there was much the Court plurality did not explain.[79]

The Court continued to waver with respect to the importance of the public rights/private rights distinction. In two cases following *Marathon*, it rejected the distinction as "a bright line test," and instead focused on "substance"—*i.e.*, on the extent to which the particular grant of jurisdiction to an Article I court threatened judicial integrity and separation of powers principles.[80] Nonetheless, the Court indicated that the distinction may be an appropriate starting point for analysis. Thus, the fact that private rights traditionally at the core of Article III jurisdiction are at stake leads the Court to a "searching" inquiry as to whether Congress is encroaching inordinately on judicial functions, whereas the concern is not so great where "public" rights are involved.[81]

However, in a subsequent case, *Granfinanciera, S.A. v. Nordberg*, the distinction was pronounced determinative not only of the issue whether a matter could be referred to a non-Article III tribunal, but whether Congress could dispense with civil jury trials.[82] In so

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[78] 301 U.S. at 50, 51, 58–63. Thus, Article III concerns were satisfied by a review of the agency fact finding upon the administrative record. Id. at 63–65. The plurality opinion denied the validity of this approach in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 86 n.39 (1982), although Justice White in dissent accepted it. *Id.* at 115. The plurality, rather, rationalized *Crowell* and subsequent cases on an analysis seeking to ascertain whether agencies or Article I tribunals were "adjuncts" of Article III courts, that is, whether Article III courts were sufficiently in charge to protect constitutional values. Id. at 76–87.

[79] 458 U.S. 50, 67–70 (1982) (plurality opinion). Thus, Justice Brennan observes that "a matter of public rights must at a minimum arise 'between the government and others,'" but "that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.'" *Id.* at 69 & n.23. Crowell v. Benson, however, remained an embarrassing presence.

[80] Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568 (1985); CFTC v. Schor, 478 U.S. 833 (1986). The cases also abandoned the principle that the Federal Government must be a party for the case to fall into the "public rights" category. *Thomas*, 473 U.S. at 586; *see also id.* at 596–99 (Justice Brennan concurring).

[81] "In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 589 (1985) (quoting *Northern Pipeline*, 458 U.S. at 68 (plurality opinion)).

[82] 492 U.S. 33, 51–55 (1989). A Seventh Amendment jury-trial case, the decision is critical to the Article III issue as well, because, as the Court makes clear what was implicit before, whether Congress can submit a legal issue to an Article I tribunal and whether it can dispense with a civil jury on that legal issue must be an-

doing, however, the Court vitiated much of the core content of "private" rights as a concept and left resolution of the central issue to a balancing test. That is, "public" rights are, strictly speaking, those in which the cause of action inheres in or lies against the Federal Government in its sovereign capacity, the understanding since *Murray's Lessee*. However, to accommodate *Crowell v. Benson*, *Atlas Roofing*, and similar cases, seemingly private causes of action between private parties will also be deemed "public" rights when Congress, acting for a valid legislative purpose pursuant to its Article I powers, fashions a cause of action that is analogous to a common-law claim and integrates it so closely into a public regulatory scheme that it becomes a matter appropriate for agency resolution with limited involvement by the Article III judiciary.[83]

In *Stern v. Marshall*,[84] the Court shifted away from the functionalism of previous cases and back towards the formalism of *Northern Pipeline*. Specifically, the *Stern* Court held that Article III prohibited a bankruptcy court from exercising jurisdiction over a common law claim concerning fraudulent interference with a gift because it did not fall under the public rights exception.[85] The Court limited the public rights exception to claims deriving from a "federal regulatory scheme" or claims in which "an expert Government agency is deemed essential to a limited regulatory objective."[86] In rejecting the application of the public rights exception to the fraudulent interference claim, the Court observed that the claim was not one that could be "pursued only by grace of the other branches" or could have been "determined exclusively" by the executive or legislative branches.[87] Additionally, the underlying claim did not "flow from a federal regulatory scheme" and was not limited to a "particularized area of law."[88] Because the claim involved the "most prototypical exercise of judicial power," adjudication of a common law cause of

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swered by the same analysis. "[T]he question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal . . . ." *Id.* at 52–53.

[83] 492 U.S. at 52–54. The Court reiterated that the government need not be a party as a prerequisite to a matter being of "public right." *Id.* at 54. Concurring, Justice Scalia argued that public rights historically were and should remain only those matters to which the Federal Government is a party. *Id.* at 65. *See also* Stern v. Marshall, 564 U.S. ___, No. 10–179, slip op. at 25 (2011) ("[W]hat makes a right 'public' rather than private is that the right is integrally related to particular Federal Government action").

[84] *See* 564 U.S. 462 (2011).

[85] *Id.* at 487–88.

[86] *Id.* at 465.

[87] *Id.*

[88] *Id.*

action not created by federal law, the Court rejected the bankruptcy courts' exercise of jurisdiction over the claim as violating Article III.[89]

Constitutional Status of the Court of Claims and the Courts of Customs and Patent Appeals.—Although the Supreme Court long accepted the Court of Claims as an Article III court,[90] it later ruled that court to be an Article I court and its judges without constitutional protection of tenure and salary.[91] Then, in the 1950s, Congress statutorily declared that the Court of Claims, the Customs Court, and the Court of Customs and Patent Appeals were Article III courts,[92] a questionable act under the standards the Court had used to determine whether courts were legislative or constitutional.[93] In *Glidden Co. v. Zdanok*,[94] however, five of seven participating Justices united to find that indeed the Court of Claims and the Court of Customs and Patent Appeals, at least, were constitutional courts and their judges eligible to participate in judicial business in other constitutional courts. Three Justices would have overruled *Bakelite* and *Williams* and would have held that the courts in question were constitutional courts.[95] Whether a court is an Article III tribunal depends largely upon whether legislation establishing it is in harmony with the limitations of that Article, specifically, "whether . . . its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite." When a court is created "to carry into effect [federal] powers . . . over subject matter . . . and not over localities," a presumption arises that the status of such a tribunal is constitutional rather than legislative.[96] The other four Justices expressly declared that *Bakelite* and *Williams* should not

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[89] *Id.*

[90] De Groot v. United States, 72 U.S. (5 Wall.) 419 (1866); United States v. Union Pacific Co., 98 U.S. 569, 603 (1878); Miles v. Graham, 268 U.S. 501 (1925).

[91] Williams v. United States, 289 U.S. 553 (1933); *cf. Ex parte* Bakelite Corp., 279 U.S. 438, 450–455 (1929).

[92] 67 Stat. 226, § 1, 28 U.S.C. § 171 (Court of Claims); 70 Stat. 532. § 1, 28 U.S.C. § 251 (Customs Court); 72 Stat. 848, § 1, 28 U.S.C. § 211 (Court of Customs and Patent Appeals).

[93] In *Ex parte* Bakelite Corp., 279 U.S. 438. 459 (1929), Justice Van Devanter refused to give any weight to the fact that Congress had bestowed life tenure on the judges of the Court of Customs Appeals because that line of thought "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred."

[94] 370 U.S. 530 (1962).

[95] Glidden Co. v. Zdanok, 370 U.S. 530, 531 (1962) (Justices Harlan, Brennan, and Stewart).

[96] 370 U.S. at 548, 552.

be overruled,[97] but two of them thought that the two courts had attained constitutional status by virtue of the clear manifestation of congressional intent expressed in the legislation.[98] Two Justices maintained that both courts remained legislative tribunals.[99] Although the result is clear, no standard for pronouncing a court legislative rather than constitutional obtained the adherence of a majority of the Court.[100]

Status of Courts of the District of Columbia.—Through a long course of decisions, the courts of the District of Columbia were regarded as legislative courts upon which Congress could impose nonjudicial functions. In *Butterworth v. United States ex rel. Hoe*,[101] the Court sustained an act of Congress which conferred revisory powers upon the Supreme Court of the District in patent appeals and made its decisions binding only upon the Commissioner of Patents. Similarly, the Court later sustained the authority of Congress to vest revisory powers in the same court over rates fixed by a public utilities commission.[102] Not long after this the same rule was applied to the revisory powers of the District Supreme Court over orders of the Federal Radio Commission.[103] These rulings were based on the assumption, express or implied, that the courts of the District were legislative courts, created by Congress pursuant to its plenary power to govern the District of Columbia. In dictum in *Ex parte Bakelite Corp.*,[104] while reviewing the history and analyzing the nature of the legislative courts, the Court stated that the courts of the District were legislative courts.

In 1933, nevertheless, the Court abandoned all previous dicta on the subject and found the courts of the District of Columbia to be constitutional courts exercising the judicial power of the United

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[97] 370 U.S. at 585 (Justice Clark and Chief Justice Warren concurring), 589 (Justices Douglas and Black dissenting).

[98] 370 U.S. at 585 (Justice Clark and Chief Justice Warren).

[99] 370 U.S. at 589 (Justices Douglas and Black). The concurrence thought that the rationale of *Bakelite* and *Williams* was based on a significant advisory and reference business of the two courts, which the two Justices now thought insignificant, but what there was of it they thought nonjudicial and the courts should not entertain it. Justice Harlan left that question open. *Id.* at 583.

[100] Aside from doctrinal matters, Congress in 1982 created the United States Court of Appeals for the Federal Circuit, giving it, *inter alia*, the appellate jurisdiction of the Court of Claims and the Court of Customs and Patent Appeals. 96 Stat. 25, title 1, 28 U.S.C. § 41. At the same time Congress created the United States Claims Court, now the United States Court of Federal Claims, as an Article I tribunal, with the trial jurisdiction of the old Court of Claims. 96 Stat. 26, as amended, § 902(a)(1), 106 Stat. 4516, 28 U.S.C. §§ 171–180.

[101] 112 U.S. 50 (1884).

[102] Keller v. Potomac Elec. Co., 261 U.S. 428 (1923).

[103] Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464 (1930).

[104] 279 U.S. 438, 450–455 (1929).

States,[105] with the result that it assumed the task of reconciling the performance of nonjudicial functions by such courts with the rule that constitutional courts can exercise only the judicial power of the United States. This task was accomplished by the argument that, in establishing courts for the District, Congress performs dual functions pursuant to two distinct powers: the power to constitute tribunals inferior to the Supreme Court, and its plenary and exclusive power to legislate for the District of Columbia. However, Article III, § 1, limits this latter power with respect to tenure and compensation, but not with respect to vesting legislative and administrative powers in such courts. Subject to the guarantees of personal liberty in the Constitution, "Congress has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts." [106]

In 1970, Congress formally recognized two sets of courts in the District: federal courts (the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia, created pursuant to Article III), and courts equivalent to state and territorial courts (including the District of Columbia Court of Appeals), created pursuant to Article I.[107] Congress's action was sustained in *Palmore v. United States*.[108] When legislating for the District, the Court held, Congress has the power of a local legislature and may, pursuant to Article I, § 8, cl. 17, vest jurisdiction to hear matters of local law and local concerns in courts not having Article III characteristics. The defendant's claim that he was denied his constitutional right to be tried before an Article III judge was denied on the basis that it was not absolutely necessary that every proceeding in which a charge, claim, or defense based on an act of Congress or a law made under its authority need be conducted in an Article III court. State courts, after all, could hear cases involving federal law as could territorial and military courts. "[T]he requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas

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[105] O'Donoghue v. United States, 289 U.S. 516 (1933).

[106] 289 U.S. at 545. Chief Justice Hughes in dissent argued that Congress's power over the District was complete in itself and the power to create courts there did not derive at all from Article III. *Id.* at 551. *See* the discussion of this point of *O'Donoghue* in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). *Cf.* Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967) (three-judge court).

[107] Pub. L. 91–358, 84 Stat. 475, D.C. Code § 11–101.

[108] 411 U.S. 389 (1973).

having particularized needs and warranting distinctive treatment."[109]

Bankruptcy Courts.—After extended and lengthy debate, Congress in 1978 revised the bankruptcy act and created a bankruptcy court as an "adjunct" of the district courts. The court was composed of judges vested with practically all the judicial power of the United States, serving for 14-year terms, subject to removal for cause by the judicial councils of the circuits, and with salaries subject to statutory change.[110] The bankruptcy courts were given jurisdiction over not only civil proceedings arising under the bankruptcy code, but all other proceedings arising in or related to bankruptcy cases, with review in Article III courts under a clearly erroneous standard.

This broad grant of jurisdiction, however, brought into question what kinds of cases could be heard by an Article I court. In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, a case in which a company petitioning for reorganization made a claim against another company for breaches of contract and warranty—purely state law claims—the Court held that the conferral of jurisdiction upon Article I judges to hear state claims regarding traditional common law actions such as existed at the time of the drafting of the Constitution was unconstitutional.[111] Although the holding was extremely narrow, a plurality of the Court sought to rationalize and limit the Court's jurisprudence of Article I courts.

According to the plurality, a fundamental principle of separation of powers requires the judicial power of the United States to be exercised by courts having the attributes prescribed in Article III. Congress may not evade the constitutional order by allocating this judicial power to courts whose judges lack security of tenure and compensation. Only in three narrowly circumscribed instances may judicial power be distributed outside the Article III framework: in territories and the District of Columbia, that is, geographi-

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[109] 411 U.S. at 407–08. *See also* Pernell v. Southall Realty Co., 416 U.S. 363, 365–365 (1974); Swain v. Pressley, 430 U.S. 372 (1977); Key v. Doyle, 434 U.S. 59 (1978). Under *Swain*, provision for hearing of motions for post-judgement relief by convicted persons in the District, the present equivalent of *habeas* for federal convicts, is placed in Article I courts. That there are limits to Congress's discretion is asserted in dictum in Territory of Guam v. Olsen, 431 U.S. 195, 201–202, 204 (1977).

[110] Bankruptcy Act of 1978, Pub. L. 95–598, 92 Stat. 2549, codified in titles 11, 28. The bankruptcy courts were made "adjuncts" of the district courts by § 201(a), 28 U.S.C. § 151(a). For citation to the debate with respect to Article III versus Article I status for these courts, *see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 61 n.12 (1982) (plurality opinion).

[111] The statement of the holding is that of the two concurring Justices, 458 U.S. at 89 (Justices Rehnquist and O'Connor), with which the plurality agreed "at the least," while desiring to go further. *Id.* at 87 n.40.

cal areas in which no state operated as sovereign and Congress exercised the general powers of government; courts martial, that is, the establishment of courts under a constitutional grant of power historically understood as giving the political branches extraordinary control over the precise subject matter; and the adjudication of "public rights," that is, the litigation of certain matters that historically were reserved to the political branches of government and that were between the government and the individual.[112] In bankruptcy legislation and litigation not involving any of these exceptions, the plurality would have held, the judicial power to process bankruptcy cases could not be assigned to the tribunals created by the act.[113]

The dissent argued that, although on its face Article III provided that judicial power could only be assigned to Article III entities, the history since *Canter* belied that simplicity. Rather, the precedents clearly indicated that there is no difference in principle between the work that Congress may assign to an Article I court and that which must be given to an Article III court. Despite this, the dissent contended that Congress did not possess plenary discretion in choosing between the two systems; rather, in evaluating whether jurisdiction was properly reposed in an Article I court, the Supreme Court must balance the values of Article III against both the strength of the interest Congress sought to further by its Article I investiture and the extent to which Article III values were undermined by the congressional action. This balancing would afford the Court, the dissent believed, the power to prevent Congress, were it moved to do so, from transferring jurisdiction in order to emasculate the constitutional courts of the United States.[114]

No majority could be marshaled behind a principled discussion of the reasons for and the limitation upon the creation of legislative courts, not that a majority opinion, or even a unanimous one, would necessarily presage the settling of the law.[115] But the breadth of the various opinions not only left unclear the degree of discre-

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[112] 458 U.S. at 63–76 (Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens).

[113] The plurality also rejected an alternative basis, a contention that as "adjuncts" of the district courts, the bankruptcy courts were like United States magistrates or like those agencies approved in Crowell v. Benson, 285 U.S. 22 (1932), to which could be assigned fact-finding functions subject to review in Article III courts, the fount of the administrative agency system. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 76–86 (1982). According to the plurality, the act vested too much judicial power in the bankruptcy courts to treat them like agencies, and it limited the review of Article III courts too much.

[114] 458 U.S. at 92, 105–13, 113–16 (Justice White, joined by Chief Justice Burger and Justice Powell).

[115] *Ex parte* Bakelite Corp., 279 U.S. 438 (1929), was, after all, a unanimous opinion and did not long survive.

tion left in Congress to restructure the bankruptcy courts, but also placed in issue the constitutionality of other legislative efforts to establish adjudicative systems outside a scheme involving the creation of life-tenured judges.[116]

Congress responded to *Marathon* by enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[117] Bankruptcy courts were maintained as Article I entities, and overall their powers as courts were not notably diminished. However, Congress did establish a division between "core proceedings," which could be heard and determined by bankruptcy courts, subject to lenient review, and other proceedings, which, though initially heard and decided by bankruptcy courts, could be reviewed *de novo* in the district court at the behest of any party, unless the parties had consented to bankruptcy-court jurisdiction in the same manner as core proceedings. A safety valve was included, permitting the district court to withdraw any proceeding from the bankruptcy court on cause shown.[118]

Notice, however, that in *Granfinanciera, S.A. v. Nordberg*[119] the Court, evaluating the related issue of when a jury trial is required under the Seventh Amendment,[120] found that a cause of action to avoid a fraudulent money transfer was founded on state law, and, although denominated a core proceeding by Congress, was actually a private right. Similarly, the Court in *Stern v. Marshall*[121] held that a counterclaim of tortuous interference with a gift, although made during a bankruptcy proceeding and statutorily deemed a core proceeding, was a state common law claim that did not fall under any of the public rights exceptions.[122] Nonetheless, as the Court later held in *Wellness International v. Sharif*,[123] a bankruptcy court may

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[116] In particular, the Federal Magistrates Act of 1968, under which judges may refer certain pretrial motions and the trial of certain matters to persons appointed to a specific term, was threatened. Pub. L. 90–578, 82 Stat. 1108, as amended, 28 U.S.C. §§ 631–639. *See* United States v. Radios, 447 U.S. 667 (1980); Mathews v. Weber, 423 U.S. 261 (1976).

[117] Pub. L. 98–353, 98 Stat. 333, judiciary provisions at 28 U.S.C. §§ 151 *et seq*.

[118] *See* 28 U.S.C. § 157.

[119] 492 U.S. 33 (1989).

[120] *See* Seventh Amendment, Cases at Common law, infra.

[121] 564 U.S. ___, No. 10–179, slip op. (2011).

[122] The Court noted that the claim ". . . is not a matter that can be pursued only by grace of the other branches . . . or one that 'historically could have been determined exclusively by' those branches . . . . It does not 'depend[] on the will of Congress's . . . ; Congress has nothing to do with it. [It] . . . does not flow from a federal statutory scheme . . . . [And it] is not 'completely dependent upon' adjudication of a claim created by federal law . . . . " 564 U.S. ___, No. 10–179, slip op. at 27 (2011) (citations omitted). The Court also noted that filing of a claim in bankruptcy court (here, a defamation claim) did not constitute consent to a counterclaim, as the claimant had nowhere else to go to obtain recovery. *Id.*

[123] 575 U.S. ___, No. 13–935, slip op. (2015).

adjudicate with finality a so-called *Stern* claim—that is, a core claim that does not fall within the public rights exception—if the parties have provided knowing and voluntary consent, arguably limiting the ultimate impact of *Stern* for federal bankruptcy law.[124]

Agency Adjudication.—In two decisions subsequent to *Marathon* involving legislative courts, *Thomas v. Union Carbide Agric. Products Co.*[125] and *CFTC v. Schor*,[126] the Court clearly suggested that the majority was now closer to the balancing approach of the *Marathon* dissenters than to the *Marathon* plurality's position that Congress may confer judicial power on legislative courts only in very limited circumstances. Subsequently, however, *Granfinanciera, S.A. v. Nordberg*,[127] a reversion to the fundamentality of *Marathon*, with an opinion by the same author, Justice Brennan, cast some doubt on this proposition.

In *Union Carbide*, the Court upheld a provision of a pesticide law which required binding arbitration, with limited judicial review, of compensation due one registrant by another for mandatory sharing of registration information pursuant to federal statutory law. And in *Schor*, the Court upheld conferral on the agency of authority, in a reparations adjudication under the Act, to also adjudicate "counterclaims" arising out of the same transaction, including those arising under state common law. Neither the fact that the pesticide case involved a dispute between two private parties nor the fact that the CFTC was empowered to decide claims traditionally adjudicated under state law proved decisive to the Court's analysis.

In rejecting a "formalistic" approach and analyzing the "substance" of the provision at issue in *Union Carbide*, Justice O'Connor's opinion for the Court pointed to several considerations.[128] The right to compensation was not a purely private right, but "bears many of the characteristics of a 'public' right," because Congress was "authoriz[ing] an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program. . . ."[129] Also deemed important was not "unduly constrict-[ing] Congress's ability to take needed and innovative action pursuant to its Article I powers";[130] arbitration seen as "a pragmatic solution

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[124] *See id.* at 20.
[125] 473 U.S. 568 (1985).
[126] 478 U.S. 833 (1986).
[127] 492 U.S. 33 (1989).
[128] *Contrast* the Court's approach to Article III separation of powers issues with the more rigid approach enunciated in INS v. Chadha *and* Bowsher v. Synar, involving congressional incursions on executive power.
[129] 473 U.S. at 589.
[130] CFTC v. Schor, 478 U.S. at 851 (summarizing the *Thomas* rule).

to [a] difficult problem." [131] The limited nature of judicial review was seen as a plus in the sense that "no unwilling defendant is subjected to judicial enforcement power." On the other hand, availability of limited judicial review of the arbitrator's findings and determination for fraud, misconduct, or misrepresentation, and for due process violations, preserved the "'appropriate exercise of the judicial function.'" [132] Thus, the Court concluded, Congress in exercise of Article I powers "may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." [133]

In *Schor*, the Court described Art. III, § 1 as serving a dual purpose: to protect the role of an independent judiciary and to safeguard the right of litigants to have claims decided by judges free from potential domination by the other branches of government. A litigant's Article III right is not absolute, the Court determined, but may be waived. This the litigant had done by submitting to the administrative law judge's jurisdiction rather than independently seeking relief as he was entitled to and then objecting only after adverse rulings on the merits. But the institutional integrity claim, not being personal, could not be waived, and the Court reached the merits. The threat to institutional independence was "weighed" by reference to "a number of factors." The conferral on the CFTC of pendent jurisdiction over common law counterclaims was seen as more narrowly confined than was the grant to bankruptcy courts at issue in *Marathon*, and as more closely resembling the "model" approved in *Crowell v. Benson*. The CFTC's jurisdiction, unlike that of bankruptcy courts, was said to be confined to "a particularized area of the law;" the agency's orders were enforceable only by order of a district court,[134] and reviewable under a less deferential standard, with legal rulings being subject to *de novo* review; and the agency was not empowered, as had been the bankruptcy courts, to exercise "all ordinary powers of district courts." [135]

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[131] *Thomas*, 473 U.S. at 590.

[132] *Thomas*, 473 U.S. at 591, 592 (quoting Crowell v. Benson, 285 U.S. 22, 54 (1932)).

[133] 473 U.S. at 594.

[134] *Cf. Union Carbide*, 473 U.S. at 591 (fact that "FIFRA arbitration scheme incorporates its own system of internal sanctions and relies only tangentially, if at all, on the Judicial Branch for enforcement" cited as lessening danger of encroachment on "Article III judicial powers").

[135] *See* CFTC v. Schor, 478 U.S. 833, 853 (1986). Notwithstanding *Schor*'s efforts to distinguish between the context presented in that case and the bankruptcy context, the Court, in Wellness International v. Sharif, extended *Schor*'s holding to adjudications of private right claims by bankruptcy courts. *See* 575 U.S. ___, No. 13–935, slip op. (2015). Specifically, the *Wellness International* Court utilized the bal-

Granfinanciera followed analysis different from that in *Schor*, although it preserved *Union Carbide* through its concept of "public rights." State law and other legal claims founded on private rights could not be remitted to non-Article III tribunals for adjudication unless Congress, in creating an integrated public regulatory scheme, has so taken up the right as to transform it. It may not simply relabel a private right and place it into the regulatory scheme. The Court is hazy with respect to whether the right itself must be a creature of federal statutory action. The general descriptive language suggests that, but the Court seemingly goes beyond this point in its determination whether the right at issue in the case, the recovery of preferential or fraudulent transfers in the context of a bankruptcy proceeding, is a "private right" that carries with it a right to jury trial. Though a statutory interest, the actions were identical to state-law contract claims brought by a bankrupt corporation to augment the estate.[136] *Schor* was distinguished solely on the waiver part of the decision, relating to the individual interest, without considering the part of the opinion deciding the institutional interest on the merits and utilizing a balancing test.[137] Thus, although the Court has made some progress in reconciling its growing line of disparate cases, doctrinal harmony has not yet been achieved.

Noncourt Entities in the Judicial Branch

Passing on the constitutionality of the establishment of the Sentencing Commission as an "independent" body in the judicial branch, the Court acknowledged that the Commission is not a court and does not exercise judicial power. Rather, its function is to promulgate binding sentencing guidelines for federal courts. It acts, therefore, legislatively, and its membership of seven is composed of three judges and three nonjudges. But the standard of constitutionality, the Court held, is whether the entity exercises powers that are more appropriately performed by another branch or that undermine the integrity of the judiciary. Because the imposition of sentences is a function traditionally exercised within congressionally prescribed limits by federal judges, the Court found the functions of the Commis-

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ancing approach employed by *Schor* to conclude that allowing bankruptcy courts to decide a fraudulent conveyance claim by consent would not "impermissibly threaten the institutional integrity of the Judicial Branch," *id.* at 12 (quoting *Schor*, 478 U.S. at 851), because (1) the underlying class of claims that was being adjudicated by the non-Article III court was "narrow" in nature, resulting in a "de minimis" intrusion on the federal judiciary; (2) the bankruptcy court was ultimately supervised and overseen by a constitutional court and not Congress; and (3) the Court found "no indication" that Congress, in allowing bankruptcy courts to decide with finality certain private right claims, was acting in "an effort to aggrandize itself or humble the Judiciary." *Id.* at 13–14.

[136] *Granfinanciera*, 492 U.S. at 51–55, 55–60.

[137] 492 U.S. at 59 n.14.

sion could be located in the judicial branch. Nor did performance of its functions contribute, in any meaningful way, to a weakening of the judiciary or an aggrandizement of power, the Court observed.[138]

JUDICIAL POWER

Characteristics and Attributes of Judicial Power

Judicial power is the power "of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[139] It is "the right to determine actual controversies arising between diverse litigants, duly instituted in courts of proper jurisdiction."[140] The terms "judicial power" and "jurisdiction" are frequently used interchangeably, with "jurisdiction" defined as the power to hear and determine the subject matter in controversy between parties to a suit[141] or as the "power to entertain the suit, consider the merits and render a binding decision thereon."[142] The cases and commentary however, support, indeed require, a distinction between the two concepts.

Jurisdiction is the authority of a court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a court exercises when it assumes jurisdiction and hears and decides a case.[143] Judicial power confers on federal courts the power to decide a case and to render a judgment that conclusively resolves a case. Included within the general judicial power are the ancillary powers of courts to punish for contempt of their authority,[144] to issue writs in aid of jurisdiction when authorized by statute,[145] to make rules governing their process in the absence of statutory authorizations or prohibitions,[146] to order their own process so as to prevent abuse, oppres-

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[138] Mistretta v. United States, 488 U.S. 361, 384–97 (1989). Clearly, some of the powers vested in the Special Division of the United States Court of Appeals for the District of Columbia Circuit under the Ethics in Government Act in respect to the independent counsel were administrative, but because the major nonjudicial power, the appointment of the independent counsel, was specifically authorized in the appointments clause, the additional powers were miscellaneous and could be lodged there by Congress. Implicit in the Court's analysis was the principle that a line exists that Congress may not cross. Morrison v. Olson, 487 U.S. 654, 677–685 (1988).

[139] Justice Samuel Miller, On the Constitution 314 (1891).

[140] Muskrat v. United States, 219 U.S. 346, 361 (1911).

[141] United States v. Arrendondo, 31 U.S. (6 Pet.) 691 (1832).

[142] General Investment Co. v. New York Central R.R., 271 U.S. 228, 230 (1926).

[143] Williams v. United States, 289 U.S. 553, 566 (1933); Yakus v. United States, 321 U.S. 414, 467–68 (1944) (Justice Rutledge dissenting).

[144] Michaelson v. United States, 266 U.S. 42 (1924).

[145] McIntire v. Wood, 11 U.S. (7 Cr.) 504 (1813); *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807).

[146] Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

sion, and injustice, and to protect their own jurisdiction and officers in the protection of property in custody of law,[147] to appoint masters in chancery, referees, auditors, and other investigators,[148] and to admit and disbar attorneys.[149]

As judicial power is the authority to render dispositive judgments, Congress violates the separation of powers when it purports to alter final judgments of Article III courts.[150] Once such instance arose when the Court unexpectedly recognized a statute of limitations for certain securities actions that was shorter than what had been recognized in many jurisdictions, resulting in the dismissal of several suits, which then become final because they were not appealed. Congress subsequently enacted a statute that, though not changing the limitations period prospectively, retroactively extended the time for suits that had been dismissed and provided for the reopening of these final judgments. In *Plaut v. Spendthrift Farm, Inc.*,[151] the Court invalidated the statute, holding it impermissible for Congress to disturb a final judgment. "Having achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was."[152] In *Miller v. French*,[153] by contrast, the Court ruled that the Prison Litigation Reform Act's automatic stay of ongoing injunctions remedying violations of prisoners' rights did not amount to an unconstitutional legislative revision of a final judgment. Rather, the automatic stay merely altered "the prospective effect" of injunctions, and it is well established that such prospective relief "remains subject to alteration due to changes in the underlying law."[154]

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[147] Gumbel v. Pitkin, 124 U.S. 131 (1888).

[148] *Ex parte* Peterson, 253 U.S. 300 (1920).

[149] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378 (1867).

[150] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995). The Court was careful to delineate the difference between attempting to alter a final judgment, one rendered by a court and either not appealed or affirmed on appeal, and legislatively amending a statute so as to change the law as it existed at the time a court issued a decision that was on appeal or otherwise still alive at the time a federal court reviewed the determination below. A court must apply the law as revised when it considers the prior interpretation. *Id.* at 226–27. Article III creates or authorizes Congress to create not a collection of unconnected courts, but a judicial *department* composed of "inferior courts" and "one Supreme Court." "Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole." *Id.* at 227.

[151] 514 U.S. 211 (1995).

[152] 514 U.S. at 227 (emphasis supplied by Court).

[153] 530 U.S. 327 (2000).

[154] 530 U.S. at 344.

"Shall Be Vested".—The distinction between judicial power and jurisdiction is especially pertinent to the meaning of the words "shall be vested" in § 1. Whereas all the judicial power of the United States is vested in the Supreme Court and the inferior federal courts created by Congress, neither has ever been vested with all the jurisdiction which could be granted and, Justice Story to the contrary,[155] the Constitution has not been read to require that Congress confer the entire jurisdiction it might.[156] Thus, except for the original jurisdiction of the Supreme Court, which flows directly from the Constitution, two prerequisites to jurisdiction must be present: first, the Constitution must have given the courts the capacity to receive it,[157] and, second, an act of Congress must have conferred it.[158] The fact that federal courts are of limited jurisdiction means that litigants in them must affirmatively establish that jurisdiction exists and may not confer nonexistent jurisdiction by consent or conduct.[159]

Finality of Judgment as an Attribute of Judicial Power

Since 1792, the federal courts have emphasized finality of judgment as an essential attribute of judicial power. In that year, Congress authorized Revolutionary War veterans to file pension claims

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[155] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 328–331 (1816). *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) 1584–1590.

[156] *See*, *e.g.*, Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799) (Justice Chase). A recent, sophisticated attempt to resurrect the core of Justice Story's argument appears in Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B. U. L. REV. 205 (1985); *see also* Amar, Meltzer, and Redish, *Symposium: Article III and the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990). Professor Amar argues from the text of Article III, § 2, cl. 1, that the use of the word "all" in each of the federal question, admiralty, and public ambassador subclauses means that Congress must confer the entire judicial power to cases involving those issues, whereas it has more discretion in the other six categories.

[157] Which was, of course, the point of Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803), once the power of the Court to hold legislation unconstitutional was established.

[158] The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 252 (1868); Cary v. Curtis, 44 U.S. (3 How.) 236 (1845); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812); Kline v. Burke Constr. Co., 260 U.S. 226 (1922). Some judges, however, have expressed the opinion that Congress's authority is limited by provisions of the Constitution such as the Due Process Clause, so that a limitation on jurisdiction that denied a litigant access to any remedy might be unconstitutional. *Cf.* Eisentrager v. Forrestal, 174 F.2d 961, 965–966 (D.C. Cir. 1949), *rev'd on other grounds sub nom*, Johnson v. Eisentrager, 339 U.S. 763 (1950); Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948); Petersen v. Clark, 285 F. Supp. 700, 703 n.5 (N.D. Calif. 1968); Murray v. Vaughn, 300 F. Supp. 688, 694–695 (D.R.I. 1969). The Supreme Court has had no occasion to consider the question.

[159] Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799); Bingham v. Cabot, 3 U.S. (3 Dall.) 382 (1798); Jackson v. Ashton, 33 U.S. (8 Pet.) 148 (1834); Mitchell v. Maurer, 293 U.S. 237 (1934).

in circuit courts of the United States, directed the judges to certify to the Secretary of War the degree of a claimant's disability and their opinion with regard to the proper percentage of monthly pay to be awarded, but empowered the Secretary to withhold judicially certified claimants from the pension list if he suspected "imposition or mistake." [160] The Justices then on circuit almost immediately forwarded objections to the President, contending that the statute was unconstitutional because the judicial power was constitutionally committed to the judicial department, the duties imposed by the act were not judicial, and the subjection of a court's opinions to revision or control by an officer of the executive or the legislature was not authorized by the Constitution.[161]

Attorney General Randolph, upon the refusal of the circuit courts to act under the new statute, filed a motion for mandamus in the Supreme Court to direct the Circuit Court in Pennsylvania to proceed on a petition filed by one Hayburn seeking a pension. Although the Court heard argument, it put off decision until the next term, presumably because Congress was already acting to delete the objectionable features of the act. Upon enactment of the new law, the Court dismissed the action.[162] Although the Court's opinion contained little analysis, *Hayburn's Case* has since been cited by the Court to reject efforts to give it and the lower federal courts jurisdiction over cases in which judgment would be subject to executive or legislative revision.[163] Thus, in a 1948 case, the Court held that an order of the Civil Aeronautics Board denying to a citizen air carrier a certificate of convenience and necessity for an overseas and foreign air route was, despite statutory language to the contrary,

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[160] Act of March 23, 1792, 1 Stat. 243.

[161] 1 AMERICAN STATE PAPERS: MISCELLANEOUS DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 49, 51, 52 (1832). President Washington transmitted the remonstrances to Congress. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 123, 133 (J. Richardson comp., 1897). The objections are also appended to the order of the Court in *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792). Note that some of the Justices declared their willingness to perform under the act as commissioners rather than as judges. *Cf.* United States v. Ferreira, 54 U.S. (13 How.) 40, 52–53 (1852). The assumption by judges that they could act in some positions as individuals while remaining judges, an assumption many times acted upon, was approved in Mistretta v. United States, 488 U.S. 361, 397–408 (1989).

[162] *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The new pension law was the Act of February 28, 1793, 1 Stat. 324. The reason for the Court's inaction may, on the other hand, have been doubt about the proper role of the Attorney General in the matter, an issue raised in the opinion. *See* Marcus & Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 4; Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There was Pragmatism*, 1989 DUKE L. J. 561, 590–618. Notice the Court's discussion in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 225–26 (1995).

[163] *See* United States v. Ferreira, 54 U.S. (13 How.) 40 (1852); Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865); *In re* Sanborn, 148 U.S. 222 (1893); *cf.* McGrath v. Kritensen, 340 U.S. 162, 167–168 (1950).

not reviewable by the courts. Because Congress had also deemed such an order subject to discretionary review and revision by the President, the lower court found, and the Supreme Court affirmed, that the courts did not have the authority to review the President's decision. While the lower Court had then attempted to reconcile the statutory scheme by permitting presidential review of the order after judicial review, the Court rejected this interpretation. "[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." [164] More recently, the Court avoided a similar situation by a close construction of a statute.[165]

Award of Execution.—The adherence of the Court to this proposition, however, has not extended to a rigid rule formulated by Chief Justice Taney, given its fullest expression in a posthumously published opinion.[166] In *Gordon v. United States*,[167] the Court refused to hear an appeal from a decision of the Court of Claims; the act establishing the Court of Claims provided for appeals to the Supreme Court, after which judgments in favor of claimants were to be referred to the Secretary of the Treasury for payments out of the general appropriation for payment of private claims. But the act also provided that no funds should be paid out of the Treasury for any claims "till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." [168] The opinion of the Court merely stated that the implication of power in the executive officer and in Congress to revise all decisions of the Court of Claims requiring payment of money denied that court the judicial power

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[164] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

[165] Connor v. Johnson, 402 U.S. 690 (1971). Under § 5 of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. § 1973e, no state may "enact or seek to administer" any change in election law or practice different from that in effect on a particular date without obtaining the approval of the Attorney General or the district court in the District of Columbia, a requirement interpreted to reach reapportionment and redistricting. Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Perkins v. Matthews, 400 U.S. 379 (1971). The issue in *Connor* was whether a districting plan drawn up and ordered into effect by a federal district court, after it had rejected a legislatively drawn plan, must be submitted for approval. Unanimously, on the papers without oral argument, the Court ruled that, despite the statute's inclusive language, it did not apply to court-drawn plans.

[166] Gordon v. United States, 117 U.S. 697 (1865) (published 1885). *See* United States v. Jones, 119 U.S. 477 (1886). The Chief Justice's initial effort was in United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

[167] 69 U.S. (2 Wall.) 561 (1865).

[168] Act of February 24, 1855, 10 Stat. 612, as amended, Act of March 3, 1963, 12 Stat. 737, as paraphrased in Gordon v. United States, 117 U.S. at 698.

from the exercise of which "alone" appeals could be taken to the Supreme Court.[169]

In his posthumously published opinion, Chief Justice Taney, because the judgment of the Court of Claims and the Supreme Court depended for execution upon future action of the Secretary and of Congress, regarded any such judgment as nothing more than a certificate of opinion and in no sense a judicial judgment. Congress could not therefore authorize appeals to the Supreme Court in a case where its judicial power could not be exercised, where its judgment would not be final and conclusive upon the parties, and where processes of execution were not awarded to carry it into effect. Taney then enunciated a rule that was rigorously applied until 1933: the award of execution is an essential part of every judgment passed by a court exercising judicial powers and no decision is a legal judgment without an award of execution.[170] The rule was most significant in barring the lower federal courts from hearing proceedings for declaratory judgments [171] and in denying appellate jurisdiction in the Supreme Court from declaratory proceedings in state courts.[172] But, in 1927, the Court began backing away from its absolute insistence upon an award of execution. Unanimously holding that a declaratory judgment in a state court was *res judicata* in a subsequent proceeding in federal court, the Court admitted that, "[w]hile ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function." [173] Then, in 1933, the Court interred the award-of-execution rule in its rigid form and accepted an appeal from a state

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[169] Gordon v. United States, 69 U.S. (2 Wall.) 561 (1865). Following repeal of the objectionable section, Act of March 17, 1866, 14 Stat. 9, the Court accepted appellate jurisdiction. United States v. Jones, 119 U.S. 477 (1886); De Groot v. United States, 72 U.S. (5 Wall.) 419 (1867). But note that execution of the judgments was still dependent upon congressional appropriations. On the effect of the requirement for appropriations at a time when appropriations had to be made for judgments over $100,000, *see* Glidden Co. v. Zdanok, 370 U.S. 530, 568–571 (1962). *Cf.* Regional Rail Reorganization Act Cases (Blanchette v. Connecticut General Ins. Corp.), 419 U.S. 102, 148–149 & n.35 (1974).

[170] Gordon v. United States, 117 U.S. 697 (1865) (published 1885). Subsequent cases accepted the doctrine that an award of execution as distinguished from finality of judgment was an essential attribute of judicial power. *See In re* Sanborn, 148 U.S. 122, 226 (1893); ICC v. Brimson, 154 U.S. 447, 483 (1894); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 457 (1899); Frasch v. Moore, 211 U.S. 1 (1908); Muskrat v. United States, 219 U.S. 346, 355, 361–362 (1911); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927).

[171] Liberty Warehouse Co. v. Grannis, 273 U.S. 70 (1927).

[172] Liberty Warehouse Co. v. Burley Growers' Coop. Marketing Ass'n, 276 U.S. 71 (1928).

[173] Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123, 132 (1927).

court in a declaratory proceeding.[174] Finality of judgment, however, remains the rule in determining what is judicial power, without regard to the demise of Chief Justice Taney's formulation.

Judicial Immunity from Suit

Under common law—the Supreme Court has not elevated judicial immunity from suit to a constitutional principle—judges "are responsible to the people alone for the manner in which they perform their duties. If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, they may be called to account by impeachment, and removed from office. . . . But responsible they are not to private parties in civil actions for the judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly." [175] Three years later, the Court qualified this exception to judges' immunity: the phrase beginning "unless, perhaps," the Court wrote, was "not necessary to a correct statement of the law, and . . . judges . . . are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter," with judges subject to liability only in the latter instance.[176]

In *Stump v. Sparkman*, the Court upheld the immunity of a judge who approved a petition from the mother of a 15-year-old girl to have the girl sterilized without her knowledge (she was told that

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[174] Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933). The decisions in *Swope* and *Wallace* removed all constitutional doubts previously shrouding a proposed federal declaratory judgment act, which was enacted in 1934, 48 Stat. 955, 28 U.S.C. §§ 2201–2202, and unanimously sustained in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937). *Wallace* and *Haworth* were cited with approval in Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007) ("Article III's limitation of federal courts' jurisdiction to 'Cases' and 'Controversies,' reflected in the 'actual controversy' requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), [does not] require[ ] a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed," id. at 120–21).

[175] Randall v. Brigham, 74 U.S. 523, 537 (1869). Judicial immunity "is a general principle of the highest importance to the proper administration of justice . . . . Liability . . . would destroy that independence without which no judiciary can be either respectable or useful. . . . Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed." Bradley v. Fisher, 80 U.S. 335, 347 (1872).

[176] Bradley v. Fisher, 80 U.S. 335, 351 (1872). The Court offered a hypothetical example of the distinction. A judge of a probate court who held a criminal trial would act in clear absence of all jurisdiction over the subject matter, whereas a judge of a criminal court who held a criminal trial for an offense that was not illegal would act merely in excess of his jurisdiction. Id. at 352.

she was to have her appendix removed).[177] In a 5-to-3 opinion, the Court found that there was not the "clear absence of all jurisdiction" that is required to hold a judge civilly liable. The judge had jurisdiction "in all cases at law and in equity whatsoever," except where exclusive jurisdiction is "conferred by law upon some other court, board, or officer," and no statute or case law prohibited the judge from considering a petition for sterilization.[178] The Court also rejected the argument that the judge's approving the petition had not constituted a "judicial" act. The Court found "that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity. . . . Judge Stump performed the type of act normally performed only by judges and . . . he did so in his capacity as a [judge]."[179]

Although judges are generally immune from suits for damages, the Court has held that a judge may be enjoined from enforcing a court rule, such as a restriction on lawyer advertising that violates the First Amendment.[180] Similarly, a state court magistrate may be enjoined from "imposing bail on persons arrested for nonjailable offenses under Virginia law and . . . incarcerating those persons if they could not meet the bail. . . ."[181] But what if the prevailing party, as it did in these two cases, seeks an award of attorneys' fees under the Civil Rights Attorney's Fees Awards Act of 1976?[182] The Court found that "Congress intended to permit attorney's fees awards in cases in which prospective relief was properly awarded against defendants who would be immune from damage awards."[183] In fact,

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[177] 435 U.S. 349 (1978).

[178] 435 U.S. at 357, 358. The defendant was an Indiana state court judge, but the suit was in federal court under 42 U.S.C. § 1983. The Court noted that it had held in Pierson v. Ray, 386 U.S. 547 (1967), that there was no indication that, in enacting this statute, Congress had intended to abolish the principle of judicial immunity established in Bradley v. Fisher, *supra*.

[179] 435 U.S. at 362. Justice Stewart's dissent, joined by Justices Marshall and Powell, concluded that what Judge Stump did "was beyond the pale of anything that could sensibly be called a judicial act." Id. at 365. Indiana law, Justice Stewart wrote, provided for administrative proceedings for the sterilization of certain people who were institutionalized (which the girl in this case was not), and what Judge Stump did "was in no way an act 'normally performed by a judge.'" Id. at 367.

[180] Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980).

[181] Pulliam v. Allen, 466 U.S. 522, 524–25 (1984).

[182] 42 U.S.C. § 1988(b). Under this statute, "suits brought against individual officers for injunctive relief are for all practical purposes suits against the State itself," and, therefore, the state must "bear the burden of the counsel fees award." Hutto v. Finney, 437 U.S. 678, 700 (1978).

[183] *Consumers Union*, 446 U.S. at 738–39. This is not the case, however, when judges are sued in their legislative capacity for having issued a rule. Id. at 734.

"Congress's intent could hardly be more plain. Judicial immunity is no bar to the award of attorney's fees under 42 U.S.C. § 1988." [184]

ANCILLARY POWERS OF FEDERAL COURTS

The Contempt Power

Categories of Contempt.—Crucial to an understanding of the history of the law governing the courts' powers of contempt is an awareness of the various kinds of contempt. With a few notable exceptions,[185] the Court has consistently distinguished between criminal and civil contempt, the former being a vindication of the authority of the courts and latter being the preservation and enforcement of the rights of the parties. A civil contempt has been traditionally viewed as the refusal of a person in a civil case to obey a mandatory order. It is incomplete in nature, may be purged by obedience to the court order, and does not involve a sentence for a definite period of time. The classic criminal contempt is one where the act of contempt has been completed, punishment is imposed to vindicate the authority of the court, and a person cannot by subsequent action purge himself of such contempt.[186]

The issue of whether a certain contempt is civil or criminal can be of great importance. For instance, criminal contempt, unlike civil contempt, implicates procedural rights attendant to prosecutions.[187] Or, in *Ex parte Grossman*,[188] while holding that the President may pardon a criminal contempt, Chief Justice Taft noted in

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[184] *Pulliam*, 466 U.S. at 544. In 1996, Public Law 104–317, § 309, amended § 1988(b) to preclude the award of attorneys' fees in a suit against a judicial officer unless the officer's action "was clearly in excess of such officer's jurisdiction."

[185] *E.g.*, United States v. United Mine Workers, 330 U.S. 258 (1947).

[186] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441–443 (1911); *Ex parte* Grossman, 267 U.S. 87 (1925). *See also* Bessette v. W.B. Conkey Co., 194 U.S. 324, 327–328 (1904).

[187] In Robertson v. United States ex rel. Watson, the Court had granted certiorari to consider a District of Columbia law that allowed a private individual to bring a criminal contempt action in the congressionally established D.C. courts based on a violation of a civil protective order. 560 U.S. ___, No. 08–6261, slip op. (2010). The Court subsequently issued a per curiam order dismissing the writ of certiorari as having been improvidently granted, but four Justices dissented. Writing in dissent, Chief Justice Roberts thought it imperative to make clear that "[t]he terrifying force of the criminal justice system may only be brought to bear against an individual by society as a whole, through a prosecution brought of behalf of the government." 560 U.S. ___, No. 08–6261, slip op. at 1 (2010) (Roberts, C.J., dissenting). Of particular concern was how various protections in the Bill of Rights against government action would play out in a privately brought action. Id. at 5–6.

[188] 267 U.S. 87, 119–120 (1925). In an analogous case, the Court was emphatic in a dictum that Congress cannot require a jury trial where the contemnor has failed to perform a positive act for the relief of private parties, Michaelson v. United States ex rel. Chicago, S.P., M. & Ry. Co., 266 U.S. 42, 65–66 (1924). *But see* Bloom v. Illinois, 391 U.S. 194, 202 (1968).

dicta that such pardon power did not extend to civil contempt. Notwithstanding the importance of distinguishing between the two, there have been instances where defendants have been charged with both civil and criminal contempt for the same act.[189]

Long-standing doctrine regarding how courts should distinguish between civil and criminal contempt remains influential. In *Shillitani v. United States*,[190] defendants were sentenced by their respective District Courts to two years imprisonment for contempt of court, but the sentences contained a purge clause providing for the unconditional release of the contemnors upon agreeing to testify before a grand jury. On appeal, the Supreme Court held that the defendants were in civil contempt, notwithstanding their sentence for a definite period of time, on the grounds that the test for determining whether the contempt is civil or criminal is what the court primarily seeks to accomplish by imposing sentence.[191] Here, the purpose was to obtain answers to the questions for the grand jury, and the court provided for the defendants' release upon compliance; whereas, "a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterence." [192]

In *International Union, UMW v. Bagwell*,[193] however, the Court formulated a new test for drawing the distinction between civil and criminal contempt in certain cases. Henceforth, the imposition of non-compensatory contempt fines for the violation of any complex injunction will require criminal proceedings. This case, as have so many, involved the imposition of large fines (here, $52 million) upon a union in a strike situation for violations of an elaborate court injunction restraining union activity during the strike. The Court was vague with regard to the standards for determining when a court order is "complex" and thus requires the protection of criminal proceedings.[194]

The Court has also recognized a second, but more subtle distinction between types of contempt, and that is the difference between direct and indirect contempt. Direct contempt results when the contumacious act is committed "in the presence of the Court or so near

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[189] *See* United States v. United Mine Workers, 330 U.S. 258, 299 (1947).

[190] 384 U.S. 364 (1966).

[191] 384 U.S. at 370.

[192] 384 U.S. at 370 n.6. *See* Hicks v. Feiock, 485 U.S. 624 (1988) (remanding for determination whether payment of child support arrearages would purge a determinate sentence, the proper characterization critical to decision on a due process claim).

[193] 512 U.S. 821 (1994).

[194] 512 U.S. at 832–38. Relevant is the fact that the alleged contempts did not occur in the presence of the court and that determinations of violations require elaborate and reliable fact-finding. *See esp.* id. at 837–38.

thereto as to obstruct the administration of justice,"[195] while indirect contempt is behavior that the Court did not itself witness.[196] The nature of the contumacious act, *i.e.*, whether it is direct or indirect, is important because it determines the appropriate procedure for charging the contemnor. As will be seen in the following discussion, the history of the contempt powers of the American judiciary is marked by two trends: a shrinking of the court's power to punish a person summarily and a multiplying of the due process requirements that must otherwise be met when finding an individual to be in contempt.[197]

The Act of 1789.—The summary power of the courts of the United States to punish contempts of their authority had its origin in the law and practice of England where disobedience of court orders was regarded as contempt of the King himself and attachment was a prerogative process derived from presumed contempt of the sovereign.[198] By the latter part of the eighteenth century, summary power to punish was extended to all contempts whether committed in or out of court.[199] In the United States, the Judiciary Act of 1789[200] conferred power on all courts of the United States "to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." The only limitation placed on this power was that summary attachment was made a negation of all other modes of punishment. The abuse of this extensive power led, following the unsuccessful impeachment of Judge James H. Peck of the Federal District Court of Missouri, to the passage of the Act of 1831 limiting the power of the federal courts to punish contempts to misbehavior in the presence of the courts, "or so near thereto as to obstruct the administration of justice," to the

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[195] Act of March 2, 1831, ch. 99, § 1, 4 Stat. 488. *Cf.* Rule 42(a), FRCrP, which provides, "A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." *See also* Beale, *Contempt of Court, Civil and Criminal*, 21 HARV. L. REV. 161, 171–172 (1908).

[196] *See* Fox, *The Nature of Contempt of Court*, 37 L.Q. REV. 191 (1921).

[197] Many of the limitations placed on the inferior federal courts have been issued on the basis of the Supreme Court's supervisory power over them rather than upon a constitutional foundation, while, of course, the limitations imposed on state courts necessarily are on constitutional dimensions. Indeed, it is often the case that a limitation, which is applied to an inferior federal court as a superintending measure, is then transformed into a constitutional limitation and applied to state courts. *Compare* Cheff v. Schnackenberg, 384 U.S. 373 (1966), *with* Bloom v. Illinois, 391 U.S. 194 (1968). In the latter stage, the limitations then bind both federal and state courts alike. Therefore, in this section, Supreme Court constitutional limitations on state court contempt powers are cited without restriction for equal application to federal courts.

[198] Fox, *The King v. Almon*, 24 L.Q. REV. 184, 194–195 (1908).

[199] Fox, *The Summary Power to Punish Contempt*, 25 L.Q. REV. 238, 252 (1909).

[200] 1 Stat. 83, § 17 (1789).

misbehavior of officers of courts in their official capacity, and to disobedience or resistance to any lawful writ, process or order of the court.[201]

An Inherent Power.—The nature of the contempt power was described Justice Field, writing for the Court in *Ex parte Robinson*,[202] sustaining the act of 1831: "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." Expressing doubts concerning the validity of the act as to the Supreme Court, he declared, however, that there could be no question of its validity as applied to the lower courts on the ground that they are created by Congress and that their "powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction."[203] With the passage of time, later adjudications, especially after 1890, came to place more emphasis on the inherent power of courts to punish contempts than upon the power of Congress to regulate summary attachment.

By 1911, the Court was saying that the contempt power must be exercised by a court without referring the issues of fact or law to another tribunal or to a jury in the same tribunal.[204] In *Michaelson v. United States*,[205] the Court intentionally placed a narrow interpretation upon those sections of the Clayton Act[206] relating to punishment for contempt of court by disobedience of injunctions in labor disputes. The sections in question provided for a jury upon the demand of the accused in contempt cases in which the acts committed in violation of district court orders also constituted a crime under the laws of the United States or of those of the state where they were committed. Although Justice Sutherland reaffirmed earlier rulings establishing the authority of Congress to regulate the contempt power, he went on to qualify this authority and declared that "the attributes which inhere in the power [to punish contempt] and are inseparable from it can neither be abrogated nor

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[201] 18 U.S.C. § 401. For a summary of the Peck impeachment and the background of the act of 1831, *see* Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts: A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1024–1028 (1924).

[202] 86 U.S. (19 Wall.) 505 (1874).

[203] 86 U.S. at 505–11.

[204] Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911). *See also In re* Debs, 158 U.S. 564, 595 (1895).

[205] 266 U.S. 42 (1924).

[206] 38 Stat. 730, 738 (1914).

rendered practically inoperative." The Court mentioned specifically "the power to deal summarily with contempt committed in the presence of the courts or so near thereto as to obstruct the administration of justice," and the power to enforce mandatory decrees by coercive means.[207] This latter power, to enforce, the Court has held, includes the authority to appoint private counsel to prosecute a criminal contempt.[208] Although the contempt power may be inherent, it is not unlimited. In *Spallone v. United States*,[209] the Court held that a district court had abused its discretion by imposing contempt sanctions on individual members of a city council for refusing to vote to implement a consent decree remedying housing discrimination by the city. The proper remedy, the Court indicated, was to proceed first with contempt sanctions against the city, and only if that course failed should it proceed against the council members individually.

First Amendment Limitations on the Contempt Power.— The phrase, "in the presence of the Court or so near thereto as to obstruct the administration of justice," was interpreted so broadly in *Toledo Newspaper Co. v. United States*[210] as to uphold the action of a district court judge in punishing a newspaper for contempt for publishing spirited editorials and cartoons issues raised in an action challenging a street railway's rates. A majority of the Court held that the test to be applied in determining the obstruction of the administration of justice is not the actual obstruction resulting from an act, but "the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty." Similarly, the test whether a particular act is an attempt to influence or intimidate a court is not the influence exerted upon the mind of a particular judge but "the reasonable tendency of the acts done

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[207] 266 U.S. at 65–66. *See* Frankfurter and Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts: A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

[208] Young v. United States ex rel. Vuitton, 481 U.S. 787, 793–801 (1987). However, the Court, invoking its supervisory power, instructed the lower federal courts first to request the United States Attorney to prosecute a criminal contempt and only if refused should they appoint a private lawyer. Id. at 801–802. Still using its supervisory power, the Court held that the district court had erred in appointing counsel for a party that was the beneficiary of the court order; disinterested counsel had to be appointed. Id. at 802–08. Justice Scalia contended that the power to prosecute is not comprehended within Article III judicial power and that federal judges had no power, inherent or otherwise, to initiate a prosecution for contempt or to appoint counsel to pursue it. Id. at 815. *See also* United States v. Providence Journal Co., 485 U.S. 693 (1988), which involved the appointment of a disinterested private attorney. The Supreme Court dismissed the writ of *certiorari* after granting it, however, holding that only the Solicitor General representing the United States could bring the petition to the Court. *See* 28 U.S.C. § 518.

[209] 493 U.S. 265 (1990). The decision was an exercise of the Court's supervisory power. Id. at 276. Four Justices dissented. Id. at 281.

[210] 247 U.S. 402 (1918).

to influence or bring about the baleful result . . . without reference to the consideration of how far they may have been without influence in a particular case." [211] In *Craig v. Hecht*,[212] these criteria were applied to sustain the imprisonment of the comptroller of New York City for writing and publishing a letter to a public service commissioner criticizing the action of a United States district judge in receivership proceedings.

The decision in *Toledo Newspaper*, however, did not follow earlier decisions interpreting the act of 1831 and was grounded on historical error. For these reasons, it was reversed in *Nye v. United States*,[213] and the theory of constructive contempt based on the "reasonable tendency" rule was rejected. The defendants in the civil suit, by persuasion and the use of liquor, had induced a plaintiff feeble in mind and body to ask for dismissal of the suit he had brought against them. The events in the episode occurred more than 100 miles from where the court was sitting and were held not to put the persons responsible for them in contempt of court. Although *Nye v. United States* was exclusively a case of statutory construction, it was significant from a constitutional point of view because its reasoning was contrary to that of earlier cases narrowly construing the act of 1831 and asserting broad inherent powers of courts to punish contempts independently of, and contrary to, congressional regulation of this power. *Bridges v. California* [214] was noteworthy for the dictum of the majority that the contempt power of all courts, federal as well as state, is limited by the guaranty of the First Amendment against interference with freedom of speech or of the press.[215]

A series of cases involving highly publicized trials and much news media attention and exploitation,[216] however, caused the Court to suggest that the contempt and other powers of trial courts should be used to stem the flow of publicity before it can taint a trial. Thus,

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[211] 247 U.S. at 418–21.

[212] 263 U.S. 255 (1923).

[213] 313 U.S. 33, 47–53 (1941).

[214] 314 U.S. 252, 260 (1941).

[215] *See also* Wood v. Georgia, 370 U.S. 375 (1962), further clarifying the limitations imposed by the First Amendment upon this judicial power and delineating the requisite serious degree of harm to the administration of law necessary to justify exercise of the contempt power to punish the publisher of an out-of-court statement attacking a charge to the grand jury, absent any showing of actual interference with the activities of the grand jury.

It is now clearly established that courtroom conduct to be punishable as contempt "must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." Craig v. Harney, 331 U.S. 367, 376 (1947); *In re* Little, 404 U.S. 553, 555 (1972).

[216] *E.g.*, Estes v. Texas, 381 U.S. 532 (1965); Marshall v. United States, 360 U.S. 310 (1959); Sheppard v. Maxwell, 384 U.S. 333 (1966).

Justice Clark, speaking for the majority in *Sheppard v. Maxwell*,[217] wrote, "If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. . . . Neither prosecutors, counsel for defense, the accused, witness, court staff nor law enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures." Though the regulation the Justice had in mind was presumably to be of the parties and related persons rather than of the press, the potential for conflict with the First Amendment is obvious, as well as is the necessity for protection of the equally important right to a fair trial.[218]

Due Process Limitations on Contempt Power: Right to Notice and to a Hearing Versus Summary Punishment.— Misbehavior in the course of a trial may be punished summarily by the trial judge. In *Ex parte Terry*,[219] the Court denied *habeas corpus* relief to a litigant who had been jailed for assaulting a United States marshal in the presence of the court. In *Cooke v. United States*,[220] however, the Court remanded for further proceedings a judgment jailing an attorney and his client for presenting the judge a letter which impugned his impartiality with respect to their case, still pending before him. Distinguishing the case from that of *Terry*, Chief Justice Taft, speaking for the unanimous Court, said: "The important distinction . . . is that this contempt was not in open court. . . . To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law."[221]

As to the timeliness of summary punishment, the Court, in *Sacher v. United States*,[222] at first construed Rule 42(a) of the Federal Rules of Criminal Procedure, which was designed to afford judges clearer

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[217] 384 U.S. 333, 363 (1966).

[218] For another approach, bar rules regulating the speech of counsel and the First Amendment standard, *see* Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

[219] 128 U.S. 289 (1888).

[220] 267 U.S. 517 (1925).

[221] 267 U.S. at 535, 534.

[222] 343 U.S. 1 (1952).

guidelines as to the exercise of their contempt power, to allow "the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power." [223] Subsequently, however, interpreting the Due Process Clause and thus binding both federal and state courts, the Court held that, although the trial judge may summarily and without notice or hearing punish contemptuous conduct committed in his presence and observed by him, if he does choose to wait until the conclusion of the proceeding, he must afford the alleged contemnor at least reasonable notice of the specific charge and opportunity to be heard in his own defense. Apparently, a "full scale trial" is not contemplated.[224]

Curbing the judge's power to consider conduct as occurring in his presence, the Court, in *Harris v. United States*,[225] held that summary contempt proceedings in aid of a grand jury probe, achieved through swearing the witness and repeating the grand jury's questions in the presence of the judge, did not constitute contempt "in the actual presence of the court" for purposes of Rule 42(a); rather, the absence of a disturbance in the court's proceedings or of the need to immediately vindicate the court's authority makes the witness' refusal to testify an offense punishable only after notice and a hearing.[226] Moreover, when it is not clear that the judge was fully aware of the contemptuous behavior when it occurred, notwithstanding the fact that it occurred during the trial, "a fair hearing would entail the opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete." [227]

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[223] 343 U.S. at 11.

[224] Taylor v. Hayes, 418 U.S. 488 (1974). In a companion case, the Court observed that, although its rule conceivably encourages a trial judge to proceed immediately rather than awaiting a calmer moment, "[s]ummary convictions during trials that are unwarranted by the facts will not be invulnerable to appellate review." Codispoti v. Pennsylvania, 418 U.S. 506, 517 (1974).

[225] 382 U.S. 162 (1965), *overruling* Brown v. United States, 359 U.S. 41 (1959).

[226] *But see* Green v. United States, 356 U.S. 165 (1958) (noncompliance with order directing defendants to surrender to marshal for execution of their sentence is an offense punishable summarily as a criminal contempt); Reina v. United States, 364 U.S. 507 (1960).

[227] Johnson v. Mississippi, 403 U.S. 212, 215 (1971) (citing *In re* Oliver, 333 U.S. 257, 275–276 (1948)).

Due Process Limitations on Contempt Power: Right to Jury Trial.—Originally, the right to a jury trial was not available in criminal contempt cases.[228] But the Court held in *Cheff v. Schnackenberg*,[229] that a defendant is entitled to trial by jury when the punishment in a criminal contempt case in federal court is more than the sentence for a petty offense, traditionally six months. Although the ruling was made pursuant to the Supreme Court's supervisory powers and was thus inapplicable to state courts and presumably subject to legislative revision, two years later the Court held that the Constitution also requires jury trials in criminal contempt cases in which the offense was more than a petty one.[230] Whether an offense is petty or not is determined by the maximum sentence authorized by the legislature or, in the absence of a statute, by the sentence actually imposed. Again the Court drew the line between petty offenses and more serious ones at six months' imprisonment. Although this case involved an indirect criminal contempt (willful petitioning to admit to probate a will known to be falsely prepared) the majority in dictum indicated that even in cases of direct contempt a jury will be required in appropriate instances. "When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power."[231] Presumably, there is no equivalent right to a jury trial in civil contempt cases,[232] although one could spend much more time in jail pursuant to a judgment of civil contempt than one could for

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[228] *See* Green v. United States, 356 U.S. 165 (1958); United States v. Barnett, 376 U.S. 681 (1964), and cases cited. The dissents of Justices Black and Douglas in those cases prepared the ground for the Court's later reversal. On the issue, *see* Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1042–1048 (1924).

[229] 384 U.S. 373 (1966).

[230] Bloom v. Illinois, 391 U.S. 194 (1968). *See also* International Union, UMW v. Bagwell, 512 U.S. 821 (1994) (refining the test for when contempt citations are criminal and thus require jury trials).

[231] 391 U.S. at 209. In Codispoti v. Pennsylvania, 418 U.S. 506 (1974), the Court held a jury trial to be required when the trial judge awaits the conclusion of the proceeding and then imposes separate contempt sentences in which the total aggregated more than six months even though no sentence for more than six months was imposed for any single act of contempt. For a tentative essay at defining a petty offense when a fine is levied, *see* Muniz v. Hoffman, 422 U.S. 454, 475–77 (1975). In International Union, UMW v. Bagwell, 512 U.S. 821, 837 n.5 (1994), the Court continued to reserve the question of the distinction between petty and serious contempt fines, because of the size of the fine in that case.

[232] The Sixth Amendment is applicable only to criminal cases and the Seventh to suits at common law, but the due process clause is available if needed.

most criminal contempts.[233] The Court has, however, expanded the right to jury trials in federal civil cases on nonconstitutional grounds.[234]

Due Process Limitations on Contempt Powers: Impartial Tribunal.—In *Cooke v. United States*,[235] Chief Justice Taft uttered some cautionary words to guide trial judges in the use of their contempt powers. "The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency. The substitution of another judge would avoid either tendency but it is not always possible. Of course where acts of contempt are palpably aggravated by a personal attack upon the judge in order to drive the judge out of the case for ulterior reasons, the scheme should not be permitted to succeed. But attempts of this kind are rare. All of such cases, however, present difficult questions for the judge. All we can say upon the whole matter is that where conditions do not make it impracticable, or where the delay may not injure public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place. *Cornish v. The United States*, 299 Fed. 283, 285; *Toledo Company v. The United States*, 237 Fed. 986, 988. The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows."[236]

Sacher v. United States[237] grew out of a tempestuous trial of eleven Communist Party leaders in which Sacher and others were counsel for the defense. Upon the conviction of the defendants, the trial judge at once found counsel guilty of criminal contempt and

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[233] Note that under 28 U.S.C. § 1826 a recalcitrant witness before a grand jury may be imprisoned for the term of the grand jury, which can be 36 months. 18 U.S.C. § 3331(a).

[234] *E.g.*, Beacon Theatres v. Westover, 359 U.S. 500 (1959); Dairy Queen v. Wood, 369 U.S. 469 (1962); Ross v. Bernhard, 396 U.S. 531 (1970). However, the Court's expansion of jury trial rights may have halted with McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[235] 267 U.S. 517, 539 (1925).

[236] The *Toledo Company* case that the Court cited was affirmed in Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

[237] 343 U.S. 1 (1952). *See* Dennis v. United States, 341 U.S. 494 (1951).

imposed jail terms of up to six months. At issue directly was whether the contempt charged was one that the judge was authorized to determine for himself or whether it was one that under Rule 42(b) could be passed upon only by another judge and only after notice and hearing, but behind this issue loomed the applicability and nature of due process requirements, in particular whether the defense attorneys were constitutionally entitled to trial before a different judge. A divided Court affirmed most of the convictions, set aside others, and denied that due process required a hearing before a different judge. "We hold that Rule 42 allows the trial judge, upon the occurrence in his presence of a contempt, immediately and summarily to punish it, if, in his opinion, delay will prejudice the trial. We hold, on the other hand, that if he believes the exigencies of the trial require that he defer judgment until its completion, he may do so without extinguishing his power. . . . We are not unaware or unconcerned that persons identified with unpopular causes may find it difficult to enlist the counsel of their choice. But we think it must be ascribed to causes quite apart from fear of being held in contempt, for we think few effective lawyers would regard the tactics condemned here as either necessary or helpful to a successful defense. That such clients seem to have thought these tactics necessary is likely to contribute to the bar's reluctance to appear for them rather more than fear of contempt. But that there may be no misunderstanding, we make clear that this Court, if its aid be needed, will unhesitatingly protect counsel in fearless, vigorous and effective performance of every duty pertaining to the office of the advocate on behalf of any person whatsoever. But it will not equate contempt with courage or insults with independence. It will also protect the processes of orderly trial, which is the supreme object of the lawyer's calling." [238]

In *Offutt v. United States*,[239] acting under its supervisory powers over the lower federal courts, the Court set aside a criminal contempt conviction imposed on a lawyer after a trial marked by highly personal recriminations between the trial judge and the lawyer. In a situation in which the record revealed that the contumacious conduct was the product of both lack of self-restraint on the part of the contemnor and a reaction to the excessive zeal and personal animosity of the trial judge, the majority felt that any contempt trial must be held before another judge. This holding, that when a judge becomes personally embroiled in the controversy with an accused he must defer trial of his contempt citation to another judge, which was founded on the Court's supervisory powers, was

[238] 343 U.S. at 11, 13–14.
[239] 348 U.S. 11 (1954).

constitutionalized in *Mayberry v. Pennsylvania*,[240] in which a defendant acting as his own counsel engaged in quite personal abuse of the trial judge. The Court appeared to leave open the option of the trial judge to act immediately and summarily to quell contempt by citing and convicting an offender, thus empowering the judge to keep the trial going,[241] but if he should wait until the conclusion of the trial he must defer to another judge.

Contempt by Disobedience of Orders.—Disobedience of injunctive orders, particularly in labor disputes, has been a fruitful source of cases dealing with contempt of court. In *United States v. United Mine Workers*,[242] the Court held, first, that disobedience of a temporary restraining order issued for the purpose of maintaining existing conditions, pending the determination of the court's jurisdiction, is punishable as criminal contempt where the issue is not frivolous, but substantial.[243] Second, the Court held that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings, even though the statute under which the order is issued is unconstitutional.[244] Third, on the basis of *United States v. Shipp*,[245] the Court held that violations of a court's order are punishable as criminal contempt, even if the order is set aside on appeal as in excess of the court's jurisdiction and even if the basic action has become moot.[246] Finally, the Court held that conduct can amount to both civil and criminal contempt, and the same acts may justify a court in resorting to coercive and punitive measures, which may be imposed in a single proceeding.[247]

Contempt Power in Aid of Administrative Power.—Proceedings to enforce the orders of administrative agencies and subpoenas issued by them to appear and produce testimony have be-

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[240] 400 U.S. 455 (1971). *See also* Johnson v. Mississippi, 403 U.S. 212 (1971); Holt v. Virginia, 381 U.S. 131 (1965). Even in the absence of a personal attack on a judge that would tend to impair his detachment, the judge may still be required to excuse himself and turn a citation for contempt over to another judge if the response to the alleged misconduct in his courtroom partakes of the character of "marked personal feelings" being abraded on both sides, so that it is likely the judge has felt a "sting" sufficient to impair his objectivity. Taylor v. Hayes, 418 U.S. 488 (1974).

[241] 400 U.S. at 463. *See* Illinois v. Allen, 397 U.S. 337 (1970), in which the Court affirmed that summary contempt or expulsion may be used to keep a trial going.

[242] 330 U.S. 258 (1947). *See also* International Union, UMW v. Bagwell, 512 U.S. 821 (1994).

[243] 330 U.S. at 292–93.

[244] 330 U.S. at 293. *See* Walker v. City of Birmingham, 388 U.S. 307 (1967).

[245] 203 U.S. 563 (1906).

[246] 330 U.S. at 290–92.

[247] 330 U.S. at 299. *But see* Cheff v. Schnackenberg, 384 U.S. 273 (1966), and "Due Process Limitations on Contempt Power: Right to Jury Trial," supra.

come increasingly common since the leading case of *ICC v. Brimson*,[248] which held that the contempt power of the courts might by statutory authorization be used to aid the Interstate Commerce Commission in enforcing compliance with its orders. In 1947 a proceeding to enforce a *subpoena duces tecum* issued by the Securities and Exchange Commission during the course of an investigation was ruled to be civil in character on the ground that the only sanction was a penalty designed to compel obedience. The Court then enunciated the principle that, where a fine or imprisonment imposed on the contemnor is designed to coerce him to do what he has refused to do, the proceeding is one for civil contempt.[249] Notwithstanding the power of administrative agencies to cite an individual for contempt, however, such bodies must be acting within the authority that has been lawfully delegated to them.[250]

Sanctions Other Than Contempt

Long recognized by the courts as inherent powers are those authorities that are necessary to the administration of the judicial system itself, of which the contempt power just discussed is only the most controversial.[251] Courts, as elements of an independent and coequal branch of government, once they are created and their jurisdiction established, have the authority to do what courts have traditionally done in order to accomplish their assigned tasks.[252] Of course, these inherent powers may be limited by statutes and by rules,[253] but, just as noted above in the discussion of the same issue with respect to contempt, the Court asserts both the power to act in areas not covered by statutes and rules and the power to act unless Congress has not only provided regulation of the exercise of

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[248] 154 U.S. 447 (1894).

[249] Penfield Co. v. SEC, 330 U.S. 585 (1947). Note the dissent of Justice Frankfurter. For delegations of the subpoena power to administrative agencies and the use of judicial process to enforce them, *see also* McCrone v. United States, 307 U.S. 61 (1939); Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[250] Gojack v. United States, 384 U.S. 702 (1966). *See also* Sanctions of the Investigatory Power: Contempt, supra, for a discussion of Congress's power to cite an individual for contempt by virtue of its investigatory duties, which is applicable, at least by analogy, to administrative agencies.

[251] "Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. . . . To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute . . . ." United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 34 (1812).

[252] *See* Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821); *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874); Link v. Wabash R.R., 370 U.S. 626, 630–631 (1962); Chambers v. NASCO, Inc., 501 U.S. 32, 43–46 (1991); and id. at 58 (Justice Scalia dissenting), 60, 62–67 (Justice Kennedy dissenting).

[253] Chambers v. NASCO, Inc., 501 U.S. at 47.

the power, but also has unmistakably enunciated its intention to limit the courts' inherent powers.[254]

Thus, in *Chambers v. NASCO, Inc.*, the Court upheld the imposition of monetary sanctions against a litigant and his attorney for bad-faith litigation conduct in a diversity case. Some of the conduct was covered by a federal statute and several sanction provisions of the Federal Rules of Civil Procedure, but some was not, and the Court held that, absent a showing that Congress had intended to limit the courts, they could use their inherent powers to impose sanctions for the entire course of conduct, including shifting attorneys' fees, which is ordinarily against the common-law American rule.[255] In another case, a party failed to comply with discovery orders and a court order concerning a schedule for filing briefs. The Supreme Court held that the attorneys' fees statute did not allow assessment of such fees in that situation, but it remanded for consideration of sanctions under both a Federal Rule of Civil Procedure and the trial court's inherent powers, subject to a finding of bad faith.[256] But bad faith is not always required for the exercise of some inherent powers. Thus, courts may dismiss an action for an unexplained failure of the moving party to prosecute it.[257]

Power to Issue Writs: The Act of 1789

From the beginning of government under the Constitution of 1789, Congress has assumed, under the Necessary and Proper Clause, its power to establish inferior courts, its power to regulate the jurisdiction of federal courts, and its power to regulate the issuance of writs.[258] Section 13 of the Judiciary Act of 1789 authorized the Supreme Court "to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."[259] Section 14 provided that all "courts of the United States shall have power to issue writs

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[254] 501 U.S. at 46–51. *But see* id. at 62–67 (Justice Kennedy dissenting).

[255] 501 U.S. at 49–51. On the implications of the fact that this was a diversity case, *see* id. at 51–55.

[256] Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

[257] Link v. Wabash R.R., 370 U.S. 626 (1962).

[258] Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in 'Inferior' Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1016–1023 (1924).

[259] 1 Stat. 73, 81. "Section 13 was a provision unique to the Court, granting the power of prohibition as to district courts in admiralty and maritime cases . . . ." WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4005, p. 98 (1996). *See also* R. FALLON, ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (6th ed. 2009), Ch. III, p. 268 (hereinafter Hart & Wechsler (6th ed.))

of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." [260]

Although the Act of 1789 left the power over writs subject largely to the common law, it is significant as a reflection of the belief, in which the courts have on the whole concurred, that an act of Congress is necessary to confer judicial power to issue writs.[261] Whether Article III itself is an independent source of the power of federal courts to fashion equitable remedies for constitutional violations or whether such remedies must fit within congressionally authorized writs or procedures is often left unexplored. In *Missouri v. Jenkins*,[262] for example, the Court, rejecting a claim that a federal court exceeded judicial power under Article III by ordering local authorities to increase taxes to pay for desegregation remedies, declared that "a court order directing a local government body to levy its own taxes" is plainly a judicial act within the power of a federal court.[263] In the same case, the Court refused to rule on "the difficult constitutional issues" presented by the state's claim that the district court had exceeded its constitutional powers in a prior order directly raising taxes, instead ruling that this order had violated principles of comity.[264]

Common Law Powers of District of Columbia Courts.— The portion of § 13 of the Judiciary Act of 1789 that authorized the Supreme Court to issue writs of mandamus in the exercise of its original jurisdiction was held invalid in *Marbury v. Madison*,[265] as an unconstitutional enlargement of the Supreme Court's original jurisdiction. After two more futile efforts to obtain a writ of mandamus, in cases in which the Court found that power to issue the writ had not been vested by statute in the courts of the United States

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[260] 1 Stat. 73, 81–82. *See also* United States v. Morgan, 346 U.S. 502 (1954), holding that the All Writs section of the Judicial Code, 28 U.S.C. § 1651(a), gives federal courts the power to employ the ancient writ of *coram nobis*.

[261] This proposition was recently reasserted in Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34 (1985) (holding that a federal district court lacked authority to order U.S. marshals to transport state prisoners, such authority not being granted by the relevant statutes).

[262] 495 U.S. 33 (1990).

[263] 495 U.S. at 55, citing Griffin v. Prince Edward County School Bd., 377 U.S. 218, 233–34 (1964) (an order that local officials "exercise the power that is theirs" to levy taxes in order to open and operate a desegregated school system "is within the court's power if required to assure . . . petitioners that their constitutional rights will no longer be denied them").

[264] 495 U.S. at 50–52.

[265] 5 U.S. (1 Cr.) 137 (1803). *Cf.* Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321 (1796).

except in aid of already existing jurisdiction,[266] a litigant was successful in *Kendall v. United States ex rel. Stokes*,[267] in finding a court that would take jurisdiction in a mandamus proceeding. This was the circuit court of the United States for the District of Columbia, which was held to have jurisdiction, on the theory that the common law, in force in Maryland when the cession of that part of the state that became the District of Columbia was made to the United States, remained in force in the District. At an early time, therefore, the federal courts established the rule that mandamus can be issued only when authorized by a constitutional statute and within the limits imposed by the common law and the separation of powers.[268]

Habeas Corpus: Congressional and Judicial Control.—The writ of *habeas corpus*[269] has a special status because its suspension is forbidden, except in narrow circumstances, by Article I, § 9, cl. 2. The writ also has a venerable common law tradition, long antedating its recognition by the first Congress in the Judiciary Act of 1789,[270] as a means "to relieve detention by executive authorities without judicial trial."[271] Nowhere in the Constitution, however, is the power to issue the writ vested in the federal courts, which raises the question of whether Congress could suspend the writ *de facto* by declining to authorize its issuance. In other words, is a statute needed to make the writ available or does the right to

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[266] McIntire v. Wood, 11 U.S. (7 Cr.) 504 (1813); McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821).

[267] 37 U.S. (12 Pet.) 524 (1838).

[268] In 1962, Congress conferred upon all federal district courts the same power to issue writs of mandamus as was exercisable by federal courts in the District of Columbia. 76 Stat. 744, 28 U.S.C. § 1361.

[269] Reference to the "writ of *habeas corpus*" is to the "Great Writ," *habeas corpus ad subjiciendum*, by which a court would inquire into the lawfulness of a detention of the petitioner. *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 95 (1807). For other uses, *see* Carbo v. United States, 364 U.S. 611 (1961); Price v. Johnston, 334 U.S. 266 (1948). Technically, federal prisoners no longer utilize the writ of *habeas corpus* in seeking post-conviction relief, now the largest office of the writ, but proceed under 28 U.S.C. § 2255, on a motion to vacate judgment. Intimating that if § 2255 afforded prisoners a less adequate remedy than they would have under *habeas corpus*, it would be unconstitutional, the Court in United States v. Hayman, 342 U.S. 205 (1952), held the two remedies to be equivalent. *Cf.* Sanders v. United States, 373 U.S. 1, 14 (1963). The claims cognizable under one are cognizable under the other. Kaufman v. United States, 394 U.S. 217 (1969). Therefore, the term *habeas corpus* is used here to include the § 2255 remedy. There is a plethora of writings about the writ. *See*, *e.g.*, Hart & Wechsler (6th ed), *supra* at 1153–1310; *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

[270] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82.

[271] INS v. St. Cyr, 533 U.S. 289, 301 (2001), quoted in Rasul v. Bush, 542 U.S. 466, 474 (2004).

habeas corpus stem by implication from the Suspension Clause or from the grant of judicial power?[272]

Since Chief Justice Marshall's opinion in *Ex parte Bollman*,[273] it was generally[274] accepted that "the power to award the writ by any of the courts of the United States, must be given by written law."[275] As Marshall explained, however, the suspension clause was an "injunction," an "obligation" to provide "efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted."[276] And so it has been understood since,[277] with only a few judicial voices raised to suggest that what Congress could not do directly (by suspension) it could not do by omission (by failing to provide for *habeas*).[278] But, because statutory authority had always existed authorizing the federal courts to grant the relief they deemed necessary under *habeas corpus*, the Court did not need to face the question.[279]

Having determined in *Bollman* that a statute was necessary before the federal courts had power to issue writs of *habeas corpus*, Chief Justice Marshall pointed to § 14 of the Judiciary Act of 1789 as containing the necessary authority.[280] As the Chief Justice read it, the authorization was limited to persons imprisoned under federal authority. It was not until 1867, with two small exceptions,[281]

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[272] Professor Chafee contended that by the time of the Constitutional Convention the right to *habeas corpus* was so well established no affirmative authorization was needed. *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143, 146 (1952). *But compare* Collins, *Habeas Corpus for Convicts: Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 344–345 (1952).

[273] 8 U.S. (4 Cr.) 75 (1807).

[274] 8 U.S. at 94. *See also Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

[275] 8 U.S. at 64.

[276] 8 U.S. at 95. In quoting the clause, Marshall renders "shall not be suspended" as "should not be suspended."

[277] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). *Cf.* Carbo v. United States, 364 U.S. 611, 614 (1961).

[278] *E.g.*, Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C. Cir. 1949), *revd. on other grounds sub nom.*, Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that habeas exists as an inherent common law right); *see also* Justice Black's dissent, id. at 791, 798: "*Habeas corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress." And, in Jones v. Cunningham, 371 U.S. 236, 238 (1963), the Court said: "The habeas corpus jurisdictional statute implements the *constitutional command* that the writ of habeas corpus be made available." (Emphasis added).

[279] *Cf. Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

[280] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 94 (1807). *See* Fay v. Noia, 372 U.S. 391, 409 (1963).

[281] Act of March 2, 1833, § 7, 4 Stat. 634 (federal officials imprisoned for enforcing federal law); Act of August 29, 1842, 5 Stat. 539 (foreign nationals detained by a

that legislation specifically empowered federal courts to inquire into the imprisonment of persons under state authority.[282] Pursuant to this authorization, the Court then expanded the use of the writ into a major instrument to reform procedural criminal law in both federal and state jurisdictions.

However, the question then arose as to what aspects of this broader *habeas* are protected against suspension. Noting that the statutory writ of habeas corpus has been expanded dramatically since the First Congress, the Court has written that it "assume[s] . . . that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."[283] This statement, however, appears to be in tension with the theory of congressionally defined *habeas* found in *Bollman*, unless one assumes that a *habeas* right, once created, cannot be diminished. The Court, however, in reviewing provisions of the Antiterrorism and Effective Death Penalty Act[284] that limited *habeas*, passed up an opportunity to delineate Congress's permissive authority over *habeas*, finding that none of the limitations to the writ in that statute raised questions of constitutional import.[285]

For practical purposes, the issue appears to have been resolved by *Boumediene v. Bush*,[286] in which the Court held that Congress's attempt to eliminate all federal *habeas* jurisdiction over "enemy combatant" detainees held at Guantanamo Bay[287] violated the Suspension Clause. Although the Court did not explicitly identify whether

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state in violation of a treaty). *See also* Bankruptcy Act of April 4, 1800,§ 38, 2 Stat. 19, 32 (*habeas corpus* for imprisoned debtor discharged in bankruptcy), repealed by Act of December 19, 1803, 2 Stat. 248.

[282] The act of February 5, 1867, 14 Stat. 385, conveyed power to federal courts "to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . ." On the law with respect to state prisoners prior to this statute, *see Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845); *cf.* Elkison v. Deliesseline, 8 Fed. Cas. 493 (No. 4366) (C.C.D.S.C. 1823) (Justice Johnson); *Ex parte* Cabrera, 4 Fed. Cas. 964 (No. 2278) (C.C.D. Pa. 1805) (Justice Washington).

[283] Felker v. Turpin, 518 U.S. 651, 663–64 (1996). *See* INS v. St. Cyr, 533 U.S. 289, 300–01 (2001) (leaving open the question of whether post-1789 legal developments are protected); Swain v. Pressley, 430 U.S. 372 (1977) (finding "no occasion" to define the contours of constitutional limits on congressional modification of the writ).

[284] Pub. L. 104–132, §§ 101–08, 110 Stat. 1214, 1217–26, amending, *inter alia*, 28 U.S.C. §§ 2244, 2253, 2254, 2255, and Fed. R. App. P. 22.

[285] Felker v. Turpin, 518 U.S. 651 (1996).

[286] 128 S. Ct. 2229 (2008).

[287] In Rasul v. Bush, 542 U.S. 466 (2004), the Court found that 28 U.S.C. § 2241, the federal *habeas* statute, applied to these detainees. Congress then removed all court jurisdiction over these detainees under the Detainee Treatment Act of 2005, Pub. L. 109–148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay)." After the Court decided in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), that the Detainee Treatment Act did not apply to detainees

the underlying right to *habeas* that was at issue arose from statute, common law, or the Constitution itself, it did decline to infer "too much" from the lack of historical examples of *habeas* being extended to enemy aliens held overseas.[288] In *Boumediene*, the Court instead emphasized a "functional" approach that considered the citizenship and status of the detainee, the adequacy of the process through which the status determination was made, the nature of the sites where apprehension and detention took place, and any practical obstacles inherent in resolving the prisoner's entitlement to the writ.[289]

In further determining that the procedures afforded to the detainees to challenge their detention in court were not adequate substitutes for *habeas*, the Court noted the heightened due process concerns when a detention is based principally on Executive Branch proceedings—here, Combatant Status Review Tribunals or (CSRTs)—rather than proceedings before a court of law.[290] The Court also expressed concern that the detentions had, in some cases, lasted as long as six years without significant judicial oversight.[291] The Court further noted the limitations at the CSRT stage on a detainee's ability to find and present evidence to challenge the government's case, the unavailability of assistance of counsel, the inability of a detainee to access certain classified government records which could contain critical allegations against him, and the admission of hearsay evidence. While reserving judgment as to whether the CSRT process itself comports with due process, the Court found that the appeals process for these decisions, assigned to the United States Court of Appeals for the District of Columbia, did not contain the means necessary to correct errors occurring in the CSRT process.[292]

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whose cases were pending at the time of enactment, it was amended by the Military Commissions Act of 2006, Pub. L. 109–366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[288] 128 S. Ct. at 2251.

[289] 128 S. Ct. at 2258, 2259.

[290] Under the Detainee Treatment Act, Pub. L. 109–148, Title X, Congress granted only a limited appeal right to determination made by the Executive Branch as to "(I) whether the status determination of [a] Combatant Status Review Tribunal . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C).

[291] 128 S. Ct. at 2263, 2275.

[292] The Court focused in particular on the inability of the reviewing court to admit and consider relevant exculpatory evidence that was not introduced in the prior proceeding. The Court also listed other potential constitutional infirmities in the review process, including the absence of provisions empowering the D.C. Circuit to order release from detention, and not permitting petitioners to challenge the President's authority to detain them indefinitely.

Sec. 1—Judicial Power, Courts, Judges

Habeas Corpus: The Process of the Writ.—A petition for a writ of *habeas corpus* is filed by or on behalf of a person in "custody," a concept which has been expanded so much that it is no longer restricted to actual physical detention in jail or prison.[293] The writ acts upon the custodian, not the prisoner, so the issue under the jurisdictional statute is whether the custodian is within the district court's jurisdiction.[294] Traditionally, the proceeding could not be used to secure an adjudication of a question which if determined in the petitioner's favor would not result in his immediate release, since a discharge from custody was the only function of the writ,[295] but this restraint too the Court has abandoned in an emphasis upon the statutory language directing the habeas court to "dispose of the matter as law and justice require."[296] Thus, even if a prisoner has been released from jail, the presence of collateral consequences flowing from his conviction gives the court jurisdiction to determine the constitutional validity of the conviction.[297]

Petitioners seeking federal *habeas* relief must first exhaust their state remedies, a limitation long settled in the case law and codified in 1948.[298] Prisoners are required to present their claims in

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[293] 28 U.S.C. §§ 2241(c), 2254(a). "Custody" does not mean one must be confined; a person on parole or probation is in custody. Jones v. Cunningham, 371 U.S. 236 (1963). A person on bail or on his own recognizance is in custody, Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 300–301 (1984); Lefkowitz v. Newsome, 420 U.S. 283, 291 n.8 (1975); Hensley v. Municipal Court, 411 U.S. 345 (1973), and Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), held that an inmate of an Alabama prison was also sufficiently in the custody of Kentucky authorities who had lodged a detainer with Alabama to obtain the prisoner upon his release.

[294] Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 494–95 (1973) (issue is whether "the custodian can be reached by service of process"). *See also* Rasul v. Bush, 542 U.S. 466 (2004) (federal district court for District of Columbia had jurisdiction of habeas petitions from prisoners held at U.S. Naval base at Guantanamo Bay, Cuba); Rumsfeld v. Padilla, 542 U.S. 426 (2004) (federal district court in New York lacks jurisdiction over prisoner being held in a naval brig in Charleston, South Carolina; the commander of the brig, not the Secretary of Defense, is the immediate custodian and proper respondent).

[295] McNally v. Hill, 293 U.S. 131 (1934); Parker v. Ellis, 362 U.S. 574 (1960).

[296] 28 U.S.C. § 2243. *See* Peyton v. Rowe, 391 U.S. 54 (1968). *See also* Maleng v. Cook, 490 U.S. 488 (1989).

[297] Carafas v. LaVallee, 391 U.S. 234 (1968), overruling Parker v. Ellis, 362 U.S. 574 (1960). In Peyton v. Rowe, 391 U.S. 54 (1968), the Court overruled McNally v. Hill, 293 U.S. 131 (1934), and held that a prisoner may attack on *habeas* the second of two consecutive sentences while still serving the first. *See also* Walker v. Wainwright, 390 U.S. 335 (1968) (prisoner may attack the first of two consecutive sentences although the only effect of a successful attack would be immediate confinement on the second sentence). Braden v. 30th Judicial Circuit Court , 410 U.S. 484 (1973), held that one sufficiently in custody of a state could use *habeas* to challenge the state's failure to bring him to trial on pending charges.

[298] 28 U.S.C. § 2254(b). See Preiser v. Rodriguez, 411 U.S. 475, 490–497 (1973), and id. at 500, 512–24 (Justice Brennan dissenting); Rose v. Lundy, 455 U.S. 509, 515–21 (1982). If a prisoner submits a petition with both exhausted and unexhausted claims, the *habeas* court must dismiss the entire petition. Rose v. Lundy, 455 U.S.

state court only once, either on appeal or collateral attack, and they need not return time and again to raise their issues before coming to federal court.[299] In addition, "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review. . . . A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration—not when the claim has been presented more than once." [300]

Although they were once required to petition the Supreme Court on *certiorari* to review directly their state convictions, prisoners have been relieved of this largely pointless exercise,[301] but, if the Supreme Court has taken and decided a case, then its judgment is conclusive in *habeas* on all issues of fact or law actually adjudicated.[302] A federal prisoner in a § 2255 proceeding will file his motion in the court that sentenced him;[303] a state prisoner in a federal *habeas* action may file either in the district of the court in which he was sentenced or in the district in which he is in custody.[304]

Habeas corpus is not a substitute for an appeal.[305] It is not a method to test ordinary procedural errors at trial or violations of state law but only to challenge alleged errors which if established would go to make the entire detention unlawful under federal law.[306] If, after appropriate proceedings, the *habeas* court finds that on the facts discovered and the law applied the prisoner is entitled to relief, it must grant it, ordinarily ordering the government to release the prisoner unless he is retried within a certain period.[307]

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at 518–519. Exhaustion first developed in cases brought by persons in state custody prior to any judgment. *Ex parte* Royall, 117 U.S. 241 (1886); Urquhart v. Brown, 205 U.S. 179 (1907).

[299] Brown v. Allen, 344 U.S. 443, 447–450 (1953); id. at 502 (Justice Frankfurter concurring); Castille v. Peoples, 489 U.S. 346, 350 (1989).

[300] Cone v. Bell, 556 U.S. ___, No. 07–1114, slip op. at 17, 18 (2009).

[301] Fay v. Noia, 372 U.S. 391, 435 (1963), overruling Darr v. Burford, 339 U.S. 200 (1950).

[302] 28 U.S.C. § 2244(c). But an affirmance of a conviction by an equally divided Court is not an adjudication on the merits. Neil v. Biggers, 409 U.S. 188 (1972).

[303] 28 U.S.C. § 2255.

[304] 28 U.S.C. § 2241(d). *Cf.* Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973), overruling Ahrens v. Clark, 335 U.S. 188 (1948), and holding that a petitioner may file in the district in which his custodian is located even though the prisoner may be located elsewhere.

[305] Glasgow v. Moyer, 225 U.S. 420, 428 (1912); Riddle v. Dyche, 262 U.S. 333, 335 (1923); Eagles v. United States ex rel. Samuels, 329 U.S. 304, 311 (1946). *But compare* Brown v. Allen, 344 U.S. 443, 558–560 (1953) (Justice Frankfurter dissenting in part).

[306] Estelle v. McGuire, 502 U.S. 62 (1991); Lewis v. Jeffers, 497 U.S. 764, 780 (1990); Pulley v. Harris, 465 U.S. 37, 41–42 (1984).

[307] 8 U.S.C. § 2244(b). See Whiteley v. Warden, 401 U.S. 560, 569 (1971); Irvin v. Dowd, 366 U.S. 717, 729 (1961).

Congressional Limitation of the Injunctive Power

Although some judicial dicta [308] support the idea of an inherent power of the federal courts sitting in equity to issue injunctions independently of statutory limitations, neither the course taken by Congress nor the specific rulings of the Supreme Court support any such principle. Congress has repeatedly exercised its power to limit the use of the injunction in federal courts. The first limitation on the equity jurisdiction of the federal courts is to be found in § 16 of the Judiciary Act of 1789, which provided that no equity suit should be maintained where there was a full and adequate remedy at law. Although this provision did no more than declare a pre-existing rule long applied in chancery courts,[309] it did assert the power of Congress to regulate the equity powers of the federal courts. The Act of March 2, 1793,[310] prohibited the issuance of any injunction by any court of the United States to stay proceedings in state courts except where such injunctions may be authorized by any law relating to bankruptcy proceedings. In subsequent statutes, Congress prohibited the issuance of injunctions in the federal courts to restrain the collection of taxes,[311] provided for a three-judge court as a prerequisite to the issuance of injunctions to restrain the enforcement of state statutes for unconstitutionality,[312] for enjoining federal statutes for unconstitutionality,[313] and for enjoining orders of the Interstate Commerce Commission,[314] limited the power to issue injunc-

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[308] In United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), Justice Brewer, speaking for the Court, approached a theory of inherent equity jurisdiction when he declared: "The principles of equity exist independently of and anterior to all Congressional legislation, and the statutes are either enunciations of those principles or limitations upon their application in particular cases." It should be emphasized, however, that the Court made no suggestion that it could apply pre-existing principles of equity without jurisdiction over the subject matter. Indeed, the inference is to the contrary. In a dissenting opinion in which Justices McKenna and Van Devanter joined, in Paine Lumber Co. v. Neal, 244 U.S. 459, 475 (1917), Justice Pitney contended that Article III, § 2, "had the effect of adopting equitable remedies in all cases arising under the Constitution and laws of the United States where such remedies are appropriate."

[309] Boyce's Executors v. Grundy, 28 U.S. (3 Pet.) 210 (1830).

[310] 1 Stat. 333, 28 U.S.C. § 2283.

[311] 26 U.S.C. § 7421(a).

[312] This provision was repealed in 1976, save for apportionment and districting suits and when otherwise required by an Act of Congress. Pub. L. 94–381, § 1, 90 Stat. 1119, and § 3, 28 U.S.C. § 2284. Congress occasionally provides for such courts, as in the Voting Rights Act, 42 U.S.C. §§ 1971, 1973c.

[313] Repealed by Pub. L. 94–381, § 2, 90 Stat. 1119 (1976). Congress occasionally provides for such courts now, in order to expedite Supreme Court consideration of constitutional challenges to critical federal laws. *See* Bowsher v. Synar, 478 U.S. 714, 719–721 (1986) (3-judge court and direct appeal to Supreme Court in the Balanced Budget and Emergency Deficit Control Act of 1985).

[314] Repealed by Pub. L. 93–584, § 7, 88 Stat. 1918.

tions restraining rate orders of state public utility commissions,[315] and the use of injunctions in labor disputes,[316] and placed a very rigid restriction on the power to enjoin orders of the Administrator under the Emergency Price Control Act.[317]

Perhaps pressing its powers further than prior legislation, Congress has enacted the Prison Litigation Reform Act of 1996.[318] Essentially, the law imposes a series of restrictions on judicial remedies in prison-conditions cases. Thus, courts may not issue prospective relief that extends beyond that necessary to correct the violation of a federal right that they have found, that is narrowly drawn, is the least intrusive, and that does not give attention to the adverse impact on public safety. Preliminary injunctive relief is limited by the same standards. Consent decrees may not be approved unless they are subject to the same conditions, meaning that the court must conduct a trial and find violations, thus cutting off consent decrees. If a decree was previously issued without regard to the standards now imposed, the defendant or intervenor is entitled to move to vacate it. No prospective relief is to last longer than two years if any party or intervenor so moves. Finally, a previously issued decree that does not conform to the new standards imposed by the Act is subject to termination upon the motion of the defendant or an intervenor. After a short period (30 or 60 days, depending on whether there is "good cause" for a 30-day extension), such a motion operates as an automatic stay of the prior decree pending the court's decision on the merits. The Court upheld the termination and automatic stay provisions in *Miller v. French*,[319] rejecting the contention that the automatic stay provision offends separation of powers principles by legislative revision of a final judgment. Rather, Congress merely established new standards for the enforcement of prospective relief, and the automatic stay provision "helps to implement the change in the law."[320] A number of constitutional challenges can be expected respecting Congress's power to limit federal judicial authority to remedy constitutional violations.

All of these restrictions have been sustained by the Supreme Court as constitutional and applied with varying degrees of thoroughness. The Court has made exceptions to the application of the

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[315] 28 U.S.C. § 1342.
[316] 29 U.S.C. §§ 52, 101–110.
[317] 56 Stat. 31, 204 (1942).
[318] The statute was part of an Omnibus Appropriations Act signed by the President on April 26, 1996. Pub. L. 104–134, §§ 801–10, 110 Stat. 1321–66—1321–77, amending 18 U.S.C. § 3626.
[319] 530 U.S. 327 (2000).
[320] 530 U.S. at 348.

prohibition against the stay of proceedings in state courts,[321] but it has on the whole adhered to the statute. The exceptions raise no constitutional issues, and the tendency has been alternately to contract and to expand the scope of the exceptions.[322]

In *Duplex Printing Press Co. v. Deering*,[323] the Supreme Court placed a narrow construction upon the labor provisions of the Clayton Act and thereby contributed in part to the more extensive restriction by Congress on the use of injunctions in labor disputes in the Norris-LaGuardia Act of 1932, which has not only been declared constitutional[324] but has been applied liberally[325] and in such a manner as to repudiate the notion of an inherent power to issue injunctions contrary to statutory provisions.

Injunctions Under the Emergency Price Control Act of 1942.—*Lockerty v. Phillips*[326] justifies the same conclusion. Here the validity of the special appeals procedure of the Emergency Price Control Act of 1942 was sustained. This act provided for a special Emergency Court of Appeals, which, subject to review by the Supreme Court, was given exclusive jurisdiction to determine the validity of regulations, orders, and price schedules issued by the Office of Price Administration. The Emergency Court and the Emergency Court alone was permitted to enjoin regulations or orders of OPA, and even it could enjoin such orders only after finding that the order was not in accordance with law or was arbitrary or capricious. The Emergency Court was expressly denied power to issue temporary restraining orders or interlocutory decrees, and in addition the effectiveness of any permanent injunction it might issue was to be postponed for thirty days. If review was sought in the Supreme Court by *certiorari*, effectiveness was to be postponed until final disposition. A unanimous Court, speaking through Chief Justice Stone, declared that there "is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court." All federal courts, other than the Supreme Court, it was asserted, derive their jurisdiction solely from the exercise of the authority to ordain and establish inferior courts conferred on Congress by Article III, § 1, of the Constitution. This power, which Congress

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[321] Freeman v. Howe, 65 U.S. (24 How.) 450 (1861); Gaines v. Fuentes, 92 U.S. 10 (1876); *Ex parte* Young, 209 U.S. 123 (1908).

[322] *See*, Anti-Injunction Statute, *infra*.

[323] 254 U.S. 443 (1921).

[324] Lauf v. E. G. Shinner & Co., 303 U.S. 323 (1938); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

[325] In addition to *Lauf* and *New Negro Alliance*, *see* Drivers' Union v. Valley Co., 311 U.S. 91, 100–103 (1940), *and compare* Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), *with* Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970).

[326] 319 U.S. 182 (1943).

is left free to exercise or not, was held to include the power "'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" [327] Although the Court avoided passing upon the constitutionality of the prohibition against interlocutory decrees, the language of the Court was otherwise broad enough to support it, as was the language of *Yakus v. United States*,[328] which sustained a different phase of the special procedure for appeals under the Emergency Price Control Act.[329]

The Rule-Making Power and Powers Over Process

Among the incidental powers of courts is that of making all necessary rules governing their process and practice and for the orderly conduct of their business.[330] However, this power too is derived from the statutes and cannot go beyond them. The landmark case is *Wayman v. Southard*,[331] which sustained the validity of the Process Acts of 1789 and 1792 as a valid exercise of authority under the necessary and proper clause. Although Chief Justice Marshall regarded the rule-making power as essentially legislative in nature, he ruled that Congress could delegate to the courts the power to vary minor regulations in the outlines marked out by the statute. Fifty-seven years later, in *Fink v. O'Neil*,[332] in which the United States sought to enforce by summary process the payment of a debt, the Supreme Court ruled that under the process acts the law of Wisconsin was the law of the United States, and hence the government was required to bring a suit, obtain a judgment, and cause execution to issue. Justice Matthews for a unanimous Court declared that the courts have "no inherent authority to take any one of these steps, except as it may have been conferred by the legislative department; for they can exercise no jurisdiction, except as the

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[327] 319 U.S. at 187 (quoting Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845). *See* South Carolina v. Katzenbach, 383 U.S. 301, 331–332 (1966), upholding a provision of the Voting Rights Act of 1965 that made the district court for the District of Columbia the only avenue of relief for States seeking to remove the coverage of the Act.

[328] 321 U.S. 414 (1944). *But compare* Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) (construing statute in way to avoid the constitutional issue raised in *Yakus*). In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), the Court held that, when judicial review of a deportation order had been precluded, due process required that the alien be allowed to make a collateral challenge to the use of that proceeding as an element of a subsequent criminal proceeding.

[329] Ch. 26, 56 Stat. 31, § 204 (1942).

[330] Washington-Southern Nav. Co. v. Baltimore & P.S.B.C. Co., 263 U.S. 629 (1924).

[331] 23 U.S. (10 Wheat.) 1 (1825).

[332] 106 U.S. 272, 280 (1882).

law confers and limits it."[333] Conceding, in 1934, the limited competence of legislative bodies to establish a comprehensive system of court procedure, and acknowledging the inherent power of courts to regulate the conduct of their business, Congress authorized the Supreme Court to prescribe rules for the lower federal courts not inconsistent with the Constitution and statutes.[334] Their operation being restricted, in conformity with the proviso attached to the congressional authorization, to matters of pleading and practice, the Federal Rules of Civil Procedure thus judicially promulgated neither affect the substantive rights of litigants[335] nor alter the jurisdiction[336] of federal courts and the venue of actions therein[337] and, thus circumscribed, have been upheld as valid.

Limitations to The Rule Making Power.—The principal function of court rules is that of regulating the practice of courts as regards forms, the operation and effect of process, and the mode and time of proceedings. However, rules are sometimes employed to state in convenient form principles of substantive law previously established by statutes or decisions. But no such rule "can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law." This rule is applicable equally to courts of law, equity, and admiralty, to rules prescribed by the Supreme Court for the guidance of lower courts, and to rules "which lower courts make for their own guidance under authority conferred."[338] As incident to the judicial power, courts of the United States possess inherent

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[333] *See* Miner v. Atlass, 363 U.S. 641 (1960), holding that a federal district court, sitting in admiralty, has no inherent power, independent of any statute or the Supreme Court's Admiralty Rules, to order the taking of deposition for the purpose of discovery. *See also* Harris v. Nelson, 394 U.S. 286 (1969), in which the Court found statutory authority in the "All Writs Statute" for a *habeas corpus* court to propound interrogatories.

[334] In the Act of June 19, 1934, 48 Stat. 1064, and contained in 28 U.S.C. § 2072, Congress, in authorizing promulgation of rules of civil procedure, reserved the power to examine and override or amend rules proposed pursuant to the act which it found to be contrary to its legislative policy. *See* Sibbach v. Wilson, 312 U.S. 1, 14–16 (1941). Congress also has authorized promulgation of rules of criminal procedure, *habeas*, evidence, admiralty, bankruptcy, and appellate procedure. *See* Hart & Wechsler (6th ed.), supra at 533–543 (discussing development of rules and citing secondary authority). Congress in the 1970s disagreed with the direction of proposed rules of evidence and of *habeas* practice, and, first postponing their effectiveness, enacted revised rules. Pub. L. 93–505, 88 Stat. 1926 (1974); Pub. L. 94–426, 90 Stat. 1334 (1976). On this and other actions, *see* Hart & Wechsler (6th ed.), supra.

[335] However, the abolition of old rights and the creation of new ones in the course of litigation conducted in conformance with these judicially prescribed federal rules has been sustained as against the contention of a violation of substantive rights. Sibbach v. Wilson, 312 U.S. 1, 14 (1941).

[336] *Cf.* United States v. Sherwood, 312 U.S. 584, 589–590 (1941).

[337] Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946).

[338] Washington-Southern Nav. Co. v. Baltimore & P.S.B.C. Co., 263 U.S. 629, 635, 636 (1924). It is not for the Supreme Court to prescribe how the discretion vested in a Court of Appeals should be exercised. As long as the latter court keeps within the

authority to supervise the conduct of their officers, parties, witnesses, counsel, and jurors by self-preserving rules for the protection of the rights of litigants and the orderly administration of justice.[339]

The courts of the United States possess inherent equitable powers over their process to prevent abuse, oppression, and injustice, and to protect their jurisdiction and officers in the protection of property in the custody of law.[340] Such powers are said to be essential to and inherent in the organization of courts of justice.[341] While the Court has not "precisely delineated the outer boundaries" of a federal court's inherent powers to manage its own internal affairs, the Court has recognized two limits on the exercise of such authority.[342] First, a court, in exercising its inherent powers over its own processes, must act reasonably in response to a specific problem or issue "confronting the court's fair administration of justice."[343] Second, any exercise of an inherent power cannot conflict with any express grant of or limitation on the district court's power as contained in a statute or rule, such as the Federal Rules of Civil Procedure.[344] In applying these two standards, the Court has recognized that a district court, as an exercise of its inherent powers, can in limited circumstances rescind an order to discharge a jury and recall that jury in a civil case.[345] The Supreme Court has also acknowledged that federal courts possess the inherent power to con-

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bounds of judicial discretion, its action is not reviewable. *In re* Burwell, 350 U.S. 521 (1956).

[339] McDonald v. Pless, 238 U.S. 264, 266 (1915); Griffin v. Thompson, 43 U.S. (2 How.) 244, 257 (1844). *See* Thomas v. Arn, 474 U.S. 140 (1985) (court of appeal rule conditioning appeal on having filed with the district court timely objections to a master's report). In Rea v. United States, 350 U.S. 214, 218 (1956), the Court, citing McNabb v. United States, 318 U.S. 332 (1943), asserted that this supervisory power extends to policing the requirements of the Court's rules with respect to the law enforcement practices of federal agents. *But compare* United States v. Payner, 447 U.S. 727 (1980).

[340] Gumbel v. Pitkin, 124 U.S. 131 (1888); Covell v. Heyman, 111 U.S. 176 (1884); Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1866).

[341] Eberly v. Moore, 65 U.S. (24 How.) 147 (1861); Arkadelphia Co. v. St. Louis S.W. Ry., 249 U.S. 134 (1919).

[342] *See* Dietz v. Bouldin, 579 U.S. ___, No. 15–458, slip op. at 4 (2016).

[343] *Id.* at 4–5.

[344] *Id.* at 4.

[345] *Id.* at 5–7 (acknowledging that while it is "reasonable" to allow a jury to reconvene after a formal discharge to correct an error and while such an exercise of authority does not conflict with a rule or statute, the exercise of the inherent power to rescind a discharge order needs to be "carefully circumscribed" to guarantee the existence of an impartial jury); *see also id.* at 9–10 (holding that a court, in exercising an inherent power to rescind a discharge order, must consider, among other factors, (1) the length of delay between discharge and recall; (2) whether jurors have spoken to anyone after discharge; (3) any reaction to the verdict in the courtroom; and (4) any access jurors may have had to outside materials after discharge). The rule provided in *Dietz* extends only to civil cases, as additional constitutional concerns—

trol other aspects of regulating internal court proceedings, including having the inherent power to (1) hear a motion *in limine*;[346] (2) dismiss a case for the convenience of the parties or witnesses because of the availability of an alternative forum[347]; and (3) stay proceedings pending the resolution of parallel actions in other courts.[348] The courts of the United States also possess inherent power to amend their records, correct the errors of the clerk or other court officers, and to rectify defects or omissions in their records even after the lapse of a term, subject, however, to the qualification that the power to amend records conveys no power to create a record or re-create one of which no evidence exists.[349]Nonetheless, while the exercise of an inherent power can, at times, allow for departures from even long-established, judicially crafted common law rules,[350] courts are not "generally free to discover new inherent powers that are contrary to civil practice as recognized in the common laws."[351]

Appointment of Referees, Masters, and Special Aids

The administration of insolvent enterprises, investigations into the reasonableness of public utility rates, and the performance of other judicial functions often require the special services of masters in chancery, referees, auditors, and other special aids. The practice of referring pending actions to a referee was held in *Heckers v. Fowler*[352] to be coequal with the organization of the federal courts. In the leading case of *Ex parte Peterson*,[353] a United States district court appointed an auditor with power to compel the attendance of witnesses and the production of testimony. The court authorized him to conduct a preliminary investigation of facts and file a report thereon

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namely, the attachment of the double jeopardy bar—may arise if a court were to recall a jury after discharge in a criminal case. *See id.* at 10.

[346] *See* Luce v. United States, 469 U.S. 38, 41 n.4 (1984). A motion *in limine* is a preliminary motion resolved by a court prior to trial and generally regards the admissibility of evidence. *See* BLACK'S LAW DICTIONARY 1171 (10th ed. 2014).

[347] *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–08 (1947). This doctrine is called *forum non conveniens*. *See* BLACK'S LAW DICTIONARY 770 (10th ed. 2014) (defining *forum non conveniens* as the "doctrine that an appropriate forum—even though competent under the law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place.").

[348] *See* Landis v. N. Am. Co., 299 U.S. 248, 254 (1936).

[349] Gagnon v. United States, 193 U.S. 451, 458 (1904).

[350] *See Dietz*, slip op. at 11 (assuming that, even if courts at common law lacked the inherent power to rescind a jury discharge order, a court's exercise of its inherent powers can depart from the common law). The term "common law" refers to the body of English law that was "adopted as the law of the American colonies and supplemented with local enactments and judgments." *See* BLACK'S LAW DICTIONARY 334 (10th ed. 2014).

[351] *See Dietz*, slip op. at 12.

[352] 69 U.S. (2 Wall.) 123, 128–129 (1864).

[353] 253 U.S. 300 (1920).

for the purpose of simplifying the issues for the jury. This action was neither authorized nor prohibited by statute. In sustaining the action of the district judge, Justice Brandeis, speaking for the Court, declared: "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. . . . This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause."[354] The power to appoint auditors by federal courts sitting in equity has been exercised from their very beginning, and here it was held that this power is the same whether the court sits in law or equity.

Power to Admit and Disbar Attorneys

Subject to general statutory qualifications for attorneys, the power of the federal courts to admit and disbar attorneys rests on the common law from which it was originally derived. According to Chief Justice Taney, it was well settled by the common law that "it rests exclusively with the Court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed." Such power, he made clear, however, "is not an arbitrary and despotic one, to be exercised at the pleasure of the Court, or from passion, prejudice, or personal hostility; but it is the duty of the Court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the Court, as the right and dignity of the Court itself."[355] The Test-Oath Act of July 2, 1862, which purported to exclude former Confederates from the practice of law in the federal courts, was invalidated in *Ex parte Garland*.[356] In the course of his opinion for the Court, Justice Field discussed generally the power to admit and disbar attorneys. The exercise of such a power, he declared, is judicial power. The attorney is an officer of the court, and though Congress may prescribe qualifications for the practice of law in the federal courts, it may not do so in such a way as to inflict punishment con-

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[354] 253 U.S. at 312.

[355] *Ex parte* Secombe, 60 U.S. (19 How.) 9, 13 (1857). In Frazier v. Heebe, 482 U.S. 641 (1987), the Court exercised its supervisory power to invalidate a district court rule respecting the admission of attorneys. *See In re* Sawyer, 360 U.S. 622 (1959), with reference to the extent to which counsel of record during a pending case may attribute error to the judiciary without being subject to professional discipline.

[356] 71 U.S. (4 Wall.) 333 (1867).

trary to the Constitution or to deprive a pardon of the President of its legal effect.[357]

SECTION 2. Clause 1. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party;—to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States,—between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

JUDICIAL POWER AND JURISDICTION-CASES AND CONTROVERSIES

The potential for abuse of judicial power was of concern to the Founding Fathers, leading them to establish limits on the circumstance in which the courts could consider cases. When, late in the Convention, a delegate proposed to extend the judicial power beyond the consideration of laws and treaties to include cases arising under the Constitution, Madison's notes captured these concerns. "Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the

[357] 71 U.S. at 378–80. Although a lawyer is admitted to practice in a federal court by way of admission to practice in a state court, he is not automatically sent out of the federal court by the same route, when "principles of right and justice" require otherwise. A determination of a state court that an accused practitioner should be disbarred is not conclusively binding on the federal courts. Theard v. United States, 354 U.S. 278 (1957), citing Selling v. Radford, 243 U.S. 46 (1917). *Cf. In re* Isserman, 345 U.S. 286, 288 (1953), where it was acknowledged that upon disbarment by a state court, Rule 2, par. 5 of the Rules of the Supreme Court imposes upon the attorney the burden of showing cause why he should not be disbarred in the latter, and upon his failure to meet that burden, the Supreme Court will "follow the finding of the state that the character requisite for membership in the bar is lacking." In 348 U.S. 1 (1954), Isserman's disbarment was set aside for reason of noncompliance with Rule 8 requiring concurrence of a majority of the Justices participating in order to sustain a disbarment. *See also In re* Disbarment of Crow, 359 U.S. 1007 (1959). For an extensive treatment of disbarment and American and English precedents thereon, *see Ex parte* Wall, 107 U.S. 265 (1883).

Constitution, and whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department." Consequently, "[t]he motion of Docr. Johnson was agreed to nem : con : it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature—." [358]

This passage, and the language of Article III, § 2, makes clear that the Framers did not intend for federal judges to roam at large in construing the Constitution and laws of the United States, but rather preferred and provided for resolution of disputes arising in a "judicial" manner. This interpretation is reenforced by the refusal of the Convention to assign the judges the extra-judicial functions which some members of the Convention—Madison and Wilson notably—conceived for them. Thus, for instance, the Convention four times voted down proposals for judges, along with executive branch officials, to sit on a council of revision with the power to veto laws passed by Congress.[359] A similar fate befell suggestions that the Chief Justice be a member of a privy council to assist the President [360] and that the President or either House of Congress be able to request advisory opinions of the Supreme Court.[361] The intent of the Framers in rejecting the latter proposal was early effectuated when the Justices declined a request of President Washington to tender him advice respecting legal issues growing out of United States neutrality between England and France in 1793.[362] Moreover, the refusal of the Justices to participate in a congressional plan for awarding veterans' pensions [363] bespoke a similar adherence to the restricted role of courts. These restrictions have been encapsulated in a series of principles or doctrines, the application of which determines whether an issue is met for judicial resolution and whether the parties raising it are entitled to have it judicially resolved. Constitutional restrictions are intertwined with prudential considerations in

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[358] 2 M. Farrand, supra at 430.

[359] The proposal was contained in the Virginia Plan. 1 id. at 21. For the four rejections, *see* id. at 97–104, 108–10, 138–40, 2 id. at 73–80, 298.

[360] Id. at 328–29, 342–44. Although a truncated version of the proposal was reported by the Committee on Detail, id. at 367, the Convention never took it up.

[361] Id. at 340–41. The proposal was referred to the Committee on Detail and never heard of again.

[362] 1 C. Warren, supra at 108–111; 3 Correspondence and Public Papers of John Jay 633–635 (H. Johnston ed., 1893); Hart & Wechsler (6th ed.), supra at 50–52.

[363] *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), discussed "Finality of Judgment as an Attribute of Judicial Power," supra.

the expression of these principles and doctrines, and it is seldom easy to separate out the two strands.[364]

The Two Classes of Cases and Controversies

By the terms of the foregoing section, the judicial power extends to nine classes of cases and controversies, which fall into two general groups. In the words of Chief Justice Marshall in *Cohens v. Virginia*:[365] "In the first, jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.' This cause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied, against the express words of the article. In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended 'controversies between two or more states, between a state and citizens of another state,' and 'between a state and foreign states, citizens or subjects.' If these be the parties, it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union."[366]

Judicial power is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision."[367] The meaning attached to the terms "cases" and "controversies"[368] determines therefore the extent of the judicial power as well as the capacity of the federal courts to receive jurisdiction. According to Chief Justice Marshall, judicial power is capable of acting only when the subject is submitted in a case and a case arises only when a party asserts his rights "in a form prescribed by law."[369] "By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention,

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[364] *See*, *e.g.*, Justice Brandeis dissenting in Ashwander v. TVA, 297 U.S. 288, 341, 345–348 (1936). *Cf.* Flast v. Cohen, 392 U.S. 83, 97 (1968); Rescue Army v. Municipal Court, 331 U.S. 549, 568–575 (1947).

[365] 19 U.S. (6 Wheat.) 264 (1821).

[366] 19 U.S. at 378.

[367] Muskrat v. United States, 219 U.S. 346, 356 (1911).

[368] The two terms may be used interchangeably, inasmuch as a "controversy," if distinguishable from a "case" at all, is so only because it is a less comprehensive word and includes only suits of a civil nature. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239 (1937).

[369] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the Court for adjudication."[370]

Chief Justice Hughes once essayed a definition, which, however, presents a substantial problem of labels. "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."[371] Of the "case" and "controversy" requirement, Chief Justice Warren admitted that "those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine."[372] Justice Frankfurter perhaps best captured the flavor of the "case" and "controversy" requirement by noting that it takes the "expert feel of lawyers" often to note it.[373]

From these quotations may be isolated several factors which, in one degree or another, go to make up a "case" and "controversy."

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[370] *In re* Pacific Ry. Comm'n, 32 F. 241, 255 (C.C. Calif. 1887) (Justice Field). *See also* Smith v. Adams, 130 U.S. 167, 173–174 (1889).

[371] Aetna Life Ins. Co. v. Haworth, 300 U.S. 229, 240–241 (1937). *Cf.* Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 242 (1952).

[372] Flast v. Cohen, 392 U.S. 83, 94–95 (1968).

[373] "The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a 'case or controversy.'" Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149, 150 (1951).

Adverse Litigants

The presence of adverse litigants with real interests to contend for is a standard which has been stressed in numerous cases,[374] and the requirement implicates a number of complementary factors making up a justiciable suit. The requirement was one of the decisive factors, if not the decisive one, in *Muskrat v. United States*,[375] in which the Court struck down a statute authorizing certain named Indians to bring a test suit against the United States to determine the validity of a law affecting the allocation of Indian lands. Attorney's fees of both sides were to be paid out of tribal funds deposited in the United States Treasury. "The judicial power," said the Court, ". . . is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. . . . It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question." [376]

Concerns regarding adversity also arise when the executive branch chooses to enforce, but not defend in court, federal statutes that it has concluded are unconstitutional. In *United States v. Windsor*,[377] the Court considered the Defense of Marriage Act (DOMA), which excludes same-sex partners from the definition of "spouse" as used

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[374] Lord v. Veazie, 49 U.S. (8 How.) 251 (1850); Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339 (1892); South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300 (1892); California v. San Pablo & T.R.R., 149 U.S. 308 (1893); Tregea v. Modesto Irrigation District, 164 U.S. 179 (1896); Lampasas v. Bell, 180 U.S. 276 (1901); Smith v. Indiana, 191 U.S. 138 (1903); Braxton County Court v. West Virginia, 208 U.S. 192 (1908); Muskrat v. United States, 219 U.S. 346 (1911); United States v. Johnson, 319 U.S. 302 (1943); Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971).

[375] 219 U.S. 346 (1911).

[376] 219 U.S. at 361–62. The Indians obtained the sought-after decision the following year by the simple expedient of suing to enjoin the Secretary of the Interior from enforcing the disputed statute. Gritts v. Fisher, 224 U.S. 640 (1912). Other cases have involved similar problems, but they resulted in decisions on the merits. *E.g.*, *Cherokee Intermarriage Cases*, 203 U.S. 76 (1906); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 455–463 (1899); South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966); *but see* id. at 357 (Justice Black dissenting). The principal effect of *Muskrat* was to put in doubt for several years the validity of any sort of declaratory judgment provision in federal law.

[377] 570 U.S. ___, No. 12–307, slip op. (2013).

in federal statutes.[378] DOMA was challenged by the surviving member of a same-sex couple (married in Canada), who was seeking to claim a spousal federal estate tax exemption. Although the executive branch continued to deny the exemption, it also declined to defend the statute based on doubts as to whether it would survive scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause. Consequently, the Bipartisan Legal Advisory Group of the House of Representatives (BLAG)[379] intervened to defend the statute. The Court held that, despite the decision not to defend, the failure of the United States to provide a refund to the taxpayer constituted an injury sufficient to establish standing, leaving only "prudential" limitations on judicial review at issue.[380] The Court concluded that the "prudential" concerns were outweighed by the presence of BLAG to offer an adversarial presentation of the issue, the legal uncertainty that would be caused by dismissing the case, and the concern that the executive branch's assessment of the constitutionality of the statute would be immunized from judicial review.[381]

Collusive and Feigned Suits.—Adverse litigants are lacking in those suits in which two parties have gotten together to bring a friendly suit to settle a question of interest to them. Thus, in *Lord v. Veazie*,[382] the latter had executed a deed to the former warranting that he had certain rights claimed by a third person, and suit was instituted to decide the "dispute." Declaring that "the whole proceeding was in contempt of the court, and highly reprehensible," the Court observed: "The contract set out in the pleadings was made for the purpose of instituting this suit. . . . The plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to the suit. . . . And their conduct is the more objectionable, because they have brought up the question upon a statement of facts agreed upon between themselves . . . and upon a judgment pro forma entered by their mutual consent, without any actual judicial decision. . . ."[383] "Whenever," said the Court in another case, "in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involv-

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[378] Pub. L. 104–199, § 3, 110 Stat. 2419, 1 U.S.C. § 7.

[379] The BLAG is a standing body of the House, created by rule, consisting of members of the House Leadership and authorized to direct the House Office of the General Counsel to file suit on its behalf in state or federal court.

[380] *Windsor*, slip op. at 6–7.

[381] *Id.* at 10–13.

[382] 49 U.S. (8 How.) 251 (1850).

[383] 49 U.S. at 254–55.

ing the validity of any act of any legislature, State or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must . . . determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." [384] Yet several widely known constitutional decisions have been rendered in cases in which friendly parties contrived to have the actions brought and in which the suits were supervised and financed by one side.[385] There are also instances in which there may not be in fact an adverse party at certain stages; that is, instances when the parties do not actually disagree, but where the Supreme Court and the lower courts are empowered to adjudicate.[386]

Stockholder Suits.—Moreover, adversity in parties has often been found in suits by stockholders against their corporation in which the constitutionality of a statute or a government action is drawn in question, even though one may suspect that the interests of plaintiffs and defendant are not all that dissimilar. Thus, in *Pollock v. Farmers' Loan & Trust Co.*,[387] the Court sustained the jurisdiction of a district court which had enjoined the company from paying an income tax even though the suit was brought by a stockholder against the company, thereby circumventing a statute which forbade the maintenance in any court of a suit to restrain the collection of any tax.[388] Subsequently, the Court sustained jurisdiction in cases brought by

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[384] Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 345 (1892).

[385] *E.g.*, Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796); Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); *cf.* 1 C. Warren, supra at 147, 392–95; 2 id. at 279–82. In Powell v. Texas, 392 U.S. 514 (1968), the Court adjudicated on the merits a challenge to the constitutionality of criminal treatment of chronic alcoholics although the findings of the trial court, agreed to by the parties, appeared rather to be "the premises of a syllogism transparently designed to bring this case" within the confines of an earlier enunciated constitutional principle. But adversity arguably still existed.

[386] Examples are naturalization cases, Tutun v. United States, 270 U.S. 568 (1926), entry of judgment by default or on a plea of guilty, *In re* Metropolitan Ry. Receivership, 208 U.S. 90 (1908), and consideration by the Court of cases in which the Solicitor General confesses error below. *Cf.* Young v. United States, 315 U.S. 257, 258–259 (1942); Casey v. United States, 343 U.S. 808 (1952); Rosengart v. Laird, 404 U.S. 908 (1972) (Justice White dissenting). *See also* Sibron v. New York, 392 U.S. 40, 58–59 (1968).

[387] 157 U.S. 429 (1895). The first injunction suit by a stockholder to restrain a corporation from paying a tax was apparently Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1856). *See also* Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916).

[388] *Cf.* Cheatham v. United States, 92 U.S. 85 (1875); Snyder v. Marks, 109 U.S. 189 (1883).

a stockholder to restrain a company from investing its funds in farm loan bonds issued by federal land banks [389] and by preferred stockholders against a utility company and the TVA to enjoin the performance of contracts between the company and TVA on the ground that the statute creating it was unconstitutional.[390] Perhaps most notorious was *Carter v. Carter Coal Co.*,[391] in which the president of the company brought suit against the company and its officials, among whom was Carter's father, a vice president of the company, and in which the Court entertained the suit and decided the case on the merits.[392]

Substantial Interest: Standing

Perhaps the most important element of the requirement of adverse parties may be found in the "complexities and vagaries" of the standing doctrine. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." [393] The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." [394] This practical conception of standing has now given way to a primary emphasis upon separation of powers as the guide. "[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that require-

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[389] Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

[390] Ashwander v. TVA, 297 U.S. 288 (1936). *See* id. at 341 (Justice Brandeis dissenting in part).

[391] 298 U.S. 238 (1936).

[392] Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645, 667–668 (1948) (detailing the framing of the suit).

[393] Flast v. Cohen, 392 U.S. 83, 99 (1968). This characterization is not the view of the present Court; *see* Allen v. Wright, 468 U.S. 737, 750, 752, 755–56, 759–61 (1984). In taxpayer suits, it is appropriate to look to the substantive issues to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated. Id. at 102; United States v. Richardson, 418 U.S. 166, 174–75 (1974); Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 78–79 (1978).

[394] Baker v. Carr, 369 U.S. 186, 204 (1962). That persons or organizations have a personal, ideological interest sufficiently strong to create adverseness is not alone enough to confer standing; rather, the adverseness is the consequence of one being able to satisfy the Article III requisite of injury in fact. Valley Forge Christian College v. Americans United, 454 U.S. 464, 482–486 (1982); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 225–226 (1974). Nor is the fact that, if plaintiffs have no standing to sue, no one would have standing, a sufficient basis for finding standing. Id. at 227.

ment are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" [395]

Standing as a doctrine is composed of both constitutional and prudential restraints on the power of the federal courts to render decisions,[396] and is almost exclusively concerned with such public law questions as determinations of constitutionality and review of administrative or other governmental action.[397] As such, it is often interpreted according to the prevailing philosophies of judicial activism and restraint, and narrowly or broadly in terms of the viewed desirability of access to the courts by persons seeking to challenge legislation or other governmental action. The trend in the 1960s was to broaden access; in the 1970s, 1980s, and 1990s, it was to narrow access by stiffening the requirements of standing, although Court majorities were not entirely consistent. The major difficulty in setting forth the standards is that the Court's generalizations and the results it achieves are often at variance.[398]

The standing rules apply to actions brought in *federal* courts, and they have no direct application to actions brought in state courts.[399]

Generalized or Widespread Injuries.—Persons do not have standing to sue in federal court when all they can claim is that they have an interest or have suffered an injury that is shared by

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[395] Allen v. Wright, 468 U.S. 737, 750 (1984) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). All the standards relating to whether a plaintiff is entitled to adjudication of his claims must be evaluated "by reference to the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity,' . . . and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" Id. at 752 (quoting, respectively, Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 345 (1892), and Flast v. Cohen, 392 U.S. 83, 97 (1968)). For the strengthening of the separation-of-powers barrier to standing, *see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60, 571–78 (1992).

[396] *E.g.*, Valley Forge Christian College v. Americans United, 454 U.S. 464, 471–476 (1982); Allen v. Wright, 468 U.S. 737, 750–751 (1984).

[397] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 60 (4th ed. 1983).

[398] "[T]he concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court . . . [and] this very fact is probably proof that the concept cannot be reduced to a one-sentence or one-paragraph definition." Valley Forge Christian College v. Americans United, 454 U.S. 464, 475 (1982). "Generalizations about standing to sue are largely worthless as such." Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 151 (1970). For extensive consideration of the doctrine, *see* Hart & Wechsler (6th ed.), supra at 100–183.

[399] Thus, state courts could adjudicate a case brought by a person who had no standing in the federal sense. If the plaintiff lost, he would have no recourse in the U.S. Supreme Court, because of his lack of standing, Tileston v. Ullman, 318 U.S. 44 (1943); Doremus v. Board of Education, 342 U.S. 429 (1952), but if plaintiff prevailed, the losing defendant might be able to appeal, because he might be able to assert sufficient injury to his federal interests. ASARCO Inc. v. Kadish, 490 U.S. 605 (1989).

all members of the public. Thus, a group of persons suing as citizens to litigate a contention that membership of Members of Congress in the military reserves constituted a violation of Article I, § 6, cl. 2, was denied standing.[400] "The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract. . . . [The] claimed nonobservance [of the clause], standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance." [401]

Notwithstanding that a generalized injury that all citizens share is insufficient to confer standing, where a plaintiff alleges that the defendant's action injures him in "a concrete and personal way," "it does not matter how many [other] persons have [also] been injured. . . . [W]here a harm is concrete, though widely shared, the Court has found injury in fact." [402]

Taxpayer Suits.—Save for a narrow exception, standing is also lacking when a litigant attempts to sue to contest governmental action that he claims injures him as a taxpayer. In *Frothingham v. Mellon*,[403] the Court denied standing to a taxpayer suing to restrain disbursements of federal money to those states that chose to participate in a program to reduce maternal and infant mortality; her claim was that Congress lacked power to appropriate funds for those purposes and that the appropriations would increase her taxes in future years in an unconstitutional manner. Noting that a federal taxpayer's "interest in the moneys of the Treasury . . . is comparatively minute and indeterminate" and that "the effect upon future taxation, of any payment out of the funds . . . [is] remote, fluctuating and uncertain," the Court ruled that plaintiff had failed to allege the type of "direct injury" necessary to confer standing.[404]

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[400] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

[401] 418 U.S. at 217. *See also* United States v. Richardson, 418 U.S. 166, 176–77 (1974); Valley Forge Christian College v. Americans United, 454 U.S. 464, 483 (1982); Allen v. Wright, 468 U.S. 737, 754 (1984); Whitmore v. Arkansas, 495 U.S. 149 (1990); Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–77 (1992); Lance v. Coffman, 549 U.S. 437, 441 (2007) (per curiam). *Cf. Ex parte* Levitt, 302 U.S. 633 (1937); Laird v. Tatum, 408 U.S. 1 (1972).

[402] Massachusetts v. Environmental Protection Agency, 549 U.S. 497, 517, 522 (2007) (internal quotation marks omitted). In this case, "EPA maintain[ed] that because greenhouse gas emissions inflict widespread harm, the doctrine of standing presents an insuperable jurisdictional obstacle." The Court, however, found that "EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'" Id. at 517, 521.

[403] Usually cited as Massachusetts v. Mellon, 262 U.S. 447 (1923), the two suits having been consolidated.

[404] 262 U.S. at 487, 488. In Hein v. Freedom from Religion Foundation, Inc., 127 S. Ct. 2553, 2559 (2007), the Court added that, "if every federal taxpayer could sue to challenge any Government expenditure, the federal courts would cease to function as courts of law and would be cast in the role of general complaint bureaus."

Taxpayers were found to have standing, however, in *Flast v. Cohen*,[405] to contest the expenditure of federal moneys to assist religious-affiliated organizations. The Court asserted that the answer to the question whether taxpayers have standing depends on whether the circumstances of each case demonstrate that there is a logical nexus between the status asserted and the claim sought to be adjudicated. First, there must be a logical link between the status of taxpayer and the type of legislative enactment attacked; this means that a taxpayer must allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Article I, § 8, rather than also of incidental expenditure of funds in the administration of an essentially regulatory statute. Second, there must be a logical nexus between the status of taxpayer and the precise nature of the constitutional infringement alleged; this means that the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the taxing and spending power, rather than simply arguing that the enactment is generally beyond the powers delegated to Congress. Both *Frothingham* and *Flast* met the first test, because they attacked a spending program. *Flast* met the second test, because the Establishment Clause of the First Amendment operates as a specific limitation upon the exercise of the taxing and spending power, but *Frothingham* did not, having alleged only that the Tenth Amendment had been exceeded. The Court reserved the question whether other specific limitations constrain the Taxing and Spending Clause in the same manner as the Establishment Clause.[406]

Since *Flast*, the Court has refused to expand taxpayer standing. Litigants seeking standing as taxpayers to challenge legislation permitting the CIA to withhold from the public detailed information about its expenditures as a violation of Article I, § 9, cl. 7, and to challenge certain Members of Congress from holding commissions in the reserves as a violation of Article I, § 6, cl. 2, were denied standing, in the former cases because their challenge was not to an exercise of the taxing and spending power and in the latter because their challenge was not to legislation enacted under Article I, § 8, but rather was to executive action in permitting Members to maintain their reserve status.[407] An organization promoting church-state separation was denied standing to challenge an execu-

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[405] 392 U.S. 83 (1968).

[406] 392 U.S. at 105.

[407] United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227–28 (1974). *Richardson* in its generalized grievance constriction does not apply when Congress confers standing on litigants. FEC v. Akins, 524 U.S. 11 (1998). When Congress confers standing on "any person aggrieved" by the denial of information required to be furnished them, it matters

tive decision to donate surplus federal property to a church-related college, both because the contest was to executive action under valid legislation and because the property transfer was not pursuant to a Taxing and Spending Clause exercise but was taken under the Property Clause of Article IV, § 3, cl. 2.[408] The Court also refused to create an exception for Commerce Clause violations to the general prohibition on taxpayer standing.[409]

Most recently, a Court plurality held that, even in Establishment Clause cases, there is no taxpayer standing where the expenditure of funds that is challenged was not specifically authorized by Congress, but came from general executive branch appropriations.[410]

Where expenditures "were not expressly authorized or mandated by any specific congressional enactment," a lawsuit challenging them "is not directed at an exercise of congressional power and thus lacks the requisite 'logical nexus' between taxpayer status 'and the type of legislative enactment attacked.'"[411]

Local taxpayers attacking local expenditures have generally been permitted more leeway than federal taxpayers insofar as standing

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not that most people will be entitled and will thus suffer a "generalized grievance," the statutory entitlement is sufficient. Id. at 21–25.

[408] Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982). In Lewis v. Casey, 518 U.S. 343, 353 n.3 (1996), the Court played down the "serious and adversarial treatment" prong of standing and strongly reasserted the separation-of-powers value of keeping courts within traditional bounds. The Court again took this approach in Hein v. Freedom From Religion Foundation, Inc., 127 S. Ct. 2553, 2569 (2007), finding that "*Flast* itself gave too little weight to [separation-of-powers] concerns."

[409] DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 347–49 (2006) (standing denied to taxpayer claim that state tax credit given to vehicle manufacturer violated the Commerce Clause).

[410] Hein v. Freedom From Religion Foundation, Inc., 127 S. Ct. 2553, 2559 (2007). This decision does not affect Establishment Clause cases in which the plaintiff can allege a personal injury. A plaintiff who challenges a government display of a religious object, for example, need not sue as a taxpayer but may have standing "by alleging that he has undertaken a 'special burden' or has altered his behavior to avoid the object that gives him offense. . . . [I]t is enough for standing purposes that a plaintiff allege that he 'must come into direct and unwelcome contact with the religious display to participate fully as [a] citizen[ ] . . . and to fulfill . . . legal obligations.'" Books v. Elkhart County, 401 F.3d 857, 861 (7th Cir. 2005). In Van Orden v. Perry, 545 U.S. 677, 682 (2005), the Court, without mentioning standing, noted that the plaintiff "has encountered the Ten Commandments monument during his frequent visits to the [Texas State] Capitol grounds. His visits are typically for the purpose of using the law library in the Supreme Court building, which is located just northwest of the Capitol building."

[411] 127 S. Ct. at 2568 (citations omitted). Justices Scalia and Thomas concurred in the judgment but would have overruled *Flast*. Justice Souter, joined by three other justices, dissented because he saw no logic in the distinction the plurality drew, as the plurality did not and could not have suggested that the taxpayers in *Hein* "have any less stake in the outcome than the taxpayers in *Flast*." Id. at 2584.

is concerned. Thus, in *Everson v. Board of Education*,[412] a municipal taxpayer was found to have standing to challenge the use of public funds for transportation of pupils to parochial schools.[413] But, in *Doremus v. Board of Education*,[414] the Court refused an appeal from a state court for lack of standing of a taxpayer challenging Bible reading in the classroom. The taxpayer's action in *Doremus*, the Court wrote, "is not a direct dollars-and-cents injury but is a religious difference."[415] This rationale was similar to the spending program-regulatory program distinction of *Flast*. But, even a dollar-and-cents injury resulting from a state spending program will apparently not constitute a *direct* dollars-and-cents injury. The Court in *Doremus* wrote that a taxpayer challenging either a federal or a state statute "must be able to show not only that the statute is invalid but that he has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."[416]

Constitutional Standards: Injury in Fact, Causation, and Redressability.—Although the Court has been inconsistent, it has now settled upon the rule that, "at an irreducible minimum," the constitutional requisites under Article III for the existence of standing are that the plaintiff must personally have: 1) suffered some actual or threatened injury; 2) that injury can fairly be traced to the challenged action of the defendant; and 3) that the injury is likely to be redressed by a favorable decision.[417]

For a time, the actual or threatened injury requirement noted above included an additional requirement that such injury be the product of "a wrong which directly results in the violation of a le-

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[412] 330 U.S. 1 (1947). In DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 349 (2006), the Court held that a plaintiff's status as a *municipal* taxpayer does not give him standing to challenge a *state* tax credit.

[413] *See* Bradfield v. Roberts, 175 U.S. 291, 295 (1899); Crampton v. Zabriskie, 101 U.S. 601 (1880); Heim v. McCall, 239 U.S. 175 (1915). *See also* Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952); Engel v. Vitale, 370 U.S. 421 (1962) (plaintiffs suing as parents and taxpayers).

[414] 342 U.S. 429 (1952). *Compare* Alder v. Board of Education, 342 U.S. 485 (1952). *See also* Richardson v. Ramirez, 418 U.S. 24 (1974).

[415] 342 U.S. at 434.

[416] 342 U.S. at 434, quoting Massachusetts v. Mellon, 262 U.S. 447, 488 (1923); quoted with approval in DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 345 (2006).

[417] Valley Forge Christian College v. Americans United, 454 U.S. 464, 472 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Monsanto Co. v. Geerston Seed Farms, 561 U.S. ___, No. 09–475, slip op. (2010). *But see* United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), a class action case in which the majority opinion appears to reduce the significance of the personal stake requirement. Id. at 404 n.11, reserving full consideration of the dissent's argument at 401 n.1, 420–21.

gal right."[418] In other words, the injury needs to be "one of property, one arising out of contract, one protected against tortuous invasion, or one founded in a statute which confers a privilege."[419] It became apparent, however, that the "legal right" language was "demonstrably circular: if the plaintiff is given standing to assert his claims, his interest is legally protected; if he is denied standing, his interest is not legally protected."[420] Despite this test, the observable tendency of the Court was to find standing in cases which were grounded in injuries far removed from property rights.[421]

In any event, the "legal rights" language has now been dispensed with. Rejection of this doctrine occurred in two administrative law cases in which the Court announced that parties had standing when they suffered "injury in fact" to some interest, "economic or otherwise," that is arguably within the zone of interest to be protected or regulated by the statute or constitutional provision in question.[422] Political,[423] environmental, aesthetic, and social interests, when impaired, now afford a basis for making constitutional attacks upon governmental action.[424] "But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create

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[418] Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938). *Cf.* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 151–152 (1951) (Justice Frankfurter concurring). *But see* Frost v. Corporation Comm'n, 278 U.S. 515 (1929); City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958).

[419] Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137–138 (1939).

[420] C. Wright, *supra* at 65–66.

[421] *E.g.*, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (indirect injury to organization and members by governmental maintenance of list of subversive organizations); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (same); Abington School Dist. v. Schempp, 374 U.S. 203, 224 n.9 (1963) (parents and school children challenging school prayers); McGowan v. Maryland, 366 U.S. 420, 430–431 (1961) (merchants challenging Sunday closing laws); Baker v. Carr, 369 U.S. 186, 204–208 (1962) (voting rights).

[422] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). The "zone of interest" test is a prudential rather than constitutional standard. The Court sometimes uses other language to characterize this test. Thus, in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992), the Court refers to injury in fact as "an invasion of a legally protected interest," but in context, here and in the cases cited, it is clear the reference is to any interest that the Court finds protectable under the Constitution, statutes, or regulations.

[423] Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999).

[424] *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871, 885 (1991); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72–74 (1978); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 261–263 (1977); Singleton v. Wulff, 428 U.S. 106, 112–113 (1976); Warth v. Seldin, 422 U.S. 490, 498–499 (1975); O'Shea v. Littleton, 414 U.S. 488, 493–494 (1974); Linda R.S. v. Richard D., 410 U.S. 614, 617–618 (1973).

Article III standing."[425] Moreover, while Congress has the power to define injuries and articulate "chains of causation" that will give rise to a case or controversy, a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize a person to sue to vindicate that right."[426]

The breadth of the "injury-in-fact" concept may be discerned in a series of cases involving the right of private parties to bring actions under the Fair Housing Act to challenge alleged discriminatory practices, even where discriminatory action was not directed against parties to a suit, Theses case held that the subjective and intangible interests of enjoying the benefits of living in integrated communities were sufficient to permit them to attack actions that threatened or harmed those interests.[427] Or, there is important case of *FEC v. Akins*,[428] which addresses the ability of Congress to confer standing and to remove prudential constraints on judicial review. Congress had afforded persons access to Commission information and had authorized "any person aggrieved" by the actions of the FEC to sue. The Court found "injury-in-fact" present where plaintiff voters alleged that the Federal Election Commission had denied them information respecting an organization that might or might not be a political action committee.[429] Another area where the Court has interpreted this term liberally are injuries to the interests of individuals and associations of individuals who use the environment, affording them standing to challenge actions that threatened those environmental conditions.[430]

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[425] Summers v. Earth Island Institute, 129 S. Ct. 1142, 1151 (2009) (environmental group that was denied the opportunity to file comments with the United States Forest Service regarding a Forest Service action denied standing for lack of concrete injury). On the other hand, where a party has successfully established a legal right, a threat to the enforcement of that legal right gives rise to a separate legal injury. Salazar v. Buono, 559 U.S. ___, No. 08–472, slip op. at 8 (2010) (plurality opinion) ("A party that obtains a judgment in its favor acquires a 'judicially cognizable' interest in ensuring compliance with that judgment").

[426] *See* Spokeo, Inc. v. Robins, 578 U.S. ___, No. 13–1339, slip op. at 9 (2016). The phrase "chains of causation" originates from Justice Kennedy's concurrence in *Defenders of Wildlife*, in which he states that in order to properly define an injury that can be vindicated in an Article III court, "Congress must . . . identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." 504 U.S. at 580 (Kennedy, J., concurring).

[427] Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

[428] 524 U.S. 11 (1998).

[429] That the injury was widely shared did not make the claimed injury a "generalized grievance," the Court held, but rather in this case, as in others, the denial of the statutory right was found to be a concrete harm to each member of the class.

[430] Sierra Club v. Morton, 405 U.S. 727, 735 (1972); United States v. SCRAP, 412 U.S. 669, 687–88 (1973); Duke Power Co. v. Carolina Environmental Study Group,

Even citizens who bring *qui tam* actions under the False Claims Act—actions that entitle the plaintiff ("relator") to a percentage of any civil penalty assessed for violation—have been held to have standing, on the theory that the government has assigned a portion of its damages claim to the plaintiff, and the assignee of a claim has standing to assert the injury in fact suffered by the assignor.[431] Citing this holding and historical precedent, the Court upheld the standing of an assignee who had promised to remit the proceeds of the litigation to the assignor.[432] The Court noted that "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians at litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; and so forth."[433]

Beyond these historical anomalies, the Court has indicated that, for parties lacking an individualized injury to seek judicial relief on behalf of an absent third party, there generally must be some sort of agency relationship between the litigant and the injured party. In *Hollingsworth v. Perry*,[434] the Court considered the question of whether the official proponents of Proposition 8,[435] a state measure that amended the California Constitution to define marriage as a

438 U.S. 59, 72–74 (1978). But the Court has refused to credit general allegations of injury untied to specific governmental actions. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). *SCRAP* in particular is disfavored as too broad. Lujan v. Defenders of Wildlife, 504 U.S. at 566. Moreover, unlike the situation in taxpayer suits, there is no requirement of a nexus between the injuries claimed and the constitutional rights asserted. In *Duke Power*, 438 U.S. at 78–81, claimed environmental and health injuries grew out of construction and operation of nuclear power plants but were not directly related to the governmental action challenged, the limitation of liability and indemnification in cases of nuclear accident. *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 264–65 (1991); Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167 (2000).

[431] Vermont Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000). The Court confirmed its conclusion by reference to the long tradition of *qui tam* actions, since the Constitution's restriction of judicial power to "cases" and "controversies" has been interpreted to mean "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." Id. at 774.

[432] Sprint Communications Co., L.P. v. APCC Services, Inc., 128 S. Ct. 2531 (2008) (payphone operators had assigned claims against long-distance carriers to "aggregators" to sue on their behalf). Chief Justice Roberts, in a dissent joined by Justices Scalia, Thomas, and Alito, stated that the aggregators lacked standing because they "have nothing to gain from their lawsuit." Id. at 2549.

[433] 128 S. Ct. at 2543.

[434] 570 U.S. ___, No. 12–144, slip op. (2013).

[435] Under the relevant provisions of the California Elections Code , "'[p]roponents of an initiative or referendum measure' means . . . the elector or electors who submit the text of a proposed initiative or referendum to the Attorney General . . . ; or . . . the person or persons who publish a notice of intention to circulate petitions, or, where publication is not required, who file petitions with the elections official or legislative body."CAL. ELEC. CODE § 342 (West 2003).

union between a man and a woman, had standing to defend the constitutionality of the provision on appeal. After rejecting the argument that the proponents of Proposition 8 had a particularized injury in their own right,[436] the Court considered the argument that the plaintiffs were formally authorized through some sort of official act to litigate on behalf of the State of California.

Although the proponents were authorized by California law to argue in defense of the proposition,[437] the Court found that this authorization, by itself, was insufficient to create standing. The Court expressed concern that, although California law authorized the proponents to argue in favor of Proposition 8, the proponents were still acting as private individuals, not as state officials[438] or as agents that were controlled by the state.[439] Because the proponents did not act as agents or official representatives of the State of California in defending the law, the Court held that the proponents only possessed a generalized interest in arguing in defense of Proposition 8 and, therefore, lacked standing to appeal an adverse district court decision.

Nonetheless, the Court has been wary in constitutional cases of granting standing to persons who alleged threats or harm to interests that they shared with the larger community of people at large; it is unclear whether this rule against airing "generalized grievances" through the courts[440] has a constitutional or a prudential basis.[441]

In a number of cases, particularly where a plaintiff seeks prospective relief, such as an injunction or declaratory relief, the Supreme Court has strictly construed the nature of the injury-in-fact

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[436] *Hollingsworth*, slip op. at 7–9.

[437] California's governor and state and local officials declined to defend Proposition 8 in federal district court, so the proponents were allowed to intervene. After the federal district court held the proposition unconstitutional, the government officials elected not to appeal, so the proponents did. The federal court of appeals certified a question to the California Supreme Court on whether the official proponents of the proposition had the authority to assert the state's interest in defending the constitutionality of Proposition 8, *see* Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (2011), which was answered in the affirmative, *see* Perry v. Brown, 265 P.3d 1002, 1007 (Cal. 2011).

[438] *See Hollingsworth*, slip op. at 12 (citing Karcher v. May, 484 U.S. 72 (1987)).

[439] The Court noted that an essential feature of agency is the principal's right to control the agent's actions. Here, the proponents "decided what arguments to make and how to make them." *Id.* at 15. The Court also noted that the proponents were not elected to their position, took no oath, had no fiduciary duty to the people of California, and were not subject to removal. *Id.*

[440] *See* "Generalized or Widespread Injuries," *supra*.

[441] *Compare* Warth v. Seldin, 422 U.S. 490, 499–500 (1975) (prudential), *with* Valley Forge Christian College v. Americans United, 454 U.S. 464, 485, 490 (1982) (apparently constitutional). In Allen v. Wright, 468 U.S. 737, 751 (1984), it is again prudential.

necessary to obtain such judicial remedy. First, the Court has been hesitant to assume jurisdiction over matters in which the plaintiff seeking relief cannot articulate a concrete harm.[442] For example, in *Laird v. Tatum*, the Court held that plaintiffs challenging a domestic surveillance program lacked standing when their alleged injury stemmed from a "subjective chill," as opposed to a "claim of specific present objective harm or a threat of specific future harm."[443] And in *Spokeo, Inc. v. Robins*, the Court explained that a concrete injury requires that an injury must "actually exist" or there must be a "risk of real harm," such that a plaintiff who alleges nothing more than a bare procedural violation of a federal statute cannot satisfy the injury-in-fact requirement.[444] Second, the Court has required plaintiffs seeking equitable relief to demonstrate that the risk of a future injury is of a sufficient likelihood; past injury is insufficient to create standing to seek prospective relief.[445] The Court has articulated the threshold of likelihood of future injury necessary for standing in such cases in various ways,[446] generally refusing to find standing where the risk of future injury is speculative.[447]

More recently, in *Clapper v. Amnesty International USA*, the Court held that, in order to demonstrate Article III standing, a plaintiff seeking injunctive relief must prove that the future injury, which is the basis for the relief sought, must be "certainly impending"; a

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[442] *See generally* Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) ("[D]eprivation of a . . . right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing."); *see, e.g.,* Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 73 (1974) (plaintiffs alleged that Treasury regulations would require them to report currency transactions, but made no additional allegation that any of the information required by the Secretary will tend to incriminate them).

[443] 408 U.S. 1, 14–15 (1972).

[444] *See* 578 U.S. ___, No. 13–1339, slip op. at 8–10 (2016). Nonetheless, the *Spokeo* Court cautioned that "intangible" injuries, such as violations of constitutional rights like freedom of speech or the free exercise of religion, can amount to "concrete" injuries. *Id.* at 8–9 ("'Concrete' is not, however, necessarily synonymous with 'tangible.'"). In determining whether an intangible harm amounts to a concrete injury, the Court noted that history and the judgment of Congress can inform a court's conclusion about whether a particular plaintiff has standing. *Id.* at 9.

[445] *See* City of Los Angeles v. Lyons, 461 U.S. 95, 110 (1983) (holding that a victim of a police chokehold seeking injunctive relief was unable to show sufficient likelihood of recurrence as to him).

[446] *See* Davis v. FEC, 554 U.S. 724, 734 (2008) ("[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct.").

[447] *See, e.g.,* Rizzo v. Goode, 423 U.S. 362, 372 (1976) ("[I]ndividual respondents' claim to 'real and immediate' injury rests not upon what the named petitioners might do to them in the future . . . but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures."); O'Shea v. Littleton, 414 U.S. 488, 497 (1974) (no "sufficient immediacy and reality" to allegations of future injury that rest on the likelihood that plaintiffs will again be subjected to racially discriminatory enforcement and administration of criminal justice).

showing of a "reasonable likelihood" of future injury is insufficient.[448] Moreover, the Court in *Amnesty International* held that a plaintiff cannot satisfy the imminence requirement by merely "manufacturing" costs incurred in response to speculative, non-imminent injuries.[449]

A year after *Amnesty International*, the Court in *Susan B. Anthony List v. Driehaus*[450] reaffirmed that preenforcement challenges to a statute can occur "under circumstances that render the threatened enforcement sufficiently imminent."[451] In *Susan B. Anthony List*, an organization planning to disseminate a political advertisement, which was previously the source of an administrative complaint under an Ohio law prohibiting making false statements about a candidate or a candidate's record during a political campaign, challenged the prospective enforcement of that law. The Court, in finding that the plaintiff's future injury was certainly impending, relied on the history of prior enforcement of the law with respect to the advertisement, coupled with the facts that "any per-

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[448] 568 U.S. ___, No. 11–205, slip op. at 10–11 (2013). In adopting a "certainly impending" standard, the five-Justice majority observed that earlier cases had not uniformly required literal certainty. *Id.* at 15 n.5. *Amnesty International*'s limitation on standing may be particularly notable in certain contexts, such as national security, where evidence necessary to prove a "certainly impending" injury may be unavailable to a plaintiff.

[449] *Id.* at 10–11. In *Amnesty International*, defense attorneys, human rights organizations, and others challenged prospective, covert surveillance of the communications of certain foreign nationals abroad as authorized by the FISA Amendments Act of 2008. The Court found the plaintiffs lacked standing because they failed to show, inter alia, what the government's targeting practices would be, what legal authority the government would use to monitor any of the plaintiffs' overseas clients or contacts, whether any approved surveillance would be successful, and whether the plaintiffs' own communications from within the United States would incidentally be acquired. *Id.* at 11–15. Moreover, the Court rejected that the plaintiffs could demonstrate an injury-in-fact as a result of costs that they had incurred to guard against a reasonable fear of future harm (such as, travel expenses to conduct in person conversations abroad in lieu of conducting less costly electronic communications that might be more susceptible to surveillance) because those costs were the result of an injury that was not certainly impending. *Id.* at 16–19.

[450] 573 U.S. ___, No. 13–193, slip op. (2014).

[451] Relying on *Amnesty International*, the Court in *Susan B. Anthony List* held that an allegation of future injury may suffice if the injury is "'certainly impending' or there is a 'substantial risk' that the harm may occur." *Id.* at 8 (quoting *Amnesty Int'l*, slip op. at 10, 15, n.5). Interestingly, while previous Court decisions have viewed preenforcement challenges as a question of "ripeness," *see* Article III: Section 2. Judicial Power and Jurisdiction: Clause 1. Cases and Controversies; Grants of Jurisdiction: Judicial Power and Jurisdiction-Cases and Controversies: The Requirements of a Real Interest: Ripeness, *infra*, *Susan B. Anthony List* held that the doctrine of ripeness ultimately "boil[s] down to the same question" as standing and, therefore, viewed the case through the lens of Article III standing. *Susan B. Anthony List*, slip op. at 7 n.5.

son" could file a complaint under the law, and any threat of enforcement of the law could burden political speech.[452]

Of increasing importance are causation and redressability, the second and third elements of standing, recently developed and held to be of constitutional requisite. There must be a causal connection between the injury and the conduct complained of; that is, the Court insists that the plaintiff show that "but for" the action, she would not have been injured. And the Court has insisted that there must be a "substantial likelihood" that the relief sought from the court if granted would remedy the harm.[453] Thus, poor people who had been denied service at certain hospitals were held to lack standing to challenge IRS policy of extending tax benefits to hospitals that did not serve indigents, because they could not show that alteration of the tax policy would cause the hospitals to alter their policies and treat them.[454] Or, low-income persons seeking the invalidation of a town's restrictive zoning ordinance were held to lack standing, because they had failed to allege with sufficient particularity that the complained-of injury—inability to obtain adequate housing within their means—was fairly attributable to the ordinance instead of to other factors, so that voiding of the ordinance might not have any effect upon their ability to find affordable housing.[455] Similarly, the

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[452] *Susan B. Anthony List*, slip op. at 14–17 (internal quotation marks omitted).

[453] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 595 (1992); *see also* ASARCO Inc. v. Kadish, 490 U.S. 605, 612–617 (1989) (plurality opinion); Allen v. Wright, 468 U.S. 737, 751 (1984); *see, e.g.,* Wittman v. Personhuballah, 578 U.S. ___, No. 14–1504, slip op. at 4–5 (2016) (dismissing a challenge to a redistricting plan by a congressman, who conceded that regardless of the result of the case he would not run in his old district, as any injury suffered could not be redressed by a favorable ruling). Although "causation" and "redressability" were initially articulated as two facets of a single requirement, the Court now views them as separate inquiries. *See* Sprint Commc'ns Co., L.P. v. APCC Servs., 554 U.S. 269, 286–87 (2008). To the extent there is a difference, it is that the former examines a causal connection between the allegedly unlawful conduct and the injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested. *Id.*

[454] Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976). *See also* Linda R.S. v. Richard D., 410 U.S. 614 (1973) (mother of illegitimate child lacked standing to contest prosecutorial policy of using child support laws to coerce support of legitimate children only, as it was "only speculative" that prosecution of father would result in support rather than jailing). However, in Summers v. Earth Island Inst., 129 S. Ct. 1142, 1151 (2009), the Court noted in dicta that, if a plaintiff is denied a procedural right, the fact that the right had been accorded by Congress "can loosen the strictures of the redressability prong of our standing inquiry." Thus, standing may exist even though a court's enforcing a procedural right accorded by Congress, such as the right to comment on a proposed federal agency action, will not guarantee the plaintiff success in persuading the agency to adopt the plaintiff's point of view.

[455] Warth v. Seldin, 422 U.S. 490 (1975). In Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264 (1974), however, a person who alleged he was seeking housing in the community and that he would qualify if the

link between fully integrated public schools and allegedly lax administration of tax policy permitting benefits to discriminatory private schools was deemed too tenuous, the harm flowing from private actors not before the courts and the speculative possibility that directing denial of benefits would result in any minority child being admitted to a school.[456]

But the Court did permit plaintiffs to attack the constitutionality of a law limiting the liability of private utilities in the event of nuclear accidents and providing for indemnification, on a showing that "but for" the passage of the law there was a "substantial likelihood," based upon industry testimony and other material in the legislative history, that the nuclear power plants would not be constructed and that therefore the environmental and aesthetic harm alleged by plaintiffs would not occur; thus, a voiding of the law would likely relieve the plaintiffs of the complained of injuries.[457] Operation of these requirements makes difficult but not impossible the establishment of standing by persons indirectly injured by governmental action, that is, action taken as to third parties that is alleged to have injured the claimants as a consequence.[458]

In a case permitting a plaintiff contractors' association to challenge an affirmative-action, set-aside program, the Court seemed to depart from several restrictive standing decisions in which it had held that the claims of attempted litigants were too "speculative" or too "contingent."[459] The association had sued, alleging that many of its members "regularly bid on and perform construction work" for the city and that they would have bid on the set-aside contracts but for the restrictions. The Court found the association had stand-

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organizational plaintiff were not inhibited by allegedly racially discriminatory zoning laws from constructing housing for low-income persons like himself was held to have shown a "substantial probability" that voiding of the ordinance would benefit him.

[456] Allen v. Wright, 468 U.S. 737 (1984). *But see* Heckler v. Mathews, 465 U.S. 728 (1984), where persons denied equal treatment in conferral of benefits were held to have standing to challenge the treatment, although a judicial order could only have terminated benefits to the favored class. In that event, members would have secured relief in the form of equal treatment, even if they did not receive benefits. *See also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Orr v. Orr, 440 U.S. 268, 271–273 (1979).

[457] Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 72–78 1978). The likelihood of relief in some cases appears to be rather speculative at best. *E.g.*, Bryant v. Yellen, 447 U.S. 352, 366–368 (1980); Watt v. Energy Action Educational Foundation, 454 U.S. 151, 160–162 (1981).

[458] Warth v. Seldin, 422 U.S. 490, 505 (1975); Allen v. Wright, 468 U.S. 737, 756–761 (1984).

[459] Thus, it appears that had the Court applied its standard in the current case, the results would have been different in such cases as Linda R. S. v. Richard D., 410 U.S. 614 (1973); Warth v. Seldin, 422 U.S. 490 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Allen v. Wright, 468 U.S. 737 (1984).

ing, because certain prior cases under the Equal Protection Clause established a relevant proposition. "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."[460] The association, therefore, established standing by alleging that its members were able and ready to bid on contracts but that a discriminatory policy prevented them from doing so on an equal basis.[461]

Redressability can be present in an environmental "citizen suit" even when the remedy is civil penalties payable to the government. The civil penalties, the Court explained, "carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [plaintiffs'] injuries by abating current violations and preventing future ones."[462]

Prudential Standing Rules.—Even when Article III constitutional standing rules have been satisfied, the Court has held that principles of prudence may counsel the judiciary to refuse to adjudicate some claims.[463] The rule is "not meant to be especially demanding,"[464] and it is clear that the Court feels free to disregard any of these prudential rules when it sees fit.[465] Congress is also free to legislate away prudential restraints and confer standing to the extent permitted by Article III.[466] The Court has identified three

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[460] Northeastern Fla. Ch. of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993). The Court derived the proposition from another set of cases. Turner v. Fouche, 396 U.S. 346 (1970); Clements v. Fashing, 457 U.S. 957 (1982); Regents of the Univ. of California v. Bakke, 438 U.S. 265, 281 n.14 (1978).

[461] 508 U.S. at 666. *But see*, in the context of ripeness, Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993), in which the Court, over the dissent's reliance on *Jacksonville*, 509 U.S. at 81–82, denied the relevance of its distinction between entitlement to a benefit and equal treatment. Id. at 58 n.19.

[462] Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 187 (2000).

[463] Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99–100 (1979) ("a plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim").

[464] Match-E-Be-Nash-She-Wish Band Of Pottawatomi Indians v. Patchak, 567 U.S. ___, No. 11–246, slip op. at 15 (2010).

[465] Warth v. Seldin, 422 U.S. 490, 500–501 (1975); Craig v. Boren, 429 U.S. 190, 193–194 (1976).

[466] "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even

rules as prudential ones,[467] only one of which has been a significant factor in the jurisprudence of standing. The first two rules are that the plaintiff's interest, to which she asserts an injury, must come within the "zone of interest" arguably protected by the constitutional provision or statute in question[468] and that plaintiffs may not air "generalized grievances" shared by all or a large class of citizens.[469] The important rule concerns the ability of a plaintiff to represent the constitutional rights of third parties not before the court.

Standing to Assert the Rights of Others.—Usually, one may assert only one's interest in the litigation and not challenge the constitutionality of a statute or a governmental action because it infringes the protectable rights of someone else.[470] In *Tileston v. Ull-*

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if it is an injury shared by a large class of other possible litigants." Warth v. Seldin, 422 U.S. 490, 501 (1975). That is, the actual or threatened injury required may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." Linda R.S. v. Richard D., 410 U.S. 614, 617 n. 3 (1973); O'Shea v. Littleton, 414 U.S. 488, 493 n.2 (1974). Examples include United States v. SCRAP, 412 U.S. 669 (1973); Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972); Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979). *See also* Buckley v. Valeo, 424 U.S. 1, 8 n.4, 11–12 (1976). For a good example of the congressionally created interest and the injury to it, *see* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–75 (1982) (Fair Housing Act created right to truthful information on availability of housing; black tester's right injured through false information, but white tester not injured because he received truthful information). It is clear, however, that the Court will impose separation-of-powers restraints on the power of Congress to create interests to which injury would give standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 571–78 (1992). Justice Scalia, who wrote the opinion in *Defenders of Wildlife*, reiterated the separation-of-powers objection to congressional conferral of standing in FEC v. Akins, 524 U.S. 11, 29, 36 (1998) (alleged infringement of President's "take care" obligation), but this time in dissent; the Court did not advert to this objection in finding that Congress had provided for standing based on denial of information to which the plaintiffs, as voters, were entitled.

[467] Valley Forge Christian College v. Americans United, 454 U.S. 464, 474–75 (1982); Allen v. Wright, 468 U.S. 737, 751 (1984).

[468] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 153 (1970); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39 n.19 (1976); Valley Forge Christian College v. Americans United, 454 U.S. 464, 475 (1982); Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987). *See also* Bennett v. Spear, 520 U.S. 154 (1997). The Court has indicated that

[469] United States v. Richardson, 418 U.S. 166, 173, 174–76 (1974); Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80 (1978); Allen v. Wright, 468 U.S. 737, 751 (1984). In United States v. SCRAP, 412 U.S. 669, 687–88 (1973), a congressional conferral case, the Court agreed that the interest asserted was one shared by all, but the Court has disparaged SCRAP, asserting that it "surely went to the very outer limit of the law," Whitmore v. Arkansas, 495 U.S. 149, 159 (1990).

[470] United States v. Raines, 362 U.S. 17, 21–23 (1960); Yazoo & M.V.R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912). *Cf.* Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986).

man,[471] an early round in the attack on a state anti-contraceptive law, a doctor sued, charging that he was prevented from giving his patients needed birth control advice. The Court held that he had no standing; no right of his was infringed, and he could not represent the interests of his patients.

There are several exceptions to the general rule, however, that make generalization misleading. Many cases allow standing to third parties who demonstrate a requisite degree of injury to themselves and if under the circumstances the injured parties whom they seek to represent would likely not be able to assert their rights. Thus, in *Barrows v. Jackson*,[472] a white defendant who was being sued for damages for breach of a restrictive covenant directed against African Americans—and therefore able to show injury in liability for damages—was held to have standing to assert the rights of the class of persons whose constitutional rights were infringed.[473] Similarly, the Court has permitted defendants who have been convicted under state law—giving them the requisite injury—to assert the rights of those persons not before the Court whose rights would be adversely affected through enforcement of the law in question.[474] In fact, the Court has permitted persons who would be subject to future prosecution or future legal action—thus satisfying the injury requirement—to represent the rights of third parties with whom the challenged law has interfered with a relationship.[475]

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[471] 318 U.S. 44 (1943). *See* Warth v. Seldin, 422 U.S. 490, 508–510 (1975) (challenged law did not adversely affect plaintiffs and did not adversely affect a relationship between them and persons they sought to represent).

[472] 346 U.S. 249 (1953).

[473] *See also* Buchanan v. Warley, 245 U.S. 60 (1917) (white plaintiff suing for specific performance of a contract to convey property to a black had standing to contest constitutionality of ordinance barring sale of property to "colored" people, inasmuch as black defendant was relying on ordinance as his defense); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (white assignor of membership in discriminatory private club could raise rights of black assignee in seeking injunction against expulsion from club).

[474] *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (persons convicted of prescribing contraceptives for married persons and as accessories to crime of using contraceptives have standing to raise constitutional rights of patients with whom they had a professional relationship; although use of contraceptives was a crime, it was doubtful any married couple would be prosecuted so that they could challenge the statute); Eisenstadt v. Baird, 405 U.S. 438 (1972) (advocate of contraception convicted of giving device to unmarried woman had standing to assert rights of unmarried persons denied access; unmarried persons were not subject to prosecution and were thus impaired in their ability to gain a forum to assert their rights).

[475] *E.g.*, Doe v. Bolton, 410 U.S. 179, 188–189 (1973) (doctors have standing to challenge abortion statute since it operates directly against them and they should not have to await criminal prosecution to challenge it); Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976) (same); Craig v. Boren, 429 U.S. 190, 192–197 (1976) (licensed beer distributor could contest sex discriminatory alcohol laws because it operated on him, he suffered injury in fact, and was "obvious claimant" to raise issue);

It is also possible, of course, that one's own rights can be affected by action directed at someone from another group.[476] A substantial dispute was occasioned in *Singleton v. Wulff*,[477] over the standing of doctors who were denied Medicaid funds for the performance of abortions not "medically indicated" to assert the rights of absent women to compensated abortions. All the Justices thought the Court should be hesitant to resolve a controversy on the basis of the rights of third parties, but they divided with respect to the standards exceptions. Four Justices favored a lenient standard, permitting third party representation when there is a close, perhaps confidential, relationship between the litigant and the third parties and when there is some genuine obstacle to third party assertion of their rights; four Justices would have permitted a litigant to assert the rights of third parties only when government directly interdicted the relationship between the litigant and the third parties through the criminal process and when litigation by the third parties is in all practicable terms impossible.[478] Following *Wulff*, the Court emphasized the close attorney-client relationship in holding that a lawyer had standing to assert his client's Sixth Amendment right to counsel in challenging application of a drug-forfeiture law to deprive the client of the means of paying counsel.[479] However, a "next friend" whose stake in the outcome is only speculative must establish that the real party in interest is unable to litigate his own

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Carey v. Population Services Int'l, 431 U.S. 678, 682–84 (1977) (vendor of contraceptives had standing to bring action to challenge law limiting distribution). Older cases support the proposition. *See*, *e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Bantam Books v. Sullivan, 372 U.S. 58 (1963).

[476] Holland v. Illinois, 493 U.S. 474 (1990) (white defendant had standing to raise a Sixth Amendment challenge to exclusion of blacks from his jury, since defendant had a right to a jury comprised of a fair cross section of the community). The Court has expanded the rights of non-minority defendants to challenge the exclusion of minorities from petit and grand juries, both on the basis of the injury-in-fact to defendants and because the standards for being able to assert the rights of third parties were met. Powers v. Ohio, 499 U.S. 400 (1991); Campbell v. Louisiana, 523 U.S. 392 (1998).

[477] 428 U.S. 106 (1976).

[478] *Compare* 428 U.S. at 112–18 (Justices Blackmun, Brennan, White, and Marshall), *with* id. at 123–31 (Justices Powell, Stewart, and Rehnquist, and Chief Justice Burger). Justice Stevens concurred with the former four Justices on narrower grounds limited to this case.

[479] Caplin & Drysdale v. United States, 491 U.S. 617, 623–624 n.3 (1989). *Caplin & Drysdale* was distinguished in Kowalski v. Tesmer, 543 U.S. 123, 131 (2004), the Court's finding that attorneys seeking to represent hypothetical indigent clients in challenging procedures for appointing appellate counsel had "no relationship at all" with such potential clients, let alone a "close" relationship.

cause because of mental incapacity, lack of access to courts, or other disability.[480]

A variant of the general rule is that one may not assert the unconstitutionality of a statute in other respects when the statute is constitutional as to him.[481] Again, the exceptions may be more important than the rule. Thus, an overly broad statute, especially one that regulates speech and press, may be considered on its face rather than as applied, and a defendant to whom the statute constitutionally applies may thereby be enabled to assert its unconstitutionality.[482]

Legal challenges based upon the allocation of governmental authority under the Constitution, *e.g.*, separation of powers and federalism, are generally based on a showing of injury to the disadvantaged governmental institution. The prohibition on litigating the injuries of others, however, does not appear to bar individuals from bringing these suits. For instance, injured private parties routinely bring separation-of-powers challenges,[483] even though one could argue that the injury in question is actually upon the authority of the affected branch of government. Then, in *Bond v. United States*,[484] the Court considered whether a criminal defendant could raise federalism arguments based on state prerogatives under the Tenth Amendment.[485] There, the Court held that individuals could raise Tenth Amendment challenges, because states are not the "sole intended beneficiaries of federalism," and an individual has a "direct

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[480] Whitmore v. Arkansas, 495 U.S. 149 (1990) (death row inmate's challenge to death penalty imposed on a fellow inmate who knowingly, intelligently, and voluntarily chose not to appeal cannot be pursued).

[481] United States v. Raines, 362 U.S. 17, 21–24 (1960).

[482] Lanzetta v. New Jersey, 306 U.S. 451 (1939); Thornhill v. Alabama, 310 U.S. 88 (1940); Winters v. New York, 333 U.S. 507 (1948); Dombrowski v. Pfister, 380 U.S. 479, 486–487 (1965); Gooding v. Wilson, 405 U.S. 518 (1972); Lewis v. City of New Orleans, 415 U.S. 130 (1974). The Court has narrowed its overbreadth doctrine, though not consistently, in recent years. Broadrick v. Oklahoma, 413 U.S. 601 (1973); Young v. American Mini Theatres, 427 U.S. 50, 59–60 (1976), and id. at 73 (Justice Powell concurring); New York v. Ferber, 458 U.S. 747, 771–773 (1982). But the exception as stated in the text remains strong. *E.g.*, Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984); Virginia v. American Booksellers Ass'n, 484 U.S. 383 (1988).

[483] *See, e.g.,* INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986);Clinton v. City of New York, 524 U.S. 417 (1998).

[484] 564 U.S. ___, No. 09–1227, slip op. (2011).

[485] The defendant, in an attempt to harass a woman who had become impregnated by the defendant's husband, had placed caustic substances on objects the woman was likely to touch. The defendant was convicted under 18 U.S.C. § 229, a broad prohibition against the use of harmful chemicals, enacted as part of the implementation of the 1997 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. The specifics of the defendant's Tenth Amendment argument was not before the Court.

interest in objecting to laws that upset the constitutional balance between the National Government and the States . . . ."[486]

Organizational Standing.—Organizations do not have standing as such to represent their particular concept of the public interest,[487] but organizations have been permitted to assert the rights of their members.[488] In *Hunt v. Washington State Apple Advertising Comm'n*,[489] the Court promulgated elaborate standards, holding that an organization or association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." Similar considerations arise in the context of class actions, in which the Court holds that a named representative with a justiciable claim for relief is necessary when the action is filed and when the class is certified, but that following class certification there need be only a live controversy with the class, provided the adequacy of the representation is sufficient.[490]

Standing of States to Represent Their Citizens.—The right of a state to sue as *parens patriae*, in behalf of its citizens, has long been recognized.[491] No state, however, may be *parens patriae* of its citizens "as against the Federal Government."[492] But a state may

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[486] 564 U.S. ___, No. 09–1227, slip op. at 10.

[487] Sierra Club v. Morton, 401 U.S. 727 (1972). An organization may, of course, sue to redress injuries to itself. *See* Havens Realty Co. v. Coleman, 455 U.S. 363, 378–379 (1982).

[488] *E.g.*, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

[489] 432 U.S. 333, 343 (1977). The organization here was not a voluntary membership entity but a state agency charged with furthering the interests of apple growers who were assessed annual sums to support the Commission. Id. at 341–45. *See also* Warth v. Seldin, 422 U.S. 490, 510–17 (1975); Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39–40 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 263–264 (1977); Harris v. McRae, 448 U.S. 297, 321 (1980); International Union, UAW v. Brock, 477 U.S. 274 (1986).

[490] United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980). *Geraghty* was a mootness case.

[491] Louisiana v. Texas, 176 U.S. 1 (1900) (recognizing the propriety of *parens patriae* suits but denying it in this particular suit).

[492] Massachusetts v. Mellon, 262 U.S. 447, 485–486 (1923). *But see* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (denying such standing to raise two constitutional claims against the United States but deciding a third); Oregon v. Mitchell, 400 U.S. 112, 117 n.1 (1970) (no question raised about standing or jurisdiction; claims adjudicated).

sue to protect the its citizens from environmental harm,[493] and to enjoin other states and private parties from engaging in actions harmful to the economic or other well-being of it citizens.[494] The state must be more than a nominal party without a real interest of its own, merely representing the interests of particular citizens who cannot represent themselves;[495] it must articulate an interest apart from those of private parties that partakes of a "quasi-sovereign interest" in the health and well-being, both physical and economic, of its residents in general, although there are suggestions that the restrictive definition grows out of the Court's wish to constrain its original jurisdiction and may not fit such suits brought in the lower federal courts.[496]

Standing of Members of Congress.—The lower federal courts, principally the D.C. Circuit, developed a body of law governing the standing of Members of Congress, as Members, to bring court actions, usually to challenge actions of the executive branch.[497] When the Supreme Court finally addressed the issue on the merits in 1997, however, it severely curtailed Member standing.[498] All agree that a

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[493] Missouri v. Illinois, 180 U.S. 208 (1901); Kansas v. Colorado, 206 U.S. 46 (1907); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); New York v. New Jersey, 256 U.S. 296 (1921); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); North Dakota v. Minnesota, 263 U.S. 365 (1923).

[494] Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) (antitrust); Maryland v. Louisiana, 451 U.S. 725, 737–739 (1981) (discriminatory state taxation of natural gas shipped to out-of-state customers); Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982) (discrimination by growers against Puerto Rican migrant workers and denial of Commonwealth's opportunity to participate in federal employment service laws).

[495] New Hampshire v. Louisiana, 108 U.S. 76 (1883); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938); Oklahoma v. Atchison, T. & S.F. Ry., 220 U.S. 277 (1911); North Dakota v. Minnesota, 263 U.S. 365, 376 (1923); Pennsylvania v. New Jersey, 426 U.S. 660 (1976).

[496] Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607–08 (1982). Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, argued that the Court's standards should apply only in original actions and not in actions filed in federal district courts, where, they contended, the prerogative of a state to bring suit on behalf of its citizens should be commensurate with the ability of private organizations to do so. Id. at 610. The Court admitted that different considerations might apply between original actions and district court suits. Id. at 603 n.12.

[497] Member standing has not fared well in other Circuits. Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975).

[498] Raines v. Byrd, 521 U.S. 811 (1997). In Coleman v. Miller, 307 U.S. 433, 438 (1939), the Court had recognized that legislators can in some instances suffer an injury in respect to the effectiveness of their votes that will confer standing. In Pressler v. Blumenthal, 434 U.S. 1028 (1978), *affg*, 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), the Court affirmed a decision in which the lower court had found Member standing but had then decided against the Member on the merits. The "unexplicated affirmance" could have reflected disagreement with the lower court on standing or agreement with it on the merits. Note Justice Rehnquist's appended statement. Id.

legislator "receives no special consideration in the standing inquiry," [499] and that he, along with every other person attempting to invoke the aid of a federal court, must show "injury in fact" as a predicate to standing.[500] What such injury in fact may consist of, however, has been the subject of debate.

A suit by Members for an injunction against continued prosecution of the Indochina war was held maintainable on the theory that if the court found the President's actions to be beyond his constitutional authority, the holding would have a distinct and significant bearing upon the Members' duties to vote appropriations and other supportive legislation and to consider impeachment.[501] The breadth of this rationale was disapproved in subsequent cases. The leading decision is *Kennedy v. Sampson*,[502] in which a Member was held to have standing to contest the alleged improper use of a pocket veto to prevent from becoming law a bill the Senator had voted for. Thus, Congressmen were held to have a derivative rather than direct interest in protecting their votes, which was sufficient for standing purposes, when some "legislative disenfranchisement" occurred.[503] In a comprehensive assessment of its position, the Circuit distinguished between (1) a diminution in congressional influence resulting from executive action that nullifies a specific congressional vote or opportunity to vote in an objectively verifiable manner, which will constitute injury in fact, and (2) a diminution in a legislator's effectiveness, subjectively judged by him, resulting from executive ac-

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In Goldwater v. Carter, 444 U.S. 996 (1979), the Court vacated a decision, in which the lower Court had found Member standing, and directed dismissal, but none of the Justices who addressed the question of standing. The opportunity to consider Member standing was strongly pressed in Burke v. Barnes, 479 U.S. 361 (1987), but the expiration of the law in issue mooted the case.

[499] Reuss v. Balles, 584 F.2d 461, 466 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 997 (1978).

[500] *See, e.g.,* Wittman v. Personhuballah, 578 U.S. ___, No. 14–1504, slip op. at 6 (2016) (concluding that two congressmen could not invoke federal jurisdiction to challenge a redistricting plan when they could not provide any evidence that the plan might injure their reelection chances).

[501] Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

[502] 511 F.2d 430 (D.C. Cir. 1974). In Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985), the court again found standing by Members challenging a pocket veto, but the Supreme Court dismissed the appeal as moot. *Sub nom.* Burke v. Barnes, 479 U.S. 361 (1987). Whether the injury was the nullification of the past vote on passage only or whether it was also the nullification of an opportunity to vote to override the veto has divided the Circuit, with the majority favoring the broader interpretation. Goldwater v. Carter, 617 F.2d 697, 702 n.12 (D.C. Cir. 1979), and id. at 711–12 (Judge Wright), *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979)

[503] Kennedy v. Sampson, 511 F.2d 430, 435–436 (D.C. Cir. 1974). *See* Harrington v. Bush, 553 F.2d 190, 199 n.41 (D.C. Cir. 1977). *Harrington* found no standing in a Member's suit challenging CIA failure to report certain actions to Congress, in order that Members could intelligently vote on certain issues. *See also* Reuss v. Balles, 584 F.2d 461 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 997 (1978).

tion, such a failing to obey a statute, where the plaintiff legislator has power to act through the legislative process, in which injury in fact does not exist.[504] Having thus established a fairly broad concept of Member standing, the Circuit then proceeded to curtail it by holding that the equitable discretion of the court to deny relief should be exercised in many cases in which a Member had standing but in which issues of separation of powers, political questions, and other justiciability considerations counseled restraint.[505]

Member or legislator standing has been severely curtailed, although not quite abolished, in *Raines v. Byrd*.[506] Several Members of Congress, who had voted against passage of the Line Item Veto Act, sued in their official capacities as Members of Congress to invalidate the law, alleging standing based on the theory that the statute adversely affected their constitutionally prescribed lawmaking power.[507] Emphasizing its use of standing doctrine to maintain separation-of-powers principles, the Court adhered to its holdings that, in order to possess the requisite standing, a person must establish that he has a "personal stake" in the dispute and that the alleged injury suffered is particularized as to him.[508] Neither requirement, the Court held, was met by these legislators. First, the Members did not suffer a particularized loss that distinguished them from their colleagues or from Congress as an entity. Second, the Members did not claim that they had been deprived of anything to which they were personally entitled. "[A]ppellees' claim of standing is based on loss of political power, not loss of any private right, which would make the injury more concrete. . . . If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds

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[504] Goldwater v. Carter, 617 F.2d 697, 702, 703 (D.C. Cir. 1979) (en banc), *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979). The failure of the Justices to remark on standing is somewhat puzzling, since it has been stated that courts "turn initially, although not invariably, to the question of standing to sue." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 215 (1974). *But see* Harrington v. Bush, 553 F.2d 190, 207 (D.C. Cir. 1977). In any event, the Supreme Court's decision vacating *Goldwater* deprives the Circuit's language of precedential effect. United States v. Munsingwear, 340 U.S. 36, 39–40 (1950); O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975).

[505] Riegle v. FOMC, 656 F.2d 873 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981).

[506] 521 U.S. 811 (1997).

[507] The Act itself provided that "[a]ny Member of Congress or any individual adversely affected" could sue to challenge the law. 2 U.S.C. § 692(a)(1). After failure of this litigation, the Court in the following Term, on suits brought by claimants adversely affected by the exercise of the veto, held the statute unconstitutional. Clinton v. City of New York, 524 U.S. 417 (1998).

[508] 521 U.S. at 819.

. . . as trustee for his constituents, not as a prerogative of personal power." [509]

So, there is no such thing as Member standing? Not necessarily so, because the Court turned immediately to preserving (at least a truncated version of) *Coleman v. Miller*,[510] in which the Court had found that 20 of the 40 members of a state legislature had standing to sue to challenge the loss of the effectiveness of their votes as a result of a tie-breaker by the lieutenant governor. Although there are several possible explanations for the result in that case, the Court in *Raines* chose to fasten on a particularly narrow point. "[O]ur holding in *Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." [511] Because these Members could still pass or reject appropriations bills, vote to repeal the Act, or exempt any appropriations bill from presidential cancellation, the Act did not nullify their votes and thus give them standing.[512]

In a subsequent case, the Court reaffirmed the continued viability of *Coleman* [513] in concluding that legislators, when authorized by the legislature, could have standing to assert an "institutional injury" to that legislative body.[514] Specifically, the Court held in *Arizona State Legislature v. Arizona Independent Redistricting Commission* that the Arizona legislature had standing to challenge the validity of the Arizona Independent Redistricting Commission and the commission's 2012 map of congressional districts because the legislature had been "stripped" of what the plaintiff considered its "exclusive constitutionally guarded role" in redistricting.[515] Comparing the Arizona legislature's role to the "institutional injury" suffered by the plaintiffs in *Coleman*, the Court viewed the Arizona legislators' injury as akin to that of the *Coleman* legislators. Specifically, the Court likened the instant case to *Coleman* because the Arizona Constitution and the ballot initiative that provided for redistricting by an independent commission "completely nullif[y]" any vote "now or 'in the future'" by the legislature "purporting to adopt

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[509] 521 U.S. at 821.
[510] 307 U.S. 433 (1939).
[511] 521 U.S. at 823.
[512] 521 U.S. at 824–26.
[513] *See* Coleman v. Miller, 307 U.S. 433 (1939).
[514] Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. ___, No. 13–1314, slip op. at 14 (2015).
[515] *Id.* at 10.

a redistricting plan."[516] However, in *Arizona State Legislature*, the Court left open the question of whether Congress, in a lawsuit against the President over an institutional injury to the legislative branch, would likewise have standing, as such a lawsuit would "raise separation-of-powers concerns absent" in the case before the Court.[517]

Standing to Challenge Lawfulness of Governmental Action.—Standing to challenge governmental action on statutory or other non-constitutional grounds has a constitutional content to the degree that Article III requires a "case" or "controversy," necessitating a litigant who has sustained or will sustain an injury so that he will be moved to present the issue "in an adversary context and in a form historically viewed as capable of judicial resolution."[518] Liberalization of standing in the administrative law field has been notable.

The "old law" required that in order to sue to contest the lawfulness of agency administrative action, one must have suffered a "legal wrong," that is, "the right invaded must be a legal right,"[519] requiring some resolution of the merits preliminarily. An injury-in-fact was insufficient. A "legal right" could be established in one of two ways. It could be a common-law right, such that if the injury were administered by a private party, one could sue on it;[520] or it could be a right created by the Constitution or a statute.[521] The statutory right most relied on was the judicial review section of the

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[516] *Id*.

[517] *Id*. at 14 n.12.

[518] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 151–152 (1970), citing Flast v. Cohen, 392 U.S. 83, 101 (1968). "But where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' [quoting *Flast*, supra, at 100], is one within the power of Congress to determine." Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972).

[519] Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137–138 (1939). *See also* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

[520] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152 (1951) (Justice Frankfurter concurring). This was apparently the point of the definition of "legal right" as "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137–138 (1939).

[521] Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 152 (1951) (Justice Frankfurter concurring). The Court approached this concept in two interrelated ways. (1) It might be that a plaintiff had an interest that it was one of the purposes of the statute in question to protect in some degree. *Chicago Junction Case*, 264 U.S. 258 (1924); Alexander Sprunt & Son v. United States, 281 U.S. 249 (1930); Alton R.R. v. United States, 315 U.S. 15 (1942). Thus, in Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968), a private utility was held to have standing to contest allegedly illegal competition by TVA on the ground that the statute was meant to give private utilities some protection from certain forms of TVA competition. (2) It might be that a plaintiff was a "person aggrieved" within the terms of a judicial review section of an administrative or regulatory statute. Injury to an economic interest was sufficient to "aggrieve" a litigant. FCC v. Sanders Brothers Radio Sta-

Administrative Procedure Act, which provided that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[522] Early decisions under this statute interpreted the language as adopting the "legal interest" and "legal wrong" standard then prevailing as constitutional requirements of standing, which generally had the effect of limiting the type of injury cognizable in federal court to economic ones.[523]

In 1970, however, the Court promulgated a two-pronged standing test: if the litigant (1) has suffered injury-in-fact and if he (2) shows that the interest he seeks to protect is arguably within the zone of interests to be protected or regulated by the statutory guarantee in question, he has standing.[524] Of even greater importance was the expansion of the nature of the cognizable injury beyond economic injury to encompass "aesthetic, conservational, and recreational" interests as well.[525] "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make

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tion, 309 U.S. 470 (1940); Associated Industries v. Ickes, 134 F.2d 694 (2d Cir. 1943), *cert. dismissed as moot*, 320 U.S. 707 (1943).

[522] 5 U.S.C. § 702. *See also* 47 U.S.C. § 202(b)(6) (FCC); 15 U.S.C. § 77i(a) (SEC); 16 U.S.C. § 825a(b) (FPC).

[523] FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 477 (1940); City of Chicago v. Atchison, T. & S.F. Ry. Co., 357 U.S. 77, 83 (1958); Hardin v. Kentucky Utilities Co., 390 U.S. 1, 7 (1968).

[524] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). Justices Brennan and White argued that only injury-in-fact should be requisite for standing. Id. at 167. In Clarke v. Securities Industry Ass'n, 479 U.S. 388 (1987), the Court applied a liberalized zone-of-interest test. *But see* Lujan v. National Wildlife Federation, 497 U.S. 871, 885–889 (1990); Air Courier Conf. v. American Postal Workers Union, 498 U.S. 517 (1991). In applying these standards, the Court, once it determined that the litigant's interests were "arguably protected" by the statute in question, proceeded to the merits without thereafter pausing to inquire whether in fact the interests asserted were among those protected. Arnold Tours v. Camp, 400 U.S. 45 (1970); Investment Company Institute v. Camp, 401 U.S. 617 (1971); Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 320 n.3 (1977). Almost contemporaneously, the Court also liberalized the ripeness requirement in review of administrative actions. Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167 (1967); Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). *See also* National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479 (1998), in which the Court found that a bank had standing to challenge an agency ruling expanding the role of employer credit unions to include multi-employer credit unions, despite a statutory limit that any such union could be of groups having a common bond of occupation or association. The Court held that a plaintiff did not have to show it was the congressional purpose to protect its interests. It is sufficient if the interest asserted is "arguably within the zone of interests to be protected . . . by the statute." Id. at 492 (internal quotation marks and citation omitted). But the Court divided 5-to-4 in applying the test. *See also* Bennett v. Spear, 520 U.S. 154 (1997).

[525] Ass'n of Data Processing Service Org. v. Camp, 397 U.S. 150, 154 (1970).

them less deserving of legal protection through the judicial process."[526] Thus, plaintiffs who pleaded that they used the natural resources of the Washington area, that rail freight rates would deter the recycling of used goods, and that their use of natural resources would be disturbed by the adverse environmental impact caused by the nonuse of recyclable goods, had standing as "persons aggrieved" to challenge the rates set. Neither the large numbers of persons allegedly injured nor the indirect and less perceptible harm to the environment was justification to deny standing. The Court granted that the plaintiffs might never be able to establish the "attenuated line of causation" from rate setting to injury, but that was a matter for proof at trial, not for resolution on the pleadings.[527]

Much debate has occurred in recent years with respect to the validity of "citizen suit" provisions in the environmental laws, especially in light of the Court's retrenchment in constitutional standing cases. The Court in insisting on injury in fact as well as causation and redressability has curbed access to citizen suits,[528] but that Congress may expansively confer substantial degrees of standing through statutory creations of interests remains true.

The Requirement of a Real Interest

Almost inseparable from the requirements of adverse parties and substantial enough interests to confer standing is the requirement that a *real* issue be presented, as contrasted with speculative, abstract, hypothetical, or moot issues. It has long been the Court's "considered practice not to decide abstract, hypothetical or contingent questions."[529] A party cannot maintain a suit "for a mere dec-

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[526] Sierra Club v. Morton, 405 U.S. 727, 734 (1972), Moreover, said the Court, once a person establishes that he has standing to seek judicial review of an action because of particularized injury to him, he may argue the public interest as a "representative of the public interest," as a "private attorney general," so that he may contest not only the action which injures him but the entire complex of actions of which his injury-inducing action is a part. Id. at 737–738, noting Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Brothers Radio Station, 309 U.S. (1940). *See also* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103 n. (1979); Havens Realty Corp. v. Coleman, 455 U.S. 363, 376 n.16 (1982) (noting ability of such party to represent interests of third parties).

[527] United States v. SCRAP, 412 U.S. 669, 683–690 (1973). As was noted above, this case has been disparaged by the later Court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 566–67 (1992); Whitmore v. Arkansas, 495 U.S. 149, 158–160 (1990).

[528] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Lujan v. National Wildlife Federation, 497 U.S. 871 (1990). *But see* Bennett v. Spear, 520 U.S. 154 (1997) (fact that citizen suit provision of Endangered Species Act is directed at empowering suits to further environmental concerns does not mean that suitor who alleges economic harm from enforcement of Act lacks standing); FEC v. Akins, 524 U.S. 11 (1998) (expansion of standing based on denial of access to information).

[529] Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 461 (1945).

laration in the air."[530] In *Texas v. ICC*,[531] the State attempted to enjoin the enforcement of the Transportation Act of 1920 on the ground that it invaded the reserved rights of the State. The Court dismissed the complaint as presenting no case or controversy, declaring: "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power."[532] And in *Ashwander v. TVA*,[533] the Court refused to decide any issue save that of the validity of the contracts between the Authority and the Company. "The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the person complaining."[534]

Concepts of real interest and abstract questions appeared prominently in *United Public Workers v. Mitchell*,[535] an omnibus attack on the constitutionality of the Hatch Act prohibitions on political activities by governmental employees. With one exception, none of the plaintiffs had violated the Act, though they stated they desired to engage in forbidden political actions. The Court found no justiciable controversy except in regard to the one, calling for "concrete legal issues, presented in actual cases, not abstractions," and seeing the suit as really an attack on the political expediency of the Act.[536]

Advisory Opinions.—In 1793, the Court unanimously refused to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States per-

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[530] Giles v. Harris, 189 U.S. 475, 486 (1903).

[531] 258 U.S. 158 (1922).

[532] 258 U.S. at 162.

[533] 297 U.S. 288 (1936).

[534] 297 U.S. at 324. Chief Justice Hughes cited New York v. Illinois, 274 U.S. 488 (1927), in which the Court dismissed as presenting abstract questions a suit about the possible effects of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future, and Arizona v. California, 283 U.S. 423 (1931), in which it was held that claims based merely upon assumed potential invasions of rights were insufficient to warrant judicial intervention. *See also* Massachusetts v. Mellon, 262 U.S. 447, 484–485 (1923); New Jersey v. Sargent, 269 U.S. 328, 338–340 (1926); Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 76 (1867).

[535] 330 U.S. 75 (1947).

[536] 330 U.S. at 89–91. Justices Black and Douglas dissented, contending that the controversy was justiciable. Justice Douglas could not agree that the plaintiffs should have to violate the act and lose their jobs in order to test their rights. In CSC v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), the concerns expressed in Mitchell were largely ignored as the Court reached the merits in an anticipatory attack on the Act. *Compare* Epperson v. Arkansas, 393 U.S. 97 (1968).

taining to questions of international law arising out of the wars of the French Revolution.[537] Noting the constitutional separation of powers and functions in his reply, Chief Justice Jay said: "These being in certain respects checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seem to have been purposely as well as expressly united to the Executive departments."[538] Although the Court has generally adhered to its refusal, Justice Jackson was not quite correct when he termed the policy a "firm and unvarying practice. . . ."[539] The Justices in response to a letter calling for suggestions on improvements in the operation of the courts drafted a letter suggesting that circuit duty for the Justices was unconstitutional, but they apparently never sent it;[540] Justice Johnson communicated to President Monroe, apparently with the knowledge and approval of the other Justices, the views of the Justices on the constitutionality of internal improvements legislation;[541] and Chief Justice Hughes in a letter to Senator Wheeler on President Roosevelt's Court Plan questioned the constitutionality of a proposal to increase the membership and have the Court sit in divisions.[542] Other Justices have individually served as advisers and confidants of Presidents in one degree or another.[543]

Nonetheless, the Court has generally adhered to the early precedent and would no doubt have developed the rule in any event, as a logical application of the case and controversy doctrine. As Justice Jackson wrote when the Court refused to review an order of the Civil Aeronautics Board, which in effect was a mere recommendation to the President for his final action: "To revise or review an

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[537] 1 C. Warren, supra at 108–111. The full text of the exchange appears in 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 486–489 (H. Johnston ed., 1893).

[538] Jay Papers at 488.

[539] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

[540] *See* supra.

[541] 1 C. Warren, supra at 595–597.

[542] *Reorganization of the Judiciary: Hearings on S. 1392 Before the Senate Judiciary Committee*, 75th Congress, 1st Sess. (1937), pt. 3, 491. *See also* Chief Justice Taney's private advisory opinion to the Secretary of the Treasury that a tax levied on the salaries of federal judges violated the Constitution. S. TYLER, MEMOIRS OF ROGER B. TANEY 432–435 (1876).

[543] *E.g.*, Acheson, *Removing the Shadow Cast on the Courts*, 55 A.B.A.J. 919 (1969); Jaffe, *Professors and Judges as Advisors to Government: Reflections on the Roosevelt-Frankfurter Relationship*, 83 HARV. L. REV. 366 (1969). The issue earned the attention of the Supreme Court, Mistretta v. United States, 488 U.S. 361, 397–408 (1989) (citing examples and detailed secondary sources), when it upheld the congressionally authorized service of federal judges on the Sentencing Commission.

administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action." [544] The Court's early refusal to render advisory opinions has discouraged direct requests for advice so that the advisory opinion has appeared only collaterally in cases where there was a lack of adverse parties,[545] or where the judgment of the Court was subject to later review or action by the executive or legislative branches of government,[546] or where the issues involved were abstract or contingent.[547]

Declaratory Judgments.—Rigid emphasis upon such elements of judicial power as finality of judgment and award of execution coupled with equally rigid emphasis upon adverse parties and real interests as essential elements of a case and controversy created serious doubts about the validity of any federal declaratory judgment procedure.[548] These doubts were largely dispelled by Court decisions in the late 1920s and early 1930s,[549] and Congress quickly responded with the Federal Declaratory Judgment Act of 1934.[550] Quickly tested, the Act was unanimously sustained.[551] "The principle involved in this form of procedure," the House report said, "is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts." [552] The

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[544] Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113–114 (1948).

[545] Muskrat v. United States, 219 U.S. 346 (1911).

[546] United States v. Ferreira, 54 U.S. (13 How.) 40 (1852).

[547] United Public Workers v. Mitchell, 330 U.S. 75 (1947).

[548] *Cf.* Willing v. Chicago Auditorium Ass'n, 277 U.S. 274 (1928).

[549] Fidelity National Bank & Trust Co. v. Swope, 274 U.S. 123 (1927); Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1963). *Wallace* was cited with approval in Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007) ("Article III's limitation of federal courts' jurisdiction to 'Cases' and 'Controversies,' reflected in the 'actual controversy' requirement of the Declaratory Judgment Act, 28 U.S.C. § 2201(a), [does not] require[ ] a patent licensee to terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed," id. at 120–21).

[550] 48 Stat. 955, as amended, 28 U.S.C. §§ 2201–2202.

[551] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937) (cited with approval in Medimmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007)).

[552] H. REP. NO. 1264, 73d Congress, 2d Sess. (1934), 2.

Senate report stated: "The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice." [553]

The 1934 Act provided that "[i]n cases of actual controversy" federal courts could "declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed. . . ." [554] Upholding the Act, the Court wrote: "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish." [555] Finding that the case presented a definite and concrete controversy, the Court held that a declaration should have been issued.[556]

The Court has insisted that "the requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit." [557] As Justice Douglas wrote: "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." [558] It remains, therefore, for the courts to determine in each case the degree of controversy necessary to establish a case for purposes of jurisdiction. Even then, however, the Court

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[553] S. REP. NO. 1005, 73d Congress, 2d Sess. (1934), 2.
[554] 48 Stat. 955. The language remains quite similar. 28 U.S.C. § 2201.
[555] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239–240 (1937).
[556] 300 U.S. at 242–44.
[557] Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945).
[558] Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941).

is under no compulsion to exercise its jurisdiction.[559] Use of declaratory judgments to settle disputes and identify rights in many private areas, like insurance and patents in particular but extending into all areas of civil litigation, except taxes,[560] is common. The Court has, however, at various times demonstrated a substantial reluctance to have important questions of public law, especially regarding the validity of legislation, resolved by such a procedure.[561] In part, this has been accomplished by a strict insistence upon concreteness, ripeness, and the like.[562] Nonetheless, even at such times, several noteworthy constitutional decisions were rendered in declaratory judgment actions.[563]

As part of the 1960s hospitality to greater access to courts, the Court exhibited a greater receptivity to declaratory judgments in constitutional litigation, especially cases involving civil liberties issues.[564] The doctrinal underpinnings of this hospitality were sketched out by Justice Brennan in his opinion for the Court in *Zwickler v. Koota*,[565] in which the relevance to declaratory judgments of the *Dombrowski v. Pfister*[566] line of cases involving federal injunctive relief against the enforcement of state criminal statutes was in issue. First, it was held that the vesting of "federal question" jurisdiction in the federal courts by Congress following the Civil War, as well as the enactment of more specific civil rights jurisdictional statutes, "imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hear-

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[559] Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494 (1942); Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 243 (1952); Public Affairs Associates v. Rickover, 369 U.S. 111, 112 (1962). *See also* Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

[560] An exception "with respect to Federal taxes" was added in 1935. 49 Stat. 1027. The Tax Injunction Act of 1937, 50 Stat. 738, U.S.C. § 1341, prohibited federal injunctive relief directed at state taxes but said nothing about declaratory relief. It was held to apply, however, in California v. Grace Brethren Church, 457 U.S. 393 (1982). Earlier, in Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943), the Court had reserved the issue but held that considerations of comity should preclude federal courts from giving declaratory relief in such cases. *Cf.* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).

[561] *E.g.*, Ashwander v. TVA, 297 U.S. 288 (1936); Electric Bond Co. v. SEC, 303 U.S. 419 (1938); United Public Workers v. Mitchell, 330 U.S. 75 (1947); Eccles v. Peoples Bank, 333 U.S. 426 (1948); Rescue Army v. Municipal Court, 331 U.S. 549, 572–573 (1947).

[562] United Public Workers v. Mitchell, 330 U.S. 75 (1947); Poe v. Ullman, 367 U.S. 497 (1961); Altvater v. Freeman, 319 U.S. 359 (1943); International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952).

[563] *E.g.*, Currin v. Wallace, 306 U.S. 1 (1939); Perkins v. Elg, 307 U.S. 325 (1939); Ashwander v. TVA, 297 U.S. 288 (1936); Evers v. Dwyer, 358 U.S. 202 (1958).

[564] *E.g.*, Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Turner v. City of Memphis, 369 U.S. 350 (1962); Powell v. McCormack, 395 U.S. 486 (1969). *But see* Golden v. Zwickler, 394 U.S. 103 (1969).

[565] 389 U.S. 241 (1967).

[566] 380 U.S. 479 (1965).

ing and decision of his federal constitutional claims."[567] Escape from that duty might be found only in "narrow circumstances," such as an appropriate application of the abstention doctrine, which was not proper where a statute affecting civil liberties was so broad as to reach protected activities as well as unprotected activities. Second, the judicially developed doctrine that a litigant must show "special circumstances" to justify the issuance of a federal injunction against the enforcement of state criminal laws is not applicable to requests for federal declaratory relief: "a federal district court has the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction."[568] This language was qualified subsequently, so that declaratory and injunctive relief were equated in cases in which a criminal prosecution is pending in state court at the time the federal action is filed[569] or is begun in state court after the filing of the federal action but before any proceedings of substance have taken place in federal court,[570] and federal courts were instructed not to issue declaratory judgments in the absence of the factors permitting issuance of injunctions under the same circumstances. But in the absence of a pending state action or the subsequent and timely filing of one, a request for a declaratory judgment that a statute or ordinance is unconstitutional does not have to meet the stricter requirements justifying the issuance of an injunction.[571]

Ripeness.—Just as standing historically has concerned *who* may bring an action in federal court, the ripeness doctrine concerns *when* it may be brought. Formerly, it was a wholly constitutional principle requiring a determination that the events bearing on the substantive issue have happened or are sufficiently certain to occur so as to make adjudication necessary and so as to assure that the issues are sufficiently defined to permit intelligent resolution. The focus was on the harm to the rights claimed rather than on the harm to the plaintiff that gave him standing to bring the action,[572] although, to be sure, in most cases the harm is the same. But in lib-

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[567] Zwickler v. Koota, 389 U.S. 241, 248 (1967).

[568] Zwickler v. Koota, 389 U.S. 241, 254 (1967).

[569] Samuels v. Mackell, 401 U.S. 66 (1971). The case and its companion, Younger v. Harris, 401 U.S. 37 (1971), substantially undercut much of the *Dombrowski* language and much of *Zwickler* was downgraded.

[570] Hicks v. Miranda, 422 U.S. 332, 349 (1975).

[571] Steffel v. Thompson, 415 U.S. 452 (1974). In cases covered by Steffel, the federal court may issue preliminary or permanent injunctions to protect its judgments, without satisfying the *Younger* tests. Doran v. Salem Inn, 422 U.S. 922, 930–931 (1975); Wooley v. Maynard, 430 U.S. 705, 712 (1977).

[572] United Public Workers v. Mitchell, 330 U.S. 75 (1947); International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954). For recent examples of lack of ripe-

eralizing the doctrine of ripeness in recent years the Court subdivided it into constitutional and prudential parts[573] and conflated standing and ripeness considerations.[574]

The early cases generally required potential plaintiffs to expose themselves to possibly irreparable injury in order to invoke federal judicial review. Thus, in *United Public Workers v. Mitchell*,[575] government employees alleged that they wished to engage in various political activities and that they were deterred from their desires by the Hatch Act prohibitions on political activities. As to all but one plaintiff, who had himself actually engaged in forbidden activity, the Court held itself unable to adjudicate because the plaintiffs were not threatened with "actual interference" with their interests. The Justices viewed the threat to plaintiffs' rights as hypothetical and refused to speculate about the kinds of political activity they might engage in or the Government's response to it. "No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations."[576] Similarly, resident aliens planning to work in the Territory of Alaska for the summer and then return to the United States were denied a request for an interpretation of the immigration laws that they would not be treated on their return as excludable aliens entering the United States for the first time, or alternatively, for a ruling that the laws so interpreted would be unconstitutional. The resident aliens had not left the country and attempted to return, although other alien workers had gone and been denied reentry, and the immigration authorities were on record as intending to enforce

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ness, *see* Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998); Texas v. United States, 523 U.S. 296 (1998).

[573] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138–148 (1974) (certainty of injury a constitutional limitation, factual adequacy element a prudential one).

[574] Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 81–82 (1978) (that plaintiffs suffer injury-in-fact and such injury would be redressed by granting requested relief satisfies Article III ripeness requirement; prudential element satisfied by determination that Court would not be better prepared to render a decision later than now). *But compare* Renne v. Geary, 501 U.S. 312 (1991).

[575] 330 U.S. 75 (1947).

[576] 330 U.S. at 90. In CSC v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973), without discussing ripeness, the Court decided on the merits anticipatory attacks on the Hatch Act. Plaintiffs had, however, alleged a variety of more concrete infringements upon their desires and intentions than the UPW plaintiffs had.

the laws as they construed them.[577] Of course, the Court was not entirely consistent in applying the doctrine.[578]

It remains good general law that pre-enforcement challenges to criminal and regulatory legislation will often be unripe for judicial consideration because of uncertainty of enforcement,[579] because the plaintiffs can allege only a subjective feeling of inhibition or fear arising from the legislation or from enforcement of it,[580] or because the courts need before them the details of a concrete factual situation arising from enforcement in order to engage in a reasoned balancing of individual rights and governmental interests.[581] But one who challenges a statute or possible administrative action need demonstrate only a realistic danger of sustaining an injury to his rights as a result of the statute's operation and enforcement and need not await the consummation of the threatened injury in order to obtain preventive relief, such as exposing himself to actual arrest or

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[577] International Longshoremen's Union v. Boyd, 347 U.S. 222 (1954). *See also* Electric Bond Co. v. SEC, 303 U.S. 419 (1938); Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945); Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952); Socialist Labor Party v. Gilligan, 406 U.S. 583 (1972).

[578] In Adler v. Board of Educ., 342 U.S. 485 (1952), without discussing ripeness, the Court decided on the merits a suit about a state law requiring dismissal of teachers advocating violent overthrow of the government, over a strong dissent arguing the case was indistinguishable from *Mitchell*. Id. at 504 (Justice Frankfurter dissenting). In Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961), a state employee was permitted to attack a non-Communist oath, although he alleged he believed he could take the oath in good faith and could prevail if prosecuted, because the oath was so vague as to subject plaintiff to the "risk of unfair prosecution and the potential deterrence of constitutionally protected conduct." Id. at 283–84. *See also* Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[579] *E.g.*, Poe v. Ullman, 367 U.S. 497 (1961) (no adjudication of challenge to law barring use of contraceptives because in 80 years of the statute's existence the state had never instituted a prosecution). *But compare* Epperson v. Arkansas, 393 U.S. 97 (1987) (merits reached in absence of enforcement and fair indication state would not enforce it); Vance v. Amusement Co., 445 U.S. 308 (1980) (reaching merits, although state asserted law would not be used, although local prosecutor had so threatened; no discussion of ripeness, but dissent relied on *Poe*, id. at 317–18).

[580] *E.g.*, Younger v. Harris, 401 U.S. 37, 41–42 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Golden v. Zwickler, 394 U.S. 103 (1969); O'Shea v. Littleton, 414 U.S. 488 (1974); Spomer v. Littleton, 414 U.S. 514 (1974); Rizzo v. Goode, 423 U.S. 362 (1976). In the context of the ripeness to challenge of agency regulations, as to which there is a presumption of available judicial remedies, the Court has long insisted that federal courts should be reluctant to review such regulations unless the effects of administrative action challenged have been felt in a concrete way by the challenging parties, i.e., unless the controversy is "ripe." *See*, of the older cases, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158 (1967); Gardner v. Toilet Goods Ass'n, Inc., 387 U.S. 167 (1967). More recent cases include Reno v. Catholic Social Services, Inc., 509 U.S. 43 (1993); Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990).

[581] *E.g.*, California Bankers Ass'n v. Schultz, 416 U.S. 21 (1974); Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 294–297 (1981); Renne v. Geary, 501 U.S. 312, 320–323 (1991).

prosecution. When one alleges an intention to engage in conduct arguably affected with a constitutional interest but proscribed by statute and there exists a credible threat of prosecution thereunder, he may bring an action for declaratory or injunctive relief.[582] Similarly, the reasonable certainty of the occurrence of the perceived threat to a constitutional interest is sufficient to afford a basis for bringing a challenge, provided the court has sufficient facts before it to enable it to intelligently adjudicate the issues.[583]

Of considerable uncertainty in the law of ripeness is *Duke Power*, in which the Court held ripe for decision on the merits a challenge to a federal law limiting liability for nuclear accidents at nuclear power plants, on the basis that, because the plaintiffs had sustained an injury-in-fact and had standing, the Article III requisite of ripeness was satisfied and no additional facts arising out of the occurrence of the claimed harm would enable the court better to decide the issues.[584] Should this analysis prevail, ripeness as a limitation on justiciability will decline in importance.

Mootness.—A case initially presenting all the attributes necessary for federal court litigation may at some point lose some attribute of justiciability and become "moot." The usual rule is that an actual controversy must exist at all stages of trial and appellate consideration and not simply at the date the action is initiated.[585] "Under Article III of the Constitution, federal courts may adjudi-

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[582] Steffel v. Thompson, 415 U.S. 452 (1974); Wooley v. Maynard, 430 U.S. 705, 707–708, 710 (1977); Babbitt v. United Farm Workers, 442 U.S. 289, 297–305 (1979) (finding some claims ripe, others not). *Compare* Doe v. Bolton, 410 U.S. 179, 188–189 (1973), *with* Roe v. Wade, 410 U.S. 113, 127–128 (1973). *See also* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Colautti v. Franklin, 439 U.S. 379 (1979).

[583] Buckley v. Valeo, 424 U.S. 1, 113–118 (1976); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138–148 (1974) (holding some but not all the claims ripe). *See also* Goldwater v. Carter, 444 U.S. 996, 997 (Justice Powell concurring) (parties had not put themselves in opposition).

[584] Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 81–82 (1978). The injury giving standing to plaintiffs was the environmental harm arising from the plant's routine operation; the injury to their legal rights was alleged to be the harm caused by the limitation of liability in the event of a nuclear accident. The standing injury had occurred, the ripeness injury was conjectural and speculative and might never occur. *See* id. at 102 (Justice Stevens concurring in the result). It is evident on the face of the opinion and expressly stated by the objecting Justices that the Court used its standing/ripeness analyses in order to reach the merits, so as to remove the constitutional cloud cast upon the federal law by the district court decision. Id. at 95, 103 (Justices Rehnquist and Stevens concurring in the result).

[585] *E.g.*, United States v. Munsingwear, 340 U.S. 36 (1950); Golden v. Zwickler, 394 U.S. 103, 108 (1969); SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972); Roe v. Wade, 410 U.S. 113, 125 (1973); Sosna v. Iowa, 419 U.S. 393, 398–399 (1975); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980), and id. at 411 (Justice Powell dissenting); Burke v. Barnes, 479 U.S. 361, 363 (1987); Honig v. Doe, 484 U.S. 305, 317 (1988); Lewis v. Continental Bank Corp., 494 U.S. 472, 477–478 (1990); *Camreta V. Greene*, 563 U.S. ___, No. 09–1954, slip op. (2011); United States v. Juvenile Male, 564 U.S. ___, No. 09–940, slip op. at 4 (2011).

cate only actual, ongoing cases or controversies. . . . Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' . . . and confines them to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals. . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit."[586] Because, with the advent of declaratory judgments, it is open to the federal courts to "declare the rights and other legal relations" of the parties with *res judicata* effect,[587] the question in cases alleged to be moot now seems largely if not exclusively to be decided in terms of whether an actual controversy continues to exist between the parties rather than in terms of any additional older concepts.[588] So long as concrete, adverse legal interests between the parties continue, a case is not made moot by intervening actions that cast doubt on the practical enforceability of a final judicial order.[589]

Munsingwear has long stood for the proposition that the appropriate practice of the Court in a civil case that had become moot while on the way to the Court or after *certiorari* had been granted was to vacate or reverse and remand with directions to dismiss. In U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), however, the Court held that when mootness occurs because the parties have reached a settlement, vacatur of the judgment below is ordinarily not the best practice; instead, equitable principles should be applied so as to preserve a presumptively correct and valuable precedent, unless a court concludes that the public interest would be served by vacatur.

[586] Lewis v. Continental Bank Corp., 494 U.S. 472, 477–78 (1990) (internal citations omitted). The Court's emphasis upon mootness as a constitutional limitation mandated by Article III is long stated in the cases. *E.g.*, Liner v. Jafco, 375 U.S. 301, 306 n.3 (1964); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974); Sibron v. New York, 392 U.S. 40, 57 (1968). *See* Honig v. Doe, 484 U.S. 305, 317 (1988), and id. at 332 (Justice Scalia dissenting). *But compare* Franks v. Bowman Transp. Co., 424 U.S. 747, 756 n.8 (1976) (referring to mootness as presenting policy rather than constitutional considerations).

[587] *But see* Steffel v. Thompson, 415 U.S. 452, 470–72 (1974); id. at 477 (Justice White concurring), 482 n.3 (Justice Rehnquist concurring) (on *res judicata* effect in state court in subsequent prosecution). In any event, the statute authorizes the federal court to grant "[f]urther necessary or proper relief," which could include enjoining state prosecutions.

[588] Award of process and execution are no longer essential to the concept of judicial power. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

[589] Chafin v. Chafin, 568 U.S. ___, No. 11–1347, slip op. (2013) (appeal of district court order returning custody of a child to her mother in Scotland not made moot by physical return of child to Scotland and subsequent ruling of Scottish court in favor of the mother continuing to have custody).

Cases may become moot because of a change in the law,[590] or in the status of the parties,[591] or because of some act of one of the parties which dissolves the controversy.[592] But the Court has developed several exceptions. Thus, in criminal cases, although the sentence of the convicted appellant has been served, the case "is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction." [593] The "mere possibility" of such a consequence, even a "remote" one, is enough to find that one who has served his sentence has retained the requisite personal stake giving his case "an adversary cast and making it justiciable." [594] This exception has its

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[590] *E.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852); United States v. Alaska Steamship Co., 253 U.S. 113 (1920); Hall v. Beals, 396 U.S. 45 (1969); Sanks v. Georgia, 401 U.S. 144 (1971); Richardson v. Wright, 405 U.S. 208 (1972); Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972); Lewis v. Continental Bank Corp., 494 U.S. 481 (1990). *But compare* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288–289 (1982) (case not mooted by repeal of ordinance, since City made clear its intention to reenact it if free from lower court judgment); *see also* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. ___, No. 11–338, slip op. (2013) (action to enforce penalty under former regulation not mooted by change in regulation where violation occurred before regulation was changed). Following *Aladdin's Castle*, the Court in Northeastern Fla. Ch. of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 660–63 (1993), held that when a municipal ordinance is repealed but replaced by one sufficiently similar so that the challenged action in effect continues, the case is not moot. *But see* id. at 669 (Justice O'Connor dissenting) (modification of ordinance more significant and case is mooted).

[591] Atherton Mills v. Johnston, 259 U.S. 13 (1922) (in challenge to laws regulating labor of youths 14 to 16, Court held case two-and-one-half years after argument and dismissed as moot since certainly none of the challengers was now in the age bracket); Golden v. Zwickler, 394 U.S. 103 (1969); DeFunis v. Odegaard, 416 U.S. 312 (1974); Dove v. United States, 423 U.S. 325 (1976); Lane v. Williams, 455 U.S. 624 (1982). *Compare* County of Los Angeles v. Davis, 440 U.S. 625 (1979), *with* Vitek v. Jones, 445 U.S. 480 (1980). In Arizonans For Official English v. Arizona, 520 U.S. 43 (1997), a state employee attacking an English-only work requirement had standing at the time she brought the suit, but she resigned following a decision in the trial court, thus mooting the case before it was taken to the appellate court, which should not have acted to hear and decide it.

[592] *E.g.*, Commercial Cable Co. v. Burleson, 250 U.S. 360 (1919); Oil Workers Local 8–6 v. Missouri, 361 U.S. 363 (1960); A.L. Mechling Barge Lines v. United States, 368 U.S. 324 (1961); Preiser v. Newkirk, 422 U.S. 395 (1975); County of Los Angeles v. Davis, 440 U.S. 625 (1979); Alvarez v. Smith, 558 U.S. ___, No. 08–351 (2009).

[593] Sibron v. New York, 395 U.S. 40, 50–58 (1968). *But compare* Spencer v. Kemna, 523 U.S. 1 (1998).

[594] Benton v. Maryland, 395 U.S. 784, 790–791 (1969). The cases have progressed from leaning toward mootness to leaning strongly against. *E.g.*, St. Pierre v. United States, 319 U.S. 41 (1943); Fiswick v. United States, 329 U.S. 211 (1946); United States v. Morgan, 346 U.S. 502 (1954); Pollard v. United States, 352 U.S. 354 (1957); Ginsberg v. New York, 390 U.S. 629, 633–634 n.2 (1968); Sibron v. New York, 392 U.S. 40, 49–58 (1968).*But see* Lane v. Williams, 455 U.S. 624 (1982);United States v. Juvenile Male, 564 U.S. ___, No. 09–940, slip op. at 6 (2011) (per curiam) (rejecting as too indirect a benefit that favorable resolution of a case might serve as beneficial precedent for a future case involving the plaintiff). The exception permits review at the instance of the prosecution as well as defendant. Pennsylvania v. Mimms,

counterpart in civil litigation in which a lower court judgment may still have certain present or future adverse effects on the challenging party.[595]

A second exception, the "voluntary cessation" doctrine, focuses on whether challenged conduct which has lapsed or the utilization of a statute which has been superseded is likely to recur.[596] Thus, cessation of the challenged activity by the voluntary choice of the person engaging in it, especially if he contends that he was properly engaging in it, will moot the case only if it can be said with assurance "that 'there is no reasonable expectation that the wrong will be repeated.'" [597] This amounts to a "formidable burden" of showing with absolute clarity that there is no reasonable prospect of renewed activity.[598] Otherwise, "[t]he defendant is free to return to his old ways" and this fact would be enough to prevent mootness because of the "public interest in having the legality of the practices settled." [599] In this vein, the Court in *Campbell-Ewald Co. v. Gomez*, informed by principles of contract law, held that an unaccepted offer to settle a lawsuit amounts to a "legal nullity" that fails to bind either party and therefore does not moot the litigation.[600]

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434 U.S. 106 (1977). When a convicted defendant dies while his case is on direct review, the Court's present practice is to dismiss the petition for certiorari. Dove v. United States, 423 U.S. 325 (1976), overruling Durham v. United States, 401 U.S. 481 (1971).

[595] Southern Pacific Terminal Co. v. ICC, 219 U.S. 433, 452 (1911); Carroll v. President & Commr's of Princess Anne, 393 U.S. 175 (1968). *See* Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) (holding that expiration of strike did not moot employer challenge to state regulations entitling strikers to state welfare assistance since the consequences of the regulations would continue).

[596] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); Walling v. Helmerich & Payne, 323 U.S. 37 (1944); Porter v. Lee, 328 U.S. 246 (1946); United States v. W.T. Grant Co., 345 U.S. 629 (1953); Gray v. Sanders, 372 U.S. 368 (1963); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 202–04 (1969); DeFunis v. Odegaard, 416 U.S. 312, 318 (1974); County of Los Angeles v. Davis, 440 U.S. 625, 631–34 (1979), and id. at 641–46 (Justice Powell dissenting); Vitek v. Jones, 445 U.S. 480, 486–487 (1980), and id. at 500–01 (Justice Stewart dissenting); Princeton University v. Schmidt, 455 U.S. 100 (1982); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 288–289 (1982).

[597] United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953) (quoting United States v. Aluminum Co. of America, 148 F.2d 416, 448 (2d. Cir. 1945)).

[598] Already, LLC v. Nike, Inc., 568 U.S. ___, No. 11–982, slip op. at 4 (2013) (dismissal of a trademark infringement claim against rival and submittal of an unconditional and irrevocable covenant not to sue satisfied the burden under the voluntary cessation test) (citing Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 190 (2000)).

[599] United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953). *But see* A.L. Mechling Barge Lines v. United States, 368 U.S. 324 (1961).

[600] 577 U.S. ___, No. 14–857, slip op. 7–9 (2016) ("[W]ith no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation that they had at the outset."). The *Campbell-Ewald* decision was limited to the question of whether an *offer* of complete relief moots a case. The Court left

Still a third exception concerns the ability to challenge short-term conduct which may recur in the future, which has been denominated as disputes "capable of repetition, yet evading review."[601] Thus, in cases in which (1) the challenged action is too short in its duration to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again, mootness will not be found when the complained-of conduct ends.[602] This exception is frequently invoked in cases involving situations of comparatively limited duration, such as elections,[603] pregnancies,[604] short sentences in criminal cases,[605] the award of at least some short-term federal government contracts,[606] and the issuance of injunctions that expire in a brief period.[607]

An interesting and potentially significant liberalization of the law of mootness, perhaps as part of a continuing circumstances exception, is occurring in the context of class action litigation. It is now clearly established that, when the controversy becomes moot as to the plaintiff in a certified class action, it still remains alive for the class he represents so long as an adversary relationship sufficient to constitute a live controversy between the class members and the other party exists.[608] The Court was closely divided, however, with respect to the right of the named party, when the sub-

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open the question of whether the *payment* of complete relief by a defendant to a plaintiff *can* render a case moot. *Id.* at 11.

[601] Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

[602] Weinstein v. Bradford, 423 U.S. 147, 149 (1975); Murphy v. Hunt, 455 U.S. 478, 482 (1982). *See* Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 125–26 (1974), and id. at 130–32 (Justice Stewart dissenting), Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 189–91 (2000),. The degree of expectation or likelihood that the issue will recur has frequently divided the Court. *Compare* Murphy v. Hunt, *with* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); *compare* Honig v. Doe, 484 U.S. 305, 318–23 (1988), *with* id. at 332 (Justice Scalia dissenting).

[603] *See, e.g.,* Storer v. Brown, 415 U.S. 724, 737 n.8 (1974); Rosario v. Rockefeller, 410 U.S. 752, 756 n.5 (1973); Moore v. Ogilvie, 394 U.S. 814, 816 (1969).

[604] *See* Roe v. Wade, 410 U.S. 113, 124–125 (1973).

[605] *See, e.g.*, Sibron v. New York, 392 U.S. 40, 49–58 (1968). *See also* Gerstein v. Pugh, 420 U.S. 103 (1975).

[606] *See, e.g.*, Kingdomware Techs., Inc. v. United States, 579 U.S. ___, No. 14–916, slip op. at 7 (2016) ("We have previously held that a period of two years is too short to complete judicial review of the lawfulness of [a] procurement.") (citing S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 514–16 (1911)).

[607] *See, e.g.,* Carroll v. President & Commr's of Princess Anne, 393 U.S. 175 (1968). *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (short-term court order restricting press coverage).

[608] Sosna v. Iowa, 419 U.S. 393 (1975); Franks v. Bowman Transp. Co., 424 U.S. 747, 752–757 (1976). A suit which proceeds as a class action but without formal certification may not receive the benefits of this rule. Board of School Commr's v. Jacobs, 420 U.S. 128 (1975). *See also* Weinstein v. Bradford, 423 U.S. 147 (1975); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 430 (1976). *But see* the characterization of these cases in United States Parole Comm'n v. Geraghty, 445 U.S. 388, 400 n.7

stantive controversy became moot as to him, to appeal as error the denial of a motion to certify the class which he sought to represent and which he still sought to represent. The Court held that in the class action setting there are two aspects of the Article III mootness question, the existence of a live controversy and the existence of a personal stake in the outcome for the named class representative.[609] Finding a live controversy, the Court determined that the named plaintiff retained a sufficient interest, "a personal stake," in his claimed right to represent the class in order to satisfy the "imperatives of a dispute capable of judicial resolution;" that is, his continuing interest adequately assures that "sharply presented issues" are placed before the court "in a concrete factual setting" with "self-interested parties vigorously advocating opposing positions." [610]

The immediate effect of the decision is that litigation in which class actions are properly certified or in which they should have been certified will rarely ever be mooted if the named plaintiff (or in effect his attorney) chooses to pursue the matter, even though the named plaintiff can no longer obtain any personal relief from the decision sought.[611] Of much greater potential significance is the possible extension of the weakening of the "personal stake" requirement in other areas, such as the representation of third-party claims in non-class actions and the initiation of some litigation in the form

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(1980). Mootness is not necessarily avoided in properly certified cases, but the standards of determination are unclear. *See* Kremens v. Bartley, 431 U.S. 119 (1977).

[609] United States Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980).

[610] 445 U.S. at 403. Justices Powell, Stewart, Rehnquist, and Chief Justice Burger dissented, id. at 409, arguing there could be no Article III personal stake in a procedural decision separate from the outcome of the case. In Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980), in an opinion by Chief Justice Burger, the Court held that a class action was not mooted when defendant tendered to the named plaintiffs the full amount of recovery they had individually asked for and could hope to retain. Plaintiffs' interest in shifting part of the share of costs of litigation to those who would share in its benefits if the class were certified was deemed to be a sufficient "personal stake". *Cf.* Genesis Healthcare Corp. v. Symczyk, 569 U.S. ___, No. 11–1059, slip op. (2013) (in the context of a "collective action" under the Fair Labor Standards Act where a plaintiff's individual claim was moot and no other individuals had joined the suit, holding that a plaintiff had no personal stake in the case that provided the court with subject matter jurisdiction). In a slightly different context, the Court, in *Campbell-Ewald Co. v. Gomez*, held that neither an unaccepted settlement offer or an offer of judgment provided *prior* to class certification would moot a potential lead plaintiff's case. 577 U.S. ___, No. 14–857, slip op. at 11 (2016). According to the majority opinion, this holding avoided placing defendants in the "driver's seat" with respect to class litigation wherein a defendant's offer of settlement could eliminate a court's jurisdiction to adjudicate potentially costly class actions. *Id.*

[611] The named plaintiff must still satisfy the class action requirement of adequacy of representation. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 405–407 (1980). On the implications of *Geraghty*, which the Court has not returned to, *see* Hart & Wechsler (6th ed.), supra at 194–198.

of a "private attorneys general" pursuit of adjudication.[612] In *Genesis Healthcare Corporation v. Symczyk*,[613] the Court appeared to follow the "personal stake" rule applicable to class actions in the context of "collective actions" under the Fair Labor Standards Act, at least to the extent that actions that would moot the plaintiff's claims prior to a "conditional certification" by the court would likewise moot the collective action.

Retroactivity Versus Prospectivity.—One of the distinguishing features of an advisory opinion is that it lays down a rule to be applied to future cases, much as does legislation generally. It should therefore follow that an Article III court could not decide purely prospective cases, cases which do not govern the rights and disabilities of the parties to the cases.[614] The Court asserted that this principle is true, while applying it only to give retroactive effect to the parties to the immediate case.[615] Yet, occasionally, the Court did not apply its holding to the parties before it,[616] and in a series of cases beginning in the mid-1960s it became embroiled in attempts to limit the retroactive effect of its—primarily but not exclusively[617]—constitutional-criminal law decisions. The results have been confusing and unpredictable.[618]

Prior to 1965, "both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions."[619] Statutory and judge-made law have consequences, at least to the extent that people must rely on them in making decisions

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[612] *Geraghty*, 445 U.S. at 404 & n.11.

[613] 569 U.S. ___, No. 11–1059, slip op. (2013).

[614] For a masterful discussion of the issue in both criminal and civil contexts, *see* Fallon & Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991).

[615] Stovall v. Denno, 388 U.S. 293, 301 (1967).

[616] England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 422 (1964); James v. United States, 366 U.S. 213 (1961). *See also* Morrissey v. Brewer, 408 U.S. 471, 490 (1972).

[617] Noncriminal constitutional cases included Lemon v. Kurtzman, 411 U.S. 192 (1973); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969). Indeed, in Buckley v. Valeo, 424 U.S. 1 (1976), and Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), the Court postponed the effectiveness of its decision for a period during which Congress could repair the flaws in the statute. Noncriminal, nonconstitutional cases include Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Allen v. State Board of Elections, 393 U.S. 544 (1969); Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968); Simpson v. Union Oil Co., 377 U.S. 13 (1964).

[618] Because of shifting coalitions of Justices, Justice Harlan complained, the course of retroactivity decisions "became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim." Mackey v. United States, 401 U.S. 667, 676 (1971) (separate opinion).

[619] Robinson v. Neil, 409 U.S. 505, 507 (1973). The older rule of retroactivity derived from the Blackstonian notion "that the duty of the court was not to 'pro-

and shaping their conduct. Therefore, the Court was moved to recognize that there should be a reconciling of constitutional interests reflected in a new rule of law with reliance interests founded upon the old.[620] In both criminal and civil cases, however, the Court's discretion to do so has been constrained by later decisions.

In the 1960s, when the Court began its expansion of the Bill of Rights and applied its rulings to the states, it became necessary to determine the application of the rulings to criminal defendants who had exhausted all direct appeals but who could still resort to *habeas corpus*, to those who had been convicted but still were on direct appeal, and to those who had allegedly engaged in conduct but who had not gone to trial. At first, the Court drew the line at cases in which judgments of conviction were not yet final, so that all persons in those situations obtained retrospective use of decisions,[621] but the Court later promulgated standards for a balancing process that resulted in different degrees of retroactivity in different cases.[622] Generally, in cases in which the Court declared a rule that was "a clear break with the past," it denied retroactivity to all defendants, with the sometime exception of the appellant himself.[623] With respect to certain cases in which a new rule was intended to overcome an impairment of the truth-finding function of a criminal trial[624] or to cases in which the Court found that a constitutional doctrine barred the conviction or punishment of someone,[625] full retroactivity, even to *habeas* claimants, was the rule. Justice Harlan strongly argued that the Court should sweep away its confusing balancing rules and hold that all defendants whose cases are still pending on direct appeal at the time of a law-changing decision should be entitled to invoke the new rule, but that no *habeas* claimant should be entitled to benefit.[626]

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nounce a new law, but to maintain and expound the old one.'" Linkletter v. Walker, 381 U.S. 618, 622–23 (1965) (quoting 1 W. Blackstone, Commentaries *69).

[620] Lemon v. Kurtzman, 411 U.S. 192, 198–99 (1973).

[621] Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966).

[622] Johnson v. New Jersey, 384 U.S. 719 (1966); Stovall v. Denno, 388 U.S. 293 (1967); Adams v. Illinois, 405 U.S. 278 (1972).

[623] Desist v. United States, 394 U.S. 244, 248 (1969); United States v. Peltier, 422 U.S. 531 (1975); Brown v. Louisiana, 447 U.S. 323, 335–36 (1980) (plurality opinion); Michigan v. Payne, 412 U.S. 47, 55 (1973); United States v. Johnson, 457 U.S. 537, 549–50, 551–52 (1982).

[624] Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion); Brown v. Louisiana, 447 U.S. 323, 328–30 (1980) (plurality opinion); Hankerson v. North Carolina, 432 U.S. 233, 243 (1977).

[625] United States v. United States Coin & Currency, 401 U.S. 715, 724 (1971); Moore v. Illinois, 408 U.S. 786, 800 (1972); Robinson v. Neil, 409 U.S. 505, 509 (1973).

[626] Mackey v. United States, 401 U.S. 667, 675 (1971) (separate opinion); Desist v. United States, 394 U.S. 244, 256 (1969) (dissenting). Justice Powell has also strongly supported the proposed rule. Hankerson v. North Carolina, 432 U.S. 233, 246–248

The Court later drew a sharp distinction between criminal cases pending on direct review and cases pending on collateral review. For cases on direct review, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."[627] Justice Harlan's *habeas* approach was first adopted by a plurality in *Teague v. Lane*[628] and then by the Court in *Penry v. Lynaugh*.[629] Thus, for collateral review in federal courts of state court criminal convictions, the general rule is that "new rules" of constitutional interpretation—those "not '*dictated* by precedent existing at the time the defendant's conviction became final'"[630]—will not be applied.[631] However, "[a] new rule applies retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[632] Put another way, a new rule will be applied in a collateral proceeding only if it places certain kinds of conduct "beyond the power of the criminal law-making authority to prescribe" or constitutes a "new procedure[ ] without which the likelihood of an accurate conviction is seriously diminished."[633] In *Montgomery v. Louisiana*, the Court extended the holding of *Teague* beyond the context of federal habeas review, such that when a new substantive rule of constitutional law controls the outcome of a case, state collateral review courts must give

(1977) (concurring in judgment); Brown v. Louisiana, 447 U.S. 323, 337 (1980) (concurring in judgment).

627 Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (cited with approval in Whorton v. Bockting, 549 U.S. 406, 416 (2007)).

628 489 U.S. 288 (1989).

629 492 U.S. 302 (1989).

630 Whorton v. Bockting, 549 U.S. 406, 416 (2007). Put another way, it is not enough that a decision is "within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision." A decision announces a "new rule" if its result "was susceptible to debate among reasonable minds" and if it was not "an illogical or even a grudging application" of the prior decision. Butler v. McKellar, 494 U.S. 407, 412–415 (1990). For additional elaboration on "new law," *see* O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). *But compare* Bousley v. Brooks, 523 U.S. 614 (1998).

631 For an example of the application of the *Teague* rule in federal collateral review of a federal court conviction, see Chaidez v. United States, 568 U.S. ___, No. 11–820, slip op. (2013). *See also* Welch v. United States, 578 U.S. ___, No. 15–6418, slip op. at 7 (2016) (assuming, without deciding, that the *Teague* framework "applies in a federal collateral challenge to a federal conviction as it does in a federal collateral challenge to a state conviction").

632 Whorton v. Bockting, 549 U.S. 406, 416 (2007).

633 Teague v. Lane, 489 U.S. 288, 307, 311–313 (1989) (plurality opinion); *see also* Butler v. McKellar, 494 U.S. 407, 415–416 (1990).

retroactive effect to that rule in the same manner as federal courts engaging in habeas review.[634]

As a result, at least with regard to the first exception, the Court has held that the *Teague* rule is constitutionally based,[635] as substantive rules set forth categorical guarantees that place certain laws and punishments beyond a state's power, making "the resulting conviction or sentence . . . by definition . . . unlawful."[636] In contrast, procedural rules are those that are aimed at enhancing the accuracy of a conviction or sentence by regulating the manner of determining the defendant's guilt.[637] As a consequence, with respect to a defendant who did not receive the benefit of a new *procedural* rule, the possibility exists that the underlying conviction or sentence may "still be accurate" and the "defendant's continued confinement may still be lawful" under the Constitution.[638] In this vein, the Court has described a substantive rule as one that alters the range of conduct that the law punishes, or that prohibits "a certain category of punishment for a class of defendants because of their status or offense."[639]

Under the second exception it is "not enough under *Teague* to say that a new rule is aimed at improving the accuracy of a trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the

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[634] *See* Montgomery v. Louisiana, 577 U.S. ___, No. 14–280, slip op. at 12 (2016) ("If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings."). The Court reasoned as such because new substantive rules constitute wholesale prohibitions on the state's power to convict or sentence a criminal defendant under certain circumstances, making the underlying conviction or sentence void and providing the state with no authority to leave the underlying judgment in place during collateral review. *Id.* at 10–11; *see also id.* at 12 ("A penalty imposed pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional. There is no grandfather clause that permits States to enforce punishments the Constitution forbids.").

[635] *See Montgomery*, slip op. at 8 ("[T]he Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final.")

[636] *Id.* at 9.

[637] *Id.*

[638] *Id.*

[639] See *Welch*, slip op. at 11; *see also* Schriro v. Summerlin, 542 U.S. 348, 353 (2004); Penry v. Lynaugh, 492 U.S. 302, 330 (1989). Accordingly, the Court has rejected the argument that the underlying "source" of a constitutional rule—i.e., the fact that a constitutional rule on its face creates substantive or procedural rights—can determine the retroactivity of a ruling. *See Welch*, slip op. at 10 ("[T]his Court has determined whether a new rule is substantive . . . by considering the function of the rule, not its underlying constitutional source.").

bedrock procedural elements essential to the fairness of a proceeding."[640]

What the rule is to be, and indeed if there *is* to be a rule, in civil cases has been disputed to a rough draw in recent cases. As was noted above, there is a line of civil cases, constitutional and nonconstitutional, in which the Court has declined to apply new rules, the result often of overruling older cases, retrospectively, sometimes even to the prevailing party in the case.[641] As in criminal cases, the creation of new law, through overrulings or otherwise, may result in retroactivity in all instances, in pure prospectivity, or in partial prospectivity in which the prevailing party obtains the results of the new rule but no one else does. In two cases raising the question when states are required to refund taxes collected under a statute that is subsequently ruled unconstitutional, the Court revealed itself to be deeply divided.[642] The question in *Beam* was whether the company could claim a tax refund under an earlier ruling holding unconstitutional the imposition of certain taxes upon its products. The holding of a fractionated Court was that it could seek a refund, because in the earlier ruling the Court had applied the holding to the contesting company, and, once a new rule has been applied retroactively to the litigants in a civil case, considerations of equality and *stare decisis* compel application to all.[643] Although par-

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[640] Sawyer v. Smith, 497 U.S. 227, 242 (1990) (emphasis in original) (internal quotations and citations omitted).

For application of these principles, see *Montgomery*, slip op. at 14–17 (holding that the Court, in interpreting the Eighth Amendment to prohibit mandatory life without parole for juvenile offenders, "did announce a new substantive rule" because the prohibition necessarily placed beyond the power of a state a particular punishment with respect to the "vast majority of juvenile offenders"). *See also Welch*, slip op. at 9–11 (holding that a conviction under a statute that was later found to be void for vagueness is a substantive rule, as the invalidity of the law under the Due Process Clause altered the "range of conduct or class of persons that the law punishes."); *Schriro*, 542 U.S. at 352 (holding that the requirement that aggravating factors justifying the death penalty be found by the jury was a new procedural rule that did not apply retroactively).

[641] The standard that has been applied was enunciated in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Briefly, the question of retroactivity or prospectivity was to be determined by a balancing of the equities. To be limited to prospectivity, a decision must have established a new principle of law, either by overruling clear past precedent on which reliance has been had or by deciding an issue of first impression whose resolution was not clearly foreshadowed. The courts must look to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Then, the courts must look to see whether a decision to apply retroactively a decision will produce substantial inequitable results. Id. at 106–07. American Trucking Assn's v. Smith, 496 U.S. 167, 179–86 (1990) (plurality opinion).

[642] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991); American Trucking Assn's, Inc. v. Smith, 496 U.S. 167 (1990).

[643] The holding described in the text is expressly that of only a two-Justice plurality. 501 U.S. at 534–44 (Justices Souter and Stevens). Justice White, Justice

tial or selective prospectivity is thus ruled out, neither pure retroactivity nor pure prospectivity is either required or forbidden.

Four Justices adhered to the principle that new rules, as defined above, may be applied purely prospectively, without violating any tenet of Article III or any other constitutional value.[644] Three Justices argued that all prospectivity, whether partial or total, violates Article III by expanding the jurisdiction of the federal courts beyond true cases and controversies.[645] Apparently, the Court now has resolved this dispute, although the principal decision was by a five-to-four vote. In *Harper v. Virginia Dep't of Taxation*,[646] the Court adopted the principle of the *Griffith* decision in criminal cases and disregarded the *Chevron Oil* approach in civil cases. Henceforth, in civil cases, the rule is: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[647] Four Justices continued to adhere to *Chevron Oil*, however,[648] so that with one Justice each retired from the different sides one may

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Blackmun, and Justice Scalia (with Justice Marshall joining the latter Justices) concurred, id. at 544, 547, 548 (respectively), but on other, and in the instance of the three latter Justices, and broader justifications. Justices O'Connor and Kennedy and Chief Justice Rehnquist dissented. Id. at 549.

644 501 U.S. at 549 (dissenting opinion of Justices O'Connor and Kennedy and Chief Justice Rehnquist), and id. at 544 (Justice White concurring). *See also Smith*, 496 U.S. at 171 (plurality opinion of Justices O'Connor, White, Kennedy, and Chief Justice Rehnquist).

645 501 U.S. at 547, 548 (Justices Blackmun, Scalia, and Marshall concurring). In *Smith*, 496 U.S. at 205, these three Justices had joined the dissenting opinion of Justice Stevens arguing that constitutional decisions must be given retroactive effect.

646 509 U.S. 86 (1993).

647 509 U.S. at 97. Although the conditional language in this passage might suggest that the Court was leaving open the possibility that in some cases it might rule purely prospectively, and not even apply its decision to the parties before it, other language belies that possibility. "This rule extends *Griffith's* ban against 'selective application of new rules.'" (Citing Griffith, 479 U.S. at 323.) Because *Griffith* rested in part on the principle that "the nature of judicial review requires that [the Court] adjudicate specific cases," 479 U.S. at 322, deriving from Article III's case or controversy requirement for federal courts and forbidding federal courts from acting legislatively, "'the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'" 509 U.S. at 97 (quoting *Smith*, 496 U.S. at 214 (Justice Stevens dissenting)). The point is made more clearly in Justice Scalia's concurrence, in which he denounces all forms of nonretroactivity as "the handmaid of judicial activism." Id. at 105.

648 509 U.S. at 110 (Justice Kennedy, with Justice White, concurring); 113 (Justice O'Connor, with Chief Justice Rehnquist, dissenting). However, these Justices disagreed in this case about the proper application of *Chevron Oil*.

not regard the issue as definitively settled.[649] Future cases must, therefore, be awaited for resolution of this issue.

Political Questions

In some cases, a court will refuse to adjudicate a case despite the fact that it presents all the qualifications that we have considered to make it a justiciable controversy; it is in its jurisdiction, presented by parties with standing, and it is a case in which adverseness and ripeness exist. Such are cases that present a "political question." Although the Court has referred to the political question doctrine as "one of the rules basic to the federal system and this Court's appropriate place within that structure,"[650] it has also been remarked that "[i]t is, measured by any of the normal responsibilities of a phrase of definition, one of the least satisfactory terms known to the law. The origin, scope, and purpose of the concept have eluded all attempts at precise statements."[651]

It has been suggested that it may be more useful to itemize the categories of questions that have been labeled political rather than to attempt to isolate the factors that a court will consider to identify such cases.[652] The Court has to some extent agreed, noting that the criteria applied by the Court in political questions cases can vary depending on the issue involved.[653] Regardless of which approach is taken, however, the Court's narrowing of the rationale for political questions in *Baker v. Carr*,[654] discussed below, appears to have changed the nature of the inquiry radically.

Origins and Development.—In the first decade after ratification of the Constitution, the Court in *Ware v. Hylton*[655] refused to pass on the question whether a treaty had been broken, and in *Mar-*

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[649] *But see* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (setting aside a state court refusal to give retroactive effect to a U.S. Supreme Court invalidation of that state's statute of limitations in certain suits, in an opinion by Justice Breyer, Justice Blackmun's successor); Ryder v. United States, 515 U.S. 177, 184–85 (1995) ("whatever the continuing validity of *Chevron Oil* after" *Harper* and *Reynoldsville Casket*).

[650] Rescue Army v. Municipal Court, 331 U.S. 549, 570 (1947); *cf.* Baker v. Carr, 369 U.S. 186, 278 (1962) (Justice Frankfurter dissenting). The most successful effort at conceptualization of the doctrine is Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966). *See* Hart & Wechsler (6th ed.), supra at 222–248.

[651] Frank, *Political Questions*, in SUPREME COURT AND SUPREME LAW (E. Cahn, ed., 1954), at 36.

[652] The concept of political question is "more amenable to description by infinite itemization than by generalization" Id.

[653] Baker v. Carr , 369 U.S. 186, 217 (1962).

[654] 369 U.S. at 208–232.

[655] 3 U.S. (3 Dall.) 199 (1796).

tin v. Mott,[656] the Court held that the President acting under congressional authorization had exclusive and unreviewable power to determine when the militia should be called out. But the roots of the doctrine are most clearly seen in *Marbury v. Madison*,[657] where Chief Justice Marshall stated: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive can never be made in this court." [658]

In *Luther v. Borden*,[659] however, the Court made clear that the doctrine went beyond considerations of interference with executive functions. This case, arising from the Dorr Rebellion (a period of political unrest in Rhode Island), considered the claims of two competing factions vying to be declared the lawful government of Rhode Island.[660] Chief Justice Taney, for the Court, began by saying that the answer was primarily a matter of state law that had been decided in favor of one faction by the state courts.[661] Insofar as the Federal Constitution had anything to say on the subject, the Chief Justice continued, that was embodied in the clause empowering the United States to guarantee to every state a republican form of government,[662] and this clause committed the determination of that issue to Congress.

"Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the govern-

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[656] 25 U.S. (12 Wheat.) 19 (1827).

[657] 5 U.S. (1 Cr.) 137 (1803).

[658] 5 U.S. (1 Cr.) at 170. In Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840), the Court, refusing an effort by mandamus to compel the Secretary of the Navy to pay a pension, said: "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them." It therefore follows that mandamus will lie against an executive official only to compel the performance of a ministerial duty, which admits of no discretion, and may not be invoked to control executive or political duties which admit of discretion. *See* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838).

[659] 48 U.S. (7 How.) 1 (1849).

[660] *Cf.* Baker v. Carr, 369 U.S. 186, 218–22 (1962); id. at 292–97 (Justice Frankfurter dissenting).

[661] *Luther*, 48 U.S. (7 How.) at 40.

[662] 48 U.S. at 42 (citing Article IV, § 4).

ment under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal."[663] Here, the contest had not proceeded to a point where Congress had made a decision, "[y]et the right to decide is placed there, and not in the courts."[664]

Moreover, in effectuating the provision in the same clause that the United States should protect states against domestic violence, Congress had vested discretion in the President to use troops to protect a state government upon the application of the legislature or the governor. Before he could act upon the application of a legislature or a governor, the President "must determine what body of men constitute the legislature, and who is the governor . . . ." No court could review the President's exercise of discretion in this respect; no court could recognize as legitimate a group vying against the group recognized by the President as the lawful government.[665] Although the President had not actually called out the militia in Rhode Island, he had pledged support to one of the competing governments, and this pledge of military assistance if it were needed had in fact led to the capitulation of the other faction, thus making an effectual and authoritative determination not reviewable by the Court.[666]

The Doctrine Before Baker v. Carr.—Over the years, the political question doctrine has been applied to preclude adjudication of a variety of other issues. In particular, prior to *Baker v. Carr*,[667] cases challenging the distribution of political power through apportionment and districting,[668] weighted voting,[669] and restrictions on political action[670] were held to present nonjusticiable political questions. Certain factors appear more or less consistently through most of the cases decided before *Baker*, and it is perhaps best to indicate the cases and issues deemed political before attempting to isolate these factors.

1. Republican Form of Government. By far the most consistent application of the doctrine has been in cases in which litigants as-

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[663] 48 U.S. at 42.

[664] Id.

[665] 48 U.S. at 43.

[666] 48 U.S. at 44.

[667] 369 U.S. 186 (1962).

[668] Colegrove v. Green, 328 U.S. 549 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947).

[669] South v. Peters, 339 U.S. 276 (1950) (county unit system for election of statewide officers with vote heavily weighted in favor of rural, lightly populated counties).

[670] MacDougall v. Green, 335 U.S. 281 (1948) (signatures on nominating petitions must be spread among counties of unequal population).

serted claims under the republican form of government clause.[671] The attacks were generally either on the government of the state itself[672] or involved a challenge regarding the manner in which it had acted.[673] There have, however, been cases involving this clause in which the Court has reached the merits.[674]

2. Recognition of Foreign States. Although there is language in the cases that would, if applied, serve to make all cases touching on foreign affairs and foreign policy political questions,[675] whether the courts can adjudicate a dispute in this area has often depended on the context in which it arises. Thus, the determination by the President whether to recognize the government of a foreign state[676] or who is the *de jure* or *de facto* ruler of a foreign state[677] is conclusive on the courts. In the absence of a definitive executive action, however, the courts will review the record to determine whether the United States has accorded a sufficient degree of recognition to allow the courts to take judicial notice of the existence of the state.[678] Moreover, the courts have often determined for themselves what effect, if any, should be accorded the acts of foreign powers, recognized or unrecognized.[679]

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[671] Article IV, § 4.

[672] As it was on the established government of Rhode Island in Luther v. Borden, 48 U.S. (7 How.) 1 (1849). *See also* Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Taylor v. Beckham, 178 U.S. 548 (1900).

[673] Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912) (challenging tax initiative); Kiernan v. City of Portland, 223 U.S. 151 (1912) (attacks on initiative and referendum); Marshall v. Dye, 231 U.S. 250 (1913) (state constitutional amendment procedure); O'Neill v. Leamer, 239 U.S. 244 (1915) (delegation to court to form drainage districts); Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916) (submission of legislation to referendum); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (workmen's compensation); Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74 (1930) (concurrence of all but one justice of state high court required to invalidate statute); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937) (delegation of legislative powers).

[674] All the cases, however, predate the application of the doctrine in Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912). *See* Attorney General of the State of Michigan ex rel. Kies v. Lowrey, 199 U.S. 233, 239 (1905) (legislative creation and alteration of school districts "compatible" with a republican form of government); Forsyth v. City of Hammond, 166 U.S. 506, 519 (1897) (delegation of power to court to determine municipal boundaries does not infringe republican form of government); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175–176 (1875) (denial of suffrage to women no violation of republican form of government).

[675] Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); Chicago & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

[676] United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818); Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852).

[677] Jones v. United States, 137 U.S. 202 (1890); Oetjen v. Central Leather Co., 246 U.S. 297 (1918). *See Ex parte* Hitz, 111 U.S. 766 (1884).

[678] United States v. The Three Friends, 166 U.S. 1 (1897); *In re* Baiz, 135 U.S. 403 (1890). *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

[679] United States v. Reynes, 50 U.S. (9 How.) 127 (1850); Garcia v. Lee, 37 U.S. (12 Pet.) 511 (1838); Keene v. McDonough, 33 U.S. (8 Pet.) 308 (1834). *See also* Wil-

3. Treaties. Similarly, the Court, when dealing with treaties and the treaty power, has treated as political questions whether the foreign party had constitutional authority to assume a particular obligation [680] and whether a treaty has lapsed because of the foreign state's loss of independence [681] or because of changes in the territorial sovereignty of the foreign state.[682] On the other hand, the Court will not only interpret the domestic effects of treaties,[683] but it will at times interpret the effects bearing on international matters.[684] The Court has generally deferred to the President and Congress with regard to the existence of a state of war and the dates of the beginning and ending and of states of belligerency between foreign powers, but the deference has sometimes been forced.[685]

4. Enactment or Ratification of Laws. Ordinarily, the Court will not look behind the fact of certification as to whether the standards requisite for the enactment of legislation [686] or ratification of a constitutional amendment [687] have in fact been met, although it will interpret the Constitution to determine what the basic standards are.[688] Further, the Court will decide certain questions if the political branches are in disagreement.[689]

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liams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839); Underhill v. Hernandez, 168 U.S. 250 (1897). *But see* United States v. Belmont, 301 U.S. 324 (1937). On the "act of state" doctrine, *compare* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), *with* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). *See also* First National City Bank v. Banco Para el Comercio de Cuba, 462 U.S. 611 (1983); W.S. Kirkpatrick & Co. v. Environmental Tectronics Corp., U.S. 400 (1990).

[680] Doe v. Braden, 57 U.S. (16 How.) 635 (1853).

[681] Terlinden v. Ames, 184 U.S. 270 (1902); Clark v. Allen, 331 U.S. 503 (1947).

[682] Kennett v. Chambers, 55 U.S. (14 How.) 38 (1852). On the effect of a violation by a foreign state on the continuing effectiveness of the treaty, *see* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); Charlton v. Kelly, 229 U.S. 447 (1913).

[683] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796). *Cf.* Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581 (1889) (conflict of treaty with federal law). On the modern formulation, *see* Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 229–230 (1986).

[684] Perkins v. Elg, 307 U.S. 325 (1939); United States v. Rauscher, 119 U.S. 407 (1886).

[685] Commercial Trust Co v. Miller, 262 U.S. 51 (1923); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948); Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924); Ludecke v. Watkins, 335 U.S. 160 (1948); Lee v. Madigan, 358 U.S. 228 (1959); *The Divina Pastora*, 17 U.S. (4 Wheat.) 52 (1819). The cases involving the status of Indian tribes as foreign states usually but not always have presented political questions. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); United States v. Sandoval, 231 U.S. 28 (1913); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[686] Field v. Clark, 143 U.S. 649 (1892); Harwood v. Wentworth, 162 U.S. 547 (1896); *cf.* Gardner v. The Collector, 73 U.S. (6 Wall.) 499 (1868). *See*, for the modern formulation, United States v. Munoz-Flores, 495 U.S. 385 (1990).

[687] Coleman v. Miller, 307 U.S. 433 (1939) (Congress's discretion to determine what passage of time will cause an amendment to lapse, and effect of previous rejection by legislature).

[688] Missouri Pac. Ry. v. Kansas, 248 U.S. 276 (1919); Rainey v. United States, 232 U.S. 310 (1914); Flint v. Stone Tracy Co., 220 U.S. 107 (1911); Twin City Na-

From this limited review of the principal areas in which the political question doctrine seemed most established, it is possible to extract some factors that seemingly convinced the courts that the issues presented went beyond the judicial responsibility. These factors, stated baldly, would appear to be the lack of requisite information and the difficulty of obtaining it,[690] the necessity for uniformity of decision and deference to the wider responsibilities of the political departments,[691] and the lack of adequate standards to resolve a dispute.[692] But present in all the political cases was (and is) the most important factor: a "prudential" attitude about the exercise of judicial review, which emphasizes that courts should be wary of deciding on the merits any issue in which claims of principle as to the issue and of expediency as to the power and prestige of courts are in sharp conflict. The political question doctrine was (and is) thus a way of avoiding a principled decision damaging to the Court or an expedient decision damaging to the principle.[693]

Baker v. Carr.—In *Baker v. Carr*,[694] the Court undertook a major reformulation and rationalization of the political question doctrine, which has considerably narrowed its application. Following *Baker*, the whole of the apportionment-districting-election restriction controversy previously immune to federal-court adjudication was considered and decided on the merits,[695] and the Court's subse-

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tional Bank v. Nebeker, 167 U.S. 196 (1897); Lyons v. Woods, 153 U.S. 649 (1894); United States v. Ballin, 144 U.S. 1 (1892) (statutes); United States v. Sprague, 282 U.S. 716 (1931); Leser v. Garnett, 258 U.S. 130 (1922); Dillon v. Gloss, 256 U.S. 368 (1921); Hawke v. Smith (No. 1), 253 U.S. 221 (1920); *National Prohibition Cases*, 253 U.S. 350 (1920); Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798) (constitutional amendments).

689 *Pocket Veto Case*, 279 U.S. 655 (1929); Wright v. United States, 302 U.S. 583 (1938).

690 *See*, *e.g.*, Chicago & S. Air Lines v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948); Coleman v. Miller, 307 U.S. 433, 453, (1939).

691 *See*, *e.g.*, Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 420 (1839). Similar considerations underlay the opinion in Luther v. Borden, 48 U.S. (7 How.) 1 (1849), in which Chief Justice Taney wondered how a court decision in favor of one faction would be received with Congress seating the representatives of the other faction and the President supporting that faction with military force.

692 Baker v. Carr, 369 U.S. 186, 217, 226 (1962) (opinion of the Court); id. at 268, 287, 295 (Justice Frankfurter dissenting)

693 For a statement of the "prudential" view, *see generally* A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962), *but see esp.* 23–28, 69–71, 183–198. *See also* Baker v. Carr, 369 U.S. 186, 267 (1962) (Justice Frankfurter dissenting.) The opposing view, which has been called the "classicist" view, is that courts are duty bound to decide all cases properly before them. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). *See also* H. Wechsler, Principles, Politics, and Fundamental Law: Selected Essays 11–15 (1961).

694 369 U.S. 186 (1962).

695 Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Hadley v. Junior College District, 397 U.S. 50 (1970) (apportionment and districting, congressional, legislative, and local); Gray v. Sanders, 372 U.S. 368 (1963) (county

quent rejection of the doctrine in other cases disclosed narrowing in other areas as well.[696]

According to Justice Brennan, who delivered the opinion of the Court, "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"[697] Thus, the "nonjusticiability of a political question is primarily a function of the separation of powers."[698] "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."[699] Following a discussion of several areas in which the doctrine had been used, Justice Brennan continued: "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers."

The Justice went on to list a variety of factors to be considered, noting that "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrass-

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unit system weighing statewide elections); Moore v. Ogilvie, 394 U.S. 814 (1969) (geographic dispersion of persons signing nominating petitions).

[696] *See, e.g.,* Powell v. McCormack, 395 U.S. 486 (1969). Nonetheless, the doctrine continues to be sighted.

[697] Baker v. Carr, 369 U.S. 186, 210 (1962). This formulation fails to explain cases like Moyer v. Peabody, 212 U.S. 78 (1909), in which the conclusion of the governor of a state that insurrection existed or was imminent justifying suspension of constitutional rights was deemed binding on the Court. *Cf.* Sterling v. Constantin, 287 U.S. 378 (1932). The political question doctrine was applied in cases challenging the regularity of enactments of territorial legislatures. Harwood v. Wentworth, 162 U.S. 547 (1896); Lyons v. Woods, 153 U.S. 649 (1894); Clough v. Curtis, 134 U.S. 361 (1890). *See also In re* Sawyer, 124 U.S. 200 (1888); Walton v. House of Representatives, 265 U.S. 487 (1924).

[698] 369 U.S. at 210.

[699] 369 U.S. at 211.

ment from multifarious pronouncements by various departments on one question." [700]

Powell v. McCormack.—Because *Baker* had apparently restricted the political question doctrine to intrafederal issues, there was no discussion of the doctrine when the Court held that it had power to review and overturn a state legislature's refusal to seat a member-elect because of his expressed views.[701] But in *Powell v. McCormack*,[702] the Court was confronted with a challenge to the exclusion of a member-elect by the United States House of Representatives. Its determination that the political question doctrine did not bar its review of the challenge indicates the narrowness of application of the doctrine in its present state. Taking Justice Brennan's formulation in *Baker* of the factors that go to make up a political question,[703] Chief Justice Warren determined that the only critical one in this case was whether there was a "textually demonstrable constitutional commitment" to the House to determine in its sole discretion the qualifications of members.[704]

In order to determine whether there was a textual commitment, the Court reviewed the Constitution, the Convention proceedings, and English and United States legislative practice to ascertain what power had been conferred on the House to judge the qualifications of its members; finding that the Constitution vested the House with power only to look at the qualifications of age, residency, and citizenship, the Court thus decided that in passing on Powell's conduct and character the House had exceeded the powers committed to it and thus judicial review was not barred by this fac-

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[700] 369 U.S. at 217. It remains unclear after *Baker* whether the political question doctrine is applicable *solely* to intrafederal issues or only *primarily*, so that the existence of one or more of these factors in a case involving, say, a state, might still give rise to nonjusticiability. At one point, id. at 210, Justice Brennan says that nonjusticiability of a political question is "primarily" a function of separation of powers but in the immediately preceding paragraph he states that "it is" the intrafederal aspect "and not the federal judiciary's relationship to the States" that raises political questions. But subsequently, id. at 226, he balances the present case, which involves a state and not a branch of the Federal Government, against each of the factors listed in the instant quotation and notes that none apply. His discussion of why Guarantee Clause cases are political presents much the same difficulty, id. at 222–26, because he joins the conclusion that the clause commits resolution of such issues to Congress with the assertion that the clause contains no "criteria by which a court could determine which form of government was republican," id. at 222, a factor not present when the Equal Protection Clause is relied on. Id. at 226.

[701] Bond v. Floyd, 385 U.S. 116 (1966).

[702] 395 U.S. 486 (1969).

[703] Baker v. Carr, 369 U.S. 186, 217 (1962).

[704] 395 U.S. at 319.

tor of the political question doctrine.[705] Although this approach accords with the "classicist" theory of judicial review,[706] it circumscribes the political question doctrine severely, inasmuch as all constitutional questions turn on whether a governmental body has exceeded its specified powers, a determination the Court traditionally makes, whereas traditionally the doctrine precluded the Court from inquiring whether the governmental body had exceeded its powers. In short, the political question consideration may now be one on the merits rather than a decision not to decide.

Chief Justice Warren disposed of the other factors present in political question cases in slightly more than a page. Because resolution of the question turned on an interpretation of the Constitution, a judicial function which must sometimes be exercised "at variance with the construction given the document by another branch," there was no lack of respect shown another branch. Nor, because the Court is the "ultimate interpreter of the Constitution," will there be "multifarious pronouncements by various departments on one question," nor, since the Court is merely interpreting the Constitution, is there an "initial policy determination" not suitable for courts. Finally, "judicially . . . manageable standards" are present in the text of the Constitution.[707] The effect of *Powell* was to discard all the *Baker* factors inhering in a political question, with the exception of the textual commitment factor, and that was interpreted in such a manner as seldom if ever to preclude a judicial decision on the merits.

The Doctrine Reappears.—Despite the apparent narrowing of the doctrine in *Baker* and *Powell*, the Court has not abandoned it. Reversing a lower federal court ruling subjecting the training and discipline of National Guard troops to court review and supervision, the Court held that under Article I, § 8, cl. 16, the organizing, arming, and disciplining of such troops are committed to Congress and by congressional enactment to the Executive Branch. "It would be difficult to think of a clearer example of the type of governmen-

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[705] 395 U.S. at 519–47. The Court noted, however, that even if this conclusion had not been reached from unambiguous evidence, the result would have followed from other considerations. Id. at 547–48.

[706] *See* H. Wechsler, supra at 11–12. Professor Wechsler believed that congressional decisions about seating members were immune to review. Id. Chief Justice Warren noted that "federal courts might still be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications. This is an issue not presented in this case and we express no view as to its resolution." Powell v. McCormack, 395 U.S. 486, 521 n.42 (1969). *See also* id. at 507 n.27 (reservation on limitations that might exist on Congress's power to expel or otherwise punish a sitting member).

[707] 395 U.S. at 548–549. With the formulation of Chief Justice Warren, *compare* that of then-Judge Burger in the lower court. 395 F.2d 577, 591–96 (D.C. Cir. 1968).

tal action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." [708]

The suggestion of the infirmity of the political question doctrine was rejected, since "because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise." [709] In staying a grant of remedial relief in another case, the Court strongly suggested that the actions of political parties in national nominating conventions may also present issues not meet for judicial resolution.[710] A challenge to the Senate's interpretation of and exercise of its impeachment powers was held to be nonjusticiable; there was a textually demonstrable commitment of the issue to the Senate, and there was a lack of judicially discoverable and manageable standards for resolving the issue.[711]

Despite the occasional resort to the doctrine, the Court continues to reject its application in language that confines its scope. Thus, when parties challenged the actions of the Secretary of Commerce in declining to certify, as required by statute, that Japanese whaling practices undermined the effectiveness of international conventions, the Court rejected the Government's argument that the political question doctrine precluded decision on the merits. The Court's prime responsibility, it said, is to interpret statutes, treaties, and executive agreements; the interplay of the statutes and the agree-

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[708] Gilligan v. Morgan, 413 U.S. 1, 10 (1973). Similar prudential concerns seem to underlay, though they did not provide the formal basis for, the decisions in O'Shea v. Littleton, 414 U.S. 488 (1974), and Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974).

[709] 413 U.S. at 11. Other considerations of justiciability, however, id. at 10, preclude using the case as square precedent on political questions. Notice that in Scheuer v. Rhodes, 416 U.S. 232, 249 (1974), the Court denied that the Gilligan v. Morgan holding barred adjudication of damage actions brought against state officials by the estates of students killed in the course of the conduct that gave rise to both cases.

[710] O'Brien v. Brown, 409 U.S. 1 (1972) (granting stay). The issue was mooted by the passage of time and was not thereafter considered on the merits by the Court. Id. at 816 (remanding to dismiss as moot). It was also not before the Court in Cousins v. Wigoda, 419 U.S. 477 (1975), but it was alluded to there. *See* id. at 483 n.4, and id. at 491 (Justice Rehnquist concurring). *See also* Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Justices Rehnquist, Stewart, and Stevens, and Chief Justice Burger using political question analysis to dismiss a challenge to presidential action). *But see* id. at 997, 998 (Justice Powell rejecting analysis for this type of case).

[711] Nixon v. United States, 506 U.S. 224 (1993). The Court pronounced its decision as perfectly consonant with Powell v. McCormack. Id. at 236–38.

ments in this case implicated the foreign relations of the Nation. "But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones." [712]

After requesting argument on the issue, the Court held that a challenge to a statute on the ground that it did not originate in the House of Representatives as required by the Origination Clause was justiciable.[713] Turning back reliance on the various factors set out in *Baker*, in much the same tone as in *Powell v. McCormack*, the Court continued to evidence the view that only questions textually committed to another branch are political questions. Invalidation of a statute because it did not originate in the right House would not demonstrate a "lack of respect" for the House that passed the bill. "[D]isrespect," in the sense of rejecting Congress's reading of the Constitution, "cannot be sufficient to create a political question. If it were *every* judicial resolution of a constitutional challenge to a congressional enactment would be impermissible." [714] That the House of Representatives has the power and incentives to protect its prerogatives by not passing a bill violating the Origination Clause did not make this case nonjusticiable. "[T]he fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question." [715]

The Court also rejected the contention that, because the case did not involve a matter of individual rights, it ought not be adjudicated. Political questions are not restricted to one kind of claim, but the Court frequently has decided separation-of-power cases brought by people in their individual capacities. Moreover, the allocation of powers within a branch, just as the separation of powers among branches, is designed to safeguard liberty.[716] Finally, the Court was sanguine that it could develop "judicially manageable standards" for disposing of Origination Clause cases, and, thus, it did not view the issue as political in that context.[717]

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[712] Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 230 (1986). *See also* Davis v. Bandemer, 478 U.S. 109 (1986) (challenge to political gerrymandering is justiciable). *But see* Vieth v. Jubelirer, 541 U.S. 267 (2004) (no workable standard has been found for measuring burdens on representational rights imposed by political gerrymandering).

[713] United States v. Munoz-Flores, 495 U.S. 385 (1990).

[714] 495 U.S. at 390 (emphasis in original).

[715] 495 U.S. at 393.

[716] 495 U.S. at 393–95.

[717] 495 U.S. at 395–96.

In *Zivotosky v. Clinton,*[718] the Court declined to find a political question where a citizen born in Jerusalem sought, pursuant to federal statute, to have "Israel" listed on his passport as his place of birth, the Executive Branch having declined to recognize Israeli sovereignly over that city. Justice Roberts, for the Court, failed to even acknowledge the numerous factors set forth in Justice Brennan's *Baker* opinion save two—whether there is a textually demonstrable commitment of the issue to another department or a lack of judicially discoverable and manageable standards for resolving it.[719] The Court noted that while the decision as whether or not to recognized Jerusalem as the capital of Israel might be exclusively the province of the Executive Branch, there is "no exclusive commitment to the Executive of the power to determine the constitutionality of a statute,"[720] such as whether Congress is encroaching on Presidential powers. Similarly, this latter question, while perhaps a difficult one, is amenable to the type of separation of powers "standards" used by the Court in other separation of powers cases.

In short, the political question doctrine may not be moribund, but it does seem applicable to a very narrow class of cases. Significantly, the Court made no mention of the doctrine when it resolved issues arising from Florida's recount of votes in the closely contested 2000 presidential election,[721] despite the fact that the Constitution vests in Congress the authority to count electoral votes, and further provides for selection of the President by the House of Representatives if no candidate receives a majority of electoral votes.[722]

JUDICIAL REVIEW

The Establishment of Judicial Review

Judicial review is one of the distinctive features of United States constitutional law. It is no small wonder, then, to find that the power of the federal courts to test federal and state legislative enactments and other actions by the standards of what the Constitution grants and withholds is nowhere expressly conveyed. But it is hardly noteworthy that its legitimacy has been challenged from the first, and, while now accepted generally, it still has detractors and its

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[718] 566 U.S. ___, No. 10–699, slip op. (2010).

[719] This left it to Justice Sotomayor and Justice Breyer to raise and address the other considerations, respectively, in concurrence and dissent.

[720] 566 U.S. ___, No. 10–699, slip op. at 8.

[721] *See* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000); and Bush v. Gore, 531 U.S. 98 (2000).

[722] 12th Amendment.

supporters disagree about its doctrinal basis and its application.[723] Although it was first asserted in *Marbury v. Madison*[724] to strike down an act of Congress as inconsistent with the Constitution, judicial review did not spring full-blown from the brain of Chief Justice Marshall. The concept had been long known, having been utilized in a much more limited form by Privy Council review of colonial legislation and its validity under the colonial charters,[725] and there were several instances known to the Framers of state court invalidation of state legislation as inconsistent with state constitutions.[726]

Practically all of the framers who expressed an opinion on the issue in the Convention appear to have assumed and welcomed the existence of court review of the constitutionality of legislation,[727]

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[723] *See* the richly detailed summary and citations to authority in G. GUNTHER, CONSTITUTIONAL LAW 1–38 (12th ed. 1991); For expositions on the legitimacy of judicial review, *see* L. HAND, THE BILL OF RIGHTS (1958); H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW:SELECTED ESSAYS 1–15 (1961); A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1–33 (1962); R. BERGER, CONGRESS V. THE SUPREME COURT (1969). For an extensive historical attack on judicial review, *see* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES chs. 27–29 (1953), with which *compare* Hart, *Book Review*, 67 HARV. L. REV. 1456 (1954). A brief review of the ongoing debate on the subject, in a work that now is a classic attack on judicial review, is Westin, *Introduction: Charles Beard and American Debate over Judicial Review, 1790–1961*, in C. BEARD, THE SUPREME COURT AND THE CONSTITUTION 1–34 (1962 reissue of 1938 ed.), and bibliography at 133–149. While much of the debate focuses on judicial review of acts of Congress, the similar review of state acts has occasioned much controversy as well.

[724] 5 U.S. (1 Cr.) 137 (1803). A state act was held inconsistent with a treaty in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

[725] J. Goebel, supra at 60–95.

[726] Id. at 96–142.

[727] M. Farrand, supra at 97–98 (Gerry), 109 (King), 2 id. at 28 (Morris and perhaps Sherman). 73 (Wilson), 75 (Strong, but the remark is ambiguous). 76 (Martin), 78 (Mason), 79 (Gorham, but ambiguous), 80 (Rutledge), 92–93 (Madison), 248 (Pinckney), 299 (Morris), 376 (Williamson), 391 (Wilson), 428 (Rutledge), 430 (Madison), 440 (Madison), 589 (Madison); 3 id. at 220 (Martin). The only expressed opposition to judicial review came from Mercer with a weak seconding from Dickinson. "Mr. Mercer . . . disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontroulable." 2 id. at 298. "Mr. Dickinson was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute." Id. at 299. Of course, the debates in the Convention were not available when the state ratifying conventions acted, so that the delegates could not have known these views about judicial review in order to have acted knowingly about them. Views, were, however, expressed in the ratifying conventions recognizing judicial review, some of them being uttered by Framers. 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836). 131 (Samuel Adams, Massachusetts), 196–197 (Ellsworth, Connecticut). 348, 362 (Hamilton, New York): 445–446. 478 (Wilson, Pennsylvania), 3 id. at 324–25, 539, 541 (Henry, Virginia), 480 (Mason, Virginia), 532 (Madison, Virginia), 570 (Randolph, Virginia); 4 id. at 71 (Steele, North Carolina), 156–157 (Davie, North Carolina). In the Virginia convention, John Marshall observed if Congress "were

and prior to *Marbury* the power seems very generally to have been assumed to exist by the Justices themselves.[728] In enacting the Ju-

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to make a law not warranted by any of the powers enumerated, it would be considered by the judge as an infringement of the Constitution which they are to guard . . . They would declare it void . . . . To what quarter will you look for protection from an infringement on the constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." 3 id. at 553–54. Both Madison and Hamilton similarly asserted the power of judicial review in their campaign for ratification. THE FEDERALIST (J. Cooke ed. 1961). *See* Nos. 39 and 44, at 256, 305 (Madison), Nos. 78 and 81, at 524–530, 541–552 (Hamilton). The persons supporting or at least indicating they thought judicial review existed did not constitute a majority of the Framers, but the absence of controverting statements, with the exception of the Mercer-Dickinson comments, indicates at least acquiescence if not agreements by the other Framers.

To be sure, subsequent comments of some of the Framers indicate an understanding contrary to those cited in the convention. *See, e.g.*, Charles Pinckney in 1799: "On no subject am I more convinced, than that it is an unsafe and dangerous doctrine in a republic, ever to suppose that a judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws, or any act of the legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country." STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 412 (F. Wharton ed., 1849).

Madison's subsequent changes of position are striking. His remarks in the Philadelphia Convention, in the Virginia ratifying convention, and in The Federalist, cited above, all unequivocally favor the existence of judicial review. And in Congress arguing in support of the constitutional amendments providing a bill of rights, he observed: "If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights," 1 ANNALS OF CONGRESS 457 (1789); 5 WRITINGS OF JAMES MADISON 385 (G. Hunt ed., 1904). Yet, in a private letter in 1788, he wrote: "In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them; and as the courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with the final character. This makes the Judiciary Department paramount in fact to the legislature, which was never intended and can never be proper." Id. at 294. At the height of the dispute over the Alien and Sedition Acts, Madison authored a resolution ultimately passed by the Virginia legislature which, though milder, and more restrained than one authored by Jefferson and passed by the Kentucky legislature, asserted the power of the states, though not of one state or of the state legislatures alone, to "interpose" themselves to halt the application of an unconstitutional law. 3 I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION, 1787–1800 460–464, 467–471 (1950); Report on the Resolutions of 1798, 6 Writings of James Madison, op. cit., 341–406. Embarrassed by the claim of the nullificationists in later years that his resolution supported their position, Madison distinguished his and their positions and again asserted his belief in judicial review. 6 I. Brant, *supra*, 481–485, 488–489.

The various statements made and positions taken by the Framers have been culled and categorized and argued over many times. For a recent compilation reviewing the previous efforts, *see* R. Berger, supra, chs. 3–4.

[728] Thus, the Justices on circuit refused to administer a pension act on the grounds of its unconstitutionally, *see Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), and "Finality of Judgment as an Attribute of Judicial Power," supra. Chief Justice Jay and other Justices wrote that the imposition of circuit duty on Justices was unconstitu-

diciary Act of 1789, Congress explicitly provided for the exercise of the power,[729] and in other debates questions of constitutionality and of judicial review were prominent.[730] Nonetheless, although judicial review is consistent with several provisions of the Constitution and the argument for its existence may be derived from them, these provisions do not compel the conclusion that the Framers intended judicial review nor that it must exist. It was Chief Justice Marshall's achievement that, in doubtful circumstances and an awkward position, he carried the day for the device, which, though questioned, has expanded and become solidified at the core of constitutional jurisprudence.

Marbury v. Madison.—Chief Justice Marshall's argument for judicial review of congressional acts in *Marbury v. Madison* [731] had been largely anticipated by Hamilton.[732] Hamilton had written, for example: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution, is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to

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tional, although they never mailed the letter, supra, in Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), a feigned suit, the constitutionality of a federal law was argued before the Justices and upheld on the merits, in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1797), a state law was overturned, and dicta in several opinions asserted the principle. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Justice Iredell), and several Justices on circuit, quoted in J. Goebel, supra, at 589–592.

[729] In enacting the Judiciary Act of 1789, 1 Stat. 73, Congress chose not to vest "federal question" jurisdiction in the federal courts but to leave to the state courts the enforcement of claims under the Constitution and federal laws. In § 25, 1 Stat. 85, Congress provided for review by the Supreme Court of final judgments in state courts (1) ". . . where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity;" (2) ". . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity;" or (3) ". . . where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed" thereunder. The ruling below was to be "re-examined and reversed or affirmed in the Supreme Court . . . ."

[730] *See* in particular the debate on the President's removal powers, discussed supra, "The Removal Power" with statements excerpted in R. Berger, supra at 144–150. Debates on the Alien and Sedition Acts and on the power of Congress to repeal the Judiciary Act of 1801 similarly saw recognition of judicial review of acts of Congress. C. Warren, supra at 107–124.

[731] 5 U.S. (1 Cr.) 137 (1803).

[732] THE FEDERALIST, Nos. 78 and 81 (J. Cooke ed. 1961), 521–530, 541–552.

the statute, the intention of the people to the intention of their agents." [733]

At the time of the change of administration from Adams to Jefferson, several commissions of appointment to office had been signed but not delivered and were withheld on Jefferson's express instruction. Marbury sought to compel the delivery of his commission by seeking a writ of mandamus in the Supreme Court in the exercise of its original jurisdiction against Secretary of State Madison. Jurisdiction was based on § 13 of the Judiciary Act of 1789,[734] which Marbury, and ultimately the Supreme Court, interpreted to authorize the Court to issue writs of mandamus in suits in its original jurisdiction.[735] Though deciding all the other issues in Marbury's favor, the Chief Justice wound up concluding that the § 13 authorization was an attempt by Congress to expand the Court's original jurisdiction beyond the constitutional prescription and was therefore void.[736]

"The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States," Marshall began his discussion of this final phase of the case, "but, happily, not of an intricacy proportioned to its interest." [737] First, Marshall recognized certain fundamental principles. The people had come together to establish a government. They provided for its organization and assigned to its various departments their powers and established certain limits not to be transgressed by those departments. The limits were expressed in a written constitution, which would serve no purpose "if these limits may, at any time, be passed by those intended to be restrained." Be-

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[733] Id., No. at 78, 525.

[734] 1 Stat. 73, 80.

[735] The section first denominated the original jurisdiction of the Court and then described the Court's appellate jurisdiction. Following and indeed attached to the sentence on appellate jurisdiction, being separated by a semicolon, is the language saying "and shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." The Chief Justice could easily have interpreted the authority to have been granted only in cases under appellate jurisdiction or as authority conferred in cases under both original and appellate jurisdiction when the cases are otherwise appropriate for one jurisdiction or the other. Textually, the section does not compel a reading that Congress was conferring on the Court an original jurisdiction to issue writs of mandamus *per se*.

[736] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 173–180 (1803). For a classic treatment of *Marbury*, *see* Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1.

[737] 5 U.S. at 176. One critic has written that by this question Marshall "had already begged the question-in-chief, which was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant." A. Bickel, supra at 3. Marshall, however, soon reached this question, though more by way of assertion than argument. 5 U.S. (1 Cr.) at 177–78.

cause the Constitution is "a superior paramount law, unchangeable by ordinary means, . . . a legislative act contrary to the constitution is not law." [738] "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?" The answer, thought the Chief Justice, was obvious. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." [739]

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." [740]

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply." [741] To declare otherwise, Chief Justice Marshall said, would be to permit the legislature to "pass[ ] at pleasure" the limits imposed on its powers by the Constitution.[742]

The Chief Justice then turned from the philosophical justification for judicial review as arising from the very concept of a written constitution, to specific clauses of the Constitution. The judicial power, he observed, was extended to "all cases arising under the constitution." [743] It was "too extravagant to be maintained that the Framers had intended that a case arising under the constitution should be decided without examining the instrument under which it arises." [744] Suppose, he said, that Congress laid a duty on an article exported from a state or passed a bill of attainder or an *ex post facto* law or provided that treason should be proved by the testimony of one witness. Would the courts enforce such a law in the face of an express constitutional provision? They would not, he con-

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[738] 5 U.S. at 176–77.
[739] 5 U.S. at 177.
[740] 5 U.S. at 178.
[741] 5 U.S. at 177–78.
[742] 5 U.S. at 178.
[743] 5 U.S. at 178. The reference is, of course, to the first part of clause 1, § 2, Art. III: "The judicial power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." *Compare* A. Bickel, supra at 5–6, *with* R. Berger, supra at 189–222.
[744] 5 U.S. at 179.

tinued, because their oath required by the Constitution obligated them to support the Constitution and to enforce such laws would violate the oath.[745] Finally, the Chief Justice noted that the Supremacy Clause (Art. VI, cl. 2) gave the Constitution precedence over laws and treaties, providing that only laws "which shall be made in *pursuance* of the constitution" shall be the supreme law of the land.[746]

The decision in *Marbury v. Madison* has never been disturbed, although it has been criticized and has had opponents throughout our history. It not only carried the day in the federal courts, but from its announcement judicial review by state courts of local legislation under local constitutions made rapid progress and was securely established in all states by 1850.[747]

Judicial Review and National Supremacy.—Even many persons who have criticized the concept of judicial review of congressional acts by the federal courts have thought that review of state acts under federal constitutional standards is soundly based in the Supremacy Clause, which makes the Constitution, laws enacted pursuant to the Constitution, and treaties the supreme law of the land,[748] and which Congress effectuated by enacting § 25 of the Judiciary Act of 1789.[749] Five years before *Marbury v. Madison*, the Court held invalid a state law as conflicting with the terms of a treaty,[750] and seven years after Chief Justice Marshall's opinion it voided a state law as conflicting with the Constitution.[751]

Virginia provided a states' rights challenge to a broad reading of the Supremacy Clause and to the validity of § 25 in *Martin v. Hunter's Lessee*[752] and in *Cohens v. Virginia*.[753] In both cases, it

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[745] 5 U.S. at 179–80. The oath provision is contained in Art. VI, cl. 3. *Compare* A. Bickel, supra at 7–8, *with* R. Berger, supra at 237–244.

[746] 5 U.S. at 180. *Compare* A. Bickel, *supra* at 8–12, *with* R. Berger, *supra* at 223–284.

[747] E. Corwin, The Doctrine of Judicial Review 75–78 (1914); Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitution Theory in the State, 1790–1860*, 120 U. Pa. L. Rev. 1166 (1972).

[748] 2 W. Crosskey, supra at 989. *See* the famous remark of Holmes: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as the laws of the several States." O. Holmes, Collected Legal Papers 295–296 (1921).

[749] 1 Stat. 73, 85, quoted supra.

[750] Ware v. Hylton, 3 U.S. (3 Dall.) 190 (1796).

[751] Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810). The case came to the Court by appeal from a circuit court and not from a state court under § 25. Famous early cases coming to the Court under § 25 in which state laws were voided included Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); and McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[752] 14 U.S. (1 Wheat.) 304 (1816).

[753] 19 U.S. (6 Wheat.) 264 (1821).

was argued that while the courts of Virginia were constitutionally obliged to prefer "the supreme law of the land," as set out in the Supremacy Clause, over conflicting state constitutional provisions and laws, it was only by their own interpretation of the supreme law that they as courts of a sovereign state were bound. Furthermore, it was contended that cases did not "arise" under the Constitution unless they were brought in the first instance by someone claiming such a right, from which it followed that "the judicial power of the United States" did not "extend" to such cases unless they were brought in the first instance in the courts of the United States. But Chief Justice Marshall rejected this narrow interpretation: "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either." [754] Passing on to the power of the Supreme Court to review such decisions of the state courts, he said: "Let the nature and objects of our Union be considered: let the great fundamental principles on which the fabric stands, be examined: and we think, the result must be, that there is nothing so extravagantly absurd, in giving to the Court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction." [755]

Limitations on the Exercise of Judicial Review

Constitutional Interpretation.—Under a written constitution, which is law and is binding on government, the practice of judicial review raises questions of the relationship between constitutional interpretation and the Constitution—the law that is construed. The legitimacy of construction by an unelected entity in a republican or democratic system becomes an issue whenever the construction is controversial, as it frequently is. Full consideration would

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[754] 19 U.S. at 379.

[755] 19 U.S. at 422–23. Justice Story traversed much of the same ground in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). In Ableman v. Booth, 62 U.S. (21 How.) 506 (1859), the Wisconsin Supreme Court had declared an act of Congress invalid and disregarded a writ of error from the Supreme Court, raising again the Virginia arguments. Chief Justice Taney emphatically rebuked the assertions on grounds both of dual sovereignty and national supremacy. His emphasis on the indispensability of the federal judicial power to maintain national supremacy, to protect the states from national encroachments, and to make the Constitution and laws of the United States uniform all combine to enhance the federal judicial power to a degree perhaps beyond that envisaged even by Story and Marshall. As late as Williams v. Bruffy, 102 U.S. 248 (1880), the concepts were again thrashed out with the refusal of a Virginia court to enforce a mandate of the Supreme Court. *See also* Cooper v. Aaron, 358 U.S. 1 (1958).

carry us far afield, in view of the immense corpus of writing with respect to the proper mode of interpretation during this period.

Scholarly writing has identified six forms of constitutional argument or construction that may be used by courts or others in deciding a constitutional issue.[756] These are (1) historical, (2) textual, (3) structural, (4) doctrinal, (5) ethical, and (6) prudential. The historical argument is largely, though not exclusively, associated with the theory of original intent or original understanding, under which constitutional and legal interpretation is limited to attempting to discern the original meaning of the words being construed as that meaning is revealed in the intentions of those who created the law or the constitutional provision in question. The textual argument, closely associated in many ways to the doctrine of original intent, concerns whether the judiciary or another is bound by the text of the Constitution and the intentions revealed by that language, or whether it may go beyond the four corners of the constitutional document to ascertain the meaning, a dispute encumbered by the awkward constructions, interpretivism and noninterpretivism.[757] Using a structural argument, one seeks to infer structural rules from the relationships that the Constitution mandates.[758] The remaining three modes are not necessarily tied to original intent, text, or structure, though they may have some relationship. Doctrinal arguments proceed from the application of precedents. Prudential arguments seek to balance the costs and benefits of a particular rule. Ethical arguments derive rules from those moral commitments of the American ethos that are reflected in the Constitution.

Although the scholarly writing ranges widely, a much more narrow scope is seen in the actual political-judicial debate. Rare is the judge who will proclaim a devotion to ethical guidelines, such, for example, as natural-law precepts. The usual debate ranges from those

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[756] The six forms, or "modalities" as he refers to them, are drawn from P. Bobbitt, Constitutional Fate: Theory of the Constitution (1982); P. Bobbitt, Constitutional Interpretation (1991). Of course, other scholars may have different categories, but these largely overlap these six forms. *E.g.*, Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987); Post, *Theories of Constitutional Interpretation*, in Law and the Order of Culture 13–41 (R. Post ed., 1991).

[757] Among the vast writing, *see, e.g.*, R. Bork, The Tempting of America (1990); J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980); L. Tribe & M. Dorf, On Reading the Constitution (1991); H. Wellington, Interpreting the Constitution (1990); Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N. Y. U. L. Rev. 259 (1981); Symposium, *Judicial Review and the Constitution: The Text and Beyond*, 8 U. Dayton L. Rev. 43 (1983); Symposium, *Judicial Review Versus Democracy*, 42 Ohio St. L.J. 1 (1981); Symposium, *Democracy and Distrust: Ten Years Later*, 77 Va. L. Rev. 631 (1991). *See also* Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 Ohio St. L.J. 1085 (1989).

[758] This mode is most strongly association with C. Black, Structure and Relationship in Constitutional Law (1969).

adherents of strict construction and original intent to those with loose construction and adaptation of text to modern-day conditions.[759] However, it is with regard to more general rules of prudence and self-restraint that one usually finds the enunciation and application of limitations on the exercise of constitutional judicial review.

Prudential Considerations.—Implicit in the argument of *Marbury v. Madison*[760] is the thought that the Court is obligated to take and decide cases meeting jurisdictional standards. Chief Justice Marshall spelled this out in *Cohens v. Virginia*:[761] "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." As the comment recognizes, because judicial review grows out of the fiction that courts only declare what the law is in specific cases[762] and are without will or discretion,[763] its exercise is surrounded by the inherent limitations of the judicial process, most basically, of course, by the necessity of a case or controversy and the strands of the doctrine comprising the concept of justiciability.[764] But, although there are hints of Chief Justice Marshall's activism in some modern cases,[765] the Court has always adhered, at times more strictly than at other times, to several discretionary rules or concepts of restraint in the exer-

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[759] *E.g.*, Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701 (1985); Addresses: Construing the Constitution, 19 U. C. DAVIS L. REV. 1 (1985), containing addresses by Justice Brennan, id. at 2, Justice Stevens, id. at 15, and Attorney General Meese. Id. at 22. *See also* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

[760] 5 U.S. (1 Cr.) 137 (1803).

[761] 19 U.S. (6 Wheat.) 264, 404, (1821).

[762] *See, e.g.*, Justice Sutherland in Adkins v. Children's Hospital, 261 U.S. 525, 544 (1923), and Justice Roberts in United States v. Butler, 297 U.S. 1, 62 (1936).

[763] "Judicial power, as contradistinguished from the powers of the law, has no existence. Courts are the mere instruments of the law, and can will nothing." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (Chief Justice Marshall). *See also* Justice Roberts in United States v. Butler, 297 U.S. 1, 62–63 (1936).

[764] The political question doctrine is another limitation arising in part out of inherent restrictions and in part from prudential considerations. For a discussion of limitations utilizing both stands, *see* Ashwander v. TVA, 297 U.S. 288, 346–56 (1936) (Justice Brandeis concurring).

[765] Powell v. McCormack, 395 U.S. 486, 548–49 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962); Zwickler v. Koota, 389 U.S. 241, 248 (1967).

cise of judicial review, the practice of which is very much contrary to the quoted dicta from *Cohens*. These rules, it should be noted, are in addition to the vast discretionary power which the Supreme Court has to grant or deny review of judgements in lower courts, a discretion fully authorized with *certiorari* jurisdiction but in effect in practice as well with regard to what remains of appeals.[766]

At various times, the Court has followed more strictly than other times the prudential theorems for avoidance of decisionmaking when it deemed restraint to be more desirable than activism.[767]

The Doctrine of "Strict Necessity".—The Court has repeatedly declared that it will decide constitutional issues only if strict necessity compels it to do so. Thus, constitutional questions will not be decided in broader terms than are required by the precise state of facts to which the ruling is to be applied, nor if the record presents some other ground upon which to decide the case, nor at the instance of one who has availed himself of the benefit of a statute or who fails to show he is injured by its operation, nor if a construction of the statute is fairly possible by which the question may be fairly avoided.[768]

Speaking of the policy of avoiding the decision of constitutional issues except when necessary, Justice Rutledge wrote: "The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental ac-

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[766] 28 U.S.C. §§ 1254–1257. *See* F. Frankfurter & J. Landis, supra at ch. 7. "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case . . . . If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." Chief Justice Vinson, *Address on the Work of the Federal Court*, in 69 Sup. Ct. v, vi. It "is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on *certiorari*." Chief Justice Warren, quoted in Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954).

[767] *See* Justice Brandeis' concurring opinion in Ashwander v. TVA, 297 U.S. 288, 346 (1936). *And contrast* A. Bickel, supra at 111–198, *with* Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

[768] Rescue Army v. Municipal Court, 331 U.S. 549, 568–75 (1947). *See also* Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909); Carter v. Carter Coal Co., 298 U.S. 238, 325 (1936); Coffman v. Breeze Corp., 323 U.S. 316, 324–325 (1945); Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944); Alma Motor v. Timken Co., 329 U.S. 129 (1946). Judicial restraint as well as considerations of comity underlie the Court's abstention doctrine when the constitutionality of state laws is challenged.

tion for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system." [769]

The Doctrine of Clear Mistake.—A precautionary rule early formulated and at the base of the traditional concept of judicial restraint was expressed by Professor James Bradley Thayer to the effect that a statute could be voided as unconstitutional only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question." [770] Whether phrased this way or phrased so that a statute is not to be voided unless it is unconstitutional beyond all reasonable doubt, the rule is of ancient origin [771] and of modern adherence.[772] In operation, however, the rule is subject to two influences, which seriously impair its efficacy as a limitation. First, the conclusion that there has been a clear mistake or that there is no reasonable doubt is that drawn by five Justices if a full Court sits. If five Justices of learning and detachment to the Constitution are convinced that a statute is invalid and if four others of equal learning and attachment are convinced it is valid, the convictions of the five prevail over the convictions or doubts of the four. Second, the Court has at times made exceptions to the rule in certain categories of cases. Statutory interferences with "liberty of contract" were once presumed to be unconstitutional until proved to be valid; [773] more recently, presumptions of invalidity have expressly or impliedly been applied against statutes alleged to interfere with freedom of expression and of religious freedom, which have

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[769] Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947).

[770] *The Origin and Scope of the American Doctrine of Constitutional Law*, in J. THAYER, LEGAL ESSAYS 1, 21 (1908).

[771] *See* Justices Chase and Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386, 395, 399 (1798).

[772] *E.g.*, Flemming v. Nestor, 363 U.S. 603, 611 (1960).

[773] "But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." Adkins v. Children's Hospital, 261 U.S. 525, 546 (1923).

been said to occupy a "preferred position" in the constitutional scheme of things.[774]

Exclusion of Extra-Constitutional Tests.—Another maxim of constitutional interpretation is that courts are concerned only with the constitutionality of legislation and not with its motives, policy, or wisdom,[775] or with its concurrence with natural justice, fundamental principles of government, or the spirit of the Constitution.[776] In various forms this maxim has been repeated to such an extent that it has become trite, and has increasingly come to be incorporated in cases in which a finding of unconstitutionality has been made as a reassurance of the Court's limited review. And it should be noted that at times the Court has absorbed natural rights doctrines into the text of the Constitution, so that it was able to reject natural law *per se* and still partake of its fruits and the same thing is true of the *laissez faire* principles incorporated in judicial decisions from about 1890 to 1937.[777]

Presumption of Constitutionality.—"It is but a decent respect to the wisdom, integrity, and patriotism of the legislative body, by which any law is passed," wrote Justice Bushrod Washington, "to presume in favor of its validity, until its violation of the Consti-

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[774] Kovacs v. Cooper, 336 U.S. 77, 88 (1949). Justice Frankfurter's concurrence, id. at 89–97, is a lengthy critique and review of the "preferred position" cases up to that time. The Court has not used the expression in recent years but the worth it attributes to the values of free expression probably approaches the same result. Today, the Court's insistence on a "compelling state interest" to justify a governmental decision to classify persons by "suspect" categories, such as race, Loving v. Virginia, 388 U.S. 1 (1967), or to restrict the exercise of a "fundamental" interest, such as the right to vote, Kramer v. Union Free School District, 395 U.S. 621 (1969), or the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), clearly imports presumption of unconstitutionality.

[775] "We fully understand . . . the powerful argument that can be made against the wisdom of this legislation, but on that point we have no concern." Noble State Bank v. Haskell, 219 U.S. 104 (1911) (Justice Holmes for the Court). *See also* Trop v. Dulles, 356 U.S. 86, 120 (1958) (Justice Frankfurter dissenting).

A supposedly hallowed tenet is that the Court will not look to the motives of legislators in determining the validity of a statute. Fletcher v. Peck, 10 U.S. (6 Cr.) 87 (1810); United States v. O'Brien, 391 U.S. 367 (1968); Palmer v. Thompson, 403 U.S. 217 (1971). Yet an intent to discriminate is a requisite to finding at least some equal protection violations, Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), and a secular or religious purpose is one of the parts of the tripartite test under the Establishment Clause. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 653 (1980), and id. at 665 (dissent). Other constitutional decisions have also turned upon the Court's assessment of purpose or motive. *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); *Child Labor Tax Case*, 259 U.S. 20 (1922).

[776] *Cf.* Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Justice Black dissenting). But note above the reference to the ethical mode of constitutional argument.

[777] *E.g.*, Lochner v. New York, 198 U.S. 45 (1905); United States v. Butler, 297 U.S. 1 (1936).

tution is proved beyond a reasonable doubt." [778] A corollary of this maxim is that if the constitutional question turns upon circumstances, courts will presume the existence of a state of facts which would justify the legislation that is challenged.[779] It seems apparent, however, that with regard to laws which trench upon First Amendment freedoms and perhaps other rights guaranteed by the Bill of Rights such deference is far less than it would be toward statutory regulation of economic matters.[780]

Disallowance by Statutory Interpretation.—If it is possible to construe a statute so that its validity can be sustained against a constitutional attack, a rule of prudence is that it should be so construed,[781] even though in some instances this "constitutional doubt" maxim has caused the Court to read a statute in a manner that defeats or impairs the legislative purpose.[782] Of course, the Court stresses that "[w]e cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." [783] The maxim is not followed if the provision would survive constitutional attack or if the text is clear.[784] Closely related to this principle is the maxim that, when part of a statute is valid and part is void, the courts will separate the valid from the invalid and save as much as possible.[785] Statutes today ordinarily expressly pro-

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[778] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 270 (1827). *See also* Fletcher v. Peck, 10 U.S. (6 Cr.) 87, 128 (1810); Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 531 (1871).

[779] Munn v. Illinois, 94 U.S. 113, 132 (1877); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78–79 (1911); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935).

[780] *E.g.*, United States v. Robel, 389 U.S. 258 (1967); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967). *But see* McGowan v. Maryland, 366 U.S. 420, 426 (1961). The development of the "compelling state interest" test in certain areas of equal protection litigation also bespeaks less deference to the legislative judgment.

[781] Bond v. United States, 572 U.S. ___, No. 12–158, slip op. (2014); United States v. X-Citement Video, Inc., 513 U.S. 64, 69 (1994); Rust v. Sullivan, 500 U.S. 173, 190–91 (1991); Public Citizen v. Department of Justice, 491 U.S. 440, 465–67 (1989) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[782] *E.g.*, Michaelson v. United States, 266 U.S. 42 (1924) (narrow construction of Clayton Act contempt provisions to avoid constitutional questions); United States v. Harriss, 347 U.S. 612 (1954) (lobbying act); United States v. Seeger, 380 U.S. 163 (1965): Welsh v. United States, 398 U.S. 333 (1970) (both involving conscientious objection statute).

[783] United States v. Locke, 471 U.S. 84, 96 (1984) (quoting Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933)).

[784] Rust v. Sullivan, 500 U.S. 173, 191 (1991); *but compare* id. at 204–07 (Justice Blackmun dissenting), and 223–225 (Justice O'Connor dissenting). *See also* Peretz v. United States, 501 U.S. 923, 929–930 (1991).

[785] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987); Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 635 (1895); *but see* Baldwin v. Franks, 120 U.S. 678, 685 (1887), now repudiated. Griffin v. Breckenridge, 403 U.S. 88, 104 (1971). In

vide for separability, but it remains for the courts in the last resort to determine whether the provisions are separable.[786]

Stare Decisis in Constitutional Law.—Adherence to precedent ordinarily limits and shapes the approach of courts to decision of a presented question. "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."[787] *Stare decisis* is a principle of policy, not a mechanical formula of adherence to the latest decision "however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder,

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Kimbrough v. United States, 128 S. Ct. 558, 577 (2007), Justice Thomas, dissenting, referred to "our longstanding presumption of the severability of unconstitutional applications of statutory provisions."

[786] *See* Whole Woman's Health v. Hellerstedt, 579 U.S. ___, No. 15–274, slip op. at 37 (2016) (noting that while as a "general matter" courts will honor a legislature's preference with regard to severability, severability clauses do not impose a requirement on courts that are confronted with *facially* unconstitutional statutory provisions, as such an approach would "inflict enormous costs on both courts and litigants" in parsing out what remains of the statute); *see also* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) (discussing how a severability clause is not grounds for a court to "devise a judicial remedy that . . . entail[s] quintessentially legislative work."); Reno v. ACLU, 521 U.S. 844, 884–85 n.49 (1997) (noting the limits on how broadly a court can read a severability clause); *see generally* Dorchy v. Kansas, 264 U.S. 286, 290 (1924) (concluding that a severability clause is an "aid merely; not an inexorable command.")

[787] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–408 (1932) (Justice Brandeis dissenting). For recent arguments with respect to overruling or not overruling previous decisions, see the self-consciously elaborate opinion for a plurality in Planned Parenthood v. Casey, 505 U.S. 833, 854–69 (1992) (Justices O'Connor, Kennedy, and Souter) (acknowledging that as an original matter they would not have decided Roe v. Wade, 410 U.S. 113 (1973), as the Court did and that they might consider it wrongly decided, but nonetheless applying the principles of *stare decisis*—they stressed the workability of the case's holding, the fact that no other line of precedent had undermined *Roe*, the vitality of that case's factual underpinnings, the reliance on the precedent in society, and the effect upon the Court's legitimacy of maintaining or overruling the case). *See* id. at 953–66 (Chief Justice Rehnquist concurring in part and dissenting in part), 993–1001 (Justice Scalia concurring in part and dissenting in part). *See also* Payne v. Tennessee, 501 U.S. 808, 827–30 (1991) (suggesting, *inter alia*, that reliance is relevant in contract and property cases), and id. at 835, 842–44 (Justice Souter concurring), 844, 848–56 (Justice Marshall dissenting).

and verified by experience." [788] The limitation of *stare decisis* seems to have been progressively weakened since the Court proceeded to correct "a century of error" in *Pollock v. Farmers' Loan & Trust Co.*[789] Since then, more than 200 decisions have been overturned,[790] and the merits of *stare decisis* seem more often celebrated in dissents than in majority opinions.[791] Of lesser formal effect than outright overruling but with roughly the same result is a Court practice of "distinguishing" precedents, which often leads to an overturning of the principle enunciated in a case while leaving the actual case more or less alive.[792]

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[788] Helvering v. Hallock, 309 U.S. 106, 110 (1940) (Justice Frankfurter for Court). *See also* Coleman v. Alabama, 399 U.S. 1, 22 (1970) (Chief Justice Burger dissenting). *But see* id. at 19 (Justice Harlan concurring in part and dissenting in part); Williams v. Florida, 399 U.S. 78, 117–119 (1970) (Justice Harlan concurring in part and dissenting in part). Recent discussions of and both applications of and refusals to apply *stare decisis* may be found in Hohn v. United States, 524 U.S. 236, 251–52 (1998), and id. at 260–63 (Justice Scalia dissenting); State Oil Co. v. Khan, 522 U.S. 3, 20–2 (1997); Agostini v. Felton, 521 U.S. 203, 235–36 (1997), and id. at 523–54 (Justice Souter dissenting); United States v. IBM Corp., 517 U.S. 843, 854–56 (1996) (noting principles of following precedent and declining to consider overturning an old precedent when parties have not advanced arguments on the point), with which *compare* id. at 863 (Justice Kennedy dissenting) (arguing that the United States had presented the point and that the old case ought to be overturned); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (plurality opinion) (discussing *stare decisis*, citing past instances of overrulings, and overruling 1990 decision), with which *compare* the dissents, id. at 242, 264, 271; Seminole Tribe of Florida v. Florida, 517 U.S. 44, 61–73 (1996) (discussing policy of *stare decisis*, why it should not be followed with respect to a 1989 decision, and overruling that precedent), with which *compare* the dissents, id. at 76, 100. Justices Scalia and Thomas have argued for various departures from precedent. *E.g.*, Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200–01 (1995) (Justice Scalia concurring) (negative commerce jurisprudence); Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604, 631 (1996) (Justice Thomas concurring in part and dissenting in part) (rejecting framework of Buckley v. Valeo and calling for overruling of part of case). *Compare* id. at 626 (Court notes those issues not raised or argued).

[789] 157 U.S. 429, 574–579 (1895).

[790] *See* Appendix. The list encompasses both constitutional and statutory interpretation decisions. The Court adheres, at least formally, to the principle that *stare decisis* is a stricter rule for statutory interpretation, Patterson v. McLean Credit Union, 491 U.S. 164, 171–175 (1989), at least in part since Congress may much more easily revise those decisions, *but compare* id. at 175 n.1, *with* id. at 190–205 (Justice Brennan concurring in the judgment in part and dissenting in part). *See also* Flood v. Kuhn, 407 U.S. 258 (1972).

[791] *E.g.*, United States v. Rabinowitz, 339 U.S. 56, 86 (1950) (Justice Frankfurter dissenting); Baker v. Carr, 369 U.S. 186, 339–340 (1962) (Justice Harlan dissenting); Gray v. Sanders, 372 U.S. 368, 383 (1963) (Justice Harlan dissenting). *But see* Green v. United States, 356 U.S. 165, 195 (1958) (Justice Black dissenting). *Compare* Justice Harlan's views in Mapp v. Ohio, 367 U.S. 643 (1961) (dissenting), *with* Glidden Co. v. Zdanok, 370 U.S. 530 (1962) (opinion of the Court).

[792] Note that, in Planned Parenthood v. Casey, 505 U.S. 833 (1992), while the Court purported to uphold and retain the "central meaning" of Roe v. Wade, it overruled several aspects of that case's requirements. *See also*, *e.g.*, the Court's treatment of Pope v. Williams, 193 U.S. 621 (1904), in Dunn v. Blumstein, 405 U.S. 330, 337, n.7 (1972). *See also* id. at 361 (Justice Blackmun concurring.)

Conclusion.—The common denominator of all these maxims of prudence is the concept of judicial restraint. "We do not sit," said Justice Frankfurter, "like a kadi under a tree dispensing justice according to considerations of individual expediency." [793] "[A] jurist is not to innovate at pleasure," wrote Justice Cardozo. "He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life." [794] All Justices will, of course, claim adherence to proper restraint,[795] but in some cases at least, such as Justice Frankfurter's dissent in the *Flag Salute Case*,[796] the practice can be readily observed. The degree of restraint, however, the degree to which legislative enactments should be subjected to judicial scrutiny, is a matter of uncertain and shifting opinion

JURISDICTION OF SUPREME COURT AND INFERIOR FEDERAL COURTS

Cases Arising Under the Constitution, Laws, and Treaties of the United States

Cases arising under the Constitution are cases that require an interpretation of the Constitution for their correct decision.[797] They arise when a litigant claims an actual or threatened invasion of his constitutional rights by the enforcement of some act of public authority, usually an act of Congress or of a state legislature, and asks for judicial relief. The clause furnishes the principal textual basis for the implied power of judicial review of the constitutionality of legislation and other official acts.

Development of Federal Question Jurisdiction.—Almost from the beginning, the Convention demonstrated an intent to create "federal question" jurisdiction in the federal courts with regard to federal laws; [798] such cases involving the Constitution and treaties were added fairly late in the Convention as floor amendments.[799] But when Congress enacted the Judiciary Act of 1789, it did not confer gen-

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[793] Terminiello v. City of Chicago, 337 U.S. 1, 11 (1949) (dissenting).

[794] B. Cardozo, The Nature of the Judicial Process 141 (1921).

[795] *Compare* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (Justice Douglas), *with* id. at 507 (Justice Black).

[796] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (dissenting).

[797] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821).

[798] M. Farrand, supra at 22, 211–212, 220, 244; 2 id. at 146–47, 186–87.

[799] Id. at 423–24, 430, 431.

eral federal question jurisdiction on the inferior federal courts, but left litigants to remedies in state courts with appeals to the United States Supreme Court if judgment went against federal constitutional claims.[800] Although there were a few jurisdictional provisions enacted in the early years,[801] it was not until the period following the Civil War that Congress, in order to protect newly created federal civil rights and in the flush of nationalist sentiment, first created federal jurisdiction in civil rights cases,[802] and then in 1875 conferred general federal question jurisdiction on the lower federal courts.[803] Since that time, the trend generally has been toward conferral of ever-increasing grants of jurisdiction to enforce the guarantees recognized and enacted by Congress.[804]

When a Case Arises Under.—The 1875 statute and its present form both speak of civil suits "arising under the Constitution, laws, or treaties of the United States,"[805] the language of the Constitution. Thus, many of the early cases relied heavily upon Chief Justice Marshall's construction of the constitutional language to interpret the statutory language.[806] The result was probably to accept more jurisdiction than Congress had intended to convey.[807] Later cases take a somewhat more restrictive course.[808]

Determination whether there is federal question jurisdiction is made on the basis of the plaintiff's pleadings and not upon the re-

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[800] 1 Stat. 73. The district courts were given cognizance of "suits for penalties and forfeitures incurred, under the laws of the United States" and "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States . . . ." Id. at 77. Plenary federal question jurisdiction was conferred by the Act of February 13, 1801,§ 11, 2 Stat. 92, but this law was repealed by the Act of March 8, 1802, 2 Stat. 132. On § 25 of the 1789 Act, providing for appeals to the Supreme Court from state court constitutional decisions, *see* supra.

[801] Act of April 10, 1790, § 5, 1 Stat. 111, as amended, Act of February 21, 1793, § 6, 1 Stat. 322 (suits relating to patents). Limited removal provisions were also enacted.

[802] Act of April 9, 1866, § 3, 14 Stat, 27; Act of May 31, 1870, § 8, 16 Stat. 142; Act of February 28, 1871,§ 15, 16 Stat. 438; Act of April 20, 1871, §§ 2, 6, 17 Stat. 14, 15.

[803] Act of March 3, 1875, § 1, 18 Stat. 470, now 28 U.S.C. § 1331(a). The classic treatment of the subject and its history is F. Frankfurter & J. Landis, supra.

[804] For a brief summary, *see* Hart & Wechsler (6th ed.), supra at 743–748.

[805] 28 U.S.C. § 1331(a). The original Act was worded slightly differently.

[806] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). *See also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379 (1821).

[807] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 17 (4th ed. 1983).

[808] *See* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 578 U.S. ___, No. 14–1132, slip op. at 9–10 (2016) ("This Court has long read the words 'arising under' in Article III to extend quite broadly, to all cases in which a federal question is an ingredient of the action . . . In the statutory context, however, we . . . give those same words a narrower scope in the light of § 1331's history, the demands of reason and coherence, and the dictates of sound judicial policy.") (internal brackets, citations, and quotations omitted).

sponse or the facts as they may develop.[809] Plaintiffs seeking access to federal courts on this ground must set out a federal claim which is "well-pleaded" and the claim must be real and substantial and may not be without color of merit.[810] Plaintiffs may not anticipate that defendants will raise a federal question in answer to the action.[811] But what exactly must be pleaded to establish a federal question is a matter of considerable uncertainty in many cases. It is no longer the rule that, when federal law is an ingredient of the claim, there is a federal question.[812]

Many suits will present federal questions because a federal law creates the action.[813] Perhaps Justice Cardozo presented the most understandable line of definition, while cautioning that "[t]o define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards [approaching futility]."[814] How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . .

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[809] *See generally* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

[810] Newburyport Water Co. v. City of Newburyport, 193 U.S. 561, 576 (1904); Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933); Binderup v. Pathe Exchange, 263 U.S. 291, 305–308 (1923). If the complaint states a case arising under the Constitution or federal law, then federal jurisdiction exists even though on the merits the party may have no federal right. In such a case, the proper course for the court is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction. Bell v. Hood, 327 U.S. 678 (1946). Of course, dismissal for lack of jurisdiction is proper if the federal claim is frivolous or obviously insubstantial. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933).

[811] Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908). *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950); Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1974).

[812] Such was the rule derived from Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). *See* Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986).

[813] American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). *Compare* Albright v. Teas, 106 U.S. 613 (1883), *and* People of Puerto Rico v. Russell & Co., 288 U.S. 476 (1933), with Feibelman v. Packard, 109 U.S. 421 (1883), and The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913).

[814] Gully v. First National Bank in Meridian, 299 U.S. 109, 117 (1936).

A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto. . . .[815]

It was long evident, though the courts were not very specific about it, that the federal question jurisdictional statute is and always was narrower than the constitutional "arising under" jurisdictional standard.[816] Chief Justice Marshall in *Osborn* was interpreting the Article III language to its utmost extent, but the courts sometimes construed the statute equivalently, with doubtful results.[817]

Removal From State Court to Federal Court.—A limited right to "remove" certain cases from state courts to federal courts was granted to defendants in the Judiciary Act of 1789,[818] and from then to 1872 Congress enacted several specific removal statutes, most of them prompted by instances of state resistance to the enforcement of federal laws through harassment of federal officers.[819] The 1875 Act conferring general federal question jurisdiction on the federal courts provided for removal of such cases by either party, subject only to the jurisdictional amount limitation.[820] The present statute provides for the removal by a defendant of any civil action which could have been brought originally in a federal district court, with no diversity of citizenship required in "federal question" cases.[821] A special civil rights removal statute permits removal of any civil or criminal action by a defendant who is denied or cannot enforce in the state court a right under any law providing for equal civil rights of persons or who is being proceeded against for any act under color of authority derived from any law providing for equal rights.[822]

The constitutionality of removal statutes was challenged and readily sustained. Justice Story analogized removal to a form of exer-

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[815] 299 U.S. at 112–13. *Compare* Wheeldin v. Wheeler, 373 U.S. 647 (1963), *with* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See also* J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

[816] For an express acknowledgment, *see* Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 495 (1983). *See also* Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900); Romero v. International Terminal Operating Co., 358 U.S. 354, 379 n.51 (1959).

[817] *E.g.*, *Pacific R.R. Removal Cases*, 115 U.S. 1 (1885); *see also* id. at 24 (Chief Justice Waite dissenting).

[818] § 12, 1 Stat. 79.

[819] The first was the Act of February 4, 1815, § 8, 3 Stat. 198. The series of statutes is briefly reviewed in Willingham v. Morgan, 395 U.S. 402, 405–406 (1969), and in Hart & Wechsler (6th ed.), supra at 396–398. *See* 28 U.S.C. §§ 1442, 1442a.

[820] Act of March 3, 1875, § 2, 18 Stat. 471. The present pattern of removal jurisdiction was established by the Act of March 3, 1887, 24 Stat. 552, as amended, 25 Stat. 433.

[821] 28 U.S.C. § 1441.

[822] 28 U.S.C. § 1443.

cise of appellate jurisdiction,[823] and a later Court saw it as an indirect mode of exercising original jurisdiction and upheld its constitutionality.[824] In *Tennessee v. Davis*,[825] which involved a state attempt to prosecute a federal internal revenue agent who had killed a man while seeking to seize an illicit distilling apparatus, the Court invoked the right of the national government to defend itself against state harassment and restraint. The power to provide for removal was discerned in the Necessary and Proper Clause authorization to Congress to pass laws to carry into execution the powers vested in any other department or officer, here the judiciary.[826] The judicial power of the United States, said the Court, embraces alike civil and criminal cases arising under the Constitution and laws and the power asserted in civil cases may be asserted in criminal cases. A case arising under the Constitution and laws "is not merely one where a party comes into court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. . . ."

"The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of September 24, 1789, was passed by the first Congress, many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from state courts before trial, those doubts soon disappeared."[827] The Court has broadly construed the modern version of the removal statute at issue in this case so that it covers all cases where federal officers can raise a colorable defense arising out of their duty

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[823] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–351 (1816). Story was not here concerned with the constitutionality of removal but with the constitutionality of Supreme Court review of state judgments.

[824] Chicago & N.W. Ry. v. Whitton's Administrator, 80 U.S. (13 Wall.) 270 (1872). Removal here was based on diversity of citizenship. *See also The Moses Taylor*, 71 U.S. (4 Wall.) 411, 429–430 (1867); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247 (1868).

[825] 100 U.S. 257 (1880).

[826] 100 U.S. at 263–64.

[827] 100 U.S. at 264–65.

to enforce federal law.[828] Other removal statutes, notably the civil rights removal statute, have not been so broadly interpreted.[829]

Corporations Chartered by Congress.—In *Osborn v. Bank of the United States*,[830] Chief Justice Marshall seized upon the authorization for the Bank to sue and be sued as a grant by Congress to the federal courts of jurisdiction in all cases to which the bank was a party.[831] Consequently, upon enactment of the 1875 law, the door was open to other federally chartered corporations to seek relief in federal courts. This opportunity was made actual when the Court in the *Pacific R.R. Removal Cases*[832] held that tort actions against railroads with federal charters could be removed to federal courts solely on the basis of federal incorporation. In a series of acts, Congress deprived national banks of the right to sue in federal court solely on the basis of federal incorporation in 1882,[833] deprived railroads holding federal charters of this right in 1915,[834] and finally in 1925 removed from federal jurisdiction all suits brought by federally chartered corporations on the sole basis of such incorporation, except where the United States holds at least half of the stock.[835]

Federal Questions Resulting from Special Jurisdictional Grants.—In the Labor-Management Relations Act of 1947, Congress authorized federal courts to entertain suits for violation of collective bargaining agreements without respect to the amount in controversy or the citizenship of the parties.[836] Although it is likely that Congress meant no more than that labor unions could be suable in law or equity, in distinction from the usual rule, the Court construed the grant of jurisdiction to be more than procedural and to

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[828] Willingham v. Morgan, 395 U.S. 402 (1969). *See also* Maryland v. Soper, 270 U.S. 9 (1926). Removal by a federal officer must be predicated on the allegation of a colorable federal defense. Mesa v. California, 489 U.S. 121 (1989). However, a federal agency is not permitted to remove under the statute's plain meaning. International Primate Protection League v. Tulane Educ. Fund, 500 U.S. 72 (1991).

[829] Georgia v. Rachel, 384 U.S. 780 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966); Johnson v. Mississippi, 421 U.S. 213 (1975).

[830] 22 U.S. (9 Wheat.) 738 (1824).

[831] The First Bank could not sue because it was not so authorized. Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809). The language, which Marshall interpreted as conveying jurisdiction, was long construed simply to give a party the right to sue and be sued without itself creating jurisdiction, Bankers Trust Co. v. Texas & P. Ry., 241 U.S. 295 (1916), but, in American National Red Cross v. S. G., 505 U.S. 247 (1992), a 5-to-4 decision, the Court held that, when a federal statutory charter expressly mentions the federal courts in its "sue and be sued" provision, the charter creates original federal-question jurisdiction as well, although a general authorization to sue and be sued in courts of general jurisdiction, including federal courts, without expressly mentioning them, does not confer jurisdiction.

[832] 115 U.S. 1 (1885).

[833] § 4, 22 Stat. 162.

[834] § 5, 38 Stat. 803.

[835] *See* 28 U.S.C. § 1349.

[836] § 301, 61 Stat. 156 (1947), 29 U.S.C. § 185.

empower federal courts to apply substantive federal law, divined and fashioned from the policy of national labor laws, in such suits.[837] State courts are not disabled from hearing actions brought under the section,[838] but they must apply federal law.[839] Developments under this section illustrate the substantive importance of many jurisdictional grants and indicate how the workload of the federal courts may be increased by unexpected interpretations of such grants.[840]

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[837] Textile Workers of America v. Lincoln Mills, 353 U.S. 448 (1957). Earlier the Court had given the section a restricted reading in Association of Employees v. Westinghouse Electric Corp., 348 U.S. 437 (1955), at least in part because of constitutional doubts that § 301 cases in the absence of diversity of citizenship presented a federal question sufficient for federal jurisdiction. Id. at 449–52, 459–61 (opinion of Justice Frankfurter). In *Lincoln Mills*, the Court resolved this difficulty by ruling that federal law was at issue in § 301 suits and thus cases arising under § 301 presented federal questions. 353 U.S. at 457. The particular holding of *Westinghouse*, that no jurisdiction exists under § 301 for suits to enforce personal rights of employees claiming unpaid wages, was overturned in Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

[838] Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

[839] Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962). State law is not, however, to be totally disregarded. "State law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy . . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957).

[840] For example, when federal regulatory statutes create new duties without explicitly creating private federal remedies for their violation, the readiness or unreadiness of the federal courts to infer private causes of action is highly significant. Although inference is an acceptable means of judicial enforcement of statutes, *e.g.*, Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916), the Court began broadly to construe statutes to infer private actions only with J. I. Case Co. v. Borak, 377 U.S. 426 (1964). *See* Cort v. Ash, 422 U.S. 66 (1975). More recently, influenced by a separation of powers critique of implication by Justice Powell, the Court drew back and asserted that it will infer an action only in instances of fairly clear congressional intent. Cannon v. University of Chicago, 441 U.S. 677 (1979); California v. Sierra Club, 451 U.S. 287 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Merrill, Lynch v. Curran, 456 U.S. 353 (1982); Thompson v. Thompson, 484 U.S. 174 (1988); Karahalios v. National Fed'n of Fed. Employees, 489 U.S. 527 (1989).

The Court appeared more ready to infer private causes of action for constitutional violations, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Davis v. Passman, 442 U.S. 228 (1979); Carlson v. Green, 446 U.S. 14 (1980), but it has retreated here as well, refusing to apply *Bivens* when "any alternative, existing process for protecting the interest" that is threatened exists, or when "any special factors counseling hesitation" are present. Wilkie v. Robbins, 551 U.S. 537, 550 (2007). *Accord* Minneci v. Pollard, 565 U.S. ___, No. 10–1104, slip op. (2012) (state tort law provided alternative, if not wholly congruent, process for protecting constitutional interests of a prisoner allegedly abused by private prison guards). *See also* Chappell v. Wallace, 462 U.S. 296, 298 (1983); Bush v. Lucas, 462 U.S. 367 (1983); Schweiker v. Chilicki, 487 U.S. 412 (1988); FDIC v. Meyer, 510 U.S. 471 (1994); Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001).

"Federal common law" may exist in a number of areas where federal interests are involved and federal courts may take cognizance of such suits under their "arising under" jurisdiction. *E.g.*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972); International Paper Co. v. Ouellette, 479 U.S. 481 (1987). *See also* County of Oneida v.

Civil Rights Act Jurisdiction.—Perhaps the most important of the special federal question jurisdictional statutes is that conferring jurisdiction on federal district courts to hear suits challenging the deprivation under color of state law or custom of any right, privilege, or immunity secured by the Constitution or by any act of Congress providing for equal rights.[841] Because it contains no jurisdictional amount provision[842] (while the general federal question statute at one time did)[843] and because the Court has held inapplicable the judicially created requirement that a litigant exhaust his state remedies before bringing federal action,[844] the statute has been heavily used, resulting in a formidable caseload, by plaintiffs attacking ra-

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Oneida Indian Nation, 470 U.S. 226, 236–240 (1985); National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985). The Court is, however, somewhat wary of finding "federal common law" in the absence of some congressional authorization to formulate substantive rules, Texas Industries v. Radcliff Materials, 451 U.S. 630 (1981), and Congress may always statutorily displace the judicially created law. City of Milwaukee v. Illinois, 451 U.S. 304 (1981). Finally, federal courts have federal question jurisdiction of claims created by state law if there exists an important necessity for an interpretation of an act of Congress. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

[841] 28 U.S.C. § 1343(3). The cause of action to which this jurisdictional grant applies is 42 U.S.C. § 1983, making liable and subject to other redress any person who, acting under color of state law, deprives any person of any rights, privileges, or immunities secured by the Constitution and laws of the United States. For discussion of the history and development of these two statutes, *see* Monroe v. Pape, 365 U.S. 167 (1961); Lynch v. Household Finance Corp., 405 U.S. 538 (1972); Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978); Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979); Maine v. Thiboutot, 448 U.S. 1 (1980). Although the two statutes originally had the same wording in respect to "the Constitution and laws of the United States," when the substantive and jurisdictional aspects were separated and codified, § 1983 retained the all-inclusive "laws" provision, while § 1343(3) read "any Act of Congress providing for equal rights." The Court has interpreted the language of the two statutes literally, so that while claims under laws of the United States need not relate to equal rights but may encompass welfare and regulatory laws, Maine v. Thiboutot; *but see* Middlesex County Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1 (1981), such suits if they do not spring from an act providing for equal rights may not be brought under § 1343(3). Chapman v. Houston Welfare Rights Org., *supra*. This was important when there was a jurisdictional amount provision in the federal question statute but is of little significance today.

[842] *See* Hague v. CIO, 307 U.S. 496 (1939). Following *Hague*, it was argued that only cases involving personal rights, that could not be valued in dollars, could be brought under § 1343(3), and that cases involving property rights, which could be so valued, had to be brought under the federal question statute. This attempted distinction was rejected in Lynch v. Household Finance Corp., 405 U.S. 538, 546–48 (1972). On the valuation of constitutional rights, *see* Carey v. Piphus, 435 U.S. 247 (1978). *See also* Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) (compensatory damages must be based on injury to the plaintiff, not on some abstract valuation of constitutional rights).

[843] 28 U.S.C. § 1331 was amended in 1976 and 1980 to eliminate the jurisdictional amount requirement. Pub. L. 94–574, 90 Stat. 2721; Pub. L. 96–486, 94 Stat. 2369.

[844] Patsy v. Florida Board of Regents, 457 U.S. 496 (1982). This had been the rule since at least McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963). *See also*

cial discrimination, malapportionment and suffrage restrictions, illegal and unconstitutional police practices, state restrictions on access to welfare and other public assistance, and a variety of other state and local governmental practices.[845] Congress has encouraged use of the two statutes by providing for attorneys' fees under § 1983,[846] and by enacting related and specialized complementary statutes.[847] The Court in recent years has generally interpreted § 1983 and its jurisdictional statute broadly, but it has also sought to restrict the kinds of claims that may be brought in federal courts.[848] Note that § 1983 and § 1343(3) need not always go together, as § 1983 actions may be brought in state courts.[849]

Pendent Jurisdiction.—Once jurisdiction has been acquired through allegation of a federal question not plainly wanting in substance,[850] a federal court may decide any issue necessary to the disposition of a case, notwithstanding that other non-federal questions of fact and law may be involved therein.[851] "Pendent jurisdiction," as this form is commonly called, exists whenever the state and federal claims "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."[852] Ordinarily, it is a rule of prudence that federal courts should not pass on federal constitutional claims if they may avoid it and should rest their conclusions upon principles of state law where possible.[853] But the federal court has

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Felder v. Casey, 487 U.S. 131 (1988) (state notice of claim statute, requiring notice and waiting period before bringing suit in state court under § 1983, is preempted).

[845] Thus, such notable cases as Brown v. Board of Education, 347 U.S. 483 (1954), and Baker v. Carr, 369 U.S. 186 (1962), arose under the statutes.

[846] Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94–559, 90 Stat. 2641, amending 42 U.S.C. § 1988. *See* Hutto v. Finney, 437 U.S. 678 (1978); Maine v. Thiboutot, 448 U.S. 1 (1980).

[847] *E.g.*, Civil Rights of Institutionalized Persons Act, Pub. L. 96–247, 94 Stat. 349 (1980), 42 U.S.C. §§ 1997 *et seq*.

[848] *E.g.*, Parratt v. Taylor, 451 U.S. 527 (1981); Ingraham v. Wright, 430 U.S. 651 (1977).

[849] Maine v. Thiboutot, 448 U.S. 1 (1980).

[850] Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105 (1933); Hagans v. Lavine, 415 U.S. 528, 534–543 (1974).

[851] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 822–28 (1824); Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909); Hurn v. Oursler, 289 U.S. 238 (1933); United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

[852] Osborn v. Bank, 22 U.S. at 725. This test replaced a difficult-to-apply test of Hurn v. Oursler, 289 U.S. 238, 245–46 (1933). *See also* Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375 (1994); Peacock v. Thomas, 516 U.S. 349 (1996) (both cases using the new vernacular of "ancillary jurisdiction").

[853] Siler v. Louisville & Nashville R. Co., 213 U.S. 175 (1909); Greene v. Louisville & Interurban R.R., 244 U.S. 499 (1917); Hagans v. Lavine, 415 U.S. 528, 546–550 (1974). In fact, it may be an abuse of discretion for a federal court to fail to decide on an available state law ground instead of reaching the federal constitutional question. Schmidt v. Oakland Unified School Dist., 457 U.S. 594 (1982) (per curiam). However, narrowing previous law, the Court held in Pennhurst State School

discretion whether to hear the pendent state claims in the proper case. Thus, the trial court should look to "considerations of judicial economy, convenience and fairness to litigants" in exercising its discretion and should avoid needless decisions of state law. If the federal claim, though substantial enough to confer jurisdiction, was dismissed before trial, or if the state claim substantially predominated, the court would be justified in dismissing the state claim.[854]

A variant of pendent jurisdiction, sometimes called "ancillary jurisdiction," is the doctrine allowing federal courts to acquire jurisdiction entirely of a case presenting two federal issues, although it might properly not have had jurisdiction of one of the issues if it had been independently presented.[855] Thus, in an action under a federal statute, a compulsory counterclaim not involving a federal question is properly before the court and should be decided.[856] The concept has been applied to a claim otherwise cognizable only in admiralty when joined with a related claim on the law side of the federal court, and in this way to give an injured seaman a right to jury trial on all of his claims when ordinarily the claim cognizable only in admiralty would be tried without a jury.[857] And a colorable constitutional claim has been held to support jurisdiction over a federal statutory claim arguably not within federal jurisdiction.[858]

Still another variant is the doctrine of "pendent parties," under which a federal court could take jurisdiction of a state claim against one party if it were related closely enough to a federal claim against another party, even though there was no independent jurisdictional base for the state claim.[859] Although the Supreme Court at first tentatively found some merit in the idea,[860] in *Finley v. United States*,[861] by a 5-to-4 vote the Court firmly disapproved of the pendent party concept and cast considerable doubt on the other prongs of pendent jurisdiction as well. Pendent party jurisdiction, Justice Scalia wrote for the Court, was within the constitutional grant of judicial power, but to be operable it must be affirmatively granted

& Hosp. v. Halderman, 465 U.S. 89 (1984), held that, when a pendent claim of state law involves a claim that is against a state for purposes of the Eleventh Amendment, federal courts may not adjudicate it.

[854] United Mine Workers v. Gibbs, 383 U.S. 715, 726–27 (1966).

[855] The initial decision was Freeman v. Howe, 65 U.S. (24 How.) 450 (1861), in which federal jurisdiction was founded on diversity of citizenship.

[856] Moore v. New York Cotton Exchange, 270 U.S. 593 (1926).

[857] Romero v. International Terminal Operating Co., 358 U.S. 354, 380–81 (1959); Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963).

[858] Rosado v. Wyman, 397 U.S. 397, 400–05 (1970).

[859] Judge Friendly originated the concept in Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971); Leather's Best, Inc. v. S. S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971).

[860] Aldinger v. Howard, 427 U.S. 1 (1976).

[861] 490 U.S. 545 (1989).

by congressional enactment.[862] Within the year, Congress supplied the affirmative grant, adopting not only pendent party jurisdiction but also codifying pendent jurisdiction and ancillary jurisdiction under the name of "supplemental jurisdiction." [863]

Thus, these interrelated doctrinal standards now seem well-grounded.

Protective Jurisdiction.—A conceptually difficult doctrine, which approaches the verge of a serious constitutional gap, is the concept of protective jurisdiction. Under this doctrine, it is argued that in instances in which Congress has legislative jurisdiction, it can confer federal jurisdiction, with the jurisdictional statute itself being the "law of the United States" within the meaning of Article III, even though Congress has enacted no substantive rule of decision and state law is to be applied. Put forward in controversial cases,[864] the doctrine has neither been rejected nor accepted by the Supreme Court. In *Verlinden B. V. v. Central Bank of Nigeria*,[865] the Court reviewed a congressional grant of jurisdiction to federal courts to hear suits by an alien against a foreign state, jurisdiction not within the "arising under" provision of article III. Federal substantive law was not applicable, that resting either on state or international law. Refusing to consider protective jurisdiction, the Court found that the statute regulated foreign commerce by promulgating rules governing sovereign immunity from suit and was a law requiring interpretation as a federal-question matter. That the doctrine does raise constitutional doubts is perhaps grounds enough to avoid reaching it.[866]

Supreme Court Review of State Court Decisions.—In addition to the constitutional issues presented by § 25 of the Judiciary Act of 1789 and subsequent enactments,[867] questions have contin-

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[862] 490 U.S. at 553, 556.

[863] Act of Dec. 1, 1990, Pub. L. 101–650, 104 Stat. 5089, § 310, 28 U.S.C. § 1367. In City of Chicago v. International College of Surgeons, 522 U.S. 156 (1998), the Court, despite the absence of language making § 1367 applicable, held that the statute gave district courts jurisdiction over state-law claims in cases originating in state court and then removed to federal court.

[864] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); *see also* the bankruptcy cases, Schumacher v. Beeler, 293 U.S. 367 (1934), and Williams v. Austrian, 331 U.S. 642 (1947).

[865] 461 U.S. 480 (1983).

[866] *E.g.*, Mesa v. California, 489 U.S. 121, 136–37 (1989) (would present grave constitutional problems).

[867] On § 25, *see* "Judicial Review and National Supremacy," supra. The present statute is 28 U.S.C. § 1257(a), which provides that review by writ of *certiorari* is available where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United

ued to arise concerning review of state court judgments which go directly to the nature and extent of the Supreme Court's appellate jurisdiction. Because of the sensitivity of federal-state relations and the delicate nature of the matters presented in litigation touching upon them, jurisdiction to review decisions of a state court is dependent in its exercise not only upon ascertainment of the existence of a federal question but upon a showing of exhaustion of state remedies and of the finality of the state judgment. Because the application of these standards to concrete facts is neither mechanical nor nondiscretionary, the Justices have often been divided over whether these requisites to the exercise of jurisdiction have been met in specific cases submitted for review by the Court.

The Court is empowered to review the judgments of "the highest court of a State in which a decision could be had."[868] This will ordinarily be the state's court of last resort, but it could well be an intermediate appellate court or even a trial court if its judgment is final under state law and cannot be reviewed by any state appellate court.[869] The review is of a final judgment below. "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."T[870] The object of this rule is to avoid piecemeal interference with state court proceedings; it promotes harmony by preventing federal assumption of a

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States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. Prior to 1988, there was a right to mandatory appeal in cases in which a state court had found invalid a federal statute or treaty or in which a state court had upheld a state statute contested under the Constitution, a treaty, or a statute of the United States. *See* the Act of June 25, 1948, 62 Stat. 929. The distinction between *certiorari* and appeal was abolished by the Act of June 27, 1988, Pub. L. 100–352, § 3, 102 Stat. 662.

[868] 28 U.S.C. § 1257(a). *See* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE ch. 3 (6th ed. 1986).

[869] Grovey v. Townsend, 295 U.S. 45, 47 (1935); Talley v. California, 362 U.S. 60, 62 (1960); Thompson v. City of Louisville, 362 U.S. 199, 202 (1960); Metlakatla Indian Community v. Egan, 363 U.S. 555 (1960); Powell v. Texas, 392 U.S. 514, 516, 517 (1968); Koon v. Aiken, 480 U.S. 943 (1987). In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the judgment reviewed was that of the Quarterly Session Court for the Borough of Norfolk, Virginia.

[870] Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 551 (1945). *See also* San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981); Flynt v. Ohio, 451 U.S. 619 (1981); Minnick v. California Dep't of Corrections, 452 U.S. 105 (1981); Florida v. Thomas, 532 U.S. 774 (2001). The Court has developed a series of exceptions permitting review when the federal issue in the case has been finally determined but there are still proceedings to come in the lower state courts. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476–487 (1975). *See also* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989); Duquesne Light Co. v. Barasch, 488 U.S. 299, 304 (1989); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 n.42 (1982).

role in a controversy until the state court efforts are finally resolved.[871] For similar reasons, the Court requires that a party seeking to litigate a federal constitutional issue on appeal of a state court judgment must have raised that issue with sufficient precision to have enabled the state court to have considered it and she must have raised the issue at the appropriate time below.[872]

When the judgment of a state court rests on an adequate, independent determination of state law, the Court will not review the resolution of the federal questions decided, even though the resolution may be in error.[873] "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion." [874] The Court is faced with two interrelated decisions: whether the state court judgment is based upon a nonfederal ground and whether the nonfederal ground is adequate to support the state court judgment. It is, of course, the responsibility of the Court to determine for itself the answer to both questions.[875]

The first question, whether there is a nonfederal ground, may be raised by several factual situations. A state court may have based its decision on two grounds, one federal, one nonfederal.[876] It may

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[871] Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 67–69 (1948); Radio Station WOW v. Johnson, 326 U.S. 120, 123–24 (1945).

[872] New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928); *See also* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77 (1988); Webb v. Webb, 451 U.S. 493, 501 (1981). The same rule applies on *habeas corpus* petitions. *E.g.*, Picard v. Connor, 404 U.S. 270 (1972).

[873] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874); Black v. Cutter Laboratories, 351 U.S. 292 (1956); Wilson v. Loew's, Inc., 355 U.S. 597 (1958).

[874] Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945). Whereas declining to review judgments of state courts that rest on an adequate and independent determination of *state* law protects the sovereignty of states, the Court has emphasized that review of state court decisions that invalidate state laws based on interpretations of *federal* law, "far from *undermining* state autonomy, is the only way to *vindicate* it" because a correction of a state court's federal errors necessarily returns power to the state government. *See* Kansas v. Carr, 577 U.S. ___, No. 14–449, slip op. at 9 (2016) (quoting Kansas v. Marsh, 548 U.S. 163, 184 (2006) (Scalia, J., concurring)) (emphasis in original).

[875] *E.g.*, Howlett v. Rose, 496 U.S. 356, 366 (1990); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 455 (1958).

[876] Fox Film Corp. v. Muller, 296 U.S. 207 (1935); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

have based its decision solely on a nonfederal ground but the federal ground may have been clearly raised.[877] Both federal and nonfederal grounds may have been raised but the state court judgment is ambiguous or is without written opinion stating the ground relied on.[878] Or the state court may have decided the federal question although it could have based its ruling on an adequate, independent non-federal ground.[879] In any event, it is essential for purposes of review by the Supreme Court that it appear from the record that a federal question was presented, that the disposition of that question was necessary to the determination of the case, that the federal question was actually decided or that the judgment could not have been rendered without deciding it.[880]

Several factors affect the answer to the second question, whether the nonfederal ground is adequate. In order to preclude Supreme Court review, the nonfederal ground must be broad enough, without reference to the federal question, to sustain the state court judgment;[881] it must be independent of the federal question;[882] and it must be tenable.[883] Rejection of a litigant's federal claim by the state court on state procedural grounds, such as failure to tender the issue at the appropriate time, will ordinarily preclude Supreme Court

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[877] Wood v. Chesborough, 228 U.S. 672, 676–80 (1913).

[878] Lynch v. New York ex rel. Pierson, 293 U.S. 52, 54–55 (1934); Williams v. Kaiser, 323 U.S. 471, 477 (1945); Durley v. Mayo, 351 U.S. 277, 281 (1956); Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1872); *cf.* Department of Mental Hygiene v. Kirchner, 380 U.S. 194 (1965).

[879] Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 375–376 (1968).

[880] Southwestern Bell Tel. Co. v. Oklahoma, 303 U.S. 206 (1938); Raley v. Ohio, 360 U.S. 423, 434–437 (1959). When there is uncertainty about what the state court did, the usual practice was to remand for clarification. Minnesota v. National Tea Co., 309 U.S. 551 (1940); California v. Krivda, 409 U.S. 33 (1972). *See* California Dept. of Motor Vehicles v. Rios, 410 U.S. 425 (1973). Now, however, in a controversial decision, the Court has adopted a presumption that when a state court decision fairly appears to rest on federal law or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion the Court will accept as the most reasonable explanation that the state court decided the case as it did because it believed that federal law required it to do so. If the state court wishes to avoid the presumption it must make clear by a plain statement in its judgment or opinion that discussed federal law did not compel the result, that state law was dispositive. Michigan v. Long, 463 U.S. 1032 (1983). *See* Harris v. Reed, 489 U.S. 255, 261 n.7 (1989) (collecting cases); Coleman v. Thompson, 501 U.S. 722 (1991) (applying the rule in a *habeas* case).

[881] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1874). A new state rule cannot be invented for the occasion in order to defeat the federal claim. *E.g.*, Ford v. Georgia, 498 U.S. 411, 420–425 (1991).

[882] Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co., 243 U.S. 157, 164 (1917); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 290 (1958).

[883] Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co., 243 U.S. 157, 164 (1917); Ward v. Love County, 253 U.S. 17, 22 (1920); Staub v. City of Baxley, 355 U.S. 313 (1958).

review as an adequate independent state ground,[884] so long as the local procedure does not discriminate against the raising of federal claims and has not been used to stifle a federal claim or to evade vindication of federal rights.[885]

Suits Affecting Ambassadors, Other Public Ministers, and Consuls

The earliest interpretation of the grant of original jurisdiction to the Supreme Court came in the Judiciary Act of 1789, which conferred on the federal district courts jurisdiction of suits to which a consul might be a party. This legislative interpretation was sustained in 1793 in a circuit court case in which the judges held the Congress might vest concurrent jurisdiction involving consuls in the inferior courts and sustained an indictment against a consul.[886] Many years later, the Supreme Court held that consuls could be sued in federal court,[887] and in another case in the same year declared sweepingly that Congress could grant concurrent jurisdiction to the inferior courts in cases where Supreme Court has been invested with original jurisdiction.[888] Nor does the grant of original jurisdiction to the Supreme Court in cases affecting ambassadors and consuls of itself preclude suits in state courts against consular officials. The leading case is *Ohio ex rel. Popovici v. Agler*,[889] in which a Rumanian vice-consul contested an Ohio judgment against him for divorce and alimony.

A number of incidental questions arise in connection with the phrase "affecting ambassadors and consuls." Does the ambassador or consul to be affected have to be a party in interest, or is a mere indirect interest in the outcome of the proceeding sufficient? In *United States v. Ortega*,[890] the Court ruled that a prosecution of a person for violating international law and the laws of the United States

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[884] Beard v. Kindler, 558 U.S. ___, No. 08–992, slip op. (2009) (firmly established procedural rule adequate state ground even though rule is discretionary). *Accord*, Walker v. Martin, 562 ___, No. 09–996, slip op. (2010). *See also* Nickel v. Cole, 256 U.S. 222, 225 (1921); Wolfe v. North Carolina, 364 U.S. 177, 195 (1960). *But see* Davis v. Wechsler, 263 U.S. 22 (1923); Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949).

[885] Davis v. Wechsler, 263 U.S. 22, 24–25 (1923); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 455–458 (1958); Barr v. City of Columbia, 378 U.S. 146, 149 (1964). This rationale probably explains Henry v. Mississippi, 379 U.S. 443 (1965). *See also* in the criminal area, Edelman v. California, 344 U.S. 357, 362 (1953) (dissenting opinion); Brown v. Allen, 344 U.S. 443, 554 (1953) (dissenting opinion); Williams v. Georgia, 349 U.S. 375, 383 (1955); Monger v. Florida, 405 U.S. 958 (1972) (dissenting opinion).

[886] United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C. Pa. 1793).

[887] Bors v. Preston, 111 U.S. 252 (1884).

[888] Ames v. Kansas ex rel. Johnston, 111 U.S. 449, 469 (1884).

[889] 280 U.S. 379, 383, 384 (1930). Now precluded by 28 U.S.C. § 1351.

[890] 24 U.S. (11 Wheat.) 467 (1826).

by offering violence to the person of a foreign minister was not a suit "affecting" the minister but a public prosecution for vindication of the laws of nations and the United States. Another question concerns the official status of a person claiming to be an ambassador or consul.

The Court has refused to review the decision of the Executive with respect to the public character of a person claiming to be a public minister and has laid down the rule that it has the right to accept a certificate from the Department of State on such a question.[891] A third question was whether the clause included ambassadors and consuls accredited by the United States to foreign governments. The Court held that it includes only persons accredited to the United States by foreign governments.[892] However, in matters of especial delicacy, such as suits against ambassadors and public ministers or their servants, where the law of nations permits such suits, and in all controversies of a civil nature in which a state is a party, Congress until recently made the original jurisdiction of the Supreme Court exclusive of that of other courts.[893] By its compliance with the congressional distribution of exclusive and concurrent original jurisdiction, the Court has tacitly sanctioned the power of Congress to make such jurisdiction exclusive or concurrent as it may choose.

Cases of Admiralty and Maritime Jurisdiction

The admiralty and maritime jurisdiction of the federal courts had its origins in the jurisdiction vested in the courts of the Admiral of the English Navy. Prior to independence, vice-admiralty courts were created in the Colonies by commissions from the English High Court of Admiralty. After independence, the states established admiralty courts, from which at a later date appeals could be taken to a court of appeals set up by Congress under the Articles of Confederation.[894] Since one of the objectives of the Philadelphia Convention was the promotion of commerce through removal of obstacles occasioned by the diverse local rules of the states, it was only logical that it should contribute to the development of a uniform body of maritime law by establishing a system of federal courts and granting to these tribunals jurisdiction over admiralty and maritime cases.[895]

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[891] *In re* Baiz, 135 U.S. 403, 432 (1890).

[892] *Ex parte* Gruber, 269 U.S. 302 (1925).

[893] 1 Stat. 80–81 (1789). Jurisdiction in the Supreme Court since 1978 has been original but not exclusive. Pub. L. 95–393, § 8(b), 92 Stat. 810, 28 U.S.C. § 1251(b)(1).

[894] G. Gilmore & C. Black, The Law of Admiralty ch. 1 (1957).

[895] The records of the Convention do not shed light on the Framers' views about admiralty. The present clause was contained in the draft of the Committee on Detail. 2 M. Farrand, supra at 186–187. None of the plans presented to the Conven-

The Constitution uses the terms "admiralty and maritime jurisdiction" without defining them. Though closely related, the words are not synonyms. In England the word "maritime" referred to the cases arising upon the high seas, whereas "admiralty" meant primarily cases of a local nature involving police regulations of shipping, harbors, fishing, and the like. A long struggle between the admiralty and common law courts had, however, in the course of time resulted in a considerable curtailment of English admiralty jurisdiction. A much broader conception of admiralty and maritime jurisdiction existed in the United States at the time of the framing of the Constitution than in the Mother Country.[896] At the very beginning of government under the Constitution, Congress conferred on the federal district courts exclusive original cognizance "of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . . ."[897] This broad legislative interpretation of admiralty and maritime jurisdiction soon won the approval of the federal circuit courts, which ruled that the extent of admiralty and maritime jurisdiction was not to be determined by English law but by the principles of maritime law as respected by maritime courts of all nations and adopted by most, if not by all, of them on the continent of Europe.[898]

Although a number of Supreme Court decisions had earlier sustained the broader admiralty jurisdiction on specific issues,[899] it was not until 1848 that the Court ruled squarely in its favor, which it did by declaring that "whatever may have been the doubt, origi-

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tion, with the exception of an apparently authentic Charles Pinckney plan, 3 id. at 601–04, 608, had mentioned an admiralty jurisdiction in national courts. *See* Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460 (1925).

[896] G. Gilmore & C. Black, supra at ch. 1. In DeLovio v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass 1815), Justice Story delivered a powerful historical and jurisprudential argument against the then-restrictive English system. *See also* Waring v. Clarke, 46 U.S. (5 How.) 441, 451–59 (1847); New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 34, 385–390 (1848).

[897] § 9, 1 Stat. 77 (1789), now 28 U.S.C. § 1333 in only slightly changed form. For the classic exposition, *see* Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950).

[898] *E.g.*, DeLovio v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); *The Seneca*, 21 Fed. Cas. 1801 (No. 12670) C.C.E.D. Pa. 1829) (Justice Washington).

[899] *The Vengeance*, 3 U.S. (3 Dall.) 297 (1796); *The Schooner Sally*, 6 U.S. (2 Cr.) 406 (1805); *The Schooner Betsy*, 8 U.S. (4 Cr.) 443 (1808); *The Samuel*, 14 U.S. (1 Wheat.) 9 (1816); *The Octavig*, 14 U.S. (1 Wheat.) 20 (1816).

nally, as to the true construction of the grant, whether it had reference to the jurisdiction in England, or to the more enlarged one that existed in other maritime countries, the question has become settled by legislative and judicial interpretation, which ought not now to be disturbed." [900] The Court thereupon proceeded to hold that admiralty had jurisdiction *in personam* as well as *in rem* over controversies arising out of contracts of affreightment between New York and Providence.

Power of Congress To Modify Maritime Law.—The Constitution does not identify the source of the substantive law to be applied in the federal courts in cases of admiralty and maritime jurisdiction. Nevertheless, the grant of power to the federal courts in Article III necessarily implies the existence of a substantive maritime law which, if they are required to do so, the federal courts can fashion for themselves.[901] But what of the power of Congress in this area? In *The Lottawanna*,[902] Justice Bradley undertook a definitive exposition of the subject. No doubt, the opinion of the Court notes, there exists "a great mass of maritime law which is the same in all commercial countries," still "the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country." [903] "The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it . . . ."

"One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under

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[900] New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 334, 386 (1848); *see also* Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

[901] Swift & Co. Packers v. Compania Columbiana Del Caribe, 339 U.S. 684, 690, 691 (1950); Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 285 (1952); Romero v. International Terminal Operating Co., 358 U.S. 354, 360–61 (1959). For a recent example, *see* Moragne v. States Marine Lines, 398 U.S. 375 (1970); United States v. Reliable Transfer Co., 421 U.S. 397 (1975). *Compare The Lottawanna*, 88 U.S. (21 Wall.) 558, 576–77 (1875) ("But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department"). States can no more override rules of judicial origin than they can override acts of Congress. Wilburn Boat Co. v. Firemen's Fund Ins. Co., 348 U.S. 310, 314 (1955).

[902] 88 U.S. (21 Wall.) 558 (1875).

[903] 88 U.S. at 572.

the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."[904]

"It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."[905] That Congress's power to enact substantive maritime law was conferred by the Commerce Clause was assumed in numerous opinions,[906] but later opinions by Justice Bradley firmly established that the source of power was the admiralty grant itself, as supplemented by the second prong of the Necessary and Proper Clause.[907] Thus, "[a]s the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature and not in the state legislatures."[908] Rejecting an attack on a maritime statute as an infringement of intrastate commerce, Justice Bradley wrote: "It is unnecessary to invoke the power given the Congress to regulate commerce in order to find authority to pass the law in question. The act was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends."[909]

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[904] 88 U.S. at 574–75.

[905] 88 U.S. at 577.

[906] *E.g.*, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1871); Moore v. American Transp. Co., 65 U.S. (24 How.) 1, 39 (1861); Providence & N.Y. S.S. Co. v. Hill Mfg. Co., 109 U.S. 578 (1883); *The Robert W. Parsons*, 191 U.S. 17 (1903).

[907] Butler v. Boston & S. S.S. Co., 130 U.S. 527 (1889); *In re* Garnett, 141 U.S. 1 (1891). The second prong of the Necessary and Proper Clause is the authorization to Congress to enact laws to carry into execution the powers vested in other departments of the Federal Government. *See* Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 42 (1934).

[908] Butler v. Boston & S. S.S. Co., 130 U.S. 527, 557 (1889).

[909] *In re* Garnett, 141 U.S. 1, 12 (1891). *See also* Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920); Crowell v. Benson, 285 U.S. 22, 55 (1932). The Jones Act, under which injured seamen may maintain an action at law for damages, has been reviewed as an exercise of legislative power deducible from the Admiralty Clause. Panama R.R. v. Johnson, 264 U.S. 375, 386, 388, 391 (1924); Romero v. International Terminal Operating Co., 358 U.S. 354, 360–361 (1959). On the limits to the congressional power, *see* Panama R.R. v. Johnson, 264 U.S. at 386–87; Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 43–44 (1934).

The law administered by federal courts in admiralty is therefore an amalgam of the general maritime law insofar as it is acceptable to the courts, modifications of that law by congressional amendment, the common law of torts and contracts as modified to the extent constitutionally possible by state legislation, and international prize law. This body of law is at all times subject to modification by the paramount authority of Congress acting in pursuance of its powers under the Admiralty and Maritime Clause and the Necessary and Proper Clause and, no doubt, the Commerce Clause, now that the Court's interpretation of that clause has become so expansive. Of this power there has been uniform agreement among the Justices of the Court.[910]

Admiralty and Maritime Cases.—Admiralty and maritime jurisdiction comprises two types of cases: (1) those involving acts committed on the high seas or other navigable waters, and (2) those involving contracts and transactions connected with shipping employed on the seas or navigable waters. In the first category, which includes prize cases and torts, injuries, and crimes committed on the high seas, jurisdiction is determined by the locality of the act, while in the second category subject matter is the primary determinative factor.[911] Specifically, contract cases include suits by seamen for wages,[912] cases arising out of marine insurance policies,[913] ac-

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[910] Thus, Justice McReynolds' assertion of the paramountcy of congressional power in Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917), was not disputed by the four dissenters in that case and is confirmed in subsequent cases critical of *Jensen* which in effect invite congressional modification of maritime law. *E.g.*, Davis v. Department of Labor and Industries, 317 U.S. 249 (1942). The nature of maritime law has excited some relevant controversy. In American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 516, 545 (1828), Chief Justice Marshall declared that admiralty cases do not "arise under the Constitution or laws of the United States" but "are as old as navigation itself; and the law, admiralty and maritime as it has existed for ages, is applied by our Courts to the cases as they arise." In Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), the plaintiff sought a jury trial in federal court on a seaman's suit for personal injury on an admiralty claim, contending that cases arising under the general maritime law are "civil actions" that arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Five Justices in an opinion by Justice Frankfurter disagreed. Maritime cases do not arise under the Constitution or laws of the United States for federal question purposes and must, absent diversity, be instituted in admiralty where there is no jury trial. The dissenting four, Justice Brennan for himself and Chief Justice Warren and Justices Black and Douglas, contended that maritime law, although originally derived from international sources, is operative within the United States only by virtue of having been accepted and adopted pursuant to Article III, and accordingly judicially originated rules formulated under authority derived from that Article are "laws" of the United States to the same extent as those enacted by Congress.

[911] DeLovio v. Boit, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

[912] Sheppard v. Taylor, 30 U.S. (5 Pet.) 675, 710 (1831). A seaman employed by the government making a claim for wages cannot proceed in admiralty but must bring his action under the Tucker Act in the Court of Claims or in the district court

tions for towage[914] or pilotage[915] charges, actions on bottomry or respondentia bonds,[916] actions for repairs on a vessel already used in navigation,[917] contracts of affreightment,[918] compensation for temporary wharfage,[919] agreements of consortship between the masters of two vessels engaged in wrecking,[920] and surveys of damaged vessels.[921] That is, admiralty jurisdiction "extends to all contracts, claims and services essentially maritime."[922] But the courts have never enunciated an unambiguous test which would enable one to determine in advance whether or not a given case is maritime.[923]

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if his claim does not exceed $10,000. Amell v. United States, 384 U.S. 158 (1966). In Kossick v. United Fruit Co., 365 U.S. 731 (1961), an oral agreement between a seaman and a shipowner whereby the latter in consideration of the seaman's forbearance to press his maritime right to maintenance and cure promised to assume the consequences of improper treatment of the seaman at a Public Health Service Hospital was held to be a maritime contract. *See also* Archawski v. Hanioti, 350 U.S. 532 (1956).

[913] Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1, 31 (1871); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955). Whether admiralty jurisdiction exists if the vessel is not engaged in navigation or commerce when the insurance claim arises is open to question. Jeffcott v. Aetna Ins. Co., 129 F.2d 582 (2d Cir. 1942), *cert. denied*, 317 U.S. 663 (1942). Contracts and agreements to procure marine insurance are outside the admiralty jurisdiction. Compagnie Francaise De Navigation A Vapeur v. Bonnasse, 19 F.2d 777 (2d Cir. 1927).

[914] Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638 (1900). For recent Court difficulties with exculpatory features of such contracts, *see* Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); Boston Metals Co. v. The Winding Gulf, 349 U.S. 122 (1955); United States v. Nielson, 349 U.S. 129 (1955); Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959); Dixilyn Drilling Corp. v. Crescent Towage & Salvage Co., 372 U.S. 697 (1963).

[915] Atlee v. Packet Co., 88 U.S. (21 Wall.) 389 (1875); *Ex parte* McNiel, 80 U.S. (13 Wall.) 236 (1872). *See also* Sun Oil v. Dalzell Towing Co., 287 U.S. 291 (1932).

[916] *The Grapeshot*, 76 U.S. (9 Wall.) 129 (1870); O'Brien v. Miller, 168 U.S. 287 (1897); *The Aurora*, 14 U.S. (1 Wheat.) 94 (1816); Delaware Mut. Safety Ins. Co. v. Gossler, 96 U.S. 645 (1877). But ordinary mortgages even though the securing property is a vessel, its gear, or cargo are not considered maritime contracts. Bogart v. The Steamboat John Jay, 58 U.S. (17 How.) 399 (1854); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 32 (1934).

[917] New Bedford Dry Dock Co. v. Purdy, 258 U.S. 96 (1922); *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819). There is admiralty jurisdiction even though the repairs are not to be made in navigable waters but, perhaps, in dry dock. North Pacific SS. Co. v. Hall Brothers Marine R. & S. Co., 249 U.S. 119 (1919). But contracts and agreements pertaining to the original construction of vessels are not within admiralty jurisdiction. Peoples Ferry Co. v. Joseph Beers, 61 U.S. (20 How.) 393 (1858); *North Pacific S.S. Co.*, 249 U.S. at 127.

[918] New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344 (1848).

[919] *Ex parte* Easton, 95 U.S. 68 (1877).

[920] Andrews v. Wall, 44 U.S. (3 How.) 568 (1845).

[921] Janney v. Columbia Ins. Co., 23 U.S. (10 Wheat.) 411, 412, 415, 418 (1825); *The Tilton*, 23 Fed. Cas. 1277 (No. 14054) (C.C.D. Mass. 1830) (Justice Story).

[922] *Ex parte* Easton, 95 U.S. 68, 72 (1877). *See*, for a clearing away of some conceptual obstructions to the principle, Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603 (1991).

[923] *E.g.*, DeLovio v. Boit, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); The Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175, 183 (1837);

"The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw. Precedent and usage are helpful insofar as they exclude or include certain common types of contract. . . ." [924]

Maritime torts include injuries to persons,[925] damages to property arising out of collisions or other negligent acts,[926] and violent dispossession of property.[927] The Court has expressed a willingness to "recogniz[e] products liability, including strict liability, as part of the general maritime law." [928] Unlike contract cases, maritime tort jurisdiction historically depended exclusively upon the commission of the wrongful act upon navigable waters, regardless of any connection or lack of connection with shipping or commerce.[929] The Court has now held, however, that in addition to the requisite situs a significant relationship to traditional maritime activity must exist in order for the admiralty jurisdiction of the federal courts to be invoked.[930] Both the Court and Congress have created exceptions to

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The People's Ferry Co. v. Joseph Beers, 61 U.S. (20 How.) 393, 401 (1858); New England Marine Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 26 (1870); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 48 (1934).

[924] Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961).

[925] *The City of Panama*, 101 U.S. 453 (1880). Reversing a long-standing rule, the Court allowed recovery under general maritime law for the wrongful death of a seaman. Moragne v. States Marine Lines, 398 U.S. 375 (1970); Miles v. Apex Marine Corp., 498 U.S. 19 (1991).

[926] *The Raithmoor*, 241 U.S. 166 (1916); Erie R.R. v. Erie Transportation Co., 204 U.S. 220 (1907).

[927] *L'Invincible*, 14 U.S. (1 Wheat.) 238 (1816); *In re* Fassett, 142 U.S. 479 (1892).

[928] East River Steamship Corp. v. Transamerica Delaval, 476 U.S. 858 (1986) (holding, however, that there is no products liability action in admiralty for purely economic injury to the product itself, unaccompanied by personal injury, and that such actions should be based on the contract law of warranty).

[929] DeLovio v. Boit, 7 Fed. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815) (Justice Story); Philadelphia, W. & B. R.R. v. Philadelphia & Havre De Grace Steam Towboat Co., 64 U.S. (23 How.) 209, 215 (1859); *The Plymouth*, 70 U.S. (3 Wall.) 20, 33–34 (1865); Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469, 476 (1922).

[930] Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972) (plane crash in which plane landed wholly fortuitously in navigable waters off the airport runway not in admiralty jurisdiction). However, so long as there is maritime activity and a general maritime commercial nexus, admiralty jurisdiction exists. Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) (collision of two pleasure boats on navigable waters is within admiralty jurisdiction); Sisson v. Ruby, 497 U.S. 358 (1990) (fire on pleasure boat docked at marina on navigable water). *See also* Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), a tort claim arising out of damages allegedly caused by negligently driving piles from a barge into the riverbed, which weakened a freight tunnel that allowed flooding of the tunnel and the basements of numerous buildings along the Chicago River. The Court found that admiralty jurisdiction could be invoked. The location test was satisfied, because the barge, even though fastened to the river bottom, was a "vessel" for admiralty tort purposes; the two-part connection test was also satisfied, inasmuch as the incident had a potential to disrupt maritime commerce and the conduct giving rise to the incident had a substantial relationship to traditional maritime activity.

the situs test for maritime tort jurisdiction to extend landward the occasions for certain connected persons or events to come within admiralty, not without a little controversy.[931]

From the earliest days of the Republic, the federal courts sitting in admiralty have been held to have exclusive jurisdiction of prize cases.[932] Also, in contrast to other phases of admiralty jurisdiction, prize law as applied by the British courts continued to provide the basis of American law so far as practicable,[933] and so far as it was not modified by subsequent legislation, treaties, or executive proclamations. Finally, admiralty and maritime jurisdiction includes the seizure and forfeiture of vessels engaged in activities in violation of the laws of nations or municipal law, such as illicit trade,[934] infraction of revenue laws,[935] and the like. [936]

Admiralty Proceedings.—Procedure in admiralty jurisdiction differs in few respects from procedure in actions at law, but the differences that do exist are significant.[937] Suits in admiralty traditionally took the form of a proceeding *in rem* against the vessel, and,

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[931] Thus, the courts have enforced seamen's claims for maintenance and cure for injuries incurred on land. O'Donnell v. Great Lakes Co., 318 U.S. 36, 41–42 (1943). The Court has applied the doctrine of seaworthiness to permit claims by longshoremen injured on land because of some condition of the vessel or its cargo. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). *But see* Victory Carriers v. Law, 404 U.S. 202 (1971). In the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688, Congress gave seamen, or their personal representatives, the right to seek compensation from their employers for personal injuries arising out of their maritime employment. Respecting who is a seaman for Jones Act purposes, *see* Southwest Marine, Inc. v. Gizoni, 502 U.S. 81 (1991); McDermott International, Inc. v. Wilander, 498 U.S. 337 (1991). The rights exist even if the injury occurred on land. O'Donnell v. Great Lakes Co., 318 U.S. at 43; Swanson v. Mara Brothers, 328 U.S. 1, 4 (1946). In the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. § 740, Congress provided an avenue of relief for persons injured in themselves or their property by action of a vessel on navigable water which is consummated on land, as by the collision of a ship with a bridge. By the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 86 Stat. 1251, amending 33 U.S.C. §§ 901–950, Congress broadened the definition of "navigable waters" to include in certain cases adjoining piers, wharfs, etc., and modified the definition of "employee" to mean any worker "engaged in maritime employment" within the prescribed meanings, thus extending the Act shoreward and changing the test of eligibility from "situs" alone to the "situs" of the injury and the "status" of the injured.

[932] Jennings v. Carson, 8 U.S. (4 Cr.) 2 (1807); Taylor v. Carryl, 61 U.S. (20 How.) 583 (1858).

[933] Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cr.) 191 (1815); *The Siren*, 80 U.S. (13 Wall.) 389, 393 (1871).

[934] Hudson v. Guestier, 8 U.S. (4 Cr.) 293 (1808).

[935] *The Vengeance*, 3 U.S. (3 Dall.) 297 (1796); Church v. Hubbard, 6 U.S. (2 Cr.) 187 (1804); *The Schooner Sally*, 6 U.S. (2 Cr.) 406 (1805).

[936] *The Brig Ann*, 13 U.S. (9 Cr.) 289 (1815); *The Sarah*, 21 U.S. (8 Wheat.) 391 (1823); Maul v. United States, 274 U.S. 501 (1927).

[937] Gilmore & Black, supra at 30–33. There are no longer separate rules of procedure governing admiralty, unification of civil admiralty procedures being achieved in 1966. 7 A J. Moore's Federal Practice §§ .01 *et seq* (New York: 1971).

with exceptions to be noted, such proceedings *in rem* are confined exclusively to federal admiralty courts, because the grant of exclusive jurisdiction to the federal courts by the Judiciary Act of 1789 has been interpreted as referring to the traditional admiralty action, the *in rem* action, which was unknown to the common law.[938] The savings clause in that Act under which a state court may entertain actions by suitors seeking a common-law remedy preserves to the state tribunals the right to hear actions at law where a common-law remedy or a new remedy analogous to a common-law remedy exists.[939] Concurrent jurisdiction thus exists for the adjudication of *in personam* maritime causes of action against the owner of the vessel, and a plaintiff may ordinarily choose whether to bring his action in a state court or a federal court.

Forfeiture to the crown for violation of the laws of the sovereign was in English law an exception to the rule that admiralty has exclusive jurisdiction over *in rem* maritime actions and was thus considered a common-law remedy. Although the Supreme Court sometimes has used language that would confine all proceedings *in rem* to admiralty courts,[940] such actions in state courts have been sustained in cases of forfeiture arising out of violations of state law.[941]

Perhaps the most significant admiralty court difference in procedure from civil courts is the absence of a jury trial in admiralty actions, with the admiralty judge trying issues of fact as well as of law.[942] Indeed, the absence of a jury in admiralty proceedings ap-

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[938] *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866); The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867). *But see* Taylor v. Carryl, 61 U.S. (20 How.) 583 (1858). In Madruga v. Superior Court, 346 U.S. 556 (1954), the jurisdiction of a state court over a partition suit at the instance of the majority shipowners was upheld on the ground that the cause of action affected only the interest of the defendant minority shipowners and therefore was *in personam*. Justice Frankfurter's dissent argued: "If this is not an action against the thing, in the sense which that has meaning in the law, then the concepts of a *res* and an *in rem* proceeding have an esoteric meaning that I do not understand." Id. at 564.

[939] After conferring "exclusive" jurisdiction in admiralty and maritime cases on the federal courts, § 9 of the Judiciary Act of 1789, 1 Stat. 77, added "saving to suitors, in all cases the right of a common law remedy, where the common law is competent to give it. . . ." Fixing the concurrent federal-state line has frequently been a source of conflict within the Court. Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

[940] *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1867).

[941] C. J. Henry Co. v. Moore, 318 U.S. 133 (1943).

[942] *The Vengeance*, 3 U.S. (3 Dall.) 297 (1796); *The Schooner Sally*, 6 U.S. (2 Cr.) 406 (1805); *The Schooner Betsy*, 8 U.S. (4 Cr.) 443 (1808); *The Whelan*, 11 U.S. (7 Cr.) 112 (1812); *The Samuel*, 14 U.S. (1 Wheat.) 9 (1816). If diversity of citizenship and the requisite jurisdictional amounts are present, a suitor may sue on the "law side" of the federal court and obtain a jury. Romero v. International Terminal Operating Co., 358 U.S. 354, 362–363 (1959). Jones Act claims, 41 Stat. 1007 (1920), 46 U.S.C. § 688, may be brought on the "law side" with a jury, Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924), and other admiralty claims joined with a Jones Act claim may be submitted to a jury. *Romero*, *supra*; Fitzgerald v. United States Lines

pears to have been one of the principal reasons why the English government vested a broad admiralty jurisdiction in the colonial vice-admiralty courts, since they provided a forum where the English authorities could enforce the Navigation Laws without "the obstinate resistance of American juries."[943]

Territorial Extent of Admiralty and Maritime Jurisdiction.—Although he was a vigorous exponent of the expansion of admiralty jurisdiction, Justice Story for the Court in *The Steamboat Thomas Jefferson*[944] adopted a restrictive English rule confining admiralty jurisdiction to the high seas and upon rivers as far as the ebb and flow of the tide extended.[945] The demands of commerce on western waters led Congress to enact a statute extending admiralty jurisdiction over the Great Lakes and connecting waters,[946] and in *The Genessee Chief v. Fitzhugh*[947] Chief Justice Taney overruled *The Thomas Jefferson* and dropped the tidal ebb and flow requirement. This ruling laid the basis for subsequent judicial extension of jurisdiction over all waters, salt or fresh, tidal or not, which are navigable in fact.[948] Some of the older cases contain language limiting jurisdiction to navigable waters which form some link in an interstate or international waterway or some link in commerce,[949] but these date from the time when it was thought the commerce power furnished the support for congressional legislation in this field.

Admiralty and Federalism.—Extension of admiralty and maritime jurisdiction to navigable waters within a state does not, however, of its own force include general or political powers of government. Thus, in the absence of legislation by Congress, the states

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Co., 374 U.S. 16 (1963). There is no constitutional barrier to congressional provision of jury trials in admiralty. Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963).

[943] C. J. Henry Co. v. Moore, 318 U.S. 133, 141 (1943).

[944] 23 U.S. (10 Wheat.) 428 (1825). On the political background of this decision, *see* 1 C. Warren, supra at 633–35.

[945] The tidal ebb and flow limitation was strained in some of its applications. Peyroux v. Howard, 32 U.S. (7 Pet.) 324 (1833); Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

[946] 5 Stat. 726 (1845).

[947] 53 U.S. (12 How.) 443 (1851).

[948] Some of the early cases include *The Magnolia*, 61 U.S. (20 How.) 296 (1857); *The Eagle*, 75 U.S. (8 Wall.) 15 (1868); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871). The fact that the body of water is artificial presents no barrier to admiralty jurisdiction. *Ex parte* Boyer, 109 U.S. 629 (1884); *The Robert W. Parsons*, 191 U.S. 17 (1903). In United States v. Appalachian Power Co., 311 U.S. 377 (1940), it was made clear that maritime jurisdiction extends to include waterways which by reasonable improvement can be made navigable. "It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country." Southern S.S. Co. v. NLRB, 316 U.S. 31, 41 (1942).

[949] *E.g.*, *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *The Montello*, 87 U.S. (20 Wall.) 430, 441–42 (1874).

through their courts may punish offenses upon their navigable waters and upon the sea within one marine league of the shore.[950]

Determination of the boundaries of admiralty jurisdiction is a judicial function, and "no State law can enlarge it, nor can an act of Congress or a rule of court make it broader than the judicial power may determine to be its true limits." [951] But, as with other jurisdictions of the federal courts, admiralty jurisdiction can only be exercised under acts of Congress vesting it in federal courts.[952]

The boundaries of federal and state competence, both legislative and judicial, in this area remain imprecise, and federal judicial determinations have notably failed to supply definiteness. During the last century, the Supreme Court generally permitted two overlapping systems of law to coexist in an uneasy relationship. The federal courts in admiralty applied the general maritime law,[953] supplemented in some instances by state law which created and defined certain causes of action.[954] Because the Judiciary Act of 1789 saved to suitors common-law remedies, persons suing in state courts or in federal courts in diversity of citizenship actions could look to common-law and statutory doctrines for relief in maritime-related cases in which the actions were noticeable.[955] In *Southern Pacific Co. v. Jensen*,[956] a sharply divided Court held that New York could not constitutionally apply its workmen's compensation system to employees injured or killed on navigable waters. For the Court, Justice McReynolds reasoned "that the general maritime law, as accepted by the federal courts, constituted part of our national law,

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[950] United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1818); Manchester v. Massachusetts, 139 U.S. 240 (1891).

[951] *The Steamer St. Lawrence*, 66 U.S. (1 Bl.) 522, 527 (1862).

[952] Janney v. Columbia Ins. Co., 23 U.S. (10 Wheat.) 411, 418 (1825); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 576 (1875).

[953] *E.g.*, New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 47 U.S. (6 How.) 344 (1848); The Steamboat New York v. Rea, 59 U.S. (18 How.) 223 (1856); *The China*, 74 U.S. (7 Wall.) 53 (1868); *Ex parte* McNiel, 80 U.S. (13 Wall.) 236 (1872); *La Bourgogne*, 210 U.S. 95 (1908).

[954] *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819); *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875) (enforcing state laws giving suppliers and repairmen liens on ships supplied and repaired). Another example concerns state-created wrongful death actions. *The Hamilton*, 207 U.S. 398 (1907).

[955] *E.g.*, Hazard's Administrator v. New England Marine Ins. Co., 33 U.S. (8 Pet.) 557 (1834); *The Belfast*, 74 U.S. (7 Wall.) 624 (1869); American Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872); Quebec Steamship Co. v. Merchant, 133 U.S. 375 (1890); Belden v. Chase, 150 U.S. 674 (1893); Homer Ramsdell Transp. Co. v. La Compagnie Gen. Transatlantique, 182 U.S. 406 (1901).

[956] 244 U.S. 205 (1917). The worker here had been killed, but the same result was reached in a case of nonfatal injury. Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917). In Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918), the *Jensen* holding was applied to preclude recovery in a negligence action against the injured party's employer under state law. Under *The Osceola*, 189 U.S. 158 (1903), the employee had a maritime right to wages, maintenance, and cure.

applicable to matters within the admiralty and maritime jurisdiction."[957] Recognizing that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified or affected by state legislation," still it was certain that "no such legislation is valid if it works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony or uniformity of that law in its international and interstate relations."[958] The "savings to suitors" clause was unavailing because the workmen's compensation statute created a remedy "of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."[959]

Congress required three opportunities to legislate to meet the problem created by the decision, the lack of remedy for maritime workers to recover for injuries resulting from the negligence of their employers. First, Congress enacted a statute saving to claimants their rights and remedies under state workmen's compensation laws.[960] The Court invalidated it as an unconstitutional delegation of legislative power to the states. "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations."[961] Second, Congress reenacted the law but excluded masters and crew members of vessels from those who might claim compensation for maritime injuries.[962]

The Court found this effort unconstitutional as well, because "the manifest purpose [of the statute] was to permit any State to alter the maritime law and thereby introduce conflicting require-

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[957] Southern Pacific Co. v. Jensen, 244 U.S. 205, 215 (1917).

[958] 244 U.S. at 216.

[959] 244 U.S. at 218. There were four dissenters: Justices Holmes, Pitney, Brandeis, and Clarke. The *Jensen* dissent featured such Holmesian epigrams as: "[J]udges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions," id. at 221, and the famous statement supporting the assertion that supplementation of maritime law had to come from state law because "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . . It always is the law of some State. . . ." Id. at 222.

[960] 40 Stat. 395 (1917).

[961] Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920). The decision was again 5-to-4 with the same dissenters.

[962] 42 Stat. 634 (1922).

ments." [963] Finally, in 1927, Congress passed the Longshoremen's and Harbor Workers' Compensation Act, which provided accident compensation for injuries, including those resulting in death, sustained on navigable waters by employees, other than members of the crew, whenever "recovery . . . may not validly be provided by State law." [964]

With certain exceptions,[965] the federal-state conflict since *Jensen* has taken place with regard to three areas: (1) the interpretation of federal and state bases of relief for injuries and death as affected by the Longshoremen's and Harbor Workers' Compensation Act; (2) the interpretation of federal and state bases of relief for personal injuries by maritime workers as affected by the Jones Act; and (3) the application of state law to permit recovery in maritime wrongful death cases in which until recently there was no federal maritime right to recover.[966]

(1) The principal difficulty here was that after *Jensen* the Supreme Court did not maintain the line between permissible and impermissible state-authorized recovery at the water's edge, but created a "maritime but local" exception, by which some injuries incurred in or on navigable waters could be compensated under state workmen's compensation laws or state negligence laws.[967] "The application of the State Workmen's Compensation Acts has been sustained

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[963] Washington v. Dawson & Co., 264 U.S. 219, 228 (1924). Holmes and Brandeis remained of the four dissenters and again dissented.

[964] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901–950. In 1984, the statute was renamed the Longshore and Harbor Workers' Compensation Act. Pub. L. 98–426.

[965] *E.g.*, Maryland Casualty Co. v. Cushing, 347 U.S. 409 (1954) (state direct action statute applies against insurers implicated in a marine accident); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310 (1955) (state statute determines effect of breach of warranty in marine insurance contract); Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) (federal rather than state law determines effect of exculpatory provisions in towage contracts); Kossick v. United Fruit Co., 365 U.S. 731 (1961) (state statute of frauds inapplicable to oral contract for medical care between seaman and employer).

[966] *Jensen*, though much criticized, is still the touchstone of the decisional process in this area with its emphasis on the general maritime law. *E.g.*, Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). In Askew v. American Waterways Operators, 411 U.S. 325, 337–44 (1973), the Court, in holding that the states may constitutionally exercise their police powers respecting maritime activities concurrently with the Federal Government, such as by providing for liability for oil spill damages, noted that *Jensen* and its progeny, although still possessing vitality, have been confined to their facts; thus, it is only with regard "to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews" that state law is proscribed. Id. at 344. *See also* Sun Ship v. Pennsylvania, 447 U.S. 715 (1980).

[967] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Grant-Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922); State Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922); Miller's Indemnity Underwriters v. Braud, 270 U.S. 59 (1926). The exception continued to be applied following enactment of the Longshoremen's

where the work of the employee has been deemed to have no direct relation to navigation or commerce and the operation of the local law 'would work no material prejudice to the essential features of the general maritime law.'"[968] Because Congress provided in the Longshoremen's and Harbor Workers' Compensation Act for recovery under the Act "if recovery . . . may not validly be provided by State law,"[969] it was held that the "maritime but local" exception had been statutorily perpetuated,[970] thus creating the danger for injured workers or their survivors that they might choose to seek relief by the wrong avenue to their prejudice. This danger was subsequently removed by the Court when it recognized that there was a "twilight zone," a "shadowy area," in which recovery under either the federal law or a state law could be justified, and held that in such a "twilight zone" the injured party should be enabled to recover under either.[971] Then, in *Calbeck v. Travelers Ins. Co.*,[972] the Court virtually read out of the Act its inapplicability when compensation would be afforded by state law and held that Congress's intent in enacting the statute was to extend coverage to all workers who sustain injuries while on navigable waters of the United States whether or not a particular injury was also within the constitutional reach of a state workmen's compensation law or other law. By the 1972 amendments to the LHWCA, Congress extended the law shoreward by refining the tests of "employee" and "navigable waters," so as to reach piers, wharfs, and the like in certain circumstances.[973]

(2) The passage of the Jones Act[974] gave seamen a statutory right of recovery for negligently inflicted injuries on which they could

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and Harbor Workers' Compensation Act. *See* cases cited in Davis v. Department of Labor and Industries, 317 U.S. 249, 253–254 (1942).

[968] Crowell v. Benson, 285 U.S. 22, 39 n.3 (1932). The internal quotation is from Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921).

[969] § 3(a), 44 Stat. 1424 (1927), 33 U.S.C. § 903(a).

[970] Crowell v. Benson, 284 U.S. 22, 39, (1932); Davis v. Department of Labor and Industries, 317 U.S. 249, 252–53 (1942).

[971] Davis v. Dept of Labor and Industries, 317 U.S. 249 (1942). The quoted phrases appear at id. at 253, 256. *See also* Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959).

[972] 370 U.S. 114 (1962). In the 1972 amendments, § 2, 86 Stat. 1251, amending 33 U.S.C. § 903(a), Congress ratified *Calbeck* by striking out "if recovery . . . may not validly be provided by State law."

[973] 86 Stat. 1251, § 2, amending 33 U.S.C. § 902. The Court had narrowly turned back an effort to achieve this result through construction in Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969). *See also* Victory Carriers v. Law, 404 U.S. 202 (1971). On the interpretation of the amendments, *see* Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977); Director, Office of Workers Compensation Programs v. Perini, 459 U.S. 297 (1983).

[974] 41 Stat. 1007 (1920), 46 U.S.C. § 688. For the prior-Jones Act law, *see The Osceola*, 189 U.S. 158 (1903).

sue in state or federal courts. Because injured parties could obtain a jury trial in Jones Act suits, there was little attempted recourse under the savings clause[975] to state law claims and thus no need to explore the line between applicable and inapplicable state law. But in the 1940s personal injury actions based on unseaworthiness[976] were given new life by Court decisions for seamen;[977] and the right was soon extended to longshoremen who were injured while on board ship or while working on the dock if the injury could be attributed either to the ship's gear or its cargo.[978] While these actions could have been brought in state court, federal law supplanted state law even with regard to injuries sustained in state territorial waters.[979] The 1972 LHWCA amendments, however, eliminated unseaworthiness recoveries by persons covered by the Act and substituted a recovery under the LHWCA itself for injuries caused by negligence.[980]

(3) In *The Harrisburg*,[981] the Court held that maritime law did not afford an action for wrongful death, a position to which the Court adhered until 1970.[982] The Jones Act,[983] the Death on the High Seas Act,[984] and the Longshoremen's and Harbor Workers' Compensa-

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[975] "Cases of Admiralty and Maritime Jurisdiction," supra.

[976] Unseaworthiness "is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. . . . [T]he owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care." Mitchell v. Trawler Racer, 362 U.S. 539, 549 (1960).

[977] Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944). *See also* Mitchell v. Trawler Racer, 362 U.S. 539 (1960); Michalic v. Cleveland Tankers, 364 U.S. 325 (1960); Waldron v. Moore-McCormack Lines, 386 U.S. 724 (1967).

[978] Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Pope & Talbot v. Hawn, 346 U.S. 406 (1953); Alaska S.S. Co. v. Patterson, 347 U.S. 396 (1954); Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); *But see* Usner v. Luckenback Overseas Corp., 400 U.S. 494 (1971); Victory Carriers v. Law, 404 U.S. 202 (1971).

[979] Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

[980] 86 Stat. 1263, § 18, amending 33 U.S.C. § 905. On the negligence standards under the amendment, *see* Scindia Steam Navigation Co., v. De Los Santos, 451 U.S. 156 (1981).

[981] 119 U.S. 199 (1886). Subsequent cases are collected in Moragne v. States Marine Lines, 398 U.S. 375 (1970).

[982] Moragne v. States Marine Lines, 398 U.S. 375 (1970).

[983] 41 Stat. 1007 (1920). 46 U.S.C. § 688. Recovery could be had if death resulted from injuries because of negligence but not from unseaworthiness.

[984] 41 Stat. 537 (1920), 46 U.S.C. §§ 761 *et seq*. The Act applies to deaths caused by negligence occurring on the high seas beyond a marine league from the shore of any state. In Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969), a unanimous Court held that this Act did not apply in cases of deaths on the artificial islands created on the continental shelf for oil drilling purposes but that the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C. §§ 1331 *et seq*., incorpo-

tion Act[985] created causes of action for wrongful death, but for cases not falling within one of these laws the federal courts looked to state wrongful death and survival statutes.[986] Thus, in *The Tungus v. Skovgaard*,[987] the Court held that a state wrongful death statute encompassed claims both for negligence and unseaworthiness in the instance of a land-based worker killed when on board ship in navigable water; the Court divided five-to-four, however, in holding that the standards of the duties to furnish a seaworthy vessel and to use due care were created by the state law as well and not furnished by general maritime concepts.[988] And, in *Hess v. United States*,[989] a suit under the Federal Tort Claims Act for recovery for a death by drowning in a navigable Oregon river of an employee of a contractor engaged in repairing the federally owned Bonneville Dam, a divided Court held that liability was to be measured by the standard of care expressed in state law, notwithstanding that the standard was higher than that required by maritime law. One area existed, however, in which beneficiaries of a deceased seaman were denied recovery.

The Jones Act provided a remedy for wrongful death resulting from negligence, but not for one caused by unseaworthiness alone; in *Gillespie v. United States Steel Corp.*,[990] the Court held that the survivors of a seaman drowned while working on a ship docked in an Ohio port could not recover under the state wrongful death statute even though the act recognized unseaworthiness as a basis for recovery, the Jones Act having superseded state laws.

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rated the laws of the adjacent state, so that Louisiana law governed. *See also* Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981). However, in Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986), the Court held that the Act is the exclusive wrongful death remedy in the case of OCS platform workers killed in a helicopter crash 35 miles off shore en route to shore from a platform.

[985] 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901–950.

[986] Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Just v. Chambers, 312 U.S. 383 (1941); Levinson v. Deupree, 345 U.S. 648 (1953).

[987] 358 U.S. 588 (1959).

[988] Justice Brennan, joined by Chief Justice Warren and Justices Black and Douglas, argued that the extent of the duties owed the decedent while on board ship should be governed by federal maritime law, though the cause of action originated in a state statute, just as would have been the result had decedent survived his injuries. *See also* United N.Y. & N.J. Sandy Hooks Pilot Ass'n v. Halecki, 358 U.S. 613 (1959).

[989] 361 U.S. 314 (1960). The four *Tungus* dissenters joined two of the *Tungus* majority solely "under compulsion" of the *Tungus* ruling; the other three majority Justices dissented on the ground that application of the state statute unacceptably disrupted the uniformity of maritime law.

[990] 379 U.S. 148 (1964). The decision was based on dictum in Lindgren v. United States, 281 U.S. 38 (1930), to the effect that the Jones Act remedy was exclusive.

Thus did matters stand until 1970, when the Court, in a unanimous opinion in *Moragne v. States Marine Lines*,[991] overruled its earlier cases and held that a right of recovery for wrongful death is sanctioned by general maritime law and that no statute is needed to bring the right into being. The Court was careful to note that the cause of action created in *Moragne* would not, like the state wrongful death statutes in *Gillespie*, be held precluded by the Jones Act, so that the survivor of a seaman killed in navigable waters within a state would have a cause of action for negligence under the Jones Act or for unseaworthiness under the general maritime law.[992]

Cases to Which the United States Is a Party

Right of the United States to Sue.—In the first edition of his *Treatise*, Justice Story noted that while "an express power is no where given in the constitution," the right of the United States to sue in its own courts "is clearly implied in that part respecting the judicial power. . . . Indeed, all the usual incidents appertaining to a *personal* sovereign, in relation to contracts, and suing, and enforcing rights, so far as they are within the scope of the powers of the government, belong to the United States, as they do to other sovereigns."[993] As early as 1818, the Supreme Court ruled that the United States could sue in its own name in all cases of contract without congressional authorization of such suits.[994] Later, this rule was extended to other types of actions. In the absence of statutory provisions to the contrary, such suits are initiated by the Attorney General in the name of the United States.[995]

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[991] 398 U.S. 375 (1970).

[992] 398 U.S. at 396 n.12. For development of the law under *Moragne*, *see* Sea-Land Services v. Gaudet, 414 U.S. 573 (1974); Miles v. Apex Marine Corp., 498 U.S. 19 (1990); and Norfolk Shipbuilding and Drydock Co. v. Garris, 532 U.S. 811 (2001) (maritime cause of action for death caused by violation of the duty of seaworthiness is equally applicable to death resulting from negligence). But, in Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), a case involving a death in territorial waters from a jet ski accident, the Court held that *Moragne* does not provide the exclusive remedy in cases involving the death in territorial waters of a "nonseafarer"—a person who is neither a seaman covered by the Jones Act nor a longshore worker covered by the LHWCA.

[993] 3 J. Story, Commentaries on the Constitution of the United States 1274 (1833), (emphasis in original).

[994] Dugan v. United States, 16 U.S. (3 Wheat.) 172 (1818).

[995] United States v. San Jacinto Tin Co., 125 U.S. 273 (1888); United States v. Beebe, 127 U.S. 338 (1888); United States v. Bell Telephone Co., 128 U.S. 315 (1888). Whether without statutory authorization the United States may sue to protect the constitutional rights of its citizens has occasioned conflict. *Compare* United States v. Brand Jewelers, 318 F. Supp. 1293 (S.D.N.Y. 1970), *and* United States v. Brittain, 319 F. Supp. 1658 (S.D.Ala. 1970), *with* United States v. Mattson, 600 F.2d 1295 (9th Cir. 1979), and United States v. Solomon, 563 F.2d 1121 (4th Cir. 1977). The

By the Judiciary Act of 1789, and subsequent amendments to it, Congress has vested in the federal district courts jurisdiction to hear all suits of a civil nature at law or in equity brought by the United States as party plaintiff.[996] As in other judicial proceedings, the United States, like any party plaintiff, must have an interest in the subject matter and a legal right to the remedy sought.[997] Under the long-settled principle that the courts have the power to abate public nuisances at the suit of the government, the provision in § 208(2) of the Labor Management Relations Act of 1949, authorizing federal courts to enjoin strikes that imperil national health or safety was upheld on the grounds that the statute entrusts the courts with the determination of a "case or controversy" on which the judicial power can operate and does not impose any legislative, executive, or non-judicial function. Moreover, the fact that the rights sought to be protected were those of the public in unimpeded production in industries vital to public health, as distinguished from the private rights of labor and management, was held not to alter the adversary ("case or controversy") nature of the litigation instituted by the United States as the guardian of the aforementioned rights.[998] Also, by reason of the highest public interest in the fulfillment of all constitutional guarantees, "including those that bear . . . directly on private rights, . . . it [is] perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief." [999]

Suits Against States.—Controversies to which the United States is a party include suits brought against states as party defendants. The first such suit occurred in *United States v. North Carolina*,[1000] which was an action by the United States to recover upon bonds

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result in *Mattson* and *Solomon* was altered by specific authorization in the Civil Rights of Institutionalized Persons Act, Pub. L. 96–247, 94 Stat. 349 (1980), 42 U.S.C. §§ 1997 *et seq*. *See also* United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980) (no standing to sue to correct allegedly unconstitutional police practices).

[996] 28 U.S.C. § 1345. By virtue of the fact that the original jurisdiction of the Supreme Court extends only to those cases enumerated in the Constitution, jurisdiction over suits brought by the United States against persons or corporations is vested in the lower federal courts. Suits by the United States against a state may be brought in the Supreme Court under its original jurisdiction, 28 U.S.C. § 1251(b)(2), although such suits may also be brought in the district courts. Case v. Bowles, 327 U.S. 92, 97 (1946).

[997] United States v. San Jacinto Tin Co., 125 U.S. 273 (1888).

[998] United Steelworkers v. United States, 361 U.S. 39, 43–44 (1960), citing *In re* Debs, 158 U.S. 564 (1895).

[999] United States v. Raines, 362 U.S. 17, 27 (1960), upholding jurisdiction of the federal court over an action to enjoin state officials from discriminating against African-American citizens seeking to vote in state elections. *See also* Oregon v. Mitchell, 400 U.S. 112 (1970), in which two of the four cases considered were actions by the United States to enjoin state compliance with the Voting Rights Act Amendments of 1970.

[1000] 136 U.S. 211 (1890).

issued by North Carolina. Although no question of jurisdiction was raised, in deciding the case on its merits in favor of the state, the Court tacitly assumed that it had jurisdiction of such cases. The issue of jurisdiction was directly raised by Texas a few years later in a bill in equity brought by the United States to determine the boundary between Texas and the Territory of Oklahoma, and the Court sustained its jurisdiction over strong arguments by Texas to the effect that it could not be sued by the United States without its consent and that the Supreme Court's original jurisdiction did not extend to cases to which the United States is a party.[1001] Stressing the inclusion within the judicial power of cases to which the United States and a state are parties, the elder Justice Harlan pointed out that the Constitution made no exception of suits brought by the United States. In effect, therefore, consent to be sued by the United States "was given by Texas when admitted to the Union upon an equal footing in all respects with the other States." [1002]

Suits brought by the United States have, however, been infrequent. All of them have arisen since 1889, and they have become somewhat more common since 1926. That year the Supreme Court decided a dispute between the United States and Minnesota over land patents issued to the state by the United States in breach of its trust obligations to the Indian.[1003] In *United States v. West Virginia*,[1004] the Court refused to take jurisdiction of a suit in equity brought by the United States to determine the navigability of the New and Kanawha Rivers on the ground that the jurisdiction in such suits is limited to cases and controversies and does not extend to the adjudication of mere differences of opinion between the officials of the two governments. A few years earlier, however, it had taken jurisdiction of a suit by the United States against Utah to quiet title to land forming the beds of certain sections of the Colorado River and its tributaries with the states.[1005] Similarly, it took jurisdiction of a suit brought by the United States against California to determine the ownership of and paramount rights over the submerged land and the oil and gas thereunder off the coast of Cali-

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[1001] United States v. Texas, 143 U.S. 621 (1892).

[1002] 143 U.S. at 642–46. This suit, it may be noted, was specifically authorized by the Act of Congress of May 2, 1890, providing for a temporary government for the Oklahoma territory to determine the ownership of Greer County. 26 Stat. 81, 92, § 25. *See also* United States v. Louisiana, 339 U.S. 699, 701–02 (1950).

[1003] United States v. Minnesota, 270 U.S. 181 (1926). For an earlier suit against a state by the United States, *see* United States v. Michigan, 190 U.S. 379 (1903).

[1004] 295 U.S. 463 (1935).

[1005] United States v. Utah, 283 U.S. 64 (1931).

fornia between the low-water mark and the three-mile limit.[1006] Like suits were decided against Louisiana and Texas in 1950.[1007]

Immunity of the United States From Suit.—Pursuant to the general rule that a sovereign cannot be sued in its own courts, the judicial power does not extend to suits against the United States unless Congress by statute consents to such suits. This rule first emanated in embryonic form in an *obiter dictum* by Chief Justice Jay in *Chisholm v. Georgia*, where he indicated that a suit would not lie against the United States because "there is no power which the courts can call to their aid."[1008] In *Cohens v. Virginia*,[1009] also in dictum, Chief Justice Marshall asserted, "the universally received opinion is that no suit can be commenced or prosecuted against the United States." The issue was more directly in question in *United States v. Clarke*,[1010] where Chief Justice Marshall stated that, as the United States is "not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it." He thereupon ruled that the act of May 26, 1830, for the final settlement of land claims in Florida condoned the suit. The doctrine of the exemption of the United States from suit was repeated in various subsequent cases, without discussion or examination.[1011] Indeed, it was not until *United States v. Lee*[1012] that the Court exam-

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[1006] United States v. California, 332 U.S. 19 (1947).

[1007] United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950). *See also* United States v. Maine, 420 U.S. 515 (1975).

[1008] 2 U.S. (2 Dall.) 419, 478 (1793).

[1009] 19 U.S. (6 Wheat.) 264, 412 (1821).

[1010] 33 U.S. (8 Pet.) 436, 444 (1834).

[1011] United States v. McLemore, 45 U.S. (4 How.) 286 (1846); Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); De Groot v. United States, 72 U.S. (5 Wall.) 419, 431 (1867); United States v. Eckford, 73 U.S. (6 Wall.) 484, 488 (1868); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869); Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1869); *The Davis*, 77 U.S. (10 Wall.) 15, 20 (1870); Carr v. United States, 98 U.S. 433, 437–439 (1879). It is also clear that the Federal Government, in the absence of its consent, is not liable in tort for the negligence of its agents or employees. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 275 (1869); Peabody v. United States, 231 U.S. 530, 539 (1913); Koekuk & Hamilton Bridge Co. v. United States, 260 U.S. 125, 127 (1922). The reason for such immunity, as stated by Justice Holmes in Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907), is that "there can be no legal right as against the authority that makes the law on which the right depends." *See also The Western Maid*, 257 U.S. 419, 433 (1922). As the Housing Act does not purport to authorize suits against the United States as such, the question is whether the Authority—which is clearly an agency of the United States—partakes of this sovereign immunity. The answer must be sought in the intention of the Congress. Sloan Shipyards v. United States Fleet Corp., 258 U.S. 549, 570 (1922); Federal Land Bank v. Priddy, 295 U.S. 229, 231 (1935). This involves a consideration of the extent to which other government-owned corporations have been held liable for their wrongful acts. 39 Ops. Atty. Gen. 559, 562 (1938).

[1012] 106 U.S. 196 (1882).

ined the rule and the reasons for it, and limited its application accordingly.

Because suits against the United States can be maintained only by congressional consent, it follows that they can be brought only in the manner prescribed by Congress and subject to the restrictions imposed.[1013] As only Congress may waive the immunity of the United States from liability, officers of the United States are powerless either to waive such immunity or to confer jurisdiction on a federal court.[1014] Even when authorized, suits may be brought only in designated courts,[1015] and this rule applies equally to suits by states against the United States.[1016] Congress may also grant or withhold immunity from suit on behalf of government corporations.[1017]

Suits Against United States Officials.—*United States v. Lee*, a 5-to-4 decision, qualified earlier holdings that a judgment affecting the property of the United States was in effect against the United States, by ruling that title to the Arlington estate of the Lee family, then being used as a national cemetery, was not legally vested in the United States but was being held illegally by army officers under an unlawful order of the President. In its examination of the sources and application of the rule of sovereign immunity, the Court

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[1013] Lonergan v. United States, 303 U.S. 33 (1938). Waivers of immunity must be express. Library of Congress v. Shaw, 461 U.S. 273 (1983) (Civil Rights Act provision that "the United States shall be liable for costs the same as a private person" insufficient to waive immunity from awards of interest). The result in *Shaw* was overturned by a specific waiver. Civil Rights Act of 1991, Pub. L. 102–166, 106 Stat. 1079, § 113, amending 42 U.S.C. § 2000e–16. Immunity was waived, with limitations, for contracts and takings claims in the Tucker Act, 28 U.S.C. § 1346(a)(2). Immunity of the United States for the negligence of its employees was waived, again with limitations, in the Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2671–2680. Other waivers of sovereign immunity include Pub. L. 94–574, § 1, 90 Stat. 2721 (1976), amending 5 U.S.C. § 702 (waiver for nonstatutory review in all cases save for suits for money damages); Pub. L. 87–748, § 1(a), 76 Stat. 744 (1962), 28 U.S.C. § 1361 (giving district courts jurisdiction of mandamus actions to compel an officer or employee of the United States to perform a duty owed to plaintiff); Westfall Act, 102 Stat. 4563, 28 U.S.C. § 2679(d) (torts of federal employees acting officially), and the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412 (making United States liable for awards of attorneys' fees in some instances when it loses an administrative proceeding or a lawsuit). *See* FDIC v. Meyer, 510 U.S. 471 (1994) (FSLIC's "sue-and-be-sued" clause waives sovereign immunity, but a *Bivens* implied cause of action for constitutional torts cannot be used directly against FSLIC).

[1014] United States v. New York Rayon Co., 329 U.S. 654 (1947).

[1015] United States v. Shaw, 309 U.S. 495 (1940). Any consent to be sued will not be held to embrace action in the federal courts unless the language giving consent is clear. Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

[1016] Minnesota v. United States, 305 U.S. 382 (1939). The United States was held here to be an indispensable party defendant in a condemnation proceeding brought by a state to acquire a right of way over lands owned by the United States and held in trust for Indian allottees. *See also* Block v. North Dakota, 461 U.S. 273 (1983).

[1017] Brady v. Roosevelt S.S. Co., 317 U.S. 575 (1943).

concluded that the rule "if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the rights of plaintiff when the United States is not a defendant or a necessary party to the suit." [1018] Except, nevertheless, for an occasional case like *Kansas v. United States*,[1019] which held that a state cannot sue the United States, most of the cases involving sovereign immunity from suit since 1883 have been cases against officers, agencies, or corporations of the United States where the United States has not been named as a party defendant. Thus, it has been held that a suit against the Secretary of the Treasury to review his decision on the rate of duty to be exacted on imported sugar would disturb the whole revenue system of the government and would in effect be a suit against the United States.[1020] Even more significant is *Stanley v. Schwalby*,[1021] holding that an action of trespass against an army officer to try title in a parcel of land occupied by the United States as a military reservation was a suit against the United States because a judgment in favor of the plaintiffs would have been a judgment against the United States.

Subsequent cases reaffirm the rule of *United States v. Lee* that, where the right to possession or enjoyment of property under general law is in issue, the fact that defendants claim the property as officers or agents of the United States does not make the action one against the United States until it is determined that they were acting within the scope of their lawful authority.[1022] On the other hand, the rule that a suit in which the judgment would affect the United States or its property is a suit against the United States has also been repeatedly approved and reaffirmed.[1023] But, as the Court has pointed out, it is not "an easy matter to reconcile all of the decisions of the court in this class of cases," [1024] and, as Justice Frankfurter quite justifiably stated in a dissent, "the subject is not free

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[1018] United States v. Lee, 106 U.S. 196, 207–208 (1882). The Tucker Act, 20 U.S.C. § 1346(a)(2), now displaces the specific rule of the case, as it provides jurisdiction against the United States for takings claims.

[1019] 204 U.S. 331 (1907).

[1020] Louisiana v. McAdoo, 234 U.S. 627, 628 (1914).

[1021] 162 U.S. 255 (1896). Justice Gray endeavored to distinguish between this case and *Lee*. Id. at 271. It was Justice Gray who spoke for the dissenters in *Lee*.

[1022] Land v. Dollar, 330 U.S. 731, 737 (1947).

[1023] Oregon v. Hitchcock, 202 U.S. 60 (1906); Louisiana v. Garfield, 211 U.S. 70 (1908); New Mexico v. Lane, 243 U.S. 52 (1917); Wells v. Roper, 246 U.S. 335 (1918); Morrison v. Work, 266 U.S. 481 (1925); Minnesota v. United States, 305 U.S.. 382 (1939); Mine Safety Co. v. Forrestal, 326 U.S. 371 (1945). *See also* Minnesota v. Hitchcock, 185 U.S. 373 (1902).

[1024] Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 451 (1883), quoted by Chief Justice Vinson in the opinion of the Court in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949).

from casuistry." [1025] Justice Douglas' characterization of *Land v. Dollar*, "this is the type of case where the question of *jurisdiction* is dependent on decision of the *merits*," [1026] is frequently applicable.

Larson v. Domestic & Foreign Corp.,[1027] illuminates these obscurities somewhat. A private company sought to enjoin the Administrator of the War Assets in his official capacity from selling surplus coal to others than the plaintiff who had originally bought the coal, only to have the sale cancelled by the Administrator because of the company's failure to make an advance payment. Chief Justice Vinson and a majority of the Court looked upon the suit as one brought against the Administrator in his official capacity, acting under a valid statute and therefore a suit against the United States. It held that, although an officer in such a situation is not immune from suits for his own torts, his official action, though tortious, cannot be enjoined or diverted, because it is also the action of the sovereign.[1028] The Court then proceeded to repeat the rule that "the action of an officer of the sovereign (be it holding, taking, or otherwise legally affecting the plaintiff's property) can be regarded as so individual only if it is not within the officer's statutory powers, or, if within those powers, only if the powers or their exercise in the particular case, are constitutionally void." [1029] The Court rejected the conten-

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[1025] *Larson*, 337 U.S. at 708. Justice Frankfurter's dissent also contains a useful classification of immunity cases and an appendix listing them.

[1026] 330 U.S. 731, 735 (1947) (emphasis added).

[1027] 337 U.S. 682 (1949).

[1028] 337 U.S. at 689–97.

[1029] 337 U.S. at 701–02. This rule was applied in Goldberg v. Daniels, 231 U.S. 218 (1913), which also involved a sale of government surplus property. After the Secretary of the Navy rejected the highest bid, plaintiff sought mandamus to compel delivery. This suit was held to be against the United States. *See also* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), which held that prospective bidders for contracts derive no enforceable rights against a federal official for an alleged misinterpretation of his government's authority on the ground that an agent is answerable only to his principal for misconstruction of instructions, given for the sole benefit of the principal. In *Larson*, the Court not only refused to follow Goltra v. Weeks, 271 U.S. 536 (1926), but in effect overruled it. *Goltra* involved an attempt of the government to repossess barges which it had leased under a contract reserving the right to repossess in certain circumstances. A suit to enjoin repossession was held not to be a suit against the United States on the ground that the actions were personal and in the nature of a trespass. Also decided in harmony with the *Larson* decision are the following, wherein the suit was barred as being against the United States: (1) Malone v. Bowdoin, 369 U.S. 643 (1962), a suit to eject a Forest Service Officer from land occupied by him in his official capacity under a claim of title from the United States; and (2) Hawaii v. Gordon, 373 U.S. 57 (1963), an original action by Hawaii against the Director of the Budget for an order directing him to determine whether a parcel of federal land could be conveyed to that state. In Dugan v. Rank, 372 U.S. 609 (1963), the Court ruled that inasmuch as the storing and diverting of water at the Friant Dam resulted, not in a trespass, but in a partial, although a casual day-by-day, taking of water rights of claimants along the San Joaquin River below the dam, a suit to enjoin such diversion by Federal Bureau of Reclamation officers was an

tion that the doctrine of sovereign immunity should be relaxed as inapplicable to suits for specific relief as distinguished from damage suits, saying: "The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." [1030]

Suits against officers involving the doctrine of sovereign immunity have been classified into four general groups by Justice Frankfurter. First, there are those cases in which the plaintiff seeks an interest in property which belongs to the government or calls "for an assertion of what is unquestionably official authority." [1031] Such suits, of course, cannot be maintained.[1032] Second, cases in which action adverse to the interests of a plaintiff is taken under an unconstitutional statute or one alleged to be so. In general these suits are maintainable.[1033] Third, cases involving injury to a plaintiff because the official has exceeded his statutory authority. In general these suits are maintainable.[1034] Fourth, cases in which an officer seeks immunity behind statutory authority or some other sovereign command for the commission of a common law tort.[1035] This category of cases presents the greatest difficulties because these suits can as readily be classified as falling into the first group if the action directly or indirectly is one for specific performance or if the judgment would affect the United States.

Suits Against Government Corporations.—The multiplication of government corporations during periods of war and depres-

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action against the United States, for grant of the remedy sought would force abandonment of a portion of a project authorized and financed by Congress, and would prevent fulfillment of contracts between the United States and local Water Utility Districts. Damages were recoverable in a suit under the Tucker Act. 28 U.S.C. § 1346(a).

[1030] 337 U.S. at 703–04. Justice Frankfurter, dissenting, would have applied the rule of the *Lee* case. *See* Pub. L. 94–574, 1, 90 Stat. 2721 (1976), amending 5 U.S.C. § 702 (action seeking relief, except for money damages, against officer, employee, or agency not to be dismissed as action against United States).

[1031] Larson v. Domestic & Foreign Corp., 337 U.S. 682, 709–710 (1949) (dissenting opinion).

[1032] Oregon v. Hitchcock, 202 U.S. 60 (1906); Louisiana v. McAdoo, 234 U.S. 627 (1914); Wells v. Roper, 246 U.S. 335 (1918). *See also* Belknap v. Schild, 161 U.S. 10 (1896); International Postal Supply Co. v. Bruce, 194 U.S. 601 (1904).

[1033] Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936); Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939) (holding that one threatened with direct and special injury by the act of an agent of the government under a statute may challenge the constitutionality of the statute in a suit against the agent).

[1034] Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); Waite v. Macy, 246 U.S. 606 (1918).

[1035] United States v. Lee, 106 U.S. 196 (1882); Goltra v. Weeks, 271 U.S. 536 (1926); Ickes v. Fox, 300 U.S. 82 (1937); Land v. Dollar, 330 U.S. 731 (1947). *See also* Barr v. Matteo, 360 U.S. 564 (1959); Howard v. Lyons, 360 U.S. 593 (1959). An emerging variant is the constitutional tort case, which springs from Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and which involves different standards of immunity for officers. Butz v. Economou, 438 U.S. 478 (1978); Carlson v. Green, 446 U.S. 14 (1980); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

sion has provided one motivation for limiting the doctrine of sovereign immunity. In *Keifer & Keifer v. RFC*,[1036] the Court held that the government does not become a conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. Nor does the creation of a government corporation confer upon it legal immunity. Whether Congress endows a public corporation with governmental immunity in a specific instance is a matter of ascertaining the congressional will. Moreover, it has been held that waivers of governmental immunity in the case of federal instrumentalities and corporations should be construed liberally.[1037] On the other hand, Indian nations are exempt from suit without further congressional authorization; it is as though their former immunity as sovereigns passed to the United States for their benefit, as did their tribal properties.[1038]

Suits Between Two or More States

The extension of federal judicial power to controversies between states and the vesting of original jurisdiction in the Supreme Court of suits to which a state is a party had its origin in experience. Prior to independence, disputes between colonies claiming charter rights to territory were settled by the Privy Council. Under the Articles of Confederation, Congress was made "the last resort on appeal" to resolve "all disputes and differences . . . between two or more States concerning boundary, jurisdiction, or any other cause whatever," and to constitute what in effect were *ad hoc* arbitral courts for determining such disputes and rendering a final judgment therein. When the Philadelphia Convention met in 1787, serious disputes over boundaries, lands, and river rights involved ten states.[1039] It is hardly surprising, therefore, that during its first 60 years the only state disputes coming to the Supreme Court were boundary disputes[1040] or that such disputes constitute the largest single number of suits between states. Since 1900, however, as the result of the increasing mobility of population and wealth and the

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[1036] 306 U.S. 381 (1939).

[1037] FHA v. Burr, 309 U.S. 242 (1940). Nonetheless, the Court held that a congressional waiver of immunity in the case of a governmental corporation did not mean that funds or property of the United States can be levied on to pay a judgment obtained against such a corporation as the result of waiver of immunity.

[1038] United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940).

[1039] Warren, *The Supreme Court and Disputes Between States*, 34 BULL. OF WILLIAM AND MARY, No. 4 (1940), 7–11. For a more comprehensive treatment of background as well as the general subject, *see* C. WARREN, THE SUPREME COURT AND THE SOVEREIGN STATES (1924).

[1040] Id. at 13. However, only three such suits were brought in this period, 1789–1849. During the next 90 years, 1849–1939, at least twenty-nine such suits were brought. Id. at 13, 14.

effects of technology and industrialization, other types of cases have occurred with increasing frequency.

Boundary Disputes: The Law Applied.—Of the earlier examples of suits between states, that between New Jersey and New York [1041] is significant for the application of the rule laid down earlier in *Chisholm v. Georgia* that the Supreme Court may proceed *ex parte* if a state refuses to appear when duly summoned. The long drawn out litigation between Rhode Island and Massachusetts is of even greater significance for its rulings, after the case had been pending for seven years, that though the Constitution does not extend the judicial power to all controversies between states, yet it does not exclude any,[1042] that a boundary dispute is a justiciable and not a political question,[1043] and that a prescribed rule of decision is unnecessary in such cases. On the last point, Justice Baldwin stated: "The submission by the sovereigns, or states, to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case (11 Ves. 294); which depends on the subject-matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo, sic jubeo*, of political power; it comes to the court, to be decided by its judgment, legal discretion and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires." [1044]

Modern Types of Suits Between States.—Beginning with *Missouri v. Illinois & Chicago District*,[1045] which sustained jurisdiction to entertain an injunction suit to restrain the discharge of sewage into the Mississippi River, water rights, the use of water resources, and the like, have become an increasing source of suits between

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[1041] New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1931).

[1042] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 (1838).

[1043] 37 U.S. at 736–37.

[1044] 37 U.S. at 737. Chief Justice Taney dissented because of his belief that the issue was not one of property in the soil, but of sovereignty and jurisdiction, and hence political. Id. at 752–53. For different reasons, it should be noted, a suit between private parties respecting soil or jurisdiction of two states, to which neither state is a party, does not come within the original jurisdiction of the Supreme Court. Fowler v. Lindsey, 3 U.S. (3 Dall.) 411 (1799). For recent boundary cases, *see* United States v. Maine (Rhode Island and New York Boundary Case), 469 U.S. 504 (1985); United States v. Louisiana (Alabama and Mississippi Boundary Case), 470 U.S. 93 (1985); United States v. Maine, 475 U.S. 89 (1986); Georgia v. South Carolina, 497 U.S. 336 (1990); Mississippi v. Louisiana, 506 U.S. 73 (1992).

[1045] 180 U.S. 208 (1901).

states. Such suits have been especially frequent in the western states,[1046] where water is even more of a treasure than elsewhere, but they have not been confined to any one region. In *Kansas v. Colorado*,[1047] the Court established the principle of the equitable division of river or water resources between conflicting state interests. In *New Jersey v. New York*,[1048] where New Jersey sought to enjoin the diversion of waters into the Hudson River watershed for New York in such a way as to diminish the flow of the Delaware River in New Jersey, injure its shad fisheries, and increase harmfully the saline contents of the Delaware, Justice Holmes stated for the Court: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be." [1049]

Other types of interstate disputes of which the Court has taken jurisdiction include suits by a state as the donee of the bonds of another to collect thereon,[1050] by Virginia against West Virginia to determine the proportion of the public debt of the original State of Virginia which the latter owed the former,[1051] by Arkansas to enjoin Texas from interfering with the performance of a contract by a Texas foundation to contribute to the construction of a new hospital in the medical center of the University of Arkansas,[1052] of one state against another to enforce a contract between the two,[1053] of a suit in equity between states for the determination of a dece-

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[1046] *E.g.* Montana v. Wyoming, 563 U.S. ___, No. 137, Orig., slip op. (2011).

[1047] 206 U.S. 46 (1907). *See also* Idaho ex rel. Evans v. Oregon and Washington, 444 U.S. 380 (1980).

[1048] 283 U.S. 336 (1931).

[1049] 283 U.S. at 342. *See also* Nebraska v. Wyoming, 325 U.S. 589 (1945); Idaho ex rel. Evans v. Oregon, 462 U.S. 1017 (1983). In Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), the Court held it had jurisdiction of a suit by a state against citizens of other states to abate a nuisance allegedly caused by the dumping of mercury into streams that ultimately run into Lake Erie, but it declined to permit the filing because the presence of complex scientific issues made the case more appropriate for first resolution in a district court. *See also* Texas v. New Mexico, 462 U.S. 554 (1983); Nevada v. United States, 463 U.S. 110 (1983).

[1050] South Dakota v. North Carolina, 192 U.S. 286 (1904).

[1051] Virginia v. West Virginia, 220 U.S. 1 (1911).

[1052] Arkansas v. Texas, 346 U.S. 368 (1953).

[1053] Kentucky v. Indiana, 281 U.S. 163 (1930).

dent's domicile for inheritance tax purposes,[1054] and of a suit by two states to restrain a third from enforcing a natural gas measure that purported to restrict the interstate flow of natural gas from the state in the event of a shortage.[1055]

In *Texas v. New Jersey*,[1056] the Court adjudicated a multistate dispute about which state should be allowed to escheat intangible property consisting of uncollected small debts held by a corporation. Emphasizing that the states could not constitutionally provide a rule of settlement and that no federal statute governed the matter, the Court evaluated the possible rules and chose the one easiest to apply and least likely to lead to continuing disputes.

In general, in taking jurisdiction of these suits, along with those involving boundaries and the diversion or pollution of water resources, the Supreme Court proceeded upon the liberal construction of the term "controversies between two or more States" enunciated in *Rhode Island v. Massachusetts*,[1057] and fortified by Chief Justice Marshall's dictum in *Cohens v. Virginia*,[1058] concerning jurisdiction because of the parties to a case, that "it is entirely unimportant, what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the Courts of the Union." [1059]

Cases of Which the Court Has Declined Jurisdiction.—In other cases, however, the Court, centering its attention upon the elements of a case or controversy, has declined jurisdiction. In *Ala-*

[1054] Texas v. Florida, 306 U.S. 398 (1939). In California v. Texas, 437 U.S. 601 (1978), the Court denied a state leave to file an original action against another state to determine the contested domicile of a decedent for death tax purposes, with several Justices of the view that Texas v. Florida had either been wrongly decided or was questionable. But, after determining that an interpleader action by the administrator of the estate for a determination of domicile was barred by the Eleventh Amendment, Cory v. White, 457 U.S. 85 (1982), the Court over dissent permitted filing of the original action. California v. Texas, 457 U.S. 164 (1982).

[1055] Pennsylvania v. West Virginia, 262 U.S. 553 (1923). The Court, in Maryland v. Louisiana, 451 U.S. 725 (1981), over strong dissent, relied on this case in permitting suit contesting a tax imposed on natural gas, the incidence of which fell on the suing state's consuming citizens. And, in Wyoming v. Oklahoma, 502 U.S. 437 (1992), the Court permitted a state to sue another to contest a law requiring that all in-state utilities burn a mixture containing at least 10% in-state coal, the plaintiff state having previously supplied 100% of the coal to those utilities and thus suffering a loss of coal-severance tax revenues.

[1056] 379 U.S. 674 (1965). *See also* Pennsylvania v. New York, 406 U.S. 206 (1972).

[1057] 37 U.S. (12 Pet.) 657 (1838).

[1058] 19 U.S. (6 Wheat.) 264 (1821).

[1059] 19 U.S. at 378. *See* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 79–80 (1961); Texas v. New Jersey, 379 U.S. 674, 677 (1965); Pennsylvania v. New York, 407 U.S. 206 (1972).

bama v. Arizona,[1060] where Alabama sought to enjoin nineteen states from regulating or prohibiting the sale of convict-made goods, the Court went far beyond holding that it had no jurisdiction, and indicated that jurisdiction of suits between states will be exercised only when absolutely necessary, that the equity requirements in a suit between states are more exacting than in a suit between private persons, that the threatened injury to a plaintiff state must be of great magnitude and imminent, and that the burden on the plaintiff state to establish all the elements of a case is greater than the burden generally required by a petitioner seeking an injunction in cases between private parties.

Pursuing a similar line of reasoning, the Court declined to take jurisdiction of a suit brought by Massachusetts against Missouri and certain of its citizens to prevent Missouri from levying inheritance taxes upon intangibles held in trust in Missouri by resident trustees. In holding that the complaint presented no justiciable controversy, the Court declared that to constitute such a controversy, the complainant state must show that it "has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to . . . the common law or equity systems of jurisprudence." [1061] The fact that the trust property was sufficient to satisfy the claims of both states and that recovery by either would not impair any rights of the other distinguished the case from *Texas v. Florida*,[1062] where the contrary situation obtained. Furthermore, the Missouri statute providing for reciprocal privileges in levying inheritance taxes did not confer upon Massachusetts any contractual right. The Court then proceeded to reiterate its earlier rule that a state may not invoke the original jurisdiction of the Supreme Court for the benefit of its residents or to enforce the individual rights of its citizens.[1063] Moreover, Massa-

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[1060] 291 U.S. 286 (1934). The Court in recent years, with a significant caseload problem, has been loath to permit filings of original actions where the parties might be able to resolve their disputes in other courts, even in cases in which the jurisdiction over the particular dispute is exclusively original. Arizona v. New Mexico, 425 U.S. 794 (1976) (dispute subject of state court case brought by private parties); California v. West Virginia, 454 U.S. 1027 (1981). But in Mississippi v. Louisiana, 506 U.S. 73 (1992), the Court's reluctance to exercise original jurisdiction ran afoul of the "uncompromising language" of 28 U.S.C. § 1251(a) giving the Court "original and *exclusive* jurisdiction" of these kinds of suits.

[1061] Massachusetts v. Missouri, 308 U.S. 1, 15–16, (1939), citing Florida v. Mellon, 273 U.S. 12 (1927).

[1062] 306 U.S. 398 (1939).

[1063] 308 U.S. at 17, citing Oklahoma v. Atchison, T. & S.F. Ry., 220 U.S. 277, 286 (1911), and Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387, 394 (1938). *See also* New Hampshire v. Louisiana and New York v. Louisiana, 108 U.S. 76 (1883), which held that a state cannot bring a suit on behalf of its citizens to collect on

chusetts could not invoke the original jurisdiction of the Court by the expedient of making citizens of Missouri parties to a suit not otherwise maintainable.[1064] Accordingly, Massachusetts was held not to be without an adequate remedy in Missouri's courts or in a federal district court in Missouri.

The Problem of Enforcement: Virginia v. West Virginia.—A very important issue in interstate litigation is the enforcement of the Court's decree, once it has been entered. In some types of suits, this issue may not arise, and if it does, it may be easily met. Thus, a judgment putting a state in possession of disputed territory is ordinarily self-executing. But if the losing state should oppose execution, refractory state officials, as individuals, would be liable to civil suits or criminal prosecutions in the federal courts. Likewise an injunction may be enforced against state officials as individuals by civil or criminal proceedings. Those judgments, on the other hand, that require a state in its governmental capacity to perform some positive act present the issue of enforcement in more serious form. The issue arose directly in the long and much litigated case between Virginia and West Virginia over the proportion of the state debt of original Virginia owed by West Virginia after its separate admission to the Union under a compact which provided that West Virginia assume a share of the debt.

The suit was begun in 1906, and a judgment was rendered against West Virginia in 1915. Finally, in 1917, Virginia filed a suit against West Virginia to show cause why, in default of payment of the judgment, an order should not be entered directing the West Virginia legislature to levy a tax for payment of the judgment.[1065] Starting with the rule that the judicial power essentially involves the right to enforce the results of its exertion,[1066] the Court proceeded to hold that it applied with the same force to states as to other litigants [1067] and to consider appropriate remedies for the enforcement of its authority. In this connection, Chief Justice White declared: "As the powers to render the judgment and to enforce it arise from the grant in the Constitution on that subject, looked at from a generic point of view, both are federal powers and, comprehensively considered, are sustained by every authority of the Federal Govern-

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bonds issued by another state, and Louisiana v. Texas, 176 U.S. 1 (1900), which held that a state cannot sue another to prevent maladministration of quarantine laws.

[1064] 308 U.S. at 17, 19.

[1065] The various decisions in Virginia v. West Virginia are found at 206 U.S. 290 (1907); 209 U.S. 514 (1908); 220 U.S. 1 (1911); 222 U.S. 17 (1911); 231 U.S. 89 (1913); 234 U.S. 117 (1914); 238 U.S. 202 (1915); 241 U.S. 531 (1916); 246 U.S. 565 (1918).

[1066] 246 U.S. at 591.

[1067] 246 U.S. at 600.

ment, judicial, legislative, or executive, which may be appropriately exercised." [1068] The Court, however, left open the question of its power to enforce the judgment under existing legislation and scheduled the case for reargument at the next term. Before that could occur, West Virginia accepted the Court's judgment and entered into an agreement with Virginia to pay it.[1069]

Enforcement Authority Includes Ordering Disgorgement and Reformation of Certain Agreements.—More recently, the Court, noting that proceedings under its original jurisdiction are "basically equitable," has taken the view that its enforcement authority encompasses ordering disgorgement of part of one state's gain from its breach of an interstate compact, as well as reforming certain agreements adopted by the states.[1070] In so doing, the Court emphasized that its enforcement authority derives both from its "inherent authority" to apportion interstate streams between states equitably and from Congress's approval of interstate compacts. As to its inherent authority, the Court noted that states bargain for water rights "in the shadow of" the Court's broad power to apportion them equitably and it is "difficult to conceive" that a state would agree to enter an agreement as to water rights if the Court lacked the power to enforce the agreement.[1071] The Court similarly reasoned that its remedial authority "gains still greater force" because a compact between the states, "having received Congress's blessing, counts as federal law." [1072] The Court stated, however, that an interstate compact's "legal status" as federal law could also limit the Court's enforcement power because the Court cannot order relief that is inconsistent with a compact's express terms.[1073]

[1068] 246 U.S. at 601.

[1069] C. WARREN, THE SUPREME COURT AND SOVEREIGN STATES 78–79 (1924).

[1070] Kansas v. Nebraska, 574 U.S. ___, No. 126, Orig., slip op. at 14–17 (2015). Equity is "the system of law or body of principles originating in the English Court of Chancery." BLACK'S LAW DICTIONARY 656 (10th ed. 2014). Persons who sought equitable relief "sought to do justice in cases for which there was no adequate remedy at common law," A.H. MANCHESTER, MODERN LEGAL HISTORY OF ENGLAND AND WALES, 1750–1950 135–36 (1980), i.e., cases in which the English courts of law could afford no relief to a plaintiff. While eventually courts of law and courts providing equitable relief merged into a single court in most jurisdictions, an equitable remedy refers to a remedy that equity courts would have historically granted. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.1(2), at 59–61 (2d ed. 1993). Compensatory damages are a classic "legal" remedy, whereas an injunction is a classic "equitable" remedy. *See* RICHARD L. HASEN, REMEDIES 141 (2d ed. 2010).

[1071] *See Kansas*, slip op. at 8 (quoting Texas v. New Mexico, 462 U.S. 554, 567 (1983)).

[1072] *Id.*

[1073] *Id.*

Controversies Between a State and Citizens of Another State

The decision in *Chisholm v. Georgia* [1074] that cases "between a state and citizens of another state" included those where a state was a party defendant provoked the proposal and ratification of the Eleventh Amendment, and since then controversies between a state and citizens of another state have included only those cases where the state has been a party plaintiff or has consented to be sued.[1075] As a party plaintiff, a state may bring actions against citizens of other states to protect its legal rights or in some instances as *parens patriae* to protect the health and welfare of its citizens. In general, the Court has tended to construe strictly this grant of judicial power, which simultaneously comes within its original jurisdiction, by perhaps an even more rigorous application of the concepts of cases and controversies than that in cases between private parties.[1076] This it does by holding rigorously to the rule that all the party defendants be citizens of other states [1077] and by adhering to congressional distribution of its original jurisdiction concurrently with that of other federal courts.[1078]

Jurisdiction Confined to Civil Cases.—In *Cohens v. Virginia*,[1079] there is a dictum to the effect that the original jurisdiction of the Supreme Court does not include suits between a state and its own citizens. Long afterwards, the Supreme Court dismissed an action for want of jurisdiction because the record did not show that the corporation against which the suit was brought was chartered in another state.[1080] Subsequently, the Court has ruled that it will not entertain an action by a state to which its citizens are either parties of record or would have to be joined because of the effect of a judgment upon them.[1081] In his dictum in *Cohens v. Virginia*, Chief Justice Marshall also indicated that perhaps no jurisdiction existed over suits by states to enforce their penal laws.[1082] Sixty-seven years later, the Court wrote this dictum into law in *Wis-*

[1074] 2 U.S. (2 Dall.) 419 (1793).

[1075] *See* the discussion under the Eleventh Amendment.

[1076] Massachusetts v. Mellon, 262 U.S. 447 (1923); Florida v. Mellon, 273 U.S. 12 (1927); New Jersey v. Sargent, 269 U.S. 328 (1926).

[1077] Pennsylvania v. Quicksilver Co., 77 U.S. (10 Wall.) 553 (1871); California v. Southern Pacific Co., 157 U.S. 229 (1895); Minnesota v. Northern Securities Co., 184 U.S. 199 (1902).

[1078] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[1079] 19 U.S. (6 Wheat.) 264, 398–99 (1821).

[1080] Pennsylvania v. Quicksilver Mining Co., 77 U.S. (10 Wall.) 553 (1871).

[1081] California v. Southern Pacific Co., 157 U.S. 229 (1895); Minnesota v. Northern Securities Co., 184 U.S. 199 (1902).

[1082] 19 U.S. (6 Wheat.) at 398–99.

consin v. Pelican Ins. Co.[1083] Wisconsin sued a Louisiana corporation to recover a judgment rendered in its favor by one of its own courts. Relying partly on the rule of international law that the courts of no country execute the penal laws of another, partly upon the 13th section of the Judiciary Act of 1789, which vested the Supreme Court with exclusive jurisdiction of controversies of a civil nature where a state is a party, and partly on Justice Iredell's dissent in *Chisholm v. Georgia*,[1084] where he confined the term "controversies" to civil suits, Justice Gray ruled for the Court that for purposes of original jurisdiction, "controversies between a State and citizens of another State" are confined to civil suits.[1085]

The State's Real Interest.—Ordinarily, a state may not sue in its name unless it is the real party in interest with real interests. It can sue to protect its own property interests,[1086] and if it sues for its own interest as owner of another state's bonds, rather than as an assignee for collection, jurisdiction exists.[1087] Where a state, in order to avoid the limitation of the Eleventh Amendment, provided by statute for suit in the name of the state to collect on the bonds of another state held by one of its citizens, it was refused the right to sue.[1088] Nor can a state sue the citizens of other states on behalf of its own citizens to collect claims.[1089]

The State as Parens Patriae.—The distinction between suits brought by states to protect the welfare of their citizens as a whole and suits to protect the private interests of individual citizens is not easily drawn. Thus, in *Oklahoma v. Atchison, T. & S.F. Ry.*,[1090] the state was refused permission to sue to enjoin unreasonable rate charges by a railroad on the shipment of specified commodities, because the state was not engaged in shipping these commodities and had no proprietary interest in them. But, in *Georgia v. Pennsylvania R.Co.*,[1091] a closely divided Court accepted a suit by the state, suing as *parens patriae* and in its proprietary capacity—the latter being treated by the Court as something of a makeweight—seeking injunctive relief against 20 railroads on allegations that the rates were discriminatory against the state and its citizens and their economic interests and that the rates had been fixed through coercive

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[1083] 127 U.S. 265 (1888).
[1084] 2 U.S. (2 Dall.) 419, 431–32 (1793).
[1085] 127 U.S. at 289–300.
[1086] Pennsylvania v. Wheeling & B. Bridge Co., 54 U.S. (13 How.) 518, 559 (1852); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938); Georgia v. Evans, 316 U.S. 159 (1942).
[1087] South Dakota v. North Carolina, 192 U.S. 286 (1904).
[1088] New Hampshire v. Louisiana, 108 U.S. 76 (1883).
[1089] Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938).
[1090] 220 U.S. 277 (1911).
[1091] 324 U.S. 439 (1945).

action by the northern roads against the southern lines in violation of the Clayton Antitrust Act. For the Court, Justice Douglas observed that the interests of a state for purposes of invoking the original jurisdiction of the Court were not to be confined to those which are proprietary but rather "embrace the so called 'quasi-sovereign' interests which . . . are 'independent of and behind the titles of its citizens, in all the earth and air within its domain.'" [1092]

Discriminatory freight rates, the Justice continued, may cause a blight no less serious than noxious gases in that they may arrest the development of a state and put it at a competitive disadvantage. "Georgia as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction." [1093]

The continuing vitality of this case is in some doubt, as the Court has limited it in a similar case.[1094] But the ability of states to act as *parens patriae* for their citizens in environmental pollution cases seems established, although as a matter of the Supreme Court's original jurisdiction such suits are not in favor.[1095]

[1092] 324 U.S. at 447–48 (quoting from Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907), in which the state was permitted to sue as *parens patriae* to enjoin the defendant from emitting noxious gases from its works in Tennessee which caused substantial damage in nearby areas of Georgia). In Alfred L. Snapp & Son v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607–08 (1982), the Court attempted to enunciate the standards by which to recognize permissible *parens patriae* assertions. *See also* Maryland v. Louisiana, 451 U.S. 725, 737–39 (1981).

[1093] Georgia v. Pennsylvania R. Co., 324 U.S. 439, 468 (1945). Chief Justice Stone and Justices Roberts, Frankfurter, and Jackson dissented.

[1094] In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), the Court, five-to-two, held that the state could not maintain an action for damages *parens patriae* under the Clayton Act and limited the previous case to instances in which injunctive relief is sought. Hawaii had brought its action in federal district court. The result in *Hawaii* was altered by Pub. L. 94–435, 90 Stat. 1383 (1976), 15 U.S.C. §§ 15c *et seq.*, but the decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), reduced the significance of the law.

[1095] Most of the cases, *but see* Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), concern suits by one state against another. Missouri v. Illinois, 180 U.S. 208 (1901); New York v. New Jersey, 256 U.S. 296 (1921); North Dakota v. Minnesota, 263 U.S. 365 (1923). Although recognizing that original jurisdiction exists when a state sues a political subdivision of another state or a private party as *parens patriae* for its citizens and on its own proprietary interests to abate environmental pollu-

One clear limitation had seemed to be solidly established until later litigation cast doubt on its foundation. It is no part of a state's "duty or power," said the Court in *Massachusetts v. Mellon*,[1096] "to enforce [its citizens'] rights in respect to their relations with the Federal Government. In that field, it is the United States and not the state that represents them as *parens patriae* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status." But, in *South Carolina v. Katzenbach*,[1097] while holding that the state lacked standing under *Massachusetts v. Mellon* to attack the constitutionality of the Voting Rights Act of 1965 [1098] under the Fifth Amendment's Due Process Clause and under the Bill of Attainder Clause of Article I,[1099] the Court decided on the merits the state's claim that Congress had exceeded its powers under the Fifteenth Amendment.[1100] Was the Court here *sub silentio* permitting it to assert its interest in the execution of its own laws, rather than those enacted by Congress, or its interest in having Congress enact only constitutional laws for application to its citizens, an assertion that is contrary to a number of supposedly venerated cases? [1101] Either possibility would be significant in a number of respects.[1102]

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tion, the Court has held that, because of the technical complexities of the issues and the inconvenience of adjudicating them on its original docket, the cases should be brought in federal district court under federal question jurisdiction founded on the federal common law. Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Washington v. General Motors Corp., 406 U.S. 109 (1972). The Court had earlier thought the cases must be brought in state court. Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971).

[1096] 262 U.S. 447, 486 (1923).

[1097] 383 U.S. 301 (1966). The state sued the Attorney General of the United States as a citizen of New Jersey, thus creating the requisite jurisdiction, and avoiding the problem that the States may not sue the United States without its consent. Minnesota v. Hitchcock, 185 U.S. 373 (1902); Oregon v. Hitchcock, 202 U.S. 60 (1906); Kansas v. United States, 204 U.S. 331 (1907). The expedient is, of course, the same device as is used to avoid the Eleventh Amendment prohibition against suing a state by suing its officers. *Ex parte* Young, 209 U.S. 123 (1908).

[1098] 79 Stat. 437 (1965), 42 U.S.C. §§ 1973 *et seq*.

[1099] The Court first held that neither of these provisions were restraints on what the Federal Government might do with regard to a state. It then added: "Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parents patriae of every American citizen." South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[1100] The Court did not indicate on what basis South Carolina could raise the issue. At the beginning of its opinion, the Court noted that "[o]riginal jurisdiction is founded on the presence of a controversy between a State and a citizen of another State under Art. III, § 2, of the Constitution. *See* Georgia v. Pennsylvania R. Co., 324 U.S. 439." 383 U.S. at 307. But surely this did not refer to that case's *parens patriae* holding.

[1101] *See* Massachusetts v. Mellon, 262 U.S. 447 (1923); Florida v. Mellon, 273 U.S. 12 (1927); Jones ex rel. Louisiana v. Bowles, 322 U.S. 707 (1944). *See especially* Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1867). In Oregon v. Mitchell, 400 U.S. 112 (1970), four original actions

Controversies Between Citizens of Different States

The records of the Federal Convention are silent on why the Framers included controversies between citizens of different states among the judicial power of the United States,[1103] but Congress has given "diversity jurisdiction" in one form or another to the federal courts since the Judiciary Act of 1789.[1104] The traditional explanation remains that offered by Chief Justice Marshall. "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states." [1105] Other explanations have been offered and controverted,[1106] but diversity cases constitute a large bulk of cases on the dockets of the federal courts today, though serious proposals for restricting access to federal courts

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were consolidated and decided. Two were actions by the United States against States, but the other two were suits by States against the Attorney General, as a citizen of New York, seeking to have the Voting Rights Act Amendments of 1970 voided as unconstitutional. South Carolina v. Katzenbach was uniformly relied on by all parties as decisive of the jurisdictional question, and in announcing the judgment of the Court Justice Black simply noted that no one raised jurisdictional or justiciability questions. Id. at 117 n.1. *See also* id. at 152 n.1 (Justice Harlan concurring in part and dissenting in part); South Carolina v. Baker, 485 U.S. 505 (1988); South Carolina v. Regan, 465 U.S. 367 (1984).

[1102] Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 79, 80–93.

[1103] Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

[1104] 1 Stat. 78, 11. The statute also created alienage jurisdiction of suits between a citizen of a state and an alien. *See* Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY L. REV. 547 (1989). Early versions of the statute conferred diversity jurisdiction only when the suit was between a citizen of the state in which the suit was brought and a citizen of another state. The Act of March 3, 1875, § 1. 18 Stat. 470, first established the language in the present statute, 28 U.S.C. § 1332(a)(1), merely requiring diverse citizenship, so that a citizen of Maryland could sue a citizen of Delaware in federal court in New Jersey. The statute also sets a threshold amount at controversy for jurisdiction to attach; the jurisdictional amount was as low as $3,000 in 1958, but set at $75,000 in 1996. 28 U.S.C. § 1332(a). Snyder v. Harris, 394 U.S. 332 (1969), held that in a class action in diversity the individual claims could not be aggregated to meet the jurisdictional amount. Zahn v. International Paper Co., 414 U.S. 291 (1974), extended *Snyder* in holding that even though the named plaintiffs had claims of more than $10,000, the extant jurisdictional amount, they could not represent a class in which many of the members had claims for less than $10,000. A separate provision on diversity and class actions sets the jurisdictional amount at $5 million. 28 U.S.C. § 1332(d).

[1105] Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61, 87 (1809).

[1106] Summarized and discussed in C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 23 (4th ed. 1983); AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99–110, 458–464 (1969).

in such cases have been before Congress for some time.[1107] The essential difficulty with this type of jurisdiction is that it requires federal judges to decide issues of local import on the basis of their reading of how state judges would decide them, an oftentimes laborious process, which detracts from the time and labor needed to resolve issues of federal import.

The Meaning of "State" and the District of Columbia Problem.—In *Hepburn v. Ellzey*,[1108] Chief Justice Marshall for the Court confined the meaning of the word "state" as used in the Constitution to "the members of the American confederacy" and ruled that a citizen of the District of Columbia could not sue a citizen of Virginia on the basis of diversity of citizenship. Marshall noted that it was "extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration." [1109] The same rule was subsequently applied to citizens of the territories of the United States.[1110]

Whether the Chief Justice had in mind a constitutional amendment or a statute when he spoke of legislative consideration remains unclear. Not until 1940, however, did Congress attempt to meet the problem by statutorily conferring on federal district courts jurisdiction of civil actions, not involving federal questions, "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska and any State or Territory." [1111] In *National Mutual Ins. Co. v. Tidewater Transfer Co.*,[1112] this act was upheld in a five-to-four decision but for widely divergent reasons by a coalition of Justices. Two Justices thought that Chief Justice Marshall's 1804 decision should be overruled, but the other seven Justices disagreed; however, three of the seven thought the statute could be sustained under Congress's power to enact legislation for the inhabitants of the District of Columbia, but the remaining four plus the other two rejected this theory. The statute was upheld because a total of five Justices voted to sustain it, although of the two theories relied on, seven Justices rejected one and six the other. The result, attributable to "conflicting minorities in combination," [1113] means that *Hepburn v. Ellzey* is still good law insofar as it holds that the District of Columbia is not a state, but

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[1107] The principal proposals are those of the American Law Institute. Id. at 123–34.

[1108] 6 U.S. (2 Cr.) 445 (1805).

[1109] 6 U.S. at 453.

[1110] City of New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816).

[1111] 54 Stat. 143 (1940), as revised, 28 U.S.C. § 1332(d).

[1112] 337 U.S. 582 (1948).

[1113] 337 U.S. at 655 (Justice Frankfurter dissenting).

is overruled insofar as it holds that District citizens may not use federal diversity jurisdiction.[1114]

Citizenship of Natural Persons.—For purposes of diversity jurisdiction, state citizenship is determined by the concept of domicile [1115] rather than of mere residence.[1116] That is, while the Court's definition has varied throughout the cases,[1117] a person is a citizen of the state in which he has his true, fixed, and permanent home and principal establishment and to which he intends to return whenever he is absent from it.[1118] Acts may disclose intention more clearly and decisively than declarations.[1119] One may change his domicile in an instant by taking up residence in the new place and by intending to remain there indefinitely and one may obtain the benefit of diversity jurisdiction by so changing for that reason alone,[1120] provided the change is more than a temporary expedient.[1121]

If the plaintiff and the defendant are citizens of different states, diversity jurisdiction exists regardless of the state in which suit is brought.[1122] Chief Justice Marshall early established that in multiparty litigation, there must be complete diversity, that is, that no party on one side could be a citizen of any state of which any party on the other side was a citizen.[1123] It has now apparently been decided that this requirement flows from the statute on diversity rather than from the constitutional grant and that therefore minimal diversity is sufficient.[1124] The Court has also placed some issues be-

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[1114] The statute's provision allowing citizens of Puerto Rico to sue in diversity was sustained in Americana of Puerto Rico v. Kaplus, 368 F.2d 431 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967), under Congress's power to make rules and regulations for United States territories. *Cf.* Examining Bd. v. Flores de Otero, 426 U.S. 572, 580–597 (1976) (discussing congressional acts with respect to Puerto Rico).

[1115] Chicago & N.W.R.R. v. Ohle, 117 U.S. 123 (1886).

[1116] Sun Printing & Pub. Ass'n v. Edwards, 194 U.S. 377 (1904).

[1117] Knox v. Greenleaf, 4 U.S. (4 Dall.) 360 (1802); Shelton v. Tiffin, 47 U.S. (6 How.) 163 (1848); Williamson v. Osenton, 232 U.S. 619 (1914).

[1118] Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954).

[1119] Shelton v. Tiffin, 47 U.S. (6 How.) 163 (1848).

[1120] Williamson v. Osenton, 232 U.S. 619 (1914).

[1121] Jones v. League, 59 U.S. (18 How.) 76 (1855).

[1122] 28 U.S.C. § 1332(a)(1).

[1123] Strawbridge v. Curtiss, 7 U.S. (3 Cr.) 267 (1806).

[1124] In State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530–31 (1967), holding that congressional provision in the interpleader statute of minimal diversity, 28 U.S.C. § 1335(a)(1), was valid, the Court said of *Strawbridge*, "Chief Justice Marshall there purported to construe only 'The words of the act of Congress,' not the Constitution itself. And in a variety of contexts this Court and the lower courts have concluded that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." Of course, the diversity jurisdictional statute not having been changed, complete diversity of citizenship, outside the interpleader situation, is still required. In class actions, only the citizenship of the named representatives is considered and other members of the class can be citizens of the same state as one or more of the

yond litigation in federal courts in diversity cases, apparently solely on policy grounds.[1125]

Citizenship of Corporations.—In *Bank of the United States v. Deveaux*,[1126] Chief Justice Marshall declared: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name." Nevertheless, the Court upheld diversity jurisdiction in the case because the members of the bank as a corporation were citizens of one state and Deveaux was a citizen of another. The holding that corporations were citizens of the states where their stockholders lived was reaffirmed a generation later,[1127] but pressures were building for change. While corporations were assuming an ever more prominent economic role, the *Strawbridge* rule, which foreclosed diversity suits if any plaintiff had common citizenship with any defendant,[1128] was working to close the doors of the federal courts to corporations with stockholders in many states.

Deveaux was overruled in 1844, when, after elaborate argument, a divided Court held that "a corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person." [1129] Ten years later, the Court abandoned this rationale, but it achieved the same result by "indulg[ing] in the fiction that, although a corporation was not itself a citizen for diversity purposes, its shareholders would be conclusively presumed citizens of the incorporating State." [1130] "State of incorporation" remained the guiding rule for determining the place of corporate citizenship until Congress amended the jurisdictional statute in 1958. Concern over growing

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parties on the other side. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Snyder v. Harris, 394 U.S. 332, 340 (1969).

[1125] In domestic relations cases and probate matters, the federal courts will not act, though diversity exists. Barber v. Barber, 62 U.S. (21 How.) 582 (1858); *Ex parte* Burrus, 136 U.S. 586 (1890); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503 (1875). These cases merely enunciated the rule, without justifying it; when the Court squarely faced the issue quite recently, it adhered to the rule, citing justifications. Ankenbrandt v. Richards, 504 U.S. 689 (1992).

[1126] 9 U.S. (5 Cr.) 61, 86 (1809).

[1127] Commercial & Railroad Bank v. Slocomb, 39 U.S. (14 Pet.) 60 (1840).

[1128] Strawbridge v. Curtiss, 7 U.S. (3 Cr.) 267 (1806).

[1129] Louisville, C. & C.R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844).

[1130] United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145, 148 (1965), citing Marshall v. Baltimore & Ohio R.R., 57 U.S. (16 How.) 314 (1854). *See* Muller v. Dows, 94 U.S. 444 (1877); St. Louis & S.F. Ry. v. James, 161 U.S. 545 (1896); Carden v. Arkoma Associates, 494 U.S. 185, 189 (1990).

dockets and companies incorporating in states of convenience then led to a dual citizenship rule whereby "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."[1131] The right of foreign corporations to resort to federal courts in diversity is not one that the states may condition as a qualification for doing business in the state.[1132]

Unincorporated associations, such as partnerships, joint stock companies, labor unions, governing boards of institutions, and the like, do not enjoy the same privilege as a corporation; the actual citizenship of each of its members must be considered in determining whether diversity exists.[1133]

Manufactured Diversity.—A litigant who, because of diversity of citizenship, can choose whether to sue in state or federal court, will properly consider where the advantages and disadvantages balance, and if diversity is lacking, a litigant who perceives the balance to favor the federal forum will sometimes attempt to create diversity. In the Judiciary Act of 1789, Congress exempted from diversity jurisdiction suits on choses of action in favor of an assignee unless the suit could have been brought in federal court if no assignment had been made.[1134] One could create diversity by a *bona fide* change of domicile even with the sole motive of creating

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[1131] 28 U.S.C. § 1332(c)(1). In Hertz Corp. v. Friend, 559 U.S. ___, No. 08–1107, slip op. (2010), the Court recounted the development of the rules on corporate jurisdictional citizenship in deciding that a corporation's "principal place of business" under the statute is its "nerve center," the place where the corporation's officers direct, control, and coordinate the corporation's activities.

The jurisdictional statute additionally deems the place of an insured's citizenship as an additional place of citizenship of an insurer being sued in a direct action case.

[1132] In Terral v. Burke Constr. Co., 257 U.S. 529 (1922), the Court resolved two conflicting lines of cases and voided a state statute that required the cancellation of the license of a foreign corporation to do business in the state upon notice that the corporation had removed a case to a federal court.

[1133] Chapman v. Barney, 129 U.S. 677 (1889); Great Southern Fire Proof Hotel Co. v. Jones, 177 U.S. 449 (1900); Thomas v. Board of Trustees, 195 U.S. 207 (1904); United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965); Carden v. Arkoma Associates, 494 U.S. 185 (1990). *But compare* People of Puerto Rico v. Russell & Co., 288 U.S. 476 (1933), distinguished in *Carden*, 494 U.S. at 189–190, and Navarro Savings Ass'n v. Lee, 446 U.S. 458 (1980), distinguished in *Carden*, 494 U.S. at 191–192.

[1134] Ch. XIX, § 11, 1 Stat. 78, sustained in Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799), and Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850). The present statute, 28 U.S.C. § 1359, provides that no jurisdiction exists in a civil action "in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." *See* Kramer v. Caribbean Mills, 394 U.S. 823 (1969).

domicile.[1135] Similarly, one could create diversity, or defeat it, by choosing a personal representative of the requisite citizenship.[1136] Most attempts to manufacture or create diversity have involved corporations. A corporation cannot get into federal court by transferring its claim to a subsidiary incorporated in another state,[1137] and for a time the Supreme Court tended to look askance at collusory incorporations and the creation of dummy corporations for purposes of creating diversity.[1138] But, in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[1139] it became highly important to the plaintiff company to bring its suit in federal court rather than in a state court. Thus, Black & White, a Kentucky corporation, dissolved itself and obtained a charter as a Tennessee corporation; the only change made was the state of incorporation, the name, officers, shareholders, and location of the business remaining the same. A majority of the Court, over a strong dissent by Justice Holmes,[1140] saw no collusion and upheld diversity, meaning that the company won whereas it would have lost had it sued in the state court. *Black & White Taxicab* probably more than anything led to a reexamination of the decision on the choice of law to be applied in diversity litigation.

The Law Applied in Diversity Cases.—By virtue of § 34 of the Judiciary Act of 1789,[1141] state law expressed in constitutional and statutory form was regularly applied in federal courts in diversity actions to govern the disposition of such cases. But, in *Swift v. Tyson*,[1142] Justice Story for the Court ruled that state court decisions were not laws within the meaning of § 34 and though entitled to respect were not binding on federal judges, except with regard to matters of a "local nature," such as statutes and interpretations

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[1135] Williamson v. Osenton, 232 U.S. 619 (1914); Morris v. Gilmer, 129 U.S. 315 (1889).

[1136] Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931).

[1137] Miller & Lux v. East Side Canal & Irrigation Co., 211 U.S. 293 (1908).

[1138] *E.g.*, Southern Realty Co. v. Walker, 211 U.S. 603 (1909).

[1139] 276 U.S. 518 (1928).

[1140] 276 U.S. at 532 (joined by Justices Brandeis and Stone). Justice Holmes here presented his view that Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), had been wrongly decided, but he preferred not to overrule it, merely "not allow it to spread . . . into new fields." 276 U.S. at 535.

[1141] The section provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 92. With only insubstantial changes, the section now appears as 28 U.S.C. § 1652. For a concise review of the entire issue, *see* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS ch. 9 (4th ed. 1983).

[1142] 41 U.S. (16 Pet.) 1 (1842). The issue in the case was whether a pre-existing debt was good consideration for an indorsement of a bill of exchange so that the endorsee would be a holder in due course.

thereof pertaining to real estate and other immovables, in contrast to questions of general commercial law as to which the answers were dependent not on "the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." [1143] The course of decision over the period of almost one hundred years was toward an expansion of the areas in which federal judges were free to construct a federal common law and a concomitant contraction of the definition of "local" laws.[1144] Although dissatisfaction with *Swift v. Tyson* was almost always present, within and without the Court,[1145] it was the Court's decision in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[1146] that brought

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[1143] 41 U.S. at 19. The Justice concluded this portion of the opinion: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. R. 883, 887, to be in great measure, not the law of a single country only, but of the commercial world. *Nun erit alia lex Romae, alia Athenis; alia munc, alia posthac, sed et apud omnes gentes, et omni tempore una eademque lex obtenebit.*" Id. The thought that the same law should prevail in Rome as in Athens was used by Justice Story in DeLovio v. Boit, 7 Fed. Cas. 418, 443 (No. 3776) (C.C.D. Mass. 1815). For a modern use, *see* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966); 380 F.2d 385, 398 (5th Cir. 1967) (dissenting opinion).

[1144] The expansions included Lane v. Vick, 44 U.S. (3 How.) 464 (1845) (wills); City of Chicago v. Robbins, 67 U.S. (2 Bl.) 418 (1862), and Baltimore & Ohio R.R. v. Baugh, 149 U.S. 368 (1893) (torts); Yates v. City of Milwaukee, 77 U.S. (10 Wall.) 497 (1870) (real estate titles and rights of riparian owners); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910) (mineral conveyances); Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847) (contracts); Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101 (1893). It was strongly contended that uniformity, the goal of Justice Story's formulation, was not being achieved, in great part because state courts followed their own rules of decision even when prior federal decisions were contrary. Frankfurter, *Distribution of Judicial Power Between Federal and State Courts*, 13 CORNELL L.Q. 499, 529 n.150 (1928). Moreover, the Court held that, although state court interpretations of state statutes or constitutions were to be followed, federal courts could ignore them if they conflicted with earlier federal constructions of the same statute or constitutional provision, Rowan v. Runnels, 46 U.S. (5 How.) 134 (1847), or if they had been rendered after the case had been tried in federal court, Burgess v. Seligman, 107 U.S. 20 (1883), thus promoting lack of uniformity. *See also* Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175 (1865); Williamson v. Berry, 49 U.S. (8 How.) 495 (1850); Pease v. Peck, 59 U.S. (18 How.) 595 (1856); Watson v. Tarpley, 59 U.S. (18 How.) 517 (1856).

[1145] Extensions of the scope of *Tyson* frequently were rendered by a divided Court over the strong protests of dissenters. *E.g.*, Gelpcke v. City of Debuque, 68 U.S. (1 Wall.) 175 (1865); Lane v. Vick, 44 U.S. (3 How.) 463 (1845); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910). In Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 401–04 (1893), Justice Field dissented in an opinion in which he expressed the view that Supreme Court disregarding of state court decisions was unconstitutional, a view endorsed by Justice Holmes in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (dissenting opinion), and adopted by the Court in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Numerous proposals were introduced in Congress to change the rule.

[1146] 276 U.S. 518 (1928). B. & W. had contracted with a railroad to provide exclusive taxi service at its station. B. & Y. began operating taxis at the same station and B. & W. wanted to enjoin the operation, but it was a settled rule by judicial decision in Kentucky courts that such exclusive contracts were contrary to public policy and were unenforceable in court. Therefore, B. & W. dissolved itself in Ken-

disagreement to the strongest point and perhaps precipitated the overruling of *Swift v. Tyson* in *Erie Railroad Co. v. Tompkins*.[1147]

"It is impossible to overstate the importance of the *Erie* decision. It announces no technical doctrine of procedure or jurisdiction, but goes to the heart of the relations between the Federal Government and the states, and returns to the states a power that had for nearly a century been exercised by the federal government." [1148] *Erie* was remarkable in a number of ways aside from the doctrine it announced. It reversed a 96-year-old precedent, which counsel had specifically not questioned; it reached a constitutional decision when a statutory interpretation was available though perhaps less desirable; and it marked the only time in United States constitutional history when the Court has held that it had undertaken an unconstitutional action.[1149]

Tompkins was injured by defendant's train while he was walking along the tracks. He was a citizen of Pennsylvania, and the railroad was incorporated in New York. Had he sued in a Pennsylvania court, state decisional law was to the effect that, because he was a trespasser, the defendant owned him only a duty not to injure him through wanton or willful misconduct; [1150] the general federal law treated him as a licensee who could recover for negligence. Tompkins sued and recovered in federal court in New York and the railroad presented the issue to the Supreme Court as one covered by "local" law within the meaning of *Swift v. Tyson*. Justice Brandeis for himself and four other Justices, however, chose to overrule the early case.

First, it was argued that *Tyson* had failed to bring about uniformity of decision and that its application discriminated against citi-

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tucky and reincorporated in Tennessee, solely in order to create diversity of citizenship and enable itself to sue in federal court. It was successful and the Supreme Court ruled that diversity was present and that the injunction should issue. In Mutual Life Ins. Co. v. Johnson, 293 U.S. 335 (1934), the Court, in an opinion by Justice Cardozo, appeared to retreat somewhat from its extensions of *Tyson*, holding that state law should be applied, through a "benign and prudent comity," in a case "balanced with doubt," a concept first used by Justice Bradley in Burgess v. Seligman, 107 U.S. 20 (1883).

[1147] 304 U.S. 64 (1938). Judge Friendly has written: "Having served as the Justice's [Brandeis'] law clerk the year *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* came before the Court, I have little doubt he was waiting for an opportunity to give *Swift v. Tyson* the happy dispatch he thought it deserved." H. FRIENDLY, BENCHMARKS 20 (1967).

[1148] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 355 (4th ed. 1983). *See* Judge Friendly's exposition, *In Praise of Erie—And of the New Federal Common Law*, in H. FRIENDLY, BENCHMARKS 155 (1967).

[1149] 304 U.S. at 157–64, 171 n.71.

[1150] This result was obtained in retrial in federal court on the basis of Pennsylvania law. Tompkins v. Erie Railroad Co., 98 F.2d 49 (3d Cir. 1938), *cert. denied*, 305 U.S. 637 (1938).

zens of a state by noncitizens. Justice Brandeis cited recent researches [1151] indicating that § 34 of the 1789 Act included court decisions in the phrase "laws of the several States." "If only a question of statutory construction were involved we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so." [1152] For a number of reasons, it would not have been wise to have overruled *Tyson* on the basis of arguable new discoveries.[1153]

Second, the decision turned on the lack of power vested in Congress to prescribe rules for federal courts in state cases. "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. No clause in the Constitution purports to confer such a power upon the federal courts." [1154] But having said

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[1151] Erie Railroad Co. v. Tompkins, 304 U.S. 64, 72–73 (1938), citing Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 84–88 (1923). *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 353 (4th ed. 1983).

[1152] 304 U.S. at 77–78 (footnote citations omitted).

[1153] Congress had re-enacted § 34 as § 721 of the Revised Statutes, citing Swift v. Tyson in its annotation, thus presumably accepting the gloss placed on the words by that ruling. But note that Justice Brandeis did not think even the re-enacted statute was unconstitutional. 304 U.S. at 79–80. *See* H. FRIENDLY, BENCHMARKS 161–163 (1967). Perhaps a more compelling reason of policy was that stated by Justice Frankfurter rejecting for the Court a claim that the general grant of federal question jurisdiction to the federal courts in 1875 made maritime suits cognizable on the law side of the federal courts. "Petitioner now asks us to hold that no student of the jurisdiction of the federal courts or of admiralty, no judge, and none of the learned and alert members of the admiralty bar were able, for seventy-five years, to discern the drastic change now asserted to have been contrived in admiralty jurisdiction by the Act of 1875. In light of such impressive testimony from the past the claim of a sudden discovery of a hidden latent meaning in an old technical phrase is surely suspect."

"The history of archeology is replete with the unearthing of riches buried for centuries. Our legal history does not, however, offer a single archeological discovery of new, revolutionary meaning in reading an old judiciary enactment. [Here, the Justice footnotes: 'For reasons that would take us too far afield to discuss, Erie Railroad Co. v. Tompkins, 304 U.S. 64, is no exception.'] The presumption is powerful that such a far-reaching, dislocating construction as petitioner would now have us find in the Act of 1875 was not uncovered by judges, lawyers or scholars for seventy-five years because it is not there." Romero v. International Terminal Operating Co., 358 U.S. 354, 370–371 (1959).

[1154] 304 U.S. at 78. Justice Brandeis does not argue the constitutional issue and does not cite either provisions of the Constitution or precedent beyond the views of Justices Holmes and Field. Id. at 78–79. Justice Reed thought that Article III and the Necessary and Proper Clause might contain authority. Id. at 91–92 (Justice Reed concurring in the result). For a formulation of the constitutional argument in favor of the Brandeis position, *see* H. FRIENDLY, BENCHMARKS 167–171 (1967). *See also* Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202, 208 (1956); Hanna v. Plumer, 380 U.S. 460, 471–472 (1965).

this, Justice Brandeis made it clear that the unconstitutional assumption of power had been made not by Congress but by the Court itself. "[W]e do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States." [1155]

Third, the rule of *Erie* replacing *Tyson* is that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. Whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." [1156]

Since 1938, the effect of *Erie* has first increased and then diminished, as the nature of the problems presented changed. Thus, the Court at first indicated that not only were the decisions of the highest court of a state binding on a federal diversity court, but also decisions of intermediate appellate courts [1157] and courts of first instance,[1158] even where the decisions bound no other state judge except as they were persuasive on their merits. It has now retreated from this position, concluding that federal judges are to give careful consideration to lower state court decisions and to old, perhaps outmoded decisions, but that they must find for themselves the state law if the state's highest court has not spoken definitively within a period that would raise no questions about the continued viability of the decision.[1159] In the event of a state supreme court reversal of an earlier decision, the federal courts are, of course, bound by the later decision, and a judgment of a federal district court, correct when rendered, must be reversed on appeal if the state's highest court in the meantime has changed the applicable law.[1160] In diversity cases that present conflicts of law problems, the Court has reiterated that the district court is to apply the law of the state in

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[1155] 304 U.S. at 79–80.

[1156] 304 U.S. at 78. *Erie* applies in equity as well as in law. Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938).

[1157] West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Six Companies of California v. Joint Highway District, 311 U.S. 180 (1940); Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940).

[1158] Fidelity Union Trust Co. v. Field, 311 U.S. 169 (1940).

[1159] King v. Order of Commercial Travelers of America, 333 U.S. 153 (1948); Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 205 (1956) (1910 decision must be followed in absence of confusion in state decisions since there were "no developing line of authorities that cast a shadow over established ones, no dicta, doubts or ambiguities . . . , no legislative development that promises to undermine the judicial rule"). *See also* Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967).

[1160] Vanderbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941); Huddleston v. Dwyer, 322 U.S. 232 (1944); Nolan v. Transocean Air Lines, 365 U.S. 293 (1961).

which it sits, so that in a case in State A in which the law of State B is applicable, perhaps because a contract was made there or a tort was committed there, the federal court is to apply State A's conception of State B's law.[1161]

The greatest difficulty in applying the *Erie* doctrine has been in cases in which issues of procedure were important.[1162] The process was initiated in 1945 when the Court held that a state statute of limitations, which would have barred suit in state court, would bar it in federal court, although as a matter of federal law the case still could have been brought in federal court.[1163] The Court regarded the substance-procedure distinction as immaterial. "[S]ince a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State." [1164] The standard to be applied was compelled by the "intent" of *Erie*, which "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." [1165] The Court's application of this standard created substantial doubt that the Federal Rules of Civil Procedure had any validity in diversity cases.[1166]

[1161] Klaxon Co. v. Stentor Manufacturing Co., 313 U.S. 487 (1941); Griffin v. McCoach, 313 U.S. 498 (1941); Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953); Nolan v. Transocean Air Lines, 365 U.S. 293 (1961).

[1162] Interestingly enough, 1938 marked what seemed to be a switching of positions *vis-a-vis* federal and state courts of substantive law and procedural law. Under *Tyson*, federal courts in diversity actions were free to formulate a federal common law, while they were required by the Conformity Act, § 5, 17 Stat. 196 (1872), to conform their procedure to that of the state in which the court sat. *Erie* then ruled that state substantive law was to control in federal court diversity actions, while by implication matters of procedure in federal court were subject to congressional governance. Congress authorized the Court to promulgate rules of civil procedure, 48 Stat. 1064 (1934), which it did in 1938, a few months after *Erie* was decided. 302 U.S. 783.

[1163] Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[1164] 326 U.S. at 108–09.

[1165] 326 U.S. at 109.

[1166] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) (state rule making unsuccessful plaintiffs liable for all expenses and requiring security for such expenses as a condition of proceeding applicable in federal court); Woods v. Interstate Realty Co., 337 U.S. 535 (1949) (state statute barring foreign corporation not qualified to do business in the state applies in federal court); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) (state rule determinative when an action is begun for purposes of statute of limitations applicable in federal court although a Federal Rule of Civil Procedure states a different rule).

But, in two later cases, the Court contracted the application of *Erie* in matters governed by the Federal Rules. Thus, in the earlier case, the Court said that "outcome" was no longer the sole determinant and countervailing considerations expressed in federal policy on the conduct of federal trials should be considered; a state rule making it a question for the judge rather than a jury of a particular defense in a tort action had to yield to a federal policy enunciated through the Seventh Amendment of favoring juries.[1167] Some confusion has been injected into consideration of which law to apply—state or federal—in the absence of a federal statute or a Federal Rule of Civil Procedure.[1168] In an action for damages, the federal courts were faced with the issue of the application either of a state statute, which gave the appellate division of the state courts the authority to determine if an award is excessive or inadequate if it *deviates materially* from what would be reasonable compensation, or of a federal judicially created practice of review of awards as so exorbitant that it shocked the conscience of the court. The Court determined that the state statute was both substantive and procedural, which would result in substantial variations between state and federal damage awards depending whether the state or the federal approach was applied; it then followed the mode of analysis exemplified by those cases emphasizing the importance of federal courts reaching the same outcome as would the state courts,[1169] rather than what had been the prevailing standard, in which the Court balanced state and federal interests to determine which law to apply.[1170] Emphasis upon either approach to considerations of applying state or federal law reflects a continuing difficulty of accommodating "the constitutional power of the states to regulate the relations among their citizens . . . [and] the constitutional power of the Federal Government to determine how its courts are to be operated." [1171] Additional decisions will be required to determine which approach, if either, prevails. The latter ruling simplified the matter greatly. *Erie* is not to be the proper test when the question is the application of one of the Rules of Civil Procedure; if the rule is valid when measured against the Enabling Act and the Constitution, it is to be applied regardless of state law to the contrary.[1172]

[1167] Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

[1168] Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). The decision was five-to-four, so that the precedent may or may not be stable for future application.

[1169] *E.g.*, Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

[1170] *E.g.*, Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

[1171] 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4511, at 311 (2d ed. 1996).

[1172] Hanna v. Plumer, 380 U.S. 460 (1965).

Although it seems clear that *Erie* applies in nondiversity cases in which the source of the right sued upon is state law,[1173] it is equally clear that *Erie* is not applicable always in diversity cases whether the nature of the issue be substantive or procedural. Thus, it may be that there is an overriding federal interest which compels national uniformity of rules, such as a case in which the issue is the appropriate rule for determining the liability of a bank which had guaranteed a forged federal check,[1174] in which the issue is the appropriate rule for determining whether a tortfeasor is liable to the United States for hospitalization of a soldier and loss of his services [1175] and in which the issue is the appropriate rule for determining the validity of a defense raised by a federal officer sued for having libeled one in the course of his official duties.[1176] In such cases, when the issue is found to be controlled by federal law, common or otherwise, the result is binding on state courts as well as on federal.[1177] Despite, then, Justice Brandeis' assurance that there is no "federal general common law," there is a common law existing and developing in the federal courts, even in diversity cases, which will sometimes control decision.[1178]

[1173] Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540 n.1 (2d Cir. 1956). The contrary view was implied in Levinson v. Deupree, 345 U.S. 648, 651 (1953), and by Justice Jackson in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 466–67, 471–72 (1942) (concurring opinion). *See* Wichita Royalty Co. v. City National Bank, 306 U.S. 103 (1939).

[1174] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). *See also* National Metropolitan Bank v. United States, 323 U.S. 454 (1945); D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); United States v. Standard Rice Co., 323 U.S. 106 (1944); United States v. Acri, 348 U.S. 211 (1955); Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 (1958); Bank of America Nat'l Trust & Savings Ass'n v. Parnell, 352 U.S. 29 (1956). *But see* United States v. Yazell, 382 U.S. 341 (1966). *But see* O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).

[1175] United States v. Standard Oil Co., 332 U.S. 301 (1947). Federal law applies in maritime tort cases brought on the "law side" of the federal courts in diversity cases. Pope & Talbot v. Hawn, 346 U.S. 406 (1953).

[1176] Howard v. Lyons, 360 U.S. 593 (1959). Matters concerned with our foreign relations also are governed by federal law in diversity. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Federal common law also governs a government contractor defense in certain cases. Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

[1177] Free v. Bland, 369 U.S. 663 (1962); Yiatchos v. Yiatchos, 376 U.S. 306 (1964).

[1178] The quoted Brandeis phrase is in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938). On the same day *Erie* was decided, the Court, in an opinion by Justice Brandeis, held that the issue of apportionment of the waters of an interstate stream between two states "is a question of 'federal common law.'" Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). On the matter, *see* Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

Controversies Between Citizens of the Same State Claiming Land Under Grants of Different States

The genesis of this clause was in the report of the Committee of Detail which vested the power to resolve such land disputes in the Senate,[1179] but this proposal was defeated in the Convention,[1180] which then added this clause to the jurisdiction of the federal judiciary without reported debate.[1181] The motivation for this clause was the existence of boundary disputes affecting ten sates at the time the Convention met. With the adoption of the Northwest Ordinance of 1787, the ultimate settlement of the boundary disputes, and the passing of land grants by the states, this clause, never productive of many cases, became obsolete.[1182]

Controversies Between a State, or the Citizens Thereof, and Foreign States, Citizens, or Subjects

The scope of this jurisdiction has been limited both by judicial decisions and the Eleventh Amendment. By judicial application of the law of nations, a foreign state is immune from suit in the federal courts without its consent,[1183] an immunity which extends to suits brought by states of the American Union.[1184] Conversely, the Eleventh Amendment has been construed to bar suits by foreign states against a state of the United States.[1185] Consequently, the jurisdiction conferred by this clause comprehends only suits brought by a state against citizens or subjects of foreign states, by foreign states against American citizens, citizens of a state against the citizens or subjects of a foreign state, and by aliens against citizens of a state.[1186]

[1179] 2 M. Farrand, supra at 162, 171, 184.

[1180] Id. at 400–401.

[1181] Id. at 431.

[1182] *See* Pawlet v. Clark, 13 U.S. (9 Cr.) 292 (1815). *Cf.* City of Trenton v. New Jersey, 262 U.S. 182 (1923).

[1183] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cr.) 116 (1812); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926); Compania Espanola v. The Navemar, 303 U.S. 68 (1938); Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938).

[1184] Principality of Monaco v. Mississippi, 292 U.S. 313, 330 (1934).

[1185] 292 U.S. at 330.

[1186] But, in the absence of a federal question, there is no basis for jurisdiction between the subjects of a foreign state. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). The Foreign Sovereign Immunities Act of 1976, Pub. L. 94–538, 90 Stat. 2891, amending various sections of title 28 U.S.C., comprehensively provided jurisdictional bases for suits by and against foreign states and appears as well to comprehend suits by an alien against a foreign state which would be beyond the constitutional grant. However, in the only case in which that matter has been an issue before it, the Court has construed the Act as creating a species of federal question jurisdiction. Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

Suits by Foreign States.—The privilege of a recognized foreign state to sue in the courts of another state upon the principle of comity is recognized by both international law and American constitutional law.[1187] To deny a sovereign this privilege "would manifest a want of comity and friendly feeling."[1188] Although national sovereignty is continuous, a suit in behalf of a national sovereign can be maintained in the courts of the United States only by a government which has been recognized by the political branches of our own government as the authorized government of the foreign state.[1189] As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit.[1190] Once a foreign government avails itself of the privilege of suing in the courts of the United States, it subjects itself to the procedure and rules of decision governing those courts and accepts whatever liabilities the court may decide to be a reasonable incident of bringing the suit.[1191] The rule that a foreign nation instituting a suit in a federal district court cannot invoke sovereign immunity as a defense to a counterclaim growing out of the same transaction has been extended to deny a claim of immunity as a defense to a counterclaim extrinsic to the subject matter of the suit but limited to the amount of the sovereign's claim.[1192] Moreover, certain of the benefits extending to a domestic sovereign do not extend to a foreign sovereign suing in the courts of the United States. A foreign state does not receive the benefit of the rule which exempts the United States and its member states from the operation of the statute of limitations, because

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[1187] *The Sapphire*, 78 U.S. (11 Wall.) 164, 167 (1871).

[1188] 78 U.S. at 167. This case also held that a change in the person of the sovereign does not affect the continuity or rights of national sovereignty, including the right to bring suit or to continue one that has been brought.

[1189] Guaranty Trust Co. v. United States, 304 U.S. 126, 137 (1938), citing Jones v. United States, 137 U.S. 202, 212 (1890); *Matter of Lehigh Valley R.R.*, 265 U.S. 573 (1924). Whether a government is to be regarded as the legal representative of a foreign state is, of course, a political question.

[1190] *Ex parte* Peru, 318 U.S. 578, 589 (1943), distinguishing Compania Espanola v. The Navemar, 303 U.S. 68 (1938), which held that where the Executive Department neither recognizes nor disallows the claim of immunity, the court is free to examine that question for itself. Under the latter circumstances, however, a claim that a foreign vessel is a public ship and immune from suit must be substantiated to the satisfaction of the federal court.

[1191] Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938). Among other benefits which the Court cited as not extending to foreign states as litigant included exemption from costs and from giving discovery. Decisions were also cited to the effect that a sovereign plaintiff "should so far as the thing can be done, be put in the same position as a body corporate."

[1192] National Bank v. Republic of China, 348 U.S. 356, 361 (1955), citing 26 Dept. State Bull. 984 (1952), in which the Department "pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government."

those considerations of public policy back of the rule are regarded as absent in the case of the foreign sovereign.[1193]

Indian Tribes.—Within the terms of Article III, an Indian tribe is not a foreign state and hence cannot sue in the courts of the United States. This rule was applied in *Cherokee Nation v. Georgia*,[1194] where Chief Justice Marshall conceded that the Cherokee Nation was a state, but not a foreign state, being a part of the United States and dependent upon it. Other passages of the opinion specify the elements essential of a foreign state for purposes of jurisdiction, such as sovereignty and independence.

Narrow Construction of the Jurisdiction.—As in cases of diversity jurisdiction, suits brought to the federal courts under this category must clearly state in the record the nature of the parties. As early as 1809, the Supreme Court ruled that a federal court could not take jurisdiction of a cause where the defendants were described in the record as "late of the district of Maryland," but were not designated as citizens of Maryland, and plaintiffs were described as aliens and subjects of the United Kingdom.[1195] The meticulous care manifested in this case appeared twenty years later when the Court narrowly construed § 11 of the Judiciary Act of 1789, vesting the federal courts with jurisdiction when an alien was a party, in order to keep it within the limits of this clause. The judicial power was further held not to extend to private suits in which an alien is a party, unless a citizen is the adverse party.[1196] This interpretation was extended in 1870 by a holding that if there is more than one plaintiff or defendant, each plaintiff or defendant must be competent to sue or liable to suit.[1197] These rules, however, do not preclude a suit between citizens of the same state if the plaintiffs are merely nominal parties and are suing on behalf of an alien.[1198]

Clause 2. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all

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[1193] Guaranty Trust Co. v. United States, 304 U.S. 126, 135, 137 (1938), citing precedents to the effect that a sovereign plaintiff "should be put in the same position as a body corporate."

[1194] 30 U.S. (5 Pet.) 1, 16–20 (1831).

[1195] Hodgson & Thompson v. Bowerbank, 9 U.S. (5 Cr.) 303 (1809).

[1196] Jackson v. Twentyman, 27 U.S. (2 Pet.) 136 (1829); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

[1197] Coal Co. v. Blatchford, 78 U.S. (11 Wall.) 172 (1871). *See*, however, Lacassagne v. Chapuis, 144 U.S. 119 (1892), which held that a lower federal court had jurisdiction over a proceeding to impeach its former decree, although the parties were new and were both aliens.

[1198] Browne v. Strode, 9 U.S. (5 Cr.) 303 (1809).

other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

THE ORIGINAL JURISDICTION OF THE SUPREME COURT

From the beginning, the Supreme Court has assumed that its original jurisdiction flows directly from the Constitution and is therefore self-executing without further action by Congress.[1199] In *Chisholm v. Georgia*,[1200] the Court entertained an action of assumpsit against Georgia by a citizen of another state. Congress in § 3 of the Judiciary Act of 1789[1201] purported to invest the Court with original jurisdiction in suits between a state and citizens of another state, but it did not authorize actions of assumpsit in such cases nor did it prescribe forms of process for the exercise of original jurisdiction. Over the dissent of Justice Iredell, the Court, in opinions by Chief Justice Jay and Justices Blair, Wilson, and Cushing, sustained its jurisdiction and its power to provide forms of process and rules of procedure in the absence of congressional enactments. The backlash of state sovereignty sentiment resulted in the proposal and ratification of the Eleventh Amendment, which did not, however, affect the direct flow of original jurisdiction to the Court, although those cases to which states were parties were now limited to states as party plaintiffs, to two or more states disputing, or to United States suits against states.[1202]

By 1861, Chief Justice Taney could confidently enunciate, after review of the precedents, that in all cases where original jurisdiction is given by the Constitution, the Supreme Court has authority "to exercise it without further act of Congress to regulate its powers or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice."[1203]

Although Chief Justice Marshall apparently assumed the Court had exclusive jurisdiction of cases within its original jurisdiction,[1204] Congress from 1789 on gave the inferior federal courts con-

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[1199] But, in § 13 of the Judiciary Act of 1789, 1 Stat. 80, Congress did so purport to convey the jurisdiction and the statutory conveyance exists today. 28 U.S.C. § 1251. It does not, however, exhaust the listing of the Constitution.

[1200] 2 U.S. (2 Dall.) 419 (1793). In an earlier case, the point of jurisdiction was not raised. Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792).

[1201] 1 Stat. 80.

[1202] On the Eleventh Amendment, *see* infra.

[1203] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861).

[1204] Marbury v. Madison, 5 U.S. (1 Cr.) 137, 174 (1803).

current jurisdiction in some classes of such cases.[1205] Sustained in the early years on circuit,[1206] this concurrent jurisdiction was finally approved by the Court itself.[1207] The Court has also relied on the first Congress's interpretation of the meaning of Article III in declining original jurisdiction of an action by a state to enforce a judgment for a pecuniary penalty awarded by one of its own courts.[1208] Noting that § 13 of the Judiciary Act had referred to "controversies of a civil nature," Justice Gray declared that it "was passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning."[1209]

However, another clause of § 13 of the Judiciary Act of 1789 was not accorded the same presumption by Chief Justice Marshall, who, interpreting it to give the Court power to issue a writ of mandamus on an original proceeding, declared that, as Congress could not restrict the original jurisdiction, neither could it enlarge it, and he pronounced the clause void.[1210] Although the Chief Justice's interpretation of the meaning of the clause may be questioned, no one has questioned the constitutional principle it proclaimed. Although the rule deprives Congress of power to expand or contract the jurisdiction, it allows a considerable latitude of interpretation to the Court itself. In some cases, such as *Missouri v. Holland*,[1211] the Court has manifested a tendency toward a liberal construction of its original jurisdiction, but the more usual view is that "our original jurisdiction should be in-

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[1205] In § 3 of the 1789 Act. The present division is in 28 U.S.C. § 1251.

[1206] United States v. Ravara, 2 U.S. (2 Dall.) 297 (C.C.Pa. 1793).

[1207] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); Bors v. Preston, 111 U.S. 252 (1884); Ames v. Kansas ex rel. Johnston, 111 U.S. 449 (1884). Such suits could be brought and maintained in state courts as well. Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898); Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930).

[1208] Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[1209] 127 U.S. at 297. *See also* the dictum in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 398–99 (1821); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 431–32 (1793).

[1210] Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803). The Chief Justice declared that "a negative or exclusive sense" had to be given to the affirmative enunciation of the cases to which original jurisdiction extends. Id. at 174. This exclusive interpretation has been since followed. *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807); New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831); *Ex parte* Barry, 43 U.S. (2 How.) 65 (1844); *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 252 (1864); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 98 (1869). In the curious case of *Ex parte* Levitt, 302 U.S. 633 (1937), the Court was asked to unseat Justice Black on the ground that his appointment violated Article I. § 6, cl. 2. Although it rejected petitioner's application, the Court did not point out that it was being asked to assume original jurisdiction in violation of Marbury v. Madison.

[1211] 252 U.S. 416 (1920). *See also* South Carolina v. Katzenbach, 383 U.S. 301 (1966), and Oregon v. Mitchell, 400 U.S. 112 (1970).

voked sparingly."[1212] Original jurisdiction "is limited and manifestly to be sparingly exercised, and should not be expanded by construction."[1213] Exercise of its original jurisdiction is not obligatory on the Court but discretionary, to be determined on a case-by-case basis on grounds of practical necessity.[1214] It is to be honored "only in appropriate cases. And the question of what is appropriate concerns of course the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."[1215] But where claims are of sufficient "seriousness and dignity," in which resolution by the judiciary is of substantial concern, the Court will hear them.[1216]

POWER OF CONGRESS TO CONTROL THE FEDERAL COURTS

The Theory of Plenary Congressional Control

Unlike its original jurisdiction, the appellate jurisdiction of the Supreme Court is subject to "exceptions and regulations" prescribed by Congress, and the jurisdiction of the inferior federal courts is subject to congressional prescription. Additionally, Congress has power to regulate modes and practices of proceeding on the part of the inferior federal courts. Whether there are limitations to the ex-

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[1212] Utah v. United States, 394 U.S. 89, 95 (1968).

[1213] California v. Southern Pacific Co., 157 U.S. 229, 261 (1895). Indeed, the use of the word "sparingly" in this context is all but ubiquitous. *E.g.*, Wyoming v. Oklahoma, 502 U.S. 437, 450 (1992); Maryland v. Louisiana, 451 U.S. 725, 739 (1981); United States v. Nevada, 412 U.S. 534, 538 (1973).

[1214] Texas v. New Mexico, 462 U.S. 554, 570 (1983).

[1215] Illinois v. City of Milwaukee, 406 U.S. 91, 93–94 (1972). In this case, and in Washington v. General Motors Corp., 406 U.S. 109 (1972), and Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971), the Court declined to permit adjudication of environmental pollution cases manifestly within its original jurisdiction because the nature of the cases required the resolution of complex, novel, and technical factual questions not suitable for resolution at the Court's level as a matter of initial decision, but which could be brought in the lower federal courts. Not all such cases, however, were barred. Vermont v. New York, 406 U.S. 186 (1972) (granting leave to file complaint). In other instances, notably involving "political questions," *cf.* Massachusetts v. Mellon, 262 U.S. 447 (1923), the Court has simply refused permission for parties to file bills of complaint without hearing them on the issue or producing an opinion. *E.g.*, Massachusetts v. Laird, 400 U.S. 886 (1970) (constitutionality of United States action in Indochina); Delaware v. New York, 385 U.S. 895 (1966) (constitutionality of electoral college under one-man, one-vote rule).

[1216] Wyoming v. Oklahoma, 502 U.S. 437, 451 (1982). The principles are the same whether the Court's jurisdiction is exclusive or concurrent. Texas v. New Mexico, 462 U.S. 554 (1983); California v. West Virginia, 454 U.S. 1027 (1981); Arizona v. New Mexico, 425 U.S. 794 (1976).

ercise of these congressional powers, and what the limitations may be, are matters that have vexed scholarly and judicial interpretation over the years, inasmuch as congressional displeasure with judicial decisions has sometimes led to successful efforts to "curb" the courts and more frequently to proposed but unsuccessful curbs.[1217] Supreme Court holdings establish clearly the breadth of congressional power, and numerous dicta assert an even broader power, but that Congress may through the exercise of its powers vitiate and overturn constitutional decisions and restrain the exercise of constitutional rights is an assertion often made but not sustained by any decision of the Court.

Appellate Jurisdiction.—In *Wiscart v. D'Auchy*,[1218] the issue was whether the statutory authorization for the Supreme Court to review on writ of error circuit court decisions in "civil actions" gave it power to review admiralty cases.[1219] A majority of the Court decided that admiralty cases were "civil actions" and thus reviewable; in the course of decision, it was said that "[i]f Congress had provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[1220] Much the same thought was soon to be expressed by Chief Justice Marshall, although he seems to have felt that in the absence of congressional authorization, the Court's appellate jurisdiction would have been measured by the constitutional grant. "Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a supreme court, as ordained by the constitution; and in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished."

"The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have

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[1217] A classic but now dated study is Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States: A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 161 (1913). The most comprehensive consideration of the constitutional issue is Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953). *See* Hart & Wechsler (6h ed.), supra at 287–305.

[1218] 3 U.S. (3 Dall.) 321 (1796).

[1219] Judiciary Act of 1789, § 22, 1 Stat. 84.

[1220] Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 327 (1796). The dissent thought that admiralty cases were not "civil actions" and thus that there was no appellate review. Id. at 326–27. *See also* Clarke v. Bazadone, 5 U.S. (1 Cr.) 212 (1803); Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799).

been passed on the subject." [1221] Later Justices viewed the matter differently from Marshall. "By the constitution of the United States," it was said in one opinion, "the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress." [1222] In order for a case to come within its appellate jurisdiction, the Court has said, "two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority." Moreover, "it is for Congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation." [1223]

This congressional power, conferred by the language of Article III, § 2, cl. 2, which provides that all jurisdiction not original is to be appellate, "with such Exceptions, and under such Regulations as the Congress shall make," has been utilized to forestall a decision which the congressional majority assumed would be adverse to its course of action. In *Ex parte McCardle*,[1224] the Court accepted review on *certiorari* of a denial of a petition for a writ of *habeas corpus* by the circuit court; the petition was by a civilian convicted by a military commission of acts obstructing Reconstruction. Anticipating that the Court might void, or at least undermine, congressional reconstruction of the Confederate States, Congress enacted over the President's veto a provision repealing the act which authorized the appeal McCardle had taken.[1225] Although the Court had already heard argument on the merits, it then dis-

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[1221] Durousseau v. United States, 10 U.S. (6 Cr.) 307, 313–314 (1810). "Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 93 (1807) (Chief Justice Marshall). Marshall had earlier expressed his *Durousseau* thoughts in United States v. More, 7 U.S. (3 Cr.) 159 (1805).

[1222] Barry v. Mercein, 46 U.S. (5 How.) 103, 119 (1847) (case held nonreviewable because minimum jurisdictional amount not alleged).

[1223] Daniels v. Railroad Co., 70 U.S. (3 Wall.) 250, 254 (1865) (case held nonreviewable because certificate of division in circuit did not set forth questions in dispute as provided by statute).

[1224] 73 U.S. (6 Wall.) 318 (1868). That Congress's apprehensions might have had a basis in fact, *see* C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. VI, PT. I: RECONSTRUCTION AND REUNION 1864–88 493–495 (1971). *McCardle* is fully reviewed at pp. 433–514.

[1225] By the Act of February 5, 1867, § 1, 14 Stat. 386, Congress had authorized appeals to the Supreme Court from circuit court decisions denying *habeas corpus*. Previous to this statute, the Court's jurisdiction to review *habeas corpus* decisions, based in § 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat fuzzily conceived. *Compare* United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795), *and Ex parte* Burford, 7 U.S. (3 Cr.) 448 (1806), with *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885. 23 Stat. 437.

missed for want of jurisdiction.[1226] "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."

"What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[1227] Although *McCardle* grew out of the stresses of Reconstruction, the principle it applied has been applied in later cases.[1228]

Jurisdiction of the Inferior Federal Courts.—The Framers, as we have seen,[1229] divided with regard to the necessity of courts inferior to the Supreme Court, simply authorized Congress to create such courts, in which, then, judicial power "shall be vested" and

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[1226] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869). In the course of the opinion, Chief Justice Chase speculated about the Court's power in the absence of any legislation in tones reminiscent of Marshall's comments. Id. at 513.

[1227] 74 U.S. at 514.

[1228] *See*, *e.g.*, Justice Frankfurter's remarks in National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 655 (1948) (dissenting): "Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred and it may do so even while a case is *sub judice*." In *The Francis Wright*, 105 U.S. 381, 385–386 (1882), upholding Congress's power to confine Supreme Court review in admiralty cases to questions of law, the Court said: "[W]hile the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as Congress sees fit to prescribe. . . . What those powers shall be, and to what extent they shall be exercised, are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to reexamination and review, while others are not." *See also* Luckenbuch S. S. Co. v. United States, 272 U.S. 533, 537 (1926); American Construction Co. v. Jacksonville, T. & K.W. Ry., 148 U.S. 372, 378 (1893); United States v. Bitty, 208 U.S. 393 (1908); United States v. Young, 94 U.S. 258 (1876). Numerous restrictions on the exercise of appellate jurisdiction have been upheld. *E.g.*, Congress for a hundred years did not provide for a right of appeal to the Supreme Court in criminal cases, except upon a certification of division by the circuit court: at first appeal was provided in capital cases and then in others. F. Frankfurter & J. Landis, supra at 79, 109–120. Other limitations noted heretofore include minimum jurisdictional amounts, restrictions of review to questions of law and to questions certified from the circuits, and the scope of review of state court decisions of federal constitutional questions. *See* Walker v. Taylor, 46 U.S. (5 How.) 64 (1847). Though *McCardle* is the only case in which Congress successfully forestalled an expected decision by shutting off jurisdiction, other cases have been cut off while pending on appeal, either inadvertently, Insurance Co. v. Ritchie, 72 U.S. (5 Wall.) 541 (1866), or intentionally, Railroad Co. v. Grant, 98 U.S. 398 (1878), by raising the requirements for jurisdiction without a reservation for pending cases. *See also* Bruner v. United States, 343 U.S. 112 (1952); District of Columbia v. Eslin, 183 U.S. 62 (1901).

[1229] Supra, "One Supreme Court" and "Inferior Courts".

to which nine classes of cases and controversies "shall extend."[1230] While Justice Story deemed it imperative of Congress to create inferior federal courts and, when they had been created, to vest them with all the jurisdiction they were capable of receiving,[1231] the First Congress acted upon a wholly different theory. Inferior courts were created, but jurisdiction generally over cases involving the Constitution, laws, and treaties of the United States was not given them, diversity jurisdiction was limited by a minimal jurisdictional amount requirement and by a prohibition on creation of diversity through assignments, equity jurisdiction was limited to those cases where a "plain, adequate, and complete remedy" could not be had at law.[1232] This care for detail in conferring jurisdiction upon the inferior federal courts bespoke a conviction by Members of Congress that it was within their power to confer or to withhold jurisdiction at their discretion. The cases have generally sustained this view.

Thus, in *Turner v. Bank of North America*,[1233] the issue was the jurisdiction of the federal courts in a suit to recover on a promissory note between two citizens of the same state but in which the note had been assigned to a citizen of a second state so that suit could be brought in federal court under its diversity jurisdiction, a course of action prohibited by § 11 of the Judiciary Act of 1789.[1234] Counsel for the bank argued that the grant of judicial power by the Constitution was a direct grant of jurisdiction, provoking from Chief Justice Ellsworth a considered doubt[1235] and from Justice Chase a firm rejection. "The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution: but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise: and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal. Be-

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[1230] Article III, § 1, 2.

[1231] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 374 (1816). For an effort to reframe Justice Story's position in modern analytical terms, *see* the writings of Professors Amar and Clinton, supra and infra.

[1232] Judiciary Act of 1789, 1 Stat. 73. *See* Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). A modern study of the first Judiciary Act that demonstrates the congressional belief in discretion to structure jurisdiction is Casto, *The First Congress's Understanding of Its Authority over the Federal Courts' Jurisdiction*, 26 B. C. L. REV. 1101 (1985).

[1233] 4 U.S. (4 Dall.) 8 (1799).

[1234] "[N]or shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange." 1 Stat. 79.

[1235] Turner v. Bank of North America, 4 U.S. (4 Dall.) 8, 10 (1799).

sides, Congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant." [1236] Applying § 11, the Court held that the circuit court had lacked jurisdiction.

Chief Justice Marshall himself soon made similar assertions,[1237] and the early decisions of the Court continued to be sprinkled with assumptions that the power of Congress to create inferior federal courts necessarily implied "the power to limit jurisdiction of those Courts to particular objects." [1238] In *Cary v. Curtis*,[1239] a statute making final the decision of the Secretary of the Treasury in certain tax disputes was challenged as an unconstitutional deprivation of the judicial power of the courts. The Court decided otherwise. "[T]he judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances applicable exclusively to this court), dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court), for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." [1240] Five years later, the validity of the assignee clause of the Judiciary Act of 1789 [1241] was placed in issue in *Sheldon v. Sill*,[1242] in which diversity of citizenship had been created by assignment of a negotiable instrument. It was argued that, because the right of a citizen of any state to sue citizens of another flowed directly from Article III, Congress could not restrict that right. Unanimously, the Court rejected this contention and held that because the Constitution did not create inferior federal courts but rather authorized Congress to create them, Congress was also empowered to define their jurisdiction and to withhold jurisdiction of any of the

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[1236] 4 U.S. at 10.

[1237] In *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 93 (1807), Marshall observed that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

[1238] United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32, 33 (1812). Justice Johnson continued: "All other Courts [besides the Supreme Court] created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer." *See also* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721–722 (1838).

[1239] 44 U.S. (3 How.) 236 (1845).

[1240] 44 U.S. at 244–45. Justices McLean and Story dissented, arguing that the right to construe the law in all matters of controversy is of the essence of judicial power. Id. at 264.

[1241] Supra.

[1242] 49 U.S. (8 How.) 441 (1850).

enumerated cases and controversies in Article III. The case and the principle have been cited and reaffirmed numerous times,[1243] including in a case under the Voting Rights Act of 1965.[1244]

Congressional Control Over Writs and Processes.—The Judiciary Act of 1789 contained numerous provisions relating to the times and places for holding court, even of the Supreme Court, to times of adjournment, appointment of officers, issuance of writs, citations for contempt, and many other matters which it might be supposed courts had some authority of their own to regulate.[1245] The power to enjoin governmental and private action has frequently been curbed by Congress, especially as the action has involved the power of taxation at either the federal or state level.[1246] Though the courts have variously interpreted these restrictions,[1247] they have not denied the power to impose them.

Reacting to judicial abuse of injunctions in labor disputes,[1248] Congress in 1932 enacted the Norris-La Guardia Act which forbade the issuance of injunctions in labor disputes except through compliance with a lengthy hearing and fact-finding process which required the district judge to determine that only through the injunctive process could irremediable harm through illegal conduct be

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[1243] *E.g.*, Kline v. Burke Constr. Co., 260 U.S. 226, 233–234 (1922); Ladew v. Tennessee Copper Co., 218 U.S. 357, 358 (1910); Venner v. Great Northern R. Co., 209 U.S. 24, 35 (1908); Kentucky v. Powers, 201 U.S. 1, 24 (1906); Stevenson v. Fain, 195 U.S. 165, 167 (1904); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 513–521 (1898); The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 251–252 (1868).

[1244] By the Voting Rights Act of 1965, Congress required covered states that wished to be relieved of coverage to bring actions to this effect in the District Court of the District of Columbia. In South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966), Chief Justice Warren for the Court said: "Despite South Carolina's argument to the contrary, Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals." *See also* Palmore v. United States, 411 U.S. 389, 400–02 (1973); Swain v. Pressley, 430 U.S. 372 (1977); Taylor v. St. Vincent's Hosp., 369 F. Supp. 948 (D. Mont. 1973), *aff'd*, 523 F.2d 75 (9th Cir.), *cert. denied*, 424 U.S. 948 (1976).

[1245] 1 Stat. 73. For a comprehensive discussion with itemization, *see* Frankfurter & Landis, *Power of Congress over Procedure in Criminal Contempts in 'Inferior' Federal Courts: A Study in Separation of Powers*, 37 HARV. L. REV. 1010 (1924).

[1246] The Act of March 2, 1867, 10, 14 Stat. 475, as amended, now 26 U.S.C. § 7421 (federal taxes): Act of August 21, 1937, 50 Stat. 738, 28 U.S.C. § 1341 (state taxes). *See also* Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. § 1342 (state ratemaking).

[1247] *Compare* Snyder v. Marks, 109 U.S. 189 (1883), *with* Dodge v. Brady, 240 U.S. 122 (1916), with Allen v. Regents, 304 U.S. 439 (1938).

[1248] F. FRANKFURTER & I. GREENE, THE LABOR INJUNCTION (1930).

prevented.[1249] The Court seemed to experience no difficulty in upholding the Act,[1250] and it has liberally applied it through the years.[1251]

Congress's power to confer, withhold, and restrict jurisdiction is clearly revealed in the Emergency Price Control Act of 1942[1252] and in the cases arising from it. Fearful that the price control program might be nullified by injunctions, Congress provided for a special court in which persons could challenge the validity of price regulations issued by the government with appeal from the Emergency Court of Appeals to the Supreme Court. The basic constitutionality of the Act was sustained in *Lockerty v. Phillips*.[1253] In *Yakus v. United States*,[1254] the Court upheld the provision of the Act which conferred exclusive jurisdiction on the special court to hear challenges to any order or regulation and foreclosed a plea of invalidity of any such regulation or order as a defense to a criminal proceeding under the Act in the regular district courts. Although Justice Rutledge protested in dissent that this provision conferred jurisdiction on district courts from which essential elements of the judicial power had been abstracted,[1255] Chief Justice Stone for the Court declared that the provision presented no novel constitutional issue.

The Theory Reconsidered

Despite the breadth of the language of many of the previously cited cases, the actual holdings constitute something less than an affirmance of plenary congressional power to do anything it desires by manipulation of jurisdiction, and, indeed, the cases reflect certain limitations. Setting to one side various formulations that lack textual and subsequent judicial support, such as mandatory vest-

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[1249] 47 Stat. 70 (1932), 29 U.S.C. §§ 101–115.

[1250] In Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938), the Court simply declared: "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."

[1251] *E.g.*, New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938); Brotherhood of Railroad Trainmen v. Chicago River & I. R.R., 353 U.S. 30 (1957); Boys Markets v. Retail Clerks Union, 398 U.S. 235 (1970).

[1252] 56 Stat. 23 (1942).

[1253] 319 U.S. 182 (1943).

[1254] 321 U.S. 414 (1944).

[1255] 321 U.S. at 468. In United States v. Mendoza-Lopez, 481 U.S. 828 (1987), purportedly in reliance on *Yakus* and other cases, the Court held that a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order had been denied. A statutory scheme similar to that in *Yakus* was before the Court in Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978), but statutory construction enabled the Court to pass by constitutional issues that were not perceived to be insignificant. *See esp.* id. at 289 (Justice Powell concurring). *See also* Harrison v. PPG Industries, 446 U.S. 578 (1980), and id. at 594 (Justice Powell concurring).

ing of jurisdiction,[1256] inherent judicial power,[1257] and a theory, variously expressed, that the Supreme Court has "essential constitutional functions" of judicial review that Congress may not impair through jurisdictional limitations,[1258] one can nonetheless see the possibilities of restrictions on congressional power flowing from such basic constitutional underpinnings as express prohibitions, separation of powers, and the nature of the judicial function.[1259] Whether because of the plethora of scholarly writing contesting the existence of unlimited congressional power or because of another reason, the Court of late has taken to noting constitutional reservations about legislative denials of jurisdiction for judicial review of constitutional issues and construing statutes so as not to deny jurisdiction.[1260]

[1256] This was Justice Story's theory propounded in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329–336 (1816). Nevertheless, Story apparently did not believe that the constitutional bestowal of jurisdiction was self-executing and accepted the necessity of statutory conferral. White v. Fenner, 29 Fed. Cas. 1015 (No. 17, 547) (C.C.D.R.I. 1818) (Justice Story). In the present day, it has been argued that the presence in the jurisdictional-grant provisions of Article III of the word "all" before the subject-matter grants—federal question, admiralty, public ambassadors –mandates federal court review at some level of these cases, whereas congressional discretion exists with respect to party-defined jurisdiction, such as diversity. Amar, *A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990). Rebuttal articles include Meltzer, The History and Structure of Article III, id. at 1569; Redish, Text, Structure, and Common Sense in the Interpretation of Article III, id. at 1633; and a response by Amar, id. at 1651. An approach similar to Professor Amar's is Clinton, *A Mandatory View of Federal Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Clinton, *Early Implementation and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986). Though perhaps persuasive as an original interpretation, both theories confront a large number of holdings and dicta as well as the understandings of the early Congresses revealed in their actions. *See* Casto, *The First Congress's Understanding of its Authority over the Federal Court's Jurisdiction*, 26 B.C. L. REV. 1101 (1985).

[1257] Justice Brewer in his opinion for the Court in United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 339 (1906), came close to asserting an independent, inherent power of the federal courts, at least in equity. *See also* Paine Lumber Co. v. Neal, 244 U.S. 459, 473, 475–476 (1917) (Justice Pitney dissenting). The acceptance by the Court of the limitations of the Norris-LaGuardia Act, among other decisions, contradicts these assertions.

[1258] The theory was apparently first developed in Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960). *See also* Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929 (1981–82). The theory was endorsed by Attorney General William French Smith as the view of the Department of Justice. 128 CONG. REC. 9093–9097 (1982) (Letter to Hon. Strom Thurmond).

[1259] An extraordinary amount of writing has been addressed to the issue, only a fraction of which is touched on here. *See* Hart & Wechsler (6th ed.), supra at 275–324.

[1260] Johnson v. Robison, 415 U.S. 361, 366–367 (1974); Weinberger v. Salfi, 422 U.S. 749, 762 (1975); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988). In the last cited

Ex parte McCardle [1261] marks the farthest advance of congressional imposition of its will on the federal courts, and it is significant because the curb related to the availability of the writ of *habeas corpus*, which is marked out with special recognition by the Constitution.[1262]

But how far did *McCardle* actually reach? In concluding its opinion, the Court carefully observed: "Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of *habeas corpus*, is denied. But this is an error. The act of 1868 does not exempt from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised." [1263] A year later, in *Ex parte Yerger*,[1264] the Court held that it did have authority under the Judiciary Act of 1789 to review on *certiorari* a denial by a circuit court of a petition for writ of *habeas corpus* on behalf of one held by the military in the South. It thus remains unclear whether the Court would have followed its language suggesting plenary congressional control if the effect had been to deny absolutely an appeal from a denial of a writ of *habeas corpus*.[1265]

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case, Justice Scalia attacked the reservation and argued for nearly complete congressional discretion. Id. at 611–15 (concurring).

[1261] 74 U.S. (7 Wall) 506 (1869). For the definitive analysis of the case, *see* Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973).

[1262] Article I, § 9, cl. 2.

[1263] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 515 (1869). A restrained reading of *McCardle* is strongly suggested by Felker v. Turpin, 518 U.S. 651 (1996). A 1996 congressional statute giving to federal courts of appeal a "gate-keeping" function over the filing of second or successive *habeas* petitions limited further review, including denying the Supreme Court appellate review of circuit court denials of motions to file second or successive *habeas* petitions. Pub. L. 104–132, § 106, 110 Stat. 1214, 1220, amending 28 U.S.C. § 2244(b). Upholding the limitation, which was nearly identical to the congressional action at issue in *McCardle* and *Yerger*, the Court held that its jurisdiction to hear appellate cases had been denied, but, just as in *Yerger*, the statute did not annul the Court's jurisdiction to hear *habeas* petitions filed as original matters in the Supreme Court. No constitutional issue was thus presented.

[1264] 75 U.S. (8 Wall.) 85 (1869). *Yerger* is fully reviewed in C. FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. VI, PT. I: RECONSTRUCTION AND REUNION, 1864–88 (New York: 1971), 558–618.

[1265] *Cf.* Eisentrager v. Forrestal, 174 F.2d 961, 966 (D.C.Cir. 1949), *rev'd on other grounds sub nom.* Johnson v. Eisentrager, 339 U.S. 763 (1950). Justice Douglas, with whom Justice Black joined, said in Glidden Co. v. Zdanok, 370 U.S. 530, 605 n.11 (1962) (dissenting opinion): "There is a serious question whether the *McCardle* case could command a majority view today." Justice Harlan, however, cited *McCardle* with apparent approval of its holding, id. at 567–68, while noting that Congress's "authority is not, of course, unlimited." Id. at 568. *McCardle* was cited approvingly in Bruner v. United States, 343 U.S. 112, 117 n.8 (1952), as illustrating the rule "that when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law. . . ."

Another Reconstruction Congress attempt to curb the judiciary failed in *United States v. Klein*,[1266] in which the Court voided a statute, couched in jurisdictional terms, which attempted to set aside both the effect of a presidential pardon and the judicial effectuation of such a pardon.[1267] The statute declared that no pardon was to be admissible in evidence in support of any claim against the United States in the Court of Claims for the return of confiscated property of Confederates nor, if already put in evidence in a pending case, should it be considered on behalf of the claimant by the Court of Claims or by the Supreme Court on appeal. Proof of loyalty was required to be made according to provisions of certain congressional enactments, and when judgment had already been rendered on other proof of loyalty the Supreme Court on appeal should have no further jurisdiction and should dismiss for want of jurisdiction. Moreover, it was provided that the recitation in any pardon which had been received that the claimant had taken part in the rebellion was to be taken as conclusive evidence that the claimant had been disloyal and was not entitled to regain his property.

The Court began by reaffirming that Congress controlled the existence of the inferior federal courts and the jurisdiction vested in them and the appellate jurisdiction of the Supreme Court. "But the language of this provision shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. . . . It is evident . . . that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The Court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction."

"It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to

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[1266] 80 U.S. (13 Wall.) 128 (1872). *See* C. Fairman, supra at 558–618. The seminal discussion of *Klein* may be found in Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 WISC. L. REV. 1189. While he granted that *Klein* is limited insofar as its bearing on jurisdictional limitation *per se* is concerned, he cited an ambiguous holding in Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1872), as in fact a judicial invalidation of a jurisdictional limitation. Young, id. at 1222–23 n.179.

[1267] Congress by the Act of July 17, 1862, §§ 5, 13, authorized the confiscation of property of those persons in rebellion and authorized the President to issue pardons on such conditions as he deemed expedient, the latter provision being unnecessary in light of Article II, § 2, cl. 1. The President's pardons all provided for restoration of property, except slaves, and in United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870), the Court held the claimant entitled to the return of his property on the basis of his pardon. Congress thereupon enacted the legislation in question. 16 Stat. 235 (1870).

the appellate power."[1268] The statute was void for two reasons; it "infring[ed] the constitutional power of the Executive,"[1269] and it "prescrib[ed] a rule for the decision of a cause in a particular way."[1270] While the precise import of *Klein*—with its broad language prohibiting Congress prescribing a "rule of decision" that unduly invades core judicial functions—has puzzled legal scholars,[1271] it appears that *Klein* broadly stands for the proposition that Congress may not usurp the judiciary's power to interpret and apply the law by directing a court "how pre-existing law applies to particular circumstances" before it.[1272] Few laws, however, have been struck down for improperly prescribing a "rule of decision" that a court must follow, and the Court has, in more recent years, declined to interpret *Klein* as inhibiting Congress from "amend[ing] applicable law."[1273] Instead, the Court has recognized that Congress may, without running afoul of *Klein*, direct courts to apply newly enacted legislation to pending civil cases, even when such an application would alter the outcome in the case.[1274] Moreover, the general permissibility under Article III of legislation affecting pending litigation extends to statutes that direct courts to apply a new legal standard even when the underlying facts of a case are undisputed, functionally leaving the court with nothing to decide. For example, in *Bank Markazi v. Peterson*,

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[1268] United States v. Klein, 80 U.S. (13 Wall.) 128, 145–46 (1872).

[1269] 80 U.S. at 147.

[1270] 80 U.S. at 146.

[1271] *See* Bank Markazi v. Peterson, No. 14–770, 578 U.S. ___, slip op. at 13 & n.18 (2016) (noting various secondary sources describing the *Klein* opinion as being "deeply puzzling," "delphic," and "baffling").

[1272] *See id.* at 12–13 & n.17. The Court in *Bank Markazi* noted that the precise constitutional concern in *Klein* was tied to the President's pardon power. *Id.* at 14–15. Specifically, the Court viewed *Klein* as a case in which the Congress, lacking the authority to impair *directly* the effect of a pardon, attempted to alter *indirectly* the legal effect of a pardon by directing a court to a particular outcome, and, in so doing, was compelling a court to a result that required the judiciary to act unconstitutionally. *See id.* at 15 & n.19 (noting the constitutional infirmity identified by *Klein* was that the challenged law "attempted to direct the result without altering the legal standards governing the effect of a pardon—standards Congress was powerless to prescribe.").

[1273] *See, e.g.*, *Bank Markazi*, slip op. at 15 (holding that *Klein*'s prohibition "cannot" be taken "at face value" because Congress has the power to "make valid statutes retroactively applicable to pending cases") (quoting R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 324 (7th ed. 2015)); Plaut v. Spendthrift Farms, Inc., 514 U.S. 211, 218 (1995) (noting that Klein's "prohibition does not take hold when Congress 'amend[s] applicable law'") (quoting Robertson v. Seattle Audubon Soc., 503 U.S. 429, 441 (1992)); *Robertson*, 503 U.S. at 437–38, 441.

[1274] *See Bank Markazi*, slip op. at 16. While retroactive legislation, standing alone, may not violate *Klein*'s prohibition, other constitutional provisions—including Article I's prohibitions on ex post facto laws and bills of attainder and the Fifth Amendment's Due Process and Takings Clauses—may otherwise restrict Congress's ability to legislate retroactively. *See id.* (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 266–67 (1994)).

the Court upheld a provision of the Iran Threat Reduction and Syria Human Rights Act of 2012 that made a designated set of assets available for recovery to satisfy a discrete and finite set of default judgments, notwithstanding the fact that the change in the underlying law made the result of the pending case all but a "forgone conclusion."[1275] In addition, the *Bank Markazi* Court, recognizing Congress's authority to legislate on "one or a very small number of specific subjects," rejected the argument that particularized congressional legislation that alters the substantive law governing a specific case—standing alone—impinges on the judicial power in violation of Article III.[1276] The Court held as such, even though the legislation in question identified a case by caption and docket number and did not apply to similar enforcement actions involving any other assets.[1277]Accordingly, *Klein*'s prohibition on congressionally prescribed "rule[s] of decision" appears to be limited to instances where Congress "fails to supply any new legal standard effectuating the lawmakers' reasonable policy judgment" and instead merely compels a court to make particular findings or results under the old law.[1278]

Other restraints on congressional power over the federal courts may be gleaned from the opinion in the much-disputed *Crowell v. Benson*.[1279] In an 1856 case, the Court distinguished between matters of private right which from their nature were the subject of a suit at the common law, equity, or admiralty and which cannot be withdrawn from judicial cognizance, and those matters of public right which, though susceptible of judicial determination, did not require it and which might or might not be brought within judicial cogni-

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[1275] *See id.* at 16; *see also Robertson*, 503 U.S. at 434–39 (upholding a statute permitting timber harvesting, altering the outcome of pending litigation over the permissibility of such harvesting).

[1276] *Bank Markazi*, slip op. at 21.

[1277] *Id.* The Court's holding in *Bank Markazi* may have been influenced by the case touching on foreign affairs, "a domain in which the controlling role of the political branches is both necessary and proper." *Id.* at 22. In concluding its opinion in *Bank Markazi*, the Court, citing to long-established historical practices in the realm of foreign affairs, "stress[ed]" that congressional regulation of claims over foreign-state property generally does not "inva[de] upon the Article III judicial power." *Id.* at 22–23.

[1278] *See Bank Markazi*, slip op. at 18–19. For example, the *Bank Markazi* Court noted that a statute that directs that in a hypothetical case—"Smith v. Jones"—that "Smith wins," would violate the principle of *Klein*. Nonetheless, Congress can alter the underlying *substantive* law affecting such a case, allowing Congress to accomplish *indirectly* what the rule of Klein *directly* prohibits. *See id.* at 12–13 n.17.

[1279] 285 U.S. 22 (1932). *See also* Ng Fung Ho v. White, 259 U.S. 276 (1922); Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920); St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936).

zance.[1280] What this might mean was elaborated in *Crowell v. Benson*,[1281] involving the finality to be accorded administrative findings of jurisdictional facts in compensation cases. In holding that an employer was entitled to a trial *de novo* of the constitutional jurisdictional facts of the matter of the employer-employee relationship and of the occurrence of the injury in interstate commerce, Chief Justice Hughes fused the Due Process Clause of the Fifth Amendment and Article III but emphasized that the issue ultimately was "rather a question of the appropriate maintenance of the Federal judicial power" and "whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." The answer was stated broadly. "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. . . . We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it." [1282]

It is not at all clear that, in this respect, *Crowell v. Benson* remains good law. It has never been overruled, and it has been cited by several Justices approvingly,[1283] but the Court has never applied the principle to control another case.[1284]

Express Constitutional Restrictions on Congress.—"[T]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers

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[1280] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

[1281] 285 U.S. 22 (1932). Justices Brandeis, Stone, and Roberts dissented.

[1282] 285 U.S. at 56, 60, 64.

[1283] *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion), and id. at 100–03, 109–11 (Justice White dissenting) (discussing the due process/Article III basis of *Crowell*). Both the plurality and the dissent agreed that later cases had "undermined" the constitutional/jurisdictional fact analysis. Id. at 82, n.34; 110 n.12. For other discussions, *see* Jacobellis v. Ohio, 378 U.S. 184, 190 (1964) (Justice Brennan announcing judgment of the Court, joined by Justice Goldberg); Pickering v. Board of Education, 391 U.S. 563, 578–79 (1968); Agosto v. INS, 436 U.S. 748, 753 (1978); United States v. Raddatz, 447 U.S. 667, 682–84 (1980), and id. at 707–12 (Justice Marshall dissenting).

[1284] *Compare Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 792 (1968); Cordillo v. Liberty Mutual Ins. Co., 330 U.S. 469 (1947); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). Justice Frankfurter was extremely critical of *Crowell*. Estep v. United States, 327 U.S. 114, 142 (1946); City of Yonkers v. United States, 320 U.S. 685 (1944).

are always subject to the limitations that they may not be exercised in a way that violates other specific provisions of the Constitution." [1285] The Supreme Court has had no occasion to deal with this principle in the context of Congress's power over its jurisdiction and the jurisdiction of the inferior federal courts, but the passage of the Portal-to-Portal Act [1286] presented the lower courts such an opportunity. The Act extinguished back-pay claims growing out of several Supreme Court interpretations of the Fair Labor Standards Act; it also provided that no court should have jurisdiction to enforce any claim arising from these decisions. The United States Court of Appeals for the Second Circuit sustained the Act.[1287] The court noted that the withdrawal of jurisdiction would be ineffective if the extinguishment of the claims as a substantive matter were invalid. "We think . . . that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation." [1288] The Court, however, found that the Portal-to-Portal Act "did not violate the Fifth Amendment in so far as it may have withdrawn from private individuals . . . any rights . . . which rested upon private contracts they had made. Nor is the Portal-to-Portal Act a violation of Article III of the Constitution or an encroachment upon the separate power of the judiciary." [1289]

Conclusion.—There thus remains a measure of doubt that Congress's power over the federal courts is as plenary as some of the Court's language suggests it is. Congress has a vast amount of discretion in conferring and withdrawing and structuring the original and appellate jurisdiction of the inferior federal courts and the ap-

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[1285] Williams v. Rhodes, 393 U.S. 23, 29 (1968). The elder Justice Harlan perhaps had the same thought in mind when he said that, with regard to Congress's power over jurisdiction, "What such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution." United States v. Bitty, 208 U.S. 393, 399–400 (1908).

[1286] 52 Stat. 1060, 29 U.S.C. § 201.

[1287] Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948). *See also* Seese v. Bethlehem Steel Co., 168 F.2d 58, 65 (4th Cir. 1948). For later dicta, *see* Johnson v. Robison, 415 U.S. 361, 366–67 (1974); Weinberger v. Salfi, 422 U.S. 749, 761–62 (1975); Territory of Guam v. Olsen, 431 U.S. 195, 201–02, 204 (1977); Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n.12 (1986); Webster v. Doe, 486 U.S. 592, 603 (1988); *but see* id. at 611–15 (Justice Scalia dissenting). Note the relevance of United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[1288] 169 F.2d at 257.

[1289] 169 F.2d at 261–62.

pellate jurisdiction of the Supreme Court; so much is clear from the practice since 1789 and the holdings of many Court decisions. That its power extends to accomplishing by means of its control over jurisdiction actions which it could not do directly by substantive enactment is by no means clear from the text of the Constitution or from the cases.

FEDERAL-STATE COURT RELATIONS

Problems Raised by Concurrency

The Constitution established a system of government in which total power, sovereignty, was not unequivocally lodged in one level of government. In Chief Justice Marshall's words, "our complex system [presents] the rare and difficult scheme of one general government, whose actions extend over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union. . . ." Naturally, in such a system, "contests respecting power must arise." [1290] Contests respecting power may frequently arise in a federal system with dual structures of courts exercising concurrent jurisdiction in a number of classes of cases. Too, the possibilities of frictions grow out of the facts that one set of courts may interfere directly or indirectly with the other through injunctive and declaratory processes, through the use of *habeas corpus* and removal to release persons from the custody of the other set, and through the refusal by state courts to be bound by decisions of the United States Supreme Court. The relations between federal and state courts are governed in part by constitutional law, with respect, say, to state court interference with federal courts and state court refusal to comply with the judgments of federal tribunals; in part by statutes, with respect to the federal law generally enjoining federal court interference with pending state court proceedings; and in part by self-imposed rules of comity and restraint, such as the abstention doctrine, all applied to avoid unseemly conflicts, which, however, have at times occurred.

Subject to congressional provision to the contrary, state courts have concurrent jurisdiction over all the classes of cases and controversies enumerated in Article III, except suits between states, those to which the United States is a party, those to which a foreign state is a party, and those within the traditional admiralty jurisdiction.[1291] Even within this last category, however, state courts, though

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[1290] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 204–05 (1824).

[1291] *See* 28 U.S.C. §§ 1251, 1331 *et seq*. Indeed, the presumption is that state courts enjoy concurrent jurisdiction, and Congress must explicitly or implicitly confine jurisdiction to the federal courts to oust the state courts. *See* Gulf Offshore Co.

unable to prejudice the harmonious operation and uniformity of general maritime law,[1292] have concurrent jurisdiction over cases that occur within the maritime jurisdiction when such litigation assumes the form of a suit at common law.[1293] Review of state court decisions by the United States Supreme Court is intended to protect the federal interest and promote uniformity of law and decision relating to the federal interest.[1294] The first category of conflict surfaces here. The second broader category arises from the fact that state interests, actions, and wishes, all of which may at times be effectuated through state courts, are variously subject to restraint by federal courts. Although the possibility always existed,[1295] it became much more significant and likely when, in the wake of the Civil War, Congress bestowed general federal question jurisdiction on the federal courts,[1296] enacted a series of civil rights statutes and conferred jurisdiction on the federal courts to enforce them,[1297] and most important proposed and saw to the ratification of the three constitutional amendments, especially the Fourteenth, which made an ever-increasing number of state actions subject to federal scrutiny.[1298]

The Autonomy of State Courts

Noncompliance With and Disobedience of Supreme Court Orders by State Courts.—The United States Supreme Court when deciding cases on review from the state courts usually remands the

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v. Mobil Oil Corp., 453 U.S. 473, 477–84 (1981); Tafflin v. Levitt, 493 U.S. 455 (1990); Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820 (1990). Federal courts have exclusive jurisdiction of the federal antitrust laws, even though Congress has not spoken expressly or impliedly. *See* General Investment Co. v. Lake Shore & Michigan Southern Ry., 260 U.S. 261, 287 (1922). Justice Scalia has argued that, inasmuch as state courts have jurisdiction generally because federal law *is* law for them, Congress can provide exclusive federal jurisdiction only by explicit and affirmative statement in the text of the statute, Tafflin v. Levitt, 493 U.S. at 469, but as can be seen that is not now the rule.

[1292] Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).

[1293] Through the "saving to suitors" clause, 28 U.S.C. § 1333(1). *See* Madruga v. Superior Court, 346 U.S. 556, 560–61 (1954).

[1294] *See* "Organization of Courts, Tenure, and Compensation of Judges" and "Marbury v. Madison," supra. *See also* 28 U.S.C. § 1257.

[1295] *E.g.*, by a suit against a state by a citizen of another state directly in the Supreme Court, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), which was overturned by the Eleventh Amendment; by suits in diversity or removal from state courts where diversity existed, 1 Stat. 78, 79; by suits by aliens on treaties, 1 Stat. 77, and, subsequently, by removal from state courts of certain actions. 3 Stat. 198. And for some unknown reason, Congress passed in 1793 a statute prohibiting federal court injunctions against state court proceedings. *See* Toucey v. New York Life Ins. Co., 314 U.S. 118, 120–32 (1941).

[1296] Act of March 3, 1875, 18 Stat. 470.

[1297] Civil Rights Act of 1871, § 1, 17 Stat. 13. The authorization for equitable relief is now 42 U.S.C. § 1983, while jurisdiction is granted by 28 U.S.C. § 1343.

[1298] *See* H. Wechsler, The Nationalization of Civil Liberties and Civil Rights (1969).

case to the state court when it reverses for "proceedings not inconsistent" with the Court's opinion. This disposition leaves open the possibility that unresolved issues of state law will be decided adversely to the party prevailing in the Supreme Court or that the state court will so interpret the facts or the Court's opinion to the detriment of the party prevailing in the Supreme Court.[1299] When it is alleged that the state court has deviated from the Supreme Court's mandate, the party losing below may appeal again[1300] or she may presumably apply for mandamus to compel compliance.[1301] Statutorily, the Court may attempt to overcome state recalcitrance by a variety of specific forms of judgment.[1302] If, however, the state courts simply defy the mandate of the Court, difficult problems face the Court, extending to the possibility of contempt citations.[1303]

The most spectacular disobedience of federal authority arose out of the conflict between the Cherokees and the State of Georgia, which

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[1299] Hart & Wechsler (6th ed.), supra at 431–531. Notable examples include Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859). For studies, *see* Note, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term 1931 to October Term 1940*, 55 HARV. L. REV. 1357 (1942); Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954); Schneider, *State Court Evasion of United States Supreme Court Mandates: A Reconsideration of the Evidence*, 7 VALP. U. L. REV. 191 (1973).

[1300] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). *See* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 785–817 (1953); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 442–453 (1926). For recent examples, *see* NAACP v. Alabama, 360 U.S. 240, 245 (1959); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964), after remand, 277 Ala. 89, 167 So.2d 171 (1964); Stanton v. Stanton, 429 U.S. 501 (1977); General Atomic Co. v. Felter, 436 U.S. 493 (1978).

[1301] It does not appear that mandamus has ever actually issued. *See In re* Blake, 175 U.S. 114 (1899); *Ex parte* Texas, 315 U.S. 8 (1942); Fisher v. Hurst, 333 U.S. 147 (1948); Lavender v. Clark, 329 U.S. 674 (1946); General Atomic Co. v. Felter, 436 U.S. 493 (1978).

[1302] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 437 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 239 (1824); Williams v. Bruffy, 102 U.S. 248 (1880) (entry of judgment); Tyler v. Maguire, 84 U.S. (17 Wall.) 253 (1873) (award of execution); Stanley v. Schwalby, 162 U.S. 255 (1896); Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270 (1885) (remand with direction to enter a specific judgment). *See* 28 U.S.C. §§ 1651(a), 2106.

[1303] *See* 18 U.S.C. § 401. In United States v. Shipp, 203 U.S. 563 (1906), 214 U.S. 386 (1909); 215 U.S. 580 (1909), on action by the Attorney General, the Court appointed a commissioner to take testimony, rendered judgment of conviction, and imposed sentence on a state sheriff who had conspired with others to cause the lynching of a prisoner in his custody after the Court had allowed an appeal from a circuit court's denial of a petition for a writ of *habeas corpus*. A question whether a probate judge was guilty of contempt of an order of the Court in failing to place certain candidates on the ballot was certified to the district court, over the objections of Justices Douglas and Harlan, who wished to follow the *Shipp* practice. *In re* Herndon, 394 U.S. 399 (1969). *See* In re Herndon, 325 F. Supp. 779 (M.D. Ala. 1971).

was seeking to remove them and seize their lands with the active support of President Jackson.[1304] In the first instance, after the Court had issued a writ of error to the Georgia Supreme Court to review the murder conviction of a Cherokee, Corn Tassel, and after the writ was served, Corn Tassel was executed on the day set for the hearing, contrary to the federal law that a writ of error superseded sentence until the appeal was decided.[1305] Two years later, Georgia again defied the Court, when, in *Worcester v. Georgia*,[1306] it set aside the conviction of two missionaries for residing among the Indians without a license. Despite the issuance of a special mandate to a local court to discharge the missionaries, they were not released, and the state's governor loudly proclaimed resistance. Consequently, the two remained in jail until they agreed to abandon further efforts for their discharge by federal authority and to leave the state, whereupon the governor pardoned them.

Use of State Courts in Enforcement of Federal Law.— Although the states' rights proponents in the Convention and in the First Congress wished to leave to the state courts the enforcement of federal law and rights rather than to create inferior federal courts,[1307] it was not long before they or their successors began to argue that state courts could not be required to adjudicate cases based on federal law. The practice in the early years was to make the jurisdiction of federal courts generally concurrent with that of state courts,[1308] and early Congresses imposed positive duties on state courts to enforce federal laws.[1309] Reaction set in out of hostility to the Embargo Acts, the Fugitive Slave Law, and other measures,[1310] and, in *Prigg v. Pennsylvania*,[1311] involving the Fugitive Slave Law, the Court indicated that the states could not be com-

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[1304] 1 C. Warren, supra at 729–79.

[1305] Id. at 732–36.

[1306] 31 U.S. (6 Pet.) 515 (1832).

[1307] *See* "Organization of Courts, Tenure, and Compensation of Judges," supra.

[1308] Judiciary Act of 1789, §§ 9, 11, 1 Stat. 76, 78; *see also* id. at § 25, 1 Stat. 85.

[1309] *E.g.*, Carriage Tax Act, 1 Stat. 373 (1794); License Tax on Wine & Spirits Act, 1 Stat. 376 (1794); Fugitive Slave Act, 1 Stat. 302 (1794); Naturalization Act of 1795, 1 Stat. 414; Alien Enemies Act of 1798, 1 Stat. 577. State courts in 1799 were vested with jurisdiction to try criminal offenses against the postal laws. 1 Stat. 733, 28. The Act of March 3, 1815, 3 Stat. 244, vested state courts with jurisdiction of complaints, suits, and prosecutions for taxes, duties, fines, penalties, and forfeitures. *See* Warren, *Federal Criminal Laws and State Courts*, 38 HARV. L. REV. 545, 577–581 (1925).

[1310] Embargo Acts, 2 Stat. 453, 473, 499, 506, 528, 550, 605, 707 (1808–1812); 3 Stat. 88 (1813); Fugitive Slave Act, 1 Stat. 302 (1793).

[1311] 41 U.S. (16 Pet.) 539, 615 (1842). *See also* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 69 (1820) (Justice Story dissenting); United States v. Bailey, 34 U.S. (9 Pet.) 238, 259 (1835) (Justice McLean dissenting). However, the Court held that states could exercise concurrent jurisdiction if they wished. Claflin v. Houseman, 93 U.S. 130 (1876), and cases cited.

pelled to enforce federal law. After a long period, however, Congress resumed its former practice,[1312] which the Court sustained,[1313] and it went even further in the Federal Employers' Liability Act by not only giving state courts concurrent jurisdiction but also by prohibiting the removal of cases begun in state courts to the federal courts.[1314]

When Connecticut courts refused to enforce an FELA claim on the ground that to do so was contrary to the public policy of the state, the Court held on the basis of the Supremacy Clause that, when Congress enacts a law and declares a national policy, that policy is as much Connecticut's and every other state's as it is of the collective United States.[1315] The Court's suggestion that the act could be enforced "as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion," [1316] leaving the impression that state practice might in some instances preclude enforcement in state courts, was given body when the Court upheld New York's refusal to adjudicate an FELA claim that fell in a class of cases in which claims under state law would not be entertained.[1317] "[T]here is nothing in the Act of Congress that purports to force a duty upon such Courts as against an otherwise valid excuse." [1318] However, "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." [1319]

The fact that a state statute divests its courts of jurisdiction not only over a disfavored federal claim, but also over an identical state claim, does not ensure that the "state law will be deemed a neutral rule of judicial administration and therefore a valid excuse for refusing to entertain a federal cause of action." [1320] "Although

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[1312] *E.g.*, Act of June 8, 1872, 17 Stat. 323.

[1313] Claflin v. Houseman, 93 U.S. 130 (1876).

[1314] 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51–60.

[1315] *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

[1316] 223 U.S. at 59.

[1317] Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).

[1318] 279 U.S. at 388. For what constitutes a valid excuse, *compare* Missouri ex rel. Southern Ry. v. Mayfield, 340 U.S. 1 (1950), *with* McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934). It appears that generally state procedure must yield to federal when it would make a difference in outcome. *Compare* Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949), *and* Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952), with Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916).

[1319] Howlett v. Rose, 496 U.S. 356, 371 (1990). *See also* Felder v. Casey, 487 U.S. 131 (1988).

[1320] Haywood v. Drown, 556 U.S. ___, No. 07–10374, slip op. at 8–9 (2009) (striking down New York statute that gave the state's supreme courts—its trial courts of general jurisdiction—jurisdiction over suits brought under 42 U.S.C. § 1983, except

the absence of discrimination [in its treatment of federal and state law] is necessary to our finding a state law neutral, it is not sufficient. A jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear." [1321]

In *Testa v. Katt*,[1322] the Court unanimously held that state courts, at least with regard to claims and cases analogous to claims and cases enforceable in those courts under state law, are required to enforce "penal" laws of the United States; the statute at issue in the case provided "that a buyer of goods at above the prescribed ceiling price may sue the seller 'in any court of competent jurisdiction.'" [1323] Respecting Rhode Island's claim that one sovereign cannot enforce the penal laws of another, Justice Black observed that the assumption underlying this claim flew "in the face of the fact that the States of the Union constitute a nation" and the fact of the existence of the Supremacy Clause.[1324]

State Interference with Federal Jurisdiction.—It seems settled, though not without dissent, that state courts have no power to enjoin proceedings [1325] or effectuation of judgments [1326] of the federal courts, with the exception of cases in which a state court has custody of property in proceedings *in rem* or *quasi in rem*, where

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in the case of suits seeking money damages from corrections officers, whether brought under federal or state law).

[1321] 556 U.S. ___, No. 07–10374, slip op. at 9 (New York statute found, "contrary to Congress's judgment [in 42 U.S.C. § 1983,] that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages").

[1322] 330 U.S. 386 (1947).

[1323] 330 U.S. at 387.

[1324] 330 U.S. at 389. *See*, for a discussion as well as an extension of *Testa*, FERC v. Mississippi, 456 U.S. 742 (1982). Cases since *Testa* requiring state court enforcement of federal rights have generally concerned federal remedial laws. *E.g.*, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). The Court has approved state court adjudication under 42 U.S.C. § 1983, Maine v. Thiboutot, 448 U.S. 1, 3 n.1 (1980), but, curiously, in Martinez v. California, 444 U.S. 277, 283 n.7 (1980) (emphasis by Court), it noted that it has "never considered . . . the question whether a State *must* entertain a claim under 1983." *See also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 n.7 (1987) (continuing to reserve question). But, with Felder v. Casey, 487 U.S. 131 (1988), and Howlett by Howlett v. Rose, 496 U.S. 356 (1990), it seems dubious that state courts could refuse. Enforcement is not limited to federal statutory law; federal common law must similarly be enforced. Free v. Bland, 369 U.S. 663 (1962).

[1325] Donovan v. City of Dallas, 377 U.S. 408 (1964), and cases cited. Justices Harlan, Clark, and Stewart dissented, arguing that a state should have power to enjoin vexatious, duplicative litigation which would have the effect of thwarting a state-court judgment already entered. *See also* Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44, 56 (1941) (Justice Frankfurter dissenting). In Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868), the general rule was attributed to the complete independence of state and federal courts in their spheres of action, but federal courts, of course may under certain circumstances enjoin actions in state courts.

[1326] McKim v. Voorhies, 11 U.S. (7 Cr.) 279 (1812); Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1868).

the state court has exclusive jurisdiction to proceed and may enjoin parties from further action in federal court.[1327]

Conflicts of Jurisdiction: Rules of Accommodation

Federal courts primarily interfere with state courts in three ways: by enjoining proceedings in them, by issuing writs of *habeas corpus* to set aside convictions obtained in them, and by adjudicating cases removed from them. With regard to all three but particularly with regard to the first, there have been developed certain rules plus a statutory limitation designed to minimize needless conflict.

Comity.—"[T]he notion of 'comity,'" Justice Black asserted, is composed of "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism'. . . ."[1328] Comity is a self-imposed rule of judicial restraint whereby independent tribunals of concurrent or coordinate jurisdiction act to moderate the stresses of coexistence and to avoid collisions of authority. It is not a rule of law but "one of practice, convenience, and expediency,"[1329] which persuades but does not command.

Abstention.—Perhaps the fullest expression of the concept of comity may be found in the abstention doctrine. The abstention doctrine instructs federal courts to abstain from exercising jurisdiction if applicable state law, which would be dispositive of the contro-

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[1327] Princess Lida v. Thompson, 305 U.S. 456 (1939). Nor do state courts have any power to release by *habeas corpus* persons in custody pursuant to federal authority. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872).

[1328] Younger v. Harris, 401 U.S. 37, 44 (1971). *Compare* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981), *with* id. at 119–25 (Justice Brennan concurring, joined by three other Justices).

[1329] Mast, Foos & Co. v. Stover Manufacturing Co., 177 U.S. 458, 488 (1900). Recent decisions emphasize comity as the primary reason for restraint in federal court actions tending to interfere with state courts. *E.g.*, O'Shea v. Littleton, 414 U.S. 488, 499–504 (1974); Huffman v. Pursue, Ltd., 420 U.S. 592, 599–603 (1975); Trainor v. Hernandez, 431 U.S. 434, 441 (1977); Moore v. Sims, 442 U.S. 415, 430 (1979). The Court has also cited comity as a reason to restrict access to federal *habeas corpus*. Francis v. Henderson, 425 U.S. 536, 541 and n.31 (1976); Wainwright v. Sykes, 433 U.S. 72, 83, 88, 90 (1977); Engle v. Isaac, 456 U.S. 107, 128–29 (1982). *See also* Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981); Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) (comity limits federal court interference with state tax systems); Levin v. Commerce Energy, Inc., 560 U.S. ___, No. 09–223, slip op. (2010) (comity has particular force in cases challenging constitutionality of state taxation of commercial activities). *And see* Missouri v. Jenkins, 495 U.S. 33 (1990).

versy, is unclear and a state court interpretation of the state law question might obviate the necessity of deciding a federal constitutional issue.[1330] Abstention is not proper, however, where the relevant state law is settled,[1331] or where it is clear that the state statute or action challenged is unconstitutional no matter how the state court construes state law.[1332] Federal jurisdiction is not ousted by abstention; rather it is postponed.[1333] Federal-state tensions would be ameliorated through federal-court deference to the concept that state courts are as adequate a protector of constitutional liberties as the federal courts and through the minimization of the likelihood that state programs would be thwarted by federal intercession. Federal courts would benefit because time and effort would

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[1330] C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 13 (4th ed. 1983). The basic doctrine was formulated by Justice Frankfurter for the Court in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Other strands of the doctrine are that a federal court should refrain from exercising jurisdiction in order to avoid needless conflict with a state's administration of its own affairs, Burford v. Sun Oil Co., 319 U.S. 315 (1943); Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 341 (1951); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943); Martin v. Creasy, 360 U.S. 219 (1959); Moses H. Cone Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) (carefully reviewing the scope of the doctrine), especially where state law is unsettled. Meredith v. City of Winter Haven, 320 U.S. 228 (1943); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959). *See also* Clay v. Sun Insurance Office Ltd., 363 U.S. 207 (1960). Also, although pendency of an action in state court will not ordinarily cause a federal court to abstain, there are "exceptional" circumstances in which it should. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). But, in Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996), an exercise in *Burford* abstention, the Court held that federal courts have power to dismiss or remand cases based on abstention principles only where relief being sought is equitable or otherwise discretionary but may not do so in common-law actions for damages.

[1331] City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77 (1958); Zwickler v. Koota, 389 U.S. 241, 249–51 (1967). *See* Babbitt v. United Farm Workers Nat'l. Union, 442 U.S. 289, 306 (1979) (quoting Harman v. Forssenius, 380 U.S. 528, 534–35 (1965)).

[1332] Harman v. Forssenius, 380 U.S. 528, 534–35 (1965); Babbitt v. United Farm Workers Nat'l., 442 U.S. 289, 305–12 (1979). Abstention is not proper simply to afford a state court the opportunity to hold that a state law violates the federal Constitution. Wisconsin v. Constantineau, 400 U.S. 433 (1971); Zablocki v. Redhail, 434 U.S. 374, 379 n.5 (1978); Douglas v. Seacoast Products, Inc., 431 U.S. 265, 271 n.4 (1977); City of Houston v. Hill, 482 U.S. 451 (1987) ("A federal court may not properly ask a state court if it would care in effect to rewrite a statute"). But if the statute is clear and there is a reasonable possibility that the state court would find it in violation of a distinct or specialized state constitutional provision, abstention may be proper, Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975); Reetz v. Bozanich, 397 U.S. 82 (1970), although not if the state and federal constitutional provisions are alike. Examining Bd. v. Flores de Otero, 426 U.S. 572, 598 (1976).

[1333] American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973); Harrison v. NAACP, 360 U.S. 167 (1959). Dismissal may be necessary if the state court will not accept jurisdiction while the case is pending in federal court. Harris County Comm'rs v. Moore, 420 U.S. 77, 88 n.14 (1975).

not be expended in decision of difficult constitutional issues which might not require decision.[1334]

During the 1960s, the abstention doctrine was in disfavor with the Supreme Court, suffering rejection in numerous cases, most of them civil rights and civil liberties cases.[1335] Time-consuming delays[1336] and piecemeal resolution of important questions[1337] were cited as a too-costly consequence of the doctrine. Actions brought under the civil rights statutes seem not to have been wholly subject to the doctrine,[1338] and for awhile cases involving First Amendment expression guarantees seemed to be sheltered as well, but this is no longer the rule.[1339] Abstention developed robustly with *Younger v. Harris*,[1340] and its progeny.

Exhaustion of State Remedies.—A complainant will ordinarily be required, as a matter of comity, to exhaust all available state legislative and administrative remedies before seeking relief in federal court.[1341] To do so may make unnecessary federal-court adjudication. The complainant will ordinarily not be required, however, to exhaust his state judicial remedies, inasmuch as it is a litigant's choice to proceed in either state or federal courts when the alterna-

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[1334] *E.g.*, Spector Motor Service v. McLaughlin, 323 U.S. 101 (1944); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Harrison v. NAACP, 360 U.S. 167 (1959).

[1335] McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963); Griffin v. School Board, 377 U.S. 218 (1964); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Baggett v. Bullitt, 377 U.S. 360 (1964); Davis v. Mann, 377 U.S. 678 (1964); Dombrowski v. Pfister, 380 U.S. 479 (1965); Harman v. Forssenius, 380 U.S. 528 (1965); Zwickler v. Koota, 389 U.S. 241 (1967); Wisconsin v. Constanineau, 400 U.S. 433 (1971).

[1336] England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411, 426 (1964) (Justice Douglas concurring). *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 305 (4th ed. 1983).

[1337] Baggett v. Bullitt, 377 U.S. 360, 378–379 (1964). Both consequences may be alleviated substantially by state adoption of procedures by which federal courts may certify to the state's highest court questions of unsettled state law which would be dispositive of the federal court action. The Supreme Court has actively encouraged resort to certification where it exists. Clay v. Sun Insurance Office Ltd., 363 U.S. 207 (1960); Lehman Brothers v. Schein, 416 U.S. 386 (1974); Bellotti v. Baird, 428 U.S. 132, 151 (1976).

[1338] *Compare* Harrison v. NAACP, 360 U.S. 167 (1959), *with* McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963).

[1339] *Compare* Baggett v. Bullitt, 377 U.S. 360 (1964), *and* Dombrowski v. Pfister, 380 U.S. 479 (1965), *with* Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971). *See* Babbitt v. United Farm Workers, 442 U.S. 289, 305–312 (1979).

[1340] 401 U.S. 37 (1971). There is room to argue whether the *Younger* line of cases represents the abstention doctrine at all, but the Court continues to refer to it in those terms. *E.g.*, Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992); Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. ___, No. 12–815, slip op. (2013).

[1341] The rule was formulated in Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908), and Bacon v. Rutland R.R., 232 U.S. 134 (1914).

tives exist and a question for judicial adjudication is present.[1342] But when a litigant is suing for protection of federally guaranteed civil rights, he need not exhaust any kind of state remedy.[1343]

Anti-Injunction Statute.—For reasons unknown,[1344] Congress in 1793 enacted a statute to prohibit the issuance of injunctions by federal courts to stay state court proceedings.[1345] Over time, a long list of exceptions to the statutory bar was created by judicial decision,[1346] but in *Toucey v. New York Life Ins. Co.*,[1347] the Court in a lengthy opinion by Justice Frankfurter announced a very liberal interpretation of the anti-injunction statute so as to do away with practically all the exceptions that had been created. Congress's response was to redraft the statute and to indicate that it was restoring the pre-*Toucey* interpretation.[1348] Considerable disagreement exists over the application of the statute, however, especially with regard to the exceptions it permits. The present tendency appears to be to read the law expansively and the exceptions restrictively in the interest of preventing conflict with state courts.[1349] Nonetheless, some exceptions exist, either expressly or implicitly in statutory language,[1350] or through Court interpretation.[1351] The Court's

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[1342] City Bank Farmers' Trust Co. v. Schnader, 291 U.S. 24 (1934); Lane v. Wilson, 307 U.S. 268 (1939). *But see* Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 341 (1951). Exhaustion of state court remedies is required in *habeas corpus* cases and usually in suits to restrain state court proceedings.

[1343] Patsy v. Florida Board of Regents, 457 U.S. 496 (1982). Where there are pending administrative proceedings that fall within the *Younger* rule, a litigant must exhaust. Younger v. Harris, 401 U.S. 37 (1971), as explicated in Ohio Civil Rights Comm'n v. Dayton Christian School, Inc., 477 U.S. 619, 627 n.2 (1986). Under title VII of the Civil Rights Act of 1964, barring employment discrimination on racial and other specified grounds, the EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter. 42 U.S.C. § 2000e–5(c). *See* Love v. Pullman Co., 404 U.S. 522 (1972). The Civil Rights of Institutionalized Persons Act contains "a specific, limited exhaustion requirement for adult prisoners bringing actions pursuant to § 1983." *Patsy*, 457 U.S. at 508.

[1344] Toucey v. New York Life Ins. Co., 314 U.S. 118, 130–32 (1941).

[1345] "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state . . . ." Ch. XXII, § 5, 1 Stat. 335 (1793), now, as amended, 28 U.S.C. § 2283.

[1346] Durfee & Sloss, *Federal Injunctions Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145 (1932).

[1347] 314 U.S. 118 (1941).

[1348] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The Reviser's Note is appended to the statute, stating intent.

[1349] Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970). *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER ch. 10 (1980).

[1350] The greatest difficulty is with the "expressly authorized by Act of Congress" exception. No other Act of Congress expressly refers to § 2283 and the Court has indicated that no such reference is necessary to create a statutory exception. Amal-

general policy of application, however, seems to a considerable degree to effectuate what is now at least the major rationale of the statute, deference to state court adjudication of issues presented to them for decision.[1352]

Res Judicata.—Both the Constitution and a contemporaneously enacted statute require federal courts to give "full faith and credit" to state court judgments, to give, that is, preclusive effect to state court judgments when those judgments would be given preclusive effect by the courts of that state.[1353] The present Court views the interpretation of "full faith and credit" in the overall context of deference to state courts running throughout this section. "Thus, *res judicata* and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."[1354] 42 U.S.C. § 1983 is not an exception to the mandate of the *res judicata* statute.[1355] An exception to § 1738 "will not be recognized unless a later statute con-

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gamated Clothing Workers v. Richman Bros., 348 U.S. 511, 516 (1955). *Compare* Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954). Rather, "in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." Mitchum v. Foster, 407 U.S. 225, 237 (1972). Applying this test, the Court in *Mitchum* held that a 42 U.S.C. § 1983 suit is an exception to § 2283 and that persons suing under this authority may, if they satisfy the requirements of comity, obtain an injunction against state court proceedings. The exception is, of course, highly constrained by the comity principle. On the difficulty of applying the test, *see* Vendo Co. v. Lektco-Vend Corp., 433 U.S. 623 (1977) (fragmented Court on whether Clayton Act authorization of private suits for injunctive relief is an "expressly authorized" exception to § 2283).

On the interpretation of the § 2283 exception for injunctions to protect or effectuate a federal-court judgment, *see* Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988).

[1351] Thus, the Act bars federal court restraint of pending state court proceedings but not restraint of the institution of such proceedings. Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965). Restraint is not barred if sought by the United States or an officer or agency of the United States. Leiter Minerals v. United States, 352 U.S. 220 (1957); NLRB v. Nash-Finch Co., 404 U.S. 138 (1971). Restraint is not barred if the state court proceeding is not judicial but rather administrative. Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908); Roudebush v. Hartke, 405 U.S. 15 (1972). *Compare* Hill v. Martin, 296 U.S. 393, 403 (1935), *with* Lynch v. Household Finance Corp., 405 U.S. 538, 552–56 (1972).

[1352] The statute is to be applied "to prevent needless friction between state and federal courts." Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4, 9 (1940); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 285–86 (1970).

[1353] Article IV, § 1, of the Constitution; 28 U.S.C. § 1738.

[1354] Allen v. McCurry, 449 U.S. 90, 95–96 (1980).

[1355] 449 U.S. at 96–105. In England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964), the Court held that, when parties are compelled to go to state court under *Pullman* abstention, either party may reserve the federal issue and thus be enabled to return to federal court without being barred by *res judicata*.

tains an express or implied partial repeal." [1356] Thus, a claimant who pursued his employment discrimination remedies through state administrative procedures, as the federal law requires her to do (within limits), and then appealed an adverse state agency decision to state court will be precluded from bringing her federal claim to federal court, since the federal court is obligated to give the state court decision "full faith and credit." [1357]

Closely related is the *Rooker-Feldman* doctrine, holding that federal subject-matter jurisdiction of federal district courts does not extend to review of state court judgments.[1358] The Supreme Court, not federal district courts, has such appellate jurisdiction. The doctrine thus prevents losers in state court from obtaining district court review, but "does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions." [1359]

Three-Judge Court Act.—When the Court in *Ex parte Young* [1360] held that federal courts were not precluded by the Eleventh Amendment from restraining state officers from enforcing state laws determined to be in violation of the federal Constitution, serious efforts were made in Congress to take away the authority thus asserted, but the result instead was legislation providing that suits in which an interlocutory injunction was sought against the enforcement of state statutes by state officers were to be heard by a panel of three federal judges, rather than by a single district judge, with appeal direct to the Supreme Court.[1361] The provision was designed to assuage state feeling by vesting such determinations in a court more prestigious than a single-judge district court, to assure a more authoritative determination, and to prevent the assertion of individual predilections in sensitive and emotional areas.[1362] Because, however, of the heavy burden that convening a three-judge court placed on the judiciary and that the direct appeals placed on the

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[1356] Kramer v. Chemical Construction Corp., 456 U.S. 461, 468 (1982).

[1357] 456 U.S. 468–76. There were four dissents. Id. at 486 (Justices Blackmun, Brennan, and Marshall), 508 (Stevens).

[1358] The doctrine derives its name from Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

[1359] Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005) (*Rooker-Feldman* has no application when federal court proceedings have been initiated prior to state court proceedings; preclusion law governs in that situation).

[1360] 209 U.S. 123 (1908).

[1361] 36 Stat. 557 (1910). The statute was amended in 1925 to apply to requests for permanent injunctions, 43 Stat. 936, and again in 1937 to apply to constitutional attacks on federal statutes. 50 Stat. 752.

[1362] Swift & Co. v. Wickham, 382 U.S. 111, 119 (1965); *Ex parte* Collins, 277 U.S. 565, 567 (1928).

Supreme Court, the provisions for such courts, save in cases "when otherwise required by an Act of Congress" [1363] or in cases involving state legislative or congressional districting, were repealed by Congress in 1976.[1364]

Conflicts of Jurisdiction: Federal Court Interference with State Courts

One challenging the constitutionality, under the United States Constitution, of state actions, statutory or otherwise, could, of course, bring suit in state court; indeed, in the time before conferral of federal-question jurisdiction on lower federal courts plaintiffs had to bring actions in state courts, and on some occasions since, this has been done.[1365] But the usual course is to sue in federal court for either an injunction or a declaratory judgment or both. In an era in which landmark decisions of the Supreme Court and of inferior federal courts have been handed down voiding racial segregation requirements, legislative apportionment and congressional districting, abortion regulations, and many other state laws and policies, it is difficult to imagine a situation in which it might be impossible to obtain such rulings because no one required as a defendant could be sued. Yet, the adoption of the Eleventh Amendment in 1798 resulted in the immunity of the state,[1366] and the immunity of state officers if the action upon which they were being sued was state action,[1367] from suit without the state's consent. *Ex parte Young* [1368] is a seminal case in American constitutional law because it created a fiction

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[1363] These now are primarily limited to suits under the Voting Rights Act, 42 U.S.C. §§ 1973b(a), 1973c, 1973h(c), and to certain suits by the Attorney General under public accommodations and equal employment provisions of the 1964 Civil Rights Act. 42 U.S.C. §§ 2000a–5(b), 2000e–6(b).

[1364] Pub. L. 94–381, 90 Stat. 1119, 28 U.S.C. § 2284. In actions still required to be heard by three-judge courts, direct appeals are still available to the Supreme Court. 28 U.S.C. § 1253.

[1365] For example, one of the cases decided in Brown v. Board of Education, 347 U.S. 483 (1954), came from the Supreme Court of Delaware. In Scott v. Germano, 381 U.S. 407 (1965), the Court set aside an order of the district court refusing to defer to the state court which was hearing an apportionment suit and said: "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States has been specifically encouraged." *See also* Scranton v. Drew, 379 U.S. 40 (1964).

[1366] By its terms, the Eleventh Amendment bars only suits against a state by citizens of other states, but, in Hans v. Louisiana, 134 U.S. 1 (1890), the Court deemed it to embody principles of sovereign immunity that applied to unconsented suits by its own citizens.

[1367] *In re* Ayers, 123 U.S. 443 (1887).

[1368] 209 U.S. 123 (1908).

by which the validity of state statutes and other actions could be challenged by suits against state officers as individuals.[1369]

Conflict between federal and state courts is inevitable when the federal courts are open to persons complaining about unconstitutional or unlawful state action which could as well be brought in the state courts and perhaps is so brought by other persons, but the various rules of restraint flowing from the concept of comity reduce federal interference here some considerable degree. It is rather in three fairly well defined areas that institutional conflict is most pronounced.

Federal Restraint of State Courts by Injunctions.—Even where the federal anti-injunction law is inapplicable, or where the question of application is not reached,[1370] those seeking to enjoin state court proceedings must overcome substantial prudential barriers, among them the abstention doctrine[1371] and more important than that the equity doctrine that suits in equity "shall not be sustained in . . . the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."[1372] The application of this latter principle has been most pronounced in the reluctance of federal courts to interfere with a state's good faith enforcement of its criminal law. Here, the Court has required of a litigant seeking to bar threatened state prosecution not only a showing of irreparable injury that is both great and immediate, but also an inability to defend his constitutional rights in the state proceeding. Certain types of injury, such as the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, are insufficient to be considered irreparable in this sense. Even if a state criminal statute *is* unconstitutional, a person charged under it usually has an adequate remedy at law by raising his constitutional defense in the state trial.[1373] The policy has never been stated

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[1369] The fiction is that while the official is a state actor for purposes of suit against him, the claim that his action is unconstitutional removes the imprimatur of the state that would shield him under the Eleventh Amendment. 209 U.S. at 159–60.

[1370] 28 U.S.C. § 2283 may be inapplicable because no state court proceeding is pending or because the action is brought under 42 U.S.C. § 1983. Its application may never be reached because a court may decide that equitable principles do not justify injunctive relief. Younger v. Harris, 401 U.S. 37, 54 (1971).

[1371] *See* "Abstention," supra.

[1372] The quoted phrase setting out the general principle is from the Judiciary Act of 1789, § 16, 1 Stat. 82.

[1373] The older cases are Fenner v. Boykin, 271 U.S. 240 (1926); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941); Watson v. Buck, 313 U.S. 387 (1941); Williams v. Miller, 317 U.S. 599 (1942); Douglas v. City of Jeannette, 319 U.S. 157 (1943). There is a stricter rule against federal restraint of the use of evidence in state criminal trials. Stefanelli v. Minard, 342 U.S. 117 (1951); Pugach v. Dollinger, 365 U.S. 458 (1961). The Court reaffirmed the rule in Perez v. Ledesma, 401 U.S. 82 (1971). State officers may not be enjoined

as an absolute, in recognition of the fact that a federal court injunction could properly issue in exceptional and limited circumstances, such as the existence of factors making it impossible for a litigant to protect his federal constitutional rights through a defense of the state criminal charges or the bringing of multiple criminal charges.[1374]

In *Dombrowski v. Pfister*,[1375] the Court appeared to change the policy somewhat. The case on its face contained allegations and offers of proof that may have been sufficient alone to establish the "irreparable injury" justifying federal injunctive relief.[1376] But the formulation of standards by Justice Brennan for the majority placed great emphasis upon the fact that the state criminal statute in issue regulated expression. Any criminal prosecution under a statute regulating expression might of itself inhibit the exercise of First Amendment rights, he said, and prosecution under an overbroad statute,[1377] such as the one in this case, might critically impair exercise of those rights. The mere threat of prosecution under such an overbroad statute "may deter . . . almost as potently as the actual application of sanctions. . . ." [1378]

In such cases, courts could no longer embrace "[t]he assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights," because either the mere threat of prosecution or the long wait between prosecution and final vindication could result in a "chilling effect upon the exercise of First Amendment rights." [1379] The principle apparently established by the Court was two-phased: a federal court should not abstain when there is a facially unconstitutional statute infringing upon speech and ap-

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from testifying or using evidence gathered in violation of federal constitutional restrictions, Cleary v. Bolger, 371 U.S. 392 (1963), but the rule is unclear with regard to federal officers and state trials. *Compare* Rea v. United States, 350 U.S. 214 (1956), *with* Wilson v. Schnettler, 365 U.S. 381 (1961).

[1374] *E.g.*, Douglas v. City of Jeannette, 319 U.S. 157, 163–164 (1943); Stefanelli v. Minard, 342 U.S. 117, 122 (1951). *See also* Terrace v. Thompson, 263 U.S. 197, 214 (1923), Future criminal proceedings were sometimes enjoined. *E.g.*, Hague v. CIO, 307 U.S. 496 (1939).

[1375] 380 U.S. 479 (1965). Grand jury indictments had been returned after the district court had dissolved a preliminary injunction, erroneously in the Supreme Court's view, so that it took the view that no state proceedings were pending as of the appropriate time. For a detailed analysis of the case, *see* Fiss, *Dombrowski*, 86 YALE L. J. 1103 (1977).

[1376] "[T]he allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury." 380 U.S. at 485–86.

[1377] That is, a statute that reaches both protected and unprotected expression and conduct.

[1378] 380 U.S. at 486.

[1379] 380 U.S. at 486, 487.

plication of that statute discourages protected activities, and the court should further enjoin the state proceedings when there is prosecution or threat of prosecution under an overbroad statute regulating expression if the prosecution or threat of prosecution chills the exercise of freedom of expression.[1380] These formulations were reaffirmed in *Zwickler v. Koota*,[1381] in which a declaratory judgment was sought with regard to a statute prohibiting anonymous election literature. The Court deemed abstention improper,[1382] and further held that adjudication for purposes of declaratory judgment is not hemmed in by considerations attendant upon injunctive relief.[1383]

The aftermath of *Dombrowski* and *Zwickler* was a considerable expansion of federal-court adjudication of constitutional attack through requests for injunctive and declaratory relief, which gradually spread out from First Amendment areas to other constitutionally protected activities.[1384] However, these developments were highly controversial and, after three arguments on the issue, the Court in a series of 1971 cases receded from its position and circumscribed the discretion of the lower federal courts to a considerable and ever-broadening degree.[1385] The important difference between the 1971 cases and the *Dombrowski-Zwickler* line was that, in the latter there were no prosecutions pending, whereas in the 1971 cases there were. Nevertheless, the care with which Justice Black for the majority in the 1971 cases undertook to distinguish *Dombrowski* signified a limitation of its doctrine.

Justice Black reviewed and reaffirmed the traditional rule of reluctance to interfere with state court proceedings except in extraordinary circumstances. The holding in *Dombrowski*, as distinguished from some of its language, did not change the general rule, because extraordinary circumstances had existed. Thus, Justice Black, with considerable support from the other Justices,[1386] went on to affirm that, where a criminal proceeding is already pending in a

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[1380] *See* Cameron v. Johnson, 381 U.S. 741 (1965); Cameron v. Johnson, 390 U.S. 611 (1968).

[1381] 389 U.S. 241 (1967). The state criminal conviction had been reversed by a state court on state law grounds and no new charge had been instituted.

[1382] It was clear that the statute could not be construed by a state court to render unnecessary a federal constitutional decision. 389 U.S. at 248–52.

[1383] 389 U.S. at 254.

[1384] Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535 (1970).

[1385] Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Boyle v. Landry, 401 U.S. 77 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971). Justice Black wrote the majority opinion in the first four of these cases; the other two were per curiam opinions.

[1386] Only Justice Douglas dissented. 401 U.S. at 58. Justices Brennan, White, and Marshall generally concurred in a restrained fashion. Id. at 56, 75, 93.

state court, if it is a single prosecution about which there is no allegation that it was brought in bad faith or that it was one of a series of repeated prosecutions that would be brought, and if the defendant may put in issue his federal-constitutional defense at the trial, then federal injunctive relief is improper, even if it is alleged that the statute on which the prosecution was based regulated expression and was overbroad.

Many statutes regulating expression were valid and some overbroad statutes could be validly applied, so findings of facial unconstitutionality abstracted from concrete factual situations was not a sound judicial method. "It is sufficient for purposes of the present case to hold, as we do, that the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it, and that appellee Harris has failed to make any showing of bad faith, harassment, or any other unusual circumstance that would call for equitable relief." [1387]

The reason for the principle, said Justice Black, flows from "Our Federalism," which requires federal courts to defer to state courts when there are proceedings pending in them.[1388]

Moreover, in a companion case, the Court held that, when prosecutions are pending in state court, the propriety of injunctive and declaratory relief should ordinarily be judged by the same standards.[1389] A declaratory judgment is as likely to interfere with state proceedings as an injunction, whether the federal decision be treated as *res judicata* or viewed as a strong precedent guiding the state court. Additionally, "the Declaratory Judgment Act provides that after a declaratory judgment is issued the district court may enforce it by granting '[f]urther necessary or proper relief,' 28 U.S.C. § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings." [1390]

When, however, there is no pending state prosecution, the Court is clear that "Our Federalism" is not offended if a plaintiff in a federal court is able to demonstrate a genuine threat of enforcement

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[1387] 401 U.S. at 54. On bad faith enforcement, *see* id. at 56 (Justices Stewart and Harlan concurring); 97 (Justices Brennan, White, and Marshall concurring in part and dissenting in part). For an example, *see* Universal Amusement Co. v. Vance, 559 F.2d 1286, 1293–1301 (5th Cir. 1977), *aff'd per curiam sub nom.* Dexter v. Butler, 587 F.2d 176 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 929 (1979).

[1388] 401 U.S. at 44.

[1389] Samuels v. Mackell, 401 U.S. 66 (1971). The holding was in line with Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943).

[1390] Samuels v. Mackell, 401 U.S. 66, 72 (1971).

of a disputed criminal statute, whether the statute is attacked on its face or as applied, and becomes entitled to a federal declaratory judgment.[1391] And, in fact, when no state prosecution is pending, a federal plaintiff need not demonstrate the existence of the *Younger* factors to justify the issuance of a preliminary or permanent injunction against prosecution under a disputed state statute.[1392]

Beyond criminal prosecutions, the Court extended *Younger*'s general directive to bar interference with pending state civil cases that are akin to criminal prosecutions.[1393] *Younger* abstention was also found appropriate when a judgment debtor in a state civil case sought to enjoin a state court order to enforce the judgment.[1394] The Court further applied *Younger*'s principles to bar federal court interference with state administrative proceedings of a judicial nature, in which important state interests were at stake.[1395]

Nonetheless, the Court has emphasized that "only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States."[1396] In *Sprint Communications, Inc. v. Jacobs*,[1397] the Court made clear that federal forbearance under Younger was limited to three discrete types of state proceedings: (1) ongoing state criminal prosecutions; (2) particular state civil proceedings that are akin to criminal prosecutions; and (3) civil proceedings involving orders uniquely in furtherance of the state courts' ability to per-

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[1391] Steffel v. Thompson, 415 U.S. 452 (1974).

[1392] Doran v. Salem Inn, 422 U.S. 922 (1975) (preliminary injunction may issue to preserve *status quo* while court considers whether to grant declaratory relief); Wooley v. Maynard, 430 U.S. 705 (1977) (when declaratory relief is given, permanent injunction may be issued if necessary to protect constitutional rights). However, it may not be easy to discern when state proceedings will be deemed to have been instituted prior to the federal proceeding. *E.g.*, Hicks v. Miranda, 422 U.S. 332 (1975); Huffman v. Pursue. Ltd., 420 U.S. 592 (1975); *see also* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984).

[1393] Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982); Moore v. Sims, 442 U.S. 415 (1979); Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (state action to close adult theater under the state's nuisance statute and to seize and sell personal property used in the theater's operations).

[1394] Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (holding that federal abstention was warranted in a federal court action to block a state court order issued under the state's "lien and bond" authority). It was "the State's [particular] interest in protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory'" that merited abstention, and not merely a general state interest in protecting ongoing civil proceedings from federal interference. *Id.* at 14 n.12 (quoting *Juidice*, 430 U.S. at 336 n.12).

[1395] Oh. Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986). The "judicial in nature" requirement is more fully explicated in *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989).

[1396] *See New Orleans Pub. Serv., Inc.*, 491 U.S. at 368.

[1397] 571 U.S. ___, No. 12–815, slip op. (2013).

form their judicial functions.[1398] In so doing, the *Sprint Communications* Court clarified that the types of cases previously held to merit abstention under the Younger line defined Younger's scope and did not merely exemplify it.[1399]

Habeas Corpus: Scope of the Writ.—At the English common law, *habeas corpus* was available to attack pretrial detention and confinement by executive order; it could not be used to question the conviction of a person pursuant to the judgment of a court with jurisdiction over the person. That common law meaning was applied in the federal courts.[1400] Expansion began after the Civil War through more liberal court interpretation of "jurisdiction." Thus, one who had already completed one sentence on a conviction was released from custody on a second sentence on the ground that the court had lost jurisdiction upon completion of the first sentence.[1401] Then, the Court held that the constitutionality of the statute upon which a charge was based could be examined on *habeas*, because an unconstitutional statute was said to deprive the trial court of its jurisdiction.[1402] Other cases expanded the want-of-jurisdiction rationale.[1403] But the modern status of the writ of *habeas corpus* may be said to have been started in its development in *Frank v. Mangum*,[1404] in which the Court reviewed on *habeas* a murder conviction in a trial in which there was substantial evidence of mob domination of the judicial process. This issue had been considered and rejected by the state appeals court. The Supreme Court indicated that, though it might initially have had jurisdiction, the trial court could have lost it if mob domination rendered the proceedings lacking in due process.

Further, in order to determine if there had been a denial of due process, a *habeas* court should examine the totality of the process,

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[1398] *Id.* at 2.

[1399] *Id.* at 8.

[1400] *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830) (Chief Justice Marshall); *cf. Ex parte* Parks, 93 U.S. 18 (1876). *But see* Fay v. Noia, 372 U.S. 391, 404–415 (1963). The expansive language used when Congress in 1867 extended the *habeas* power of federal courts to state prisoners "restrained of . . . liberty in violation of the constitution, or of any treaty or law of the United States . . . ," 14 Stat. 385, could have encouraged an expansion of the writ to persons convicted after trial.

[1401] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874).

[1402] *Ex parte* Siebold, 100 U.S. 371 (1880); *Ex parte* Royall, 117 U.S. 241 (1886); Crowley v. Christensen, 137 U.S. 86 (1890); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[1403] *Ex parte* Wilson, 114 U.S. 417 (1885); *In re* Nielsen, 131 U.S. 176 (1889); *In re* Snow, 120 U.S. 274 (1887); *but see Ex parte* Parks, 93 U.S. 18 (1876); *Ex parte* Bigelow, 113 U.S. 328 (1885). It is possible that the Court expanded the office of the writ because its reviewing power over federal convictions was closely limited. F. Frankfurter & J. Landis, supra. Once such review was granted, the Court began to restrict the use of the writ. *E.g.*, Glasgow v. Moyer, 225 U.S. 420 (1912); *In re* Lincoln, 202 U.S. 178 (1906); *In re* Morgan, 203 U.S. 96 (1906).

[1404] 237 U.S. 309 (1915).

including the appellate proceedings. Because Frank's claim of mob domination was reviewed fully and rejected by the state appellate court, he had been afforded an adequate corrective process for any denial of rights, and his custody did not violate the Constitution. Then, eight years later, in *Moore v. Dempsey*,[1405] involving another conviction in a trial in which the court was alleged to have been influenced by a mob and in which the state appellate court had heard and rejected Moore's contentions, the Court directed that the federal district judge himself determine the merits of the petitioner's allegations.

Moreover, the Court shortly abandoned its emphasis upon want of jurisdiction and held that the writ was available to consider constitutional claims as well as questions of jurisdiction.[1406] The landmark case was *Brown v. Allen*,[1407] in which the Court laid down several principles of statutory construction of the *habeas* statute. First, all federal constitutional questions raised by state prisoners are cognizable in federal *habeas*. Second, a federal court is not bound by state court judgments on federal questions, even though the state courts may have fully and fairly considered the issues. Third, a federal *habeas* court may inquire into issues of fact as well as of law, although the federal court may defer to the state court if the prisoner received an adequate hearing. Fourth, new evidentiary hearings must be held when there are unusual circumstances, when there is a "vital flaw" in the state proceedings, or when the state court record is incomplete or otherwise inadequate.

Almost plenary federal *habeas* review of state court convictions was authorized and rationalized in the Court's famous "1963 tril-

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[1405] 261 U.S. 86 (1923).

[1406] Walker v. Johnston, 312 U.S. 275 (1941). *See also* Johnson v. Zerbst, 304 U.S. 458 (1938); Walker v. Johnston, 312 U.S. 275 (1941). The way one reads the history of the developments is inevitably a product of the philosophy one brings to the subject. In addition to the recitations cited in other notes, *compare* Wright v. West, 505 U.S. 277, 285–87 & n.3 (1992) (Justice Thomas for a plurality of the Court), *with* id. at 297–301 (Justice O'Connor concurring).

[1407] 344 U.S. 443 (1953). *Brown* is commonly thought to rest on the assumption that federal constitutional rights cannot be adequately protected only by direct Supreme Court review of state court judgments but that independent review, on *habeas*, must rest with federal judges. It is, of course, true that *Brown* coincided with the extension of most of the Bill of Rights to the states by way of incorporation and expansive interpretation of federal constitutional rights; previously, there was not a substantial corpus of federal rights to protect through *habeas*. *See* Wright v. West, 505 U.S. 277, 297–99 (1992) (Justice O'Connor concurring). In Fay v. Noia, 372 U.S. 391 (1963), Justice Brennan, for the Court, and Justice Harlan, in dissent, engaged in a lengthy, informed historical debate about the legitimacy of *Brown* and its premises. *Compare* id. at 401–24, *with* id. at 450–61. *See* the material gathered and cited in Hart & Wechsler (6th ed.), supra at 1220–1248.

ogy."[1408] First, the Court dealt with the established principle that a federal *habeas* court is empowered, where a prisoner alleges facts which if proved would entitle him to relief, to relitigate facts, to receive evidence and try the facts anew, and sought to lay down broad guidelines as to when district courts must hold a hearing and find facts.[1409] "Where the facts are in dispute, the federal court in *habeas corpus* must hold an evidentiary hearing if the *habeas* applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding."[1410] To "particularize" this general test, the Court went on to hold that an evidentiary hearing must take place when (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state hearing; or (6) for any reason it appears that the state trier of fact did not afford the *habeas* applicant a full and fair fact hearing.[1411]

[1408] Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). These cases dealt, respectively, with the treatment to be accorded a *habeas* petition in the three principal categories in which they come to the federal court: when a state court has rejected petitioner's claims on the merits, when a state court has refused to hear petitioner's claims on the merits because she has failed properly or timely to present them, or when the petition is a second or later petition raising either old or new, or mixed, claims. Of course, as will be demonstrated *infra*, these cases have now been largely drained of their force.

[1409] Townsend v. Sain, 372 U.S. 293, 310–12 (1963). If the district judge concluded that the *habeas* applicant was afforded a full and fair hearing by the state court resulting in reliable findings, the Court said, he may, and ordinarily should, defer to the state factfinding. Id. at 318. Under the 1966 statutory revision, a *habeas* court must generally presume correct a state court's written findings of fact from a hearing to which the petitioner was a party. A state finding cannot be set aside merely on a preponderance of the evidence and the federal court granting the writ must include in its opinion the reason it found the state findings not fairly supported by the record or the existence of one or more listed factors justifying disregard of the factfinding. Pub. L. 89–711, 80 Stat. 1105, 28 U.S.C. § 2254(d). *See* Sumner v. Mata, 449 U.S. 539 (1981); Sumner v. Mata, 455 U.S. 591 (1982); Marshall v. Lonberger, 459 U.S. 422 (1983); Patton v. Yount, 467 U.S. 1025 (1984); Parker v. Dugger, 498 U.S. 308 (1991); Burden v. Zant, 498 U.S. 433 (1991). The presumption of correctness does not apply to questions of law or to mixed questions of law and fact. Miller v. Fenton, 474 U.S. 104, 110–16 (1985). However, in Wright v. West, 505 U.S. 277 (1992), the Justices argued inconclusively whether deferential review of questions of law or especially of law and fact should be adopted.

[1410] Townsend v. Sain, 372 U.S. 293, 312 (1963). The Court was unanimous on the statement, but it divided 5 to 4 on application.

[1411] 372 U.S. at 313–18. Congress in 1966 codified the factors in somewhat different form but essentially codified *Townsend*. Pub. L. 89–711, 80 Stat. 1105, 28 U.S.C. § 2254. The Court believes that Congress neither codified *Townsend* nor precluded the Court from altering the *Townsend* standards. Keeney v. Tamayo-Reyes, 504 U.S.

Second, *Sanders v. United States*[1412] dealt with two interrelated questions: the effects to be given successive petitions for the writ, when the second or subsequent application presented grounds previously asserted or grounds not theretofore raised. Emphasizing that "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged,"[1413] the Court set out generous standards for consideration of successive claims. As to previously asserted grounds, the Court held that controlling weight may be given to a prior denial of relief if (1) the same ground presented was determined adversely to the applicant before, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application, so that the *habeas* court might but was not obligated to deny relief without considering the claim on the merits.[1414] With respect to grounds not previously asserted, a federal court considering a successive petition could refuse to hear the new claim only if it decided the petitioner had deliberately bypassed the opportunity in the prior proceeding to raise it; if not, "[n]o matter how many prior applications for federal collateral relief a prisoner has made," the court must consider the merits of the new claim.[1415]

Third, the most controversial of the 1963 cases, *Fay v. Noia*,[1416] dealt with the important issue of state defaults, of, that is, what the effect on *habeas* is when a defendant in a state criminal trial has failed to raise in a manner in accordance with state procedure

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1, 10, n.5 (1992). *Compare* id. at 20–21 (Justice O'Connor dissenting). *Keeney* formally overruled part of *Townsend*. Id. at 5.

[1412] 373 U.S. 1 (1963). *Sanders* was a § 2255 case, a federal prisoner petitioning for postconviction relief. The Court applied the same liberal rules with respect to federal prisoners as it did for state. *See* Kaufman v. United States, 394 U.S. 217 (1969). As such, the case has also been eroded by subsequent cases. *E.g.*, Davis v. United States, 411 U.S. 233 (1973); United States v. Frady, 456 U.S. 152 (1982).

[1413] 373 U.S. at 8. The statement accorded with the established view that principles of *res judicata* were not applicable in *habeas*. *E.g.*, Price v. Johnston, 334 U.S. 266 (1948); Wong Doo v. United States, 265 U.S. 239 (1924); Salinger v. Loisel, 265 U.S. 224 (1924). Congress in 1948 had appeared to adopt some limited version of *res judicata* for federal prisoners but not for state prisoners, Act of June 25, 1948, 62 Stat. 965, 967, 28 U.S.C. §§ 2244, 2255, but the Court in *Sanders* held the same standards applicable and denied the statute changed existing caselaw. 373 U.S. at 11–14. *But see* id. at 27–28 (Justice Harlan dissenting).

[1414] 373 U.S. at 15. In codifying the *Sanders* standards in 1966, Pub. L. 89–711, 80 Stat. 1104, 28 U.S.C. § 2244(b), Congress omitted the "ends of justice" language. Although it was long thought that the omission probably had no substantive effect, this may not be the case. Kuhlmann v. Wilson, 477 U.S. 436 (1986).

[1415] 373 U.S. at 17–19.

[1416] 372 U.S. 391 (1963). *Fay* was largely obliterated over the years, beginning with Davis v. United States, 411 U.S. 233 (1973), a federal-prisoner post-conviction relief case, and Wainwright v. Sykes, 433 U.S. 72 (1977), but it was not formally overruled until Coleman v. Thompson, 501 U.S. 722, 744–51 (1991).

a claim which he subsequently wants to raise on *habeas*. If, for example, a defendant fails to object to the admission of certain evidence on federal constitutional grounds in accordance with state procedure and within state time constraints, the state courts may therefore simply refuse to address the merits of the claim, and the state's "independent and adequate state ground" bars direct federal review of the claim.[1417] Whether a similar result prevailed upon *habeas* divided the Court in *Brown v. Allen*,[1418] in which the majority held that a prisoner, refused consideration of his appeal in state court because his papers had been filed a day late, could not be heard on *habeas* because of his state procedural default. The result was changed in *Fay v. Noia*, in which the Court held that the adequate and independent state ground doctrine was a limitation only upon the Court's appellate review, but that it had no place in *habeas*. A federal court has power to consider any claim that has been procedurally defaulted in state courts.[1419]

Still, the Court recognized that the states had legitimate interests that were served by their procedural rules, and that it was important that state courts have the opportunity to afford a claimant relief to which he might be entitled. Thus, a federal court had discretion to deny a *habeas* petitioner relief if it found that he had deliberately bypassed state procedure; the discretion could be exercised only if the court found that the prisoner had intentionally waived his right to pursue his state remedy.[1420]

Liberalization of the writ thus made it possible for convicted persons who had fully litigated their claims at state trials and on appeal, who had because of some procedural default been denied the opportunity to have their claims reviewed, or who had been at least once heard on federal *habeas*, to have the chance to present their grounds for relief to a federal *habeas* judge. In addition to opportunities to relitigate the facts and the law relating to their convictions, prisoners could also take advantage of new constitutional decisions that were retroactive. The filings in federal courts increased year by year, but the numbers of prisoners who in fact obtained either release or retrial remained quite small. A major effect, however, was to exacerbate the feelings of state judges and state law enforcement officials and to stimulate many efforts in Congress

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[1417] *E.g.*, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875); Herb v. Pitcairn, 324 U.S. 117 (1945). In the *habeas* context, the procedural-bar rules are ultimately a function of the requirement that petitioners first exhaust state avenues of relief before coming to federal court.

[1418] 344 U.S. 443 (1953).

[1419] Fay v. Noia, 372 U.S. 391, 424–34 (1963).

[1420] 372 U.S. at 438–40.

to enact restrictive *habeas* amendments.[1421] Although the efforts were unsuccessful, complaints were received more sympathetically in a newly constituted Supreme Court and more restrictive rulings ensued.

The discretion afforded the Court was sounded by Justice Rehnquist, who, after reviewing the case law on the 1867 statute, remarked that the history "illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." [1422] The emphasis from early on has been upon the equitable nature of the *habeas* remedy and the judiciary's responsibility to guide the exercise of that remedy in accordance with equitable principles; thus, the Court time and again underscores that the federal courts have plenary *power* under the statute to implement it to the fullest while the Court's decisions may deny them the discretion to exercise the power.[1423]

Change has occurred in several respects in regard to access to and the scope of the writ. It is sufficient to say that the more recent rulings have eviscerated the content of the 1963 trilogy and that *Brown v. Allen* itself is threatened with extinction.

First, the Court in search and seizure cases has returned to the standard of *Frank v. Mangum*, holding that where the state courts afford a criminal defendant the opportunity for a full and adequate hearing on his Fourth Amendment claim, his only avenue of relief in the federal courts is to petition the Supreme Court for review

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[1421] In 1961, state prisoner *habeas* filings totaled 1,020, in 1965, 4,845, in 1970, a high (to date) of 9,063, in 1975, 7,843 in 1980, 8,534 in 1985, 9,045 in 1986. On relief afforded, no reliable figures are available, but estimates indicate that at most 4 percent of the filings result in either release or retrial. C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE (1988 & supps.), § 4261, at 284–91.

[1422] Wainwright v. Sykes, 433 U.S. 72, 81 (1977). The present Court's emphasis in *habeas* cases is, of course, quite different from that of the Court in the 1963 trilogy. Now, the Court favors decisions that promote finality, comity, judicial economy, and channeling the resolution of claims into the most appropriate forum. Keeney v. Tamayo-Reyes, 504 U.S. 1, 8–10 (1992). Overall, federalism concerns are critical. *See* Coleman v. Thompson, 501 U.S. 722, 726 (1991) ("This is a case about federalism." First sentence of opinion). The seminal opinion on which subsequent cases have drawn is Justice Powell's concurrence in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973). He suggested that *habeas* courts should entertain only those claims that go to the integrity of the fact-finding process, thus raising questions of the value of a guilty verdict, or, more radically, that only those prisoners able to make a credible showing of "factual innocence" could be heard on *habeas*. Id. at 256–58, 274–75. As will be evident *infra*, some form of innocence standard now is pervasive in much of the Court's *habeas* jurisprudence.

[1423] 433 U.S. at 83; Stone v. Powell, 428 U.S. 465, 495 n.37 (1976); Francis v. Henderson, 425 U.S. 536, 538 (1976); Fay v. Noia, 372 U.S. 391, 438 (1963). The dichotomy between power and discretion goes all the way back to the case imposing the rule of exhaustion of state remedies. *Ex parte* Royall, 117 U.S. 241, 251 (1886).

and that he cannot raise those claims again in a *habeas* petition.[1424] Grounded as it is in the Court's dissatisfaction with the exclusionary rule, the case has not since been extended to other constitutional grounds,[1425] but the rationale of the opinion suggests the likelihood of reaching other exclusion questions.[1426]

Second, the Court has formulated a "new rule" exception to *habeas* cognizance. That is, subject to two exceptions,[1427] a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal *habeas* relief if the case announces or applies a "new rule." [1428] A decision announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." [1429] If a rule "was susceptible to debate among reasonable minds," it could not have been dictated by precedent, and therefore it must be classified as a "new rule." [1430]

Third, the Court has largely maintained the standards of *Townsend v. Sain*, as embodied in somewhat modified form in statute, with respect to when federal judges must conduct an evidentiary hear-

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[1424] Stone v. Powell, 428 U.S. 465 (1976). The decision is based as much on the Court's dissatisfaction with the exclusionary rule as with its desire to curb *habeas*. Holding that the purpose of the exclusionary rule is to deter unconstitutional searches and seizures rather than to redress individual injuries, the Court reasoned that no deterrent purpose was advanced by applying the rule on *habeas*, except to encourage state courts to give claimants a full and fair hearing. Id. at 493–95.

[1425] *Stone* does not apply to a Sixth Amendment claim of ineffective assistance of counsel in litigating a search and seizure claim. Kimmelman v. Morrison, 477 U.S. 365, 382–383 (1986). *See also* Rose v. Mitchell, 443 U.S. 545 (1979) (racial discrimination in selection of grand jury foreman); Jackson v. Virginia, 443 U.S. 307 (1979) (insufficient evidence to satisfy reasonable doubt standard).

[1426] Issues of admissibility of confessions (*Miranda* violations) and eyewitness identifications are obvious candidates. *See, e.g.*, Duckworth v. Eagan, 492 U.S. 195, 205 (1989) (Justice O'Connor concurring); Brewer v. Williams, 430 U.S. 387, 413–14 (1977) (Justice Powell concurring), and id. at 415 (Chief Justice Burger dissenting); Wainwright v. Sykes, 433 U.S. 72, 87 n.11 (1977) (reserving *Miranda*).

[1427] The first exception permits the retroactive application on *habeas* of a new rule if the rule places a class of private conduct beyond the power of the state to proscribe or addresses a substantive categorical guarantee accorded by the Constitution. The rule must, to say it differently, either decriminalize a class of conduct or prohibit the imposition of a particular punishment on a particular class of persons. The second exception would permit the application of "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. Saffle v. Parks, 494 U.S. 484, 494–95 (1990) (citing cases); Sawyer v. Smith, 497 U.S. 227, 241–45 (1990).

[1428] Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion); Penry v. Lynaugh, 492 U.S. 302, 313–19 (1989).

[1429] Butler v. McKellar, 494 U.S. 407, 412 (1990) (quoting Penry v. Lynaugh, 492 U.S. 302, 314 (1989), which was quoting Teague v. Lane, 489 U.S. 288, 314 (1989). This sentence was quoted again in Whorton v. Bockting, 549 U.S. 406, 416 (2007)).

[1430] 494 U.S. at 415. *See also* Stringer v. Black, 503 U.S. 222, 228–29 (1992). This latter case found that two decisions relied on by petitioner merely drew on existing precedent and so did not establish a new rule. *See also* O'Dell v. Netherland, 521 U.S. 151 (1997); Lambrix v. Singletary, 520 U.S. 518 (1997); Gray v. Netherland, 518 U.S. 152 (1996). *But compare* Bousley v. Brooks, 523 U.S. 614 (1998).

ing. However, one *Townsend* factor, not expressly set out in the statute, has been overturned in order to bring the case law into line with other decisions. *Townsend* had held that a hearing was required if the material facts were not adequately developed at the state-court hearing. If the defendant had failed to develop the material facts in the state court, however, the Court held that, unless he had "deliberately bypass[ed]" that procedural outlet, he was still entitled to the hearing.[1431] The Court overruled that point and substituted a much stricter "cause-and-prejudice" standard.[1432]

Fourth, the Court has significantly stiffened the standards governing when a federal *habeas* court should entertain a second or successive petition filed by a state prisoner—a question with which *Sanders v. United States* dealt.[1433] A successive petition may be dismissed if the same ground was determined adversely to petitioner previously, the prior determination was on the merits, and "the ends of justice" would not be served by reconsideration. It is with the latter element that the Court has become more restrictive. A plurality in *Kuhlmann v. Wilson* [1434] argued that the "ends of justice" standard would be met only if a petitioner supplemented her constitutional claim with a colorable showing of factual innocence. While the Court has not expressly adopted this standard, a later capital case utilized it, holding that a petitioner sentenced to death could escape the bar on successive petitions by demonstrating "actual innocence" of the death penalty by showing by clear and convincing evidence that no reasonable juror would have found the prisoner eligible for the death penalty under applicable state law.[1435]

Even if the subsequent petition alleges new and different grounds, a *habeas* court may dismiss the petition if the prisoner's failure to assert those grounds in the prior, or first, petition constitutes "an abuse of the writ." [1436] Following the 1963 trilogy and especially *Sanders*, the federal courts had generally followed a rule excusing the failure to raise claims in earlier petitions unless the failure was a result of "inexcusable neglect" or of deliberate relinquishment. In

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[1431] Townsend v. Sain, 372 U.S. 293, 313, 317 (1963), imported the "deliberate bypass" standard from Fay v. Noia, 372 U.S. 391, 438 (1963).

[1432] Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). This standard is imported from the cases abandoning Fay v. Noia and is discussed *infra*.

[1433] 373 U.S. 1, 15–18 (1963). The standards are embodied in 28 U.S.C. § 2244(b).

[1434] 477 U.S. 436 (1986).

[1435] Sawyer v. Whitley, 505 U.S. 333 (1992). Language in the opinion suggests that the standard is not limited to capital cases. Id. at 339.

[1436] The standard is in 28 U.S.C. § 2244(b), along with the standard that, if a petitioner "deliberately withheld" a claim, the petition can be dismissed. *See also* 28 U.S.C. § 2254 Rule 9(b) (judge may dismiss successive petition raising new claims if failure to assert them previously was an abuse of the writ).

McClesky v. Zant,[1437] the Court construed the "abuse of the writ" language to require a showing of both "cause and prejudice" before a petitioner may allege in a second or later petition a ground or grounds not alleged in the first. In other words, to avoid subsequent dismissal, a petitioner must allege in his first application all the grounds he may have, unless he can show cause, some external impediment, for his failure and some actual prejudice from the error alleged. If he cannot show cause and prejudice, the petitioner may be heard only if she shows that a "fundamental miscarriage of justice" will occur, which means she must make a "colorable showing of factual innocence."[1438]

Fifth, the Court abandoned the rules of *Fay v. Noia*, although it was not until 1991 that it expressly overruled the case.[1439] *Fay*, it will be recalled, dealt with so-called procedural-bar circumstances; that is, if a defendant fails to assert a claim at the proper time or in accordance with proper procedure under valid state rules, and if the state then refuses to reach the merits of his claim and rules against him solely because of the noncompliance with state procedure, when may a petitioner present the claim in federal *habeas*? The answer in *Fay* was that the federal court always had power to review the claim but that it had discretion to deny relief to a *habeas* claimant if it found that the prisoner had intentionally waived his right to pursue his state remedy through a "deliberate bypass" of state procedure.

That is no longer the law. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules."[1440] The "miscarriage-of-justice" element is probably limited to cases in which actual inno-

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[1437] 499 U.S. 467 (1991).

[1438] 499 U.S. at 489–97. The "actual innocence" element runs through the cases under all the headings.

[1439] Coleman v. Thompson, 501 U.S. 722, 744–51 (1991).

[1440] Coleman v. Thompson, 501 U.S. 722, 750 (1991). The standard has been developed in a long line of cases. Davis v. United States, 411 U.S. 233 (1973) (under federal rules); Francis v. Henderson, 425 U.S. 536 (1976); Engle v. Isaac, 456 U.S. 107 (1982); Murray v. Carrier, 477 U.S. 478 (1986); Harris v. Reed, 489 U.S. 255 (1989). *Coleman* arose because the defendant's attorney had filed his appeal in state court three days late. Wainwright v. Sykes involved the failure of defendant to object to the admission of inculpatory statements at the time of trial. Engle v. Isaac involved a failure to object at trial to jury instructions.

cence or actual impairment of a guilty verdict can be shown.[1441] The concept of "cause" excusing failure to observe a state rule is extremely narrow; "the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[1442] As for the "prejudice" factor, it is an undeveloped concept, but the Court's only case establishes a high barrier.[1443]

The Court continues, with some modest exceptions, to construe *habeas* jurisdiction quite restrictively, but it has now been joined by new congressional legislation that is also restrictive. In *Herrera v. Collins*,[1444] the Court appeared, though ambiguously, to take the position that, although it requires a showing of actual innocence to permit a claimant to bring a successive or abusive petition, a claim of innocence is not alone sufficient to enable a claimant to obtain review of his conviction on *habeas*. Petitioners are entitled in federal *habeas* courts to show that they are imprisoned in violation of the Constitution, not to seek to correct errors of fact. But a claim of innocence does not bear on the constitutionality of one's conviction or detention, and the execution of a person claiming actual innocence would not, by this reasoning, violate the Constitution.[1445] In a subsequent part of the opinion, however, the Court assumed for the sake of argument that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," and it imposed a high standard for mak-

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[1441] *E.g.*, Smith v. Murray, 477 U.S. 527, 538–39 (1986); Murray v. Carrier, 477 U.S. 478, 496 (1986). In Bousley v. Brooks, 523 U.S. 614 (1998), a federal postconviction relief case, petitioner had pled guilty to a federal firearms offense. Subsequently, the Supreme Court interpreted more narrowly the elements of the offense than had the trial court in Bousley's case. The Court held that Bousley by his plea had defaulted, but that he might be able to demonstrate "actual innocence" so as to excuse the default if he could show on remand that it was more likely than not that no reasonable juror would have convicted him of the offense, properly defined.

[1442] Murray v. Carrier, 477 U.S. at 488. This case held that ineffective assistance of counsel is not "cause" unless it rises to the level of a Sixth Amendment violation. *See also* Coleman v. Thompson, 501 U.S. 722, 752–57 (1991) (because petitioner had no right to counsel in state postconviction proceeding where error occurred, he could not claim constitutionally ineffective assistance of counsel). The actual novelty of a constitutional claim at the time of the state court proceeding is "cause" excusing the petitioner's failure to raise it then, Reed v. Ross, 468 U.S. 1 (1984), although the failure of counsel to anticipate a line of constitutional argument then foreshadowed in Supreme Court precedent is insufficient "cause." Engle v. Isaac, 456 U.S. 107 (1982).

[1443] United States v. Frady, 456 U.S. 152, 169 (1982) (under federal rules) (with respect to erroneous jury instruction, inquiring whether the error "so infected the entire trial that the resulting conviction violates due process").

[1444] 506 U.S. 390 (1993).

[1445] 506 U.S. at 398–417.

ing this showing.[1446] Then, in *In re Troy Anthony Davis*,[1447] the Court found a death-row convict with a claim of actual innocence to be entitled to a District Court determination of his *habeas* petition. Justice Stevens, in a concurring opinion joined by Justices Ginsburg and Breyer, noted that the fact that seven of the state's key witnesses had recanted their trial testimony, and that several people had implicated the state's principal witness as the shooter, made the case "exceptional." [1448]

In *Schlup v. Delo*,[1449] the Court adopted the plurality opinion of *Kuhlmann v. Wilson* and held that, absent a sufficient showing of "cause and prejudice," a claimant filing a successive or abusive petition must, as an initial matter, make a showing of "actual innocence" so as to fall within the narrow class of cases implicating a fundamental miscarriage of justice. The Court divided, however, with respect to the showing a claimant must make. One standard, found in some of the cases, was championed by the dissenters; "to show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." [1450] The Court adopted a second standard, under which the petitioner must demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." To meet this burden, a claimant "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." [1451]

[1446] 506 U.S. at 417–419. Justices Scalia and Thomas would have unequivocally held that "[t]here is no basis in text, tradition, or even in contemporary practice . . . for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." Id. at 427–28 (concurring). However, it is not at all clear that all the Justices joining the Court believe innocence to be nondispositive on *habeas*. Id. at 419 (Justices O'Connor and Kennedy concurring), 429 (Justice White concurring). In House v. Bell, 547 U.S. 518, 554–55 (2006), the Court declined to resolve the issue that in *Herrera* it had assumed without deciding: that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *See* Amendment 8, Limitations on *Habeas Corpus* Review of Capital Sentences.

[1447] 557 U.S. ___, No. 08–1443 (2009).

[1448] Justice Scalia, joined by Justice Thomas, dissented, writing, "This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent." He also wrote that the defendant's "claim is a sure loser" and that the Supreme Court was sending the District Court "on a fool's errand."

[1449] 513 U.S. 298 (1995).

[1450] 513 U.S. at 334 (Chief Justice Rehnquist dissenting, with Justices Kennedy and Thomas), 342 (Justice Scalia dissenting, with Justice Thomas). This standard was drawn from Sawyer v. Whitley, 505 U.S. 333 (1992).

[1451] 513 U.S. at 327. This standard was drawn from Murray v. Carrier, 477 U.S. 478 (1986).

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[1452] Congress imposed tight new restrictions on successive or abusive petitions, including making the circuit courts "gate keepers" in permitting or denying the filing of such petitions, with bars to appellate review of these decisions, provisions that in part were upheld in *Felker v. Turpin*.[1453] One important restriction in AEDPA bars a federal *habeas* court from granting a writ to any person in custody under a judgment of a state court "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*." [1454] The Court has made the significance of this restriction plain: Instead of assessing whether federal law was correctly applied *de novo*, as would be the course under direct review of a federal district court decision, the proper approach for federal *habeas* relief under AEDPA is the more deferential one of determining whether the Court has established clear precedent on the issue contested and, if so, whether the state's application of the precedent was reasonable, *i.e.*, no fairminded jurist could find that the state acted in accord with the Court's established precedent.[1455]

For the future, barring changes in Court membership, other curtailing of *habeas* jurisdiction can be expected. Perhaps the Court will impose some form of showing of innocence as a predicate to obtaining a hearing. More far-reaching would be an overturning of *Brown v. Allen* itself and the renunciation of any oversight, save for the extremely limited direct review of state court convictions in the Supreme Court. The Court continues to emphasize broad federalism concerns, rather than simply comity and respect for state courts.

Removal.—In the Judiciary Act of 1789, Congress provided that civil actions commenced in the state courts which could have been brought in the original jurisdiction of the inferior federal courts could

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[1452] Pub. L. 104–132, Title I, 110 Stat. 1217–21, amending 28 U.S.C. §§ 2244, 2253, 2254, and Rule 22 of the Federal Rules of Appellate Procedure.

[1453] 518 U.S. 651 (1996).

[1454] The amended 28 U.S.C. § 2254(d) (emphasis added). The provision was applied in Bell v. Cone, 535 U.S. 685 (2002). *See also* Renico v. Lett, 559 U.S. ___, No. 09–338, slip op. 9–12 (2010). For analysis of its constitutionality, *see* the various opinions in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); Drinkard v. Johnson, 97 F.3d 751 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998); Green v. French, 143 F.3d 865 (4th Cir. 1998), *cert. denied*, 525 U.S. 1090 (1999).

[1455] Harrington v. Richter, 562 U.S. ___, No. 09–587, slip op. at 10–14 (2011) (overturning Ninth Circuit's grant of relief, which was based on ineffective assistance of counsel); *accord* Premo v. Moore, 562 U.S. ___, No. 09–658, slip op. (2011) (same) and Cullen v. Pinholster, No. 09–1088, slip op. (2011) (same).

be removed by the defendant from the state court to the federal court.[1456] Generally, as Congress expanded the original jurisdiction of the inferior federal courts, it similarly expanded removal jurisdiction.[1457] Although there is potentiality for intra-court conflict here, of course, in the implied mistrust of state courts' willingness or ability to protect federal interests, it is rather with regard to the limited areas of removal that do not correspond to federal court original jurisdiction that the greatest amount of conflict is likely to arise.

If a federal officer is sued or prosecuted in a state court for acts done under color of law[1458] or if a federal employee is sued for a wrongful or negligent act that the Attorney General certifies was done while she was acting within the scope of her employment,[1459] the actions may be removed. But the statute most open to federal-state court dispute is the civil rights removal law, which authorizes removal of any action, civil or criminal, which is commenced in a state court "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof."[1460] In the years after enactment of this statute, however, the court narrowly construed the removal privilege granted,[1461] and recent decisions for the most part confirm this

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[1456] § 12, 1 Stat. 79. The removal provision contained the same jurisdictional amount requirement as the original jurisdictional statute. It applied in the main to aliens and defendants not residents of the state in which suit was brought.

[1457] Thus the Act of March 3, 1875, § 2, 18 Stat. 470, conferring federal question jurisdiction on the inferior federal courts, provided for removal of such actions. The constitutionality of congressional authorization for removal is well-established. Chicago & N.W. Ry. v. Whitton's Administrator, 80 U.S. (13 Wall.) 270 (1871); Tennessee v. Davis, 100 U.S. 257 (1880); Ames v. Kansas ex rel. Johnston, 111 U.S. 449 (1884). *See* City of Greenwood v. Peacock, 384 U.S. 808, 833 (1966).

[1458] *See* 28 U.S.C. § 1442. This statute had its origins in the Act of February 4, 1815, § 8, 3 Stat. 198 (removal of civil and criminal actions against federal customs officers for official acts), and the Act of March 2, 1833, § 3, 4 Stat. 633 (removal of civil and criminal actions against federal officers on account of acts done under the revenue laws), both of which grew out of disputes arising when certain states attempted to nullify federal laws, and the Act of March 3, 1863, § 5, 12 Stat. 756 (removal of civil and criminal actions against federal officers for acts done during the existence of the Civil War under color of federal authority). In Mesa v. California, 489 U.S. 121 (1989), the Court held that the statute authorized federal officer removal only when the defendant avers a federal defense. *See* Willingham v. Morgan, 395 U.S. 402 (1969).

[1459] 28 U.S.C. § 2679(d), enacted after Westfall v. Erwin, 484 U.S. 292 (1988).

[1460] 28 U.S.C. § 1443(1). Subsection (2) provides for the removal of state court actions "[f]or any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law." This subsection "is available only to federal officers and to persons assisting such officers in the performance of their official duties." City of Greenwood v. Peacock, 384 U.S. 808, 815 (1966).

[1461] Strauder v. West Virginia, 100 U.S. 303 (1880); Virginia v. Rives, 100 U.S. 313 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Bush v. Kentucky, 107 U.S. 110

restrictive interpretation,[1462] so that instances of successful resort to the statute are fairly rare.

Thus, the Court's position holds, one may not obtain removal simply by an assertion that he is being denied equal rights or that he cannot enforce the law granting equal rights. Because the removal statute requires the denial to be "in the courts of such State," the pretrial conduct of police and prosecutors was deemed irrelevant, because it afforded no basis for predicting that state courts would not vindicate the federal rights of defendants.[1463] Moreover, in predicting a denial of rights, only an assertion founded on a facially unconstitutional state statute denying the right in question would suffice. From the existence of such a law, it could be predicted that defendant's rights would be denied.[1464] Furthermore, the removal statute's reference to "any law providing for . . . equal rights" covered only laws "providing for specific civil rights stated in terms of racial equality."[1465] Thus, apparently federal constitutional pro-

(1883); Gibson v. Mississippi, 162 U.S. 565 (1896); Smith v. Mississippi, 162 U.S. 592 (1896); Murray v. Louisiana, 163 U.S. 101 (1896); Williams v. Mississippi, 170 U.S. 213 (1898); Kentucky v. Powers, 201 U.S. 1 (1906).

[1462] Georgia v. Rachel, 384 U.S. 780 (1966); City of Greenwood v. Peacock, 384 U.S. 808 (1966). There was a hiatus of cases reviewing removal from 1906 to 1966 because from 1887 to 1964 there was no provision for an appeal of an order of a federal court remanding a removed case to the state courts. § 901 of the Civil Rights Act of 1964, 78 Stat. 266, 28 U.S.C. § 1447(d).

[1463] Georgia v. Rachel, 384 U.S. 780, 803 (1966); City of Greenwood v. Peacock, 384 U.S. 808, 827 (1966). Justice Douglas in dissent, joined by Justices Black, Fortas, and Chief Justice Warren, argued that "in the courts of such State" modified only "cannot enforce," so that one could be denied rights prior to as well as during a trial and police and prosecutorial conduct would be relevant. Alternately, he argued that state courts could be implicated in the denial prior to trial by certain actions. Id. at 844–55.

[1464] Georgia v. Rachel, 384 U.S. 780, 797–802 (1966). Thus, in Strauder v. West Virginia, 100 U.S. 303 (1880), African-Americans were excluded by statute from service on grand and petit juries, and it was held that a black defendant's criminal indictment should have been removed because federal law secured nondiscriminatory jury service and it could be predicted that he would be denied his rights before a discriminatorily selected state jury. In Virginia v. Rives, 100 U.S. 313 (1880), there was no state statute, but there was exclusion of Negroes from juries pursuant to custom and removal was denied. In Neal v. Delaware, 103 U.S. 370 (1880), the state provision authorizing discrimination in jury selection had been held invalid under federal law by a state court, and a similar situation existed in Bush v. Kentucky, 107 U.S. 110 (1882). Removal was denied in both cases. The dissenters in City of Greenwood v. Peacock, 384 U.S. 808, 848–52 (1966), argued that federal courts should consider facially valid statutes which might be applied unconstitutionally and state court enforcement of custom as well in evaluating whether a removal petitioner could enforce his federal rights in state court.

[1465] Georgia v. Rachel, 384 U.S. 780, 788–94 (1966); City of Greenwood v. Peacock, 384 U.S. 808, 824–27 (1966), *See also* id. at 847–48 (Justice Douglas dissenting).

visions and many general federal laws do not qualify as a basis for such removal.[1466]

Clause 3. The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.[1467]

IN GENERAL

See analysis under the Sixth Amendment.

SECTION 3. Clause 1. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open court.

TREASON

The Treason Clause is a product of the awareness of the Framers of the "numerous and dangerous excrescences" which had disfigured the English law of treason and was therefore intended to put it beyond the power of Congress to "extend the crime and punishment of treason."[1468] The debate in the Convention, remarks in the ratifying conventions, and contemporaneous public comment make clear that a restrictive concept of the crime was imposed and that ordinary partisan divisions within political society were not to be escalated by the stronger into capital charges of treason, as so often had happened in England.[1469]

[1466] City of Greenwood v. Peacock, 384 U.S. at 824–27. *See also* Johnson v. Mississippi, 421 U.S. 213 (1975).

[1467] *See* the Sixth Amendment.

[1468] 2 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON ADOPTION OF THE CONSTITUTION 469 (1836) (James Wilson). Wilson was apparently the author of the clause in the Committee of Detail and had some first hand knowledge of the abuse of treason charges. J. HURST, THE LAW OF TREASON IN THE UNITED STATES: SELECTED ESSAYS 90–91, 129–136 (1971).

[1469] 2 M. Farrand, supra at 345–50; 2 J. Elliot, supra at 469, 487 (James Wilson); 3 id. at 102–103, 447, 451, 466; 4 id. at 209, 219, 220; THE FEDERALIST No. 43 (J. Cooke ed. 1961), 290 (Madison); id. at No. 84, 576–577 (Hamilton); THE WORKS OF JAMES WILSON 663–69 (R. McCloskey ed. 1967). The matter is comprehensively studied in J. Hurst, supra at chs. 3, 4.

Thus, the Framers adopted two of the three formulations and the phraseology of the English Statute of Treason enacted in 1350,[1470] but they conspicuously omitted the phrase defining as treason the "compass[ing] or imagin[ing] the death of our lord the King,"[1471] under which most of the English law of "constructive treason" had been developed.[1472] Beyond limiting the power of Congress to define treason,[1473] the clause also prescribes limitations upon Congress's ability to make proof of the offense easy to establish[1474] and its ability to define punishment.[1475]

Levying War

Early judicial interpretation of the meaning of treason in terms of levying war was conditioned by the partisan struggles of the early nineteenth century, which involved the treason trials of Aaron Burr and his associates. In *Ex parte Bollman*,[1476] which involved two of Burr's confederates, Chief Justice Marshall, speaking for himself and three other Justices, confined the meaning of levying war to the actual waging of war. "However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that . . . it has been determined that

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[1470] 25 Edward III, Stat. 5, ch. 2, *See* J. Hurst, supra at ch 2.

[1471] Id. at 15, 31–37, 41–49, 51–55.

[1472] Id. "[T]he record does suggest that the clause was intended to guarantee nonviolent political processes against prosecution under any theory or charge, the burden of which was the allegedly seditious character of the conduct in question. The most obviously restrictive feature of the constitutional definition is its omission of any provision analogous to that branch of the Statute of Edward III which punished treason by compassing the death of the king. In a narrow sense, this provision perhaps had no proper analogue in a republic. However, to interpret the silence of the Treason Clause in this way alone does justice neither to the technical proficiency of the Philadelphia draftsmen nor to the practical statecraft and knowledge of English political history among the Framers and proponents of the Constitution. The charge of compassing the king's death had been the principal instrument by which 'treason' had been used to suppress a wide range of political opposition, from acts obviously dangerous to order and likely in fact to lead to the king's death to the mere speaking or writing of views restrictive of the royal authority." Id. at 152–53.

[1473] The clause does not, however, prevent Congress from specifying other crimes of a subversive nature and prescribing punishment, so long as Congress is not merely attempting to evade the restrictions of the Treason Clause. *E.g.*, *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 126 (1807); Wimmer v. United States, 264 Fed. 11, 12–13 (6th Cir. 1920), *cert. denied*, 253 U.S. 494 (1920).

[1474] By the requirement of two witnesses to the same overt act or a confession in open court.

[1475] Cl. 2, infra, "Corruption of the Blood and Forfeiture".

[1476] 8 U.S. (4 Cr.) 75 (1807).

the actual enlistment of men to serve against the government does not amount to levying war." Chief Justice Marshall was careful, however, to state that the Court did not mean that no person could be guilty of this crime who had not appeared in arms against the country. "On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men, for the treasonable purpose, to constitute a levying of war." [1477]

On the basis of these considerations and because no part of the crime charged had been committed in the District of Columbia, the Court held that Bollman and Swartwout could not be tried in the District, and ordered their discharge. Marshall continued by saying that "the crime of treason should not be extended by construction to doubtful cases" and concluded that no conspiracy for overturning the Government and "no enlisting of men to effect it, would be an actual levying of war." [1478]

The Burr Trial.—Not long afterward, the Chief Justice went to Richmond to preside over the trial of Aaron Burr. His ruling [1479] denying a motion to introduce certain collateral evidence bearing on Burr's activities is significant both for rendering the latter's acquittal inevitable and for the qualifications and exceptions made to the *Bollman* decision. In brief, this ruling held that Burr, who had not been present at the assemblage on Blennerhassett's Island, could be convicted of advising or procuring a levying of war only upon the testimony of two witnesses to his having procured the assemblage. This operation having been covert, such testimony was naturally unobtainable. The net effect of Marshall's pronouncements was to make it extremely difficult to convict one of levying war against the United States short of the conduct of or personal participation in actual hostilities.[1480]

[1477] 8 U.S. at 126.

[1478] 8 U.S. at 127.

[1479] United States v. Burr, 8 U.S. (4 Cr.) 469, Appx. (1807).

[1480] There have been lower court cases in which convictions were obtained. As a result of the Whiskey Rebellion, convictions of treason were obtained on the basis of the ruling that forcible resistance to the enforcement of the revenue laws was a constructive levying of war. United States v. Vigol, 29 Fed. Cas. 376 (No. 16621) (C.C.D. Pa. 1795); United States v. Mitchell, 26 Fed. Cas. 1277 (No. 15788) (C.C.D. Pa. 1795). After conviction, the defendants were pardoned. *See also* for the same ruling in a different situation the *Case of Fries*, 9 Fed. Cas. 826, 924 (Nos. 5126, 5127) (C.C.D. Pa. 1799, 1800). The defendant was again pardoned after conviction. About a half century later participation in forcible resistance to the Fugitive Slave Law was held not to be a constructive levying of war. United States v. Hanway, 26 Fed. Cas. 105

Aid and Comfort to the Enemy

The Cramer Case.—Since *Bollman*, the few treason cases that have reached the Supreme Court were outgrowths of World War II and have charged adherence to enemies of the United States and the giving of aid and comfort. In the first of these, *Cramer v. United States*,[1481] the issue was whether the "overt act" had to be "openly manifest treason" or if it was enough if, when supported by the proper evidence, it showed the required treasonable intention.[1482] The Court, in a five-to-four opinion by Justice Jackson, in effect took the former view holding that "the two-witness principle" interdicted "imputation of *incriminating acts* to the accused by circumstantial evidence or by the testimony of a single witness," [1483] even though the single witness in question was the accused himself. "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses," [1484] Justice Jackson asserted. Justice Douglas in a dissent, in which Chief Justice Stone and Justices Black and Reed concurred, contended that Cramer's treasonable intention was sufficiently shown by overt acts as attested to by two witnesses each, plus statements made by Cramer on the witness stand.

The Haupt Case.—The Supreme Court sustained a conviction of treason, for the first time in its history, in 1947 in *Haupt v. United States*.[1485] Here it was held that although the overt acts relied upon to support the charge of treason—defendant's harboring and shel-

(No. 15299) (C.C.E.D. Pa. 1851). Although the United States Government regarded the activities of the Confederate States as a levying of war, the President by Amnesty Proclamation of December 25, 1868, pardoned all those who had participated on the southern side in the Civil War. In applying the Captured and Abandoned Property Act of 1863 (12 Stat. 820) in a civil proceeding, the Court declared that the foundation of the Confederacy was treason against the United States. Sprott v. United States, 87 U.S. (20 Wall.) 459 (1875). *See also* Hanauer v. Doane, 79 U.S. (12 Wall.) 342 (1871); Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869); Young v. United States, 97 U.S. 39 (1878). These four cases bring in the concept of adhering to the enemy and giving him aid and comfort, but these are not criminal cases and deal with attempts to recover property under the Captured and Abandoned Property Act by persons who claimed that they had given no aid or comfort to the enemy. These cases are not, therefore, an interpretation of the Constitution.

[1481] 325 U.S. 1 (1945).

[1482] 89 Law. Ed. 1443–1444 (Argument of Counsel).

[1483] 325 U.S. at 35.

[1484] 325 U.S. at 34–35. Earlier, Justice Jackson had declared that this phase of treason consists of two elements: "adherence to the enemy; and rendering him aid and comfort." A citizen, it was said, may take actions "which do aid and comfort the enemy . . . but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason." Id. at 29. Justice Jackson states erroneously that the requirement of two witnesses to the same overt act was an original invention of the Convention of 1787. Actually it comes from the British Treason Trials Act of 1695. 7 Wm. III, c.3.

[1485] 330 U.S. 631 (1947).

tering in his home his son who was an enemy spy and saboteur, assisting him in purchasing an automobile, and in obtaining employment in a defense plant—were all acts which a father would naturally perform for a son, this fact did not necessarily relieve them of the treasonable purpose of giving aid and comfort to the enemy. Speaking for the Court, Justice Jackson said: "No matter whether young Haupt's mission was benign or traitorous, known or unknown to the defendant, these acts were aid and comfort to him. In the light of this mission and his instructions, they were more than casually useful; they were aids in steps essential to his design for treason. If proof be added that the defendant knew of his son's instruction, preparation and plans, the purpose to aid and comfort the enemy becomes clear." [1486]

The Court held that conversation and occurrences long prior to the indictment were admissible evidence on the question of defendant's intent. And more important, it held that the constitutional requirement of two witnesses to the same overt act or confession in open court does not operate to exclude confessions or admissions made out of court, where a legal basis for the conviction has been laid by the testimony of two witnesses of which such confessions or admissions are merely corroborative. This relaxation of restrictions surrounding the definition of treason evoked obvious satisfaction from Justice Douglas, who saw in *Haupt* a vindication of his position in *Cramer*. His concurring opinion contains what may be called a restatement of the law of treason and merits quotation at length:

"As the *Cramer* case makes plain, the overt act and the intent with which it is done are separate and distinct elements of the crime. Intent need not be proved by two witnesses but may be inferred from all the circumstances surrounding the overt act. But if two witnesses are not required to prove treasonable intent, two witnesses need not be required to show the treasonable character of the overt act. For proof of treasonable intent in the doing of the overt act necessarily involves proof that the accused committed the overt act with the knowledge or understanding of its treasonable character."

"The requirement of an overt act is to make certain a treasonable project has moved from the realm of thought into the realm of action. That requirement is undeniably met in the present case, as it was in the case of *Cramer*."

"The *Cramer* case departed from those rules when it held that 'The two-witness principle is to interdict imputation of *incriminating acts* to the accused by circumstantial evidence or by the testi-

[1486] 330 U.S. at 635–36.

mony of a single witness.' 325 U.S. p. 35. The present decision is truer to the constitutional definition of treason when it forsakes that test and holds that an act, quite innocent on its face, does not need two witnesses to be transformed into a incriminating one." [1487]

The Kawakita Case.—*Kawakita v. United States* [1488] was decided on June 2, 1952. The facts are sufficiently stated in the following headnote: "At petitioner's trial for treason, it appeared that originally he was a native-born citizen of the United States and also a national of Japan by reason of Japanese parentage and law. While a minor, he took the oath of allegiance to the United States; went to Japan for a visit on an American passport; and was prevented by the outbreak of war from returning to this country. During the war, he reached his majority in Japan; changed his registration from American to Japanese, showed sympathy with Japan and hostility to the United States; served as a civilian employee of a private corporation producing war materials for Japan; and brutally abused American prisoners of war who were forced to work there. After Japan's surrender, he registered as an American citizen; swore that he was an American citizen and had not done various acts amounting to expatriation; and returned to this country on an American passport." The question whether, on this record, Kawakita had intended to renounce American citizenship, said the Court, in sustaining conviction, was peculiarly one for the jury and their verdict that he had not so intended was based on sufficient evidence. An American citizen, it continued, owes allegiance to the United States wherever he may reside, and dual nationality does not alter the situation.[1489]

Doubtful State of the Law of Treason Today

The vacillation of Chief Justice Marshall between the *Bollman* [1490] and *Burr* [1491] cases and the vacillation of the Court in the

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[1487] 330 U.S. at 645–46. Justice Douglas cites no cases for these propositions. Justice Murphy in a solitary dissent stated: "But the act of providing shelter was of the type that might naturally arise out of petitioner's relationship to his son, as the Court recognizes. By its very nature, therefore, it is a non-treasonous act. That is true even when the act is viewed in light of all the surrounding circumstances. All that can be said is that the problem of whether it was motivated by treasonous or non-treasonous factors is left in doubt. It is therefore not an overt act of treason, regardless of how unlawful it might otherwise be." Id. at 649.

[1488] 343 U.S. 717 (1952).

[1489] 343 U.S. at 732. For citations in the subject of dual nationality, *see* id. at 723 n.2. Three dissenters asserted that Kawakita's conduct in Japan clearly showed he was consistently demonstrating his allegiance to Japan. "As a matter of law, he expatriated himself as well as that can be done." Id. at 746.

[1490] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75 (1807).

[1491] United States v. Burr, 8 U.S. (4 Cr.) 469 (1807).

Cramer [1492] and *Haupt* [1493] cases leave the law of treason in a somewhat doubtful condition. The difficulties created by *Burr* have been obviated to a considerable extent through the punishment of acts ordinarily treasonable in nature under a different label,[1494] within a formula provided by Chief Justice Marshall himself in *Bollman*. The passage reads: "Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our Constitution . . . must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation." [1495]

Clause 2. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

CORRUPTION OF THE BLOOD AND FORFEITURE

The Confiscation Act of 1862 "to suppress Insurrection, to punish Treason and Rebellion, to seize and confiscate the Property of Rebels" [1496] raised issues under Article III, § 3, cl. 2. Because of the constitutional doubts of the President, the act was accompanied by an explanatory joint resolution which stipulated that only a life estate terminating with the death of the offender could be sold and that at his death his children could take the fee simple by descent

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[1492] Cramer v. United States, 325 U.S. 1 (1945).

[1493] Haupt v. United States, 330 U.S. 631 (1947).

[1494] *Cf.* United States v. Rosenberg, 195 F.2d 583 (2d. Cir. 1952), *cert denied*, 344 U.S. 889 (1952), holding that in a prosecution under the Espionage Act for giving aid to a country, not an enemy, an offense distinct from treason, neither the two-witness rule nor the requirement as to the overt act is applicable.

[1495] *Ex parte* Bollman, 8 U.S. (4 Cr.) 126, 127 (1807). Justice Frankfurter appended to his opinion in Cramer v. United States, 325 U.S. 1, 25 n.38 (1945), a list taken from the government's brief of all the cases prior to *Cramer* in which construction of the Treason Clause was involved. The same list, updated, appears in J. Hurst, *supra* at 260–67. Professor Hurst was responsible for the historical research underlying the government's brief in *Cramer*.

[1496] 12 Stat. 589. This act incidentally did not designate rebellion as treason.

as his heirs without deriving any title from the United States. In applying this act, passed pursuant to the war power and not the power to punish treason,[1497] the Court in one case[1498] quoted with approval the English distinction between a disability absolute and perpetual and one personal or temporary. Corruption of blood as a result of attainder of treason was cited as an example of the former and was defined as the disability of any of the posterity of the attained person "to claim any inheritance in fee simple, either as heir to him, or to any ancestor above him."[1499]

[1497] Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871).

[1498] Wallach v. Van Riswick, 92 U.S. 202, 213 (1876).

[1499] *Lord de la Warre's Case*, 11 Coke Rept. 1a, 77 Eng. Rept. 1145 (1597). A number of cases dealt with the effect of a full pardon by the President of owners of property confiscated under this act. They held that a full pardon relieved the owner of forfeiture as far as the government was concerned but did not divide the interest acquired by third persons from the government during the lifetime of the offender. Illinois Cent. R.R. v. Bosworth, 133 U.S. 92, 101 (1890); Knote v. United States, 95 U.S. 149 (1877); Wallach v. Van Riswick, 92 U.S. 202, 203 (1876); *Armstrong's Foundry*, 73 U.S. (6 Wall.) 766, 769 (1868). There is no direct ruling on the question of whether only citizens can commit treason. In Carlisle v. United States, 83 U.S. (16 Wall.) 147, 154–155 (1873), the Court declared that aliens while domiciled in this country owe a temporary allegiance to it and may be punished for treason equally with a native-born citizen in the absence of a treaty stipulation to the contrary. This case involved the attempt of certain British subjects to recover claims for property seized under the Captured and Abandoned Property Act, 12 Stat. 820 (1863), which provided for the recovery of property or its value in suits in the Court of Claims by persons who had not rendered aid and comfort to the enemy. Earlier, in United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 97 (1820), which involved a conviction for manslaughter under an act punishing manslaughter and treason on the high seas, Chief Justice Marshall going beyond the necessities of the case stated that treason "is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary." However, *see* In re Shinohara, Court Martial Orders, No. 19, September 8, 1949, p. 4, Office of the Judge Advocate General of the Navy, reported in 17 Geo. Wash. L. Rev. 283 (1949). In this case, an enemy alien resident in United States territory (Guam) was found guilty of treason for acts done while the enemy nation of which he was a citizen occupied such territory. Under English precedents, an alien residing in British territory is open to conviction for high treason on the theory that his allegiance to the Crown is not suspended by foreign occupation of the territory. DeJager v. Attorney General of Natal (1907), A.C., 96 L.T.R. 857. *See also* 18 U.S.C. § 2381.

ARTICLE IV

STATES' RELATIONS

CONTENTS

STATES' RELATIONS

ARTICLE IV

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

SOURCES AND EFFECT OF FULL FAITH AND CREDIT

Private International Law

The historical background of the Full Faith and Credit Clause is furnished by the branch of private law that is variously termed "private international law," "conflict of laws," and "comity." This branch comprises a body of rules, based largely on the writings of jurists and judicial decisions, in accordance with which the courts of one country, or "jurisdiction," will ordinarily, in the absence of a local policy to the contrary, extend recognition and enforcement to rights claimed by individuals by virtue of the laws or judicial decisions of another country or "jurisdiction." Most frequently applied examples of these rules include the following: the rule that a marriage that is good in the country where performed (*lex loci*) is good elsewhere; the rule that contracts are to be interpreted in accordance with the laws of the country where entered into (*lex loci contractus*) unless the parties clearly intended otherwise; the rule that immovables may be disposed of only in accordance with the law of the country where situated (*lex rei sitae*);[1] the converse rule that chattels adhere to the person of their owner and hence are disposable by him, even when located elsewhere, in accordance with the law of his domicile (*lex domicilii*); the rule that, regardless of where the cause arose, the courts of any country where personal service of the defendant can be effected will take jurisdiction of certain types of personal actions—hence termed "transitory"—and accord such remedy as the *lex fori* affords. Still other rules, of first importance in the present connection, determine the recognition that the judgments of the courts of one country shall receive from those of another country.

[1] Clark v. Graham, 19 U.S. (6 Wheat.) 577 (1821), is an early case in which the Supreme Court enforced this rule.

So, even had the states of the Union remained in a mutual relationship of entire independence, private claims originating in one often would have been assured recognition and enforcement in the others. The Framers felt, however, that the rules of private international law should not be left among the states altogether on a basis of comity and hence subject always to the overruling local policy of the *lex fori*, but ought to be in some measure at least placed on the higher plane of constitutional obligation. In fulfillment of this intent, the Full Faith and Credit Clause was inserted, and Congress was empowered to enact supplementary and enforcing legislation.[2]

JUDGMENTS: EFFECT TO BE GIVEN IN FORUM STATE

In General

Article IV, § 1, has had its principal operation in relation to judgments. Embraced within the relevant discussions are two principal classes of judgments. First, those in which the judgment involved was offered as a basis of proceedings for its own enforcement outside the state where rendered, as for example, when an action for debt is brought in the courts of State B on a judgment for money damages rendered in State A; second, those in which the judgment involved was offered, in conformance with the principle of *res judicata*, in defense in a new or collateral proceeding growing out of the same facts as the original suit, as for example, when a decree of divorce granted in State A is offered as barring a suit for divorce by the other party to the marriage in the courts of State B.

The English courts and the different state courts in the United States, while recognizing "foreign judgments *in personam*," which were reducible to money terms as affording a basis for actions in debt, originally accorded them generally only the status of *prima facie* evidence in support thereof, so that the merits of the original controversy could always be opened. When offered in defense, on the other hand, "foreign judgments *in personam*" were regarded as conclusive upon everybody on the theory that, as stated by Chief Justice Marshall, "it is a proceeding *in rem*, to which all the world are parties."[3] The pioneer case was *Mills v. Duryee*,[4] decided in 1813. In an action brought in the circuit court of the District of Columbia, the equivalent of a state court for this purpose, on a judgment from a New York court, the defendant endeavored to reopen the whole

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[2] Congressional legislation under the Full Faith and Credit Clause, insofar as it is pertinent to adjudication under the clause, is today embraced in 28 U.S.C. §§ 1738–1739. *See also* 28 U.S.C. §§ 1740–1742.

[3] Mankin v. Chandler, 16 F. Cas. 625, 626 (No. 9030) (C.C.D. Va. 1823).

[4] 11 U.S. (7 Cr.) 481 (1813). *See also* Everett v. Everett, 215 U.S. 203 (1909); Insurance Company v. Harris, 97 U.S. 331 (1878).

question of the merits of the original case by a plea of "*nil debet*." It was answered in the words of the first implementing statute of 1790[5] that such records and proceedings were entitled in each state to the same faith and credit as in the state of origin, and that, as they were records of a court in the state of origin, and so conclusive of the merits of the case there, they were equally so in the forum state. The Court found that it had not been the intention of the Constitution merely to reenact the common law—that is, the principles of private international law—with regard to the reception of foreign judgments, but to amplify and fortify these.[6] Some years later, in *Hampton v. McConnell*,[7] Chief Justice Marshall went even further, using language that seems to show that he regarded the judgment of a state court as constitutionally entitled to be accorded in the courts of sister states not simply the faith and credit on conclusive evidence but the validity of final judgment.

When, however, the next important case arose, the Court had come under new influences. This case was *McElmoyle v. Cohen*,[8] in which the issue was whether a statute of limitations of the State of Georgia, which applied only to judgments obtained in courts other than those of Georgia, could constitutionally bar an action in Georgia on a judgment rendered by a court of record of South Carolina. Declining to follow Marshall's lead in *Hampton v. McConnell*, the Court held that the Constitution was not intended "materially to interfere with the essential attributes of the *lex fori*," that the act of Congress only established a rule of evidence—of conclusive evidence to be sure, but still of evidence only; and that it was neces-

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[5] Chap. XI, 1 Stat. 122 ("records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken").

[6] On the same basis, a judgment cannot be impeached either in or out of the state by showing that it was based on a mistake of law. American Express Co. v. Mullins, 212 U.S. 311, 312 (1909). Fauntleroy v. Lum, 210 U.S. 230 (1908); Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915); Hartford Life Ins. Co. v. Barber, 245 U.S. 146 (1917).

[7] 16 U.S. (3 Wheat.) 234 (1818).

[8] 38 U.S. (13 Pet.) 312 (1839). *See also* Townsend v. Jemison, 50 U.S. (9 How.) 407, 413–20 (1850); Bank of Alabama v. Dalton, 50 U.S. (9 How.) 522, 528 (1850); Bacon v. Howard, 61 U.S. (20 How.) 22, 25 (1858); Christmas v. Russell, 72 U.S. (5 Wall.) 290, 301 (1866); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 292 (1888); Great Western Tel. Co. v. Purdy, 162 U.S. 329 (1896); Wells v. Simonds Abrasive Co., 345 U.S. 514, 516–18 (1953). Subsequently, the Court reconsidered and adhered to the rule of these cases, although the Justices divided with respect to rationales. Sun Oil Co. v. Wortman, 486 U.S. 717 (1988). Acknowledging that in some areas it had treated statutes of limitations as substantive rules, such as in diversity cases to insure uniformity with state law in federal courts, the Court ruled that such rules are procedural for full-faith-and-credit purposes, since "[t]he purpose . . . of the Full Faith and Credit Clause . . . is . . . to delimit spheres of state legislative competence." Id. at 727.

sary, in order to carry into effect in a state the judgment of a court of a sister state, to institute a fresh action in the court of the former, in strict compliance with its laws; and that, consequently, when remedies were sought in support of the rights accruing in another jurisdiction, they were governed by the *lex fori*. In accord with this holding, the Court further held that foreign judgments enjoy, not the right of priority or privilege or lien that they have in the state where they are pronounced but only what the *lex fori* gives them by its own laws, in their character of foreign judgments.[9] A judgment of a state court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court in another state, as it has in the state in which it was rendered.[10]

A judgment enforceable in the state where rendered must be given effect in another state, notwithstanding that the modes of procedure to enforce its collection may not be the same in both states.[11] If the initial court acquired jurisdiction, its judgment is entitled to full faith and credit elsewhere even though the former, by reason of the departure of the defendant with all his property, after having been served, has lost its capacity to enforce it by execution in the state of origin.[12] "A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action, the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. Recovery upon it can be resisted only on the grounds that the court which rendered it was without jurisdiction, . . . or that it has ceased to be obligatory because of payment or other discharge . . . or that it is a cause of action for which the State of the forum has not provided a court."[13]

On the other hand, the clause is not violated when a judgment is disregarded because it is not conclusive of the issues before a court of the forum. Conversely, no greater effect can be given than

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[9] Cole v. Cunningham, 133 U.S. 107, 112 (1890). *See also* Stacy v. Thrasher, 47 U.S. (6 How.) 44, 61 (1848); Milwaukee County v. White Co., 296 U.S. 268 (1935).

[10] Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887); Hanley v. Donoghue, 116 U.S. 1, 3 (1885). *See also* Green v. Van Buskirk, 74 U.S. (7 Wall.) 139, 140 (1869); Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912); Roche v. McDonald, 275 U.S. 449 (1928); Ohio v. Chattanooga Boiler Co., 289 U.S. 439 (1933).

[11] Sistare v. Sistare, 218 U.S. 1 (1910).

[12] Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913). *See also* Fall v. Eastin, 215 U.S. 1 (1909).

[13] Milwaukee County v. White Co., 296 U.S. 268, 275–276 (1935).

is given in the state where rendered. Thus, an interlocutory judgment may not be given the effect of a final judgment.[14] Likewise, when a federal court does not attempt to foreclose the state court from hearing all matters of personal defense that landowners might plead, a state court may refuse to accept the former's judgment as determinative of the landowners' liabilities.[15] Similarly, though a confession of judgment upon a note, with a warrant of attorney annexed, in favor of the holder, is in conformity with a state law and usage as declared by the highest court of the state in which the judgment is rendered, the judgement may be collaterally impeached upon the ground that the party in whose behalf it was rendered was not in fact the holder.[16] But a consent decree, which under the law of the state has the same force and effect as a decree *in invitum*, must be given the same effect in the courts of another state.[17]

Subsequent to its departure from *Hampton v. McConnell*,[18] the Court does not appear to have formulated, as a substitute, any clear-cut principles for disposing of the contention that a state need not provide a forum for a particular type of judgment of a sister state. Thus, in one case, it held that a New York statute forbidding foreign corporations doing a domestic business to sue on causes originating outside the state was constitutionally applicable to prevent such a corporation from suing on a judgment obtained in a sister state.[19] But, in a later case, it ruled that a Mississippi statute forbidding contracts in cotton futures could not validly close the courts of the state to an action on a judgment obtained in a sister state on such a contract, although the contract in question had been entered into in the forum state and between its citizens.[20] Following the later rather than the earlier precedent, subsequent cases[21] have held: (1) that a state may adopt such system of courts and form of remedy as it sees fit but cannot, under the guise of merely affect-

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[14] Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521 (1873); Robertson v. Pickrell, 109 U.S. 608, 610 (1883).

[15] Kersh Lake Dist. v. Johnson, 309 U.S. 485 (1940). *See also* Texas & Pac. Ry. v. Southern Pacific Co., 137 U.S. 48 (1890).

[16] National Exchange Bank v. Wiley, 195 U.S. 257, 265 (1904). *See also* Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287 (1890).

[17] Harding v. Harding, 198 U.S. 317 (1905).

[18] 16 U.S. (3 Wheat.) 234 (1818).

[19] Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903).

[20] Fauntleroy v. Lum, 210 U.S. 230 (1908). Justice Holmes, who spoke for the Court in both cases, asserted in his opinion in the latter that the New York statute was "directed to jurisdiction," the Mississippi statute to "merits," but four Justices could not grasp the distinction.

[21] Kenney v. Supreme Lodge, 252 U.S. 411 (1920), and cases there cited. Holmes again spoke for the Court. *See also* Cook, *The Powers of Congress under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 434 (1919).

ing the remedy, deny enforcement of claims otherwise within the protection of the full faith and credit clause when its courts have general jurisdiction of the subject matter and the parties;[22] (2) that, accordingly, a forum state that has a shorter period of limitations than the state in which a judgment was granted and later revived erred in concluding that, whatever the effect of the revivor under the law of the state of origin, it could refuse enforcement of the revived judgment;[23] (3) that the courts of one state have no jurisdiction to enjoin the enforcement of judgments at law obtained in another state, when the same reasons assigned for granting the restraining order were passed upon on a motion for new trial in the action at law and the motion denied;[24] (4) that the constitutional mandate requires credit to be given to a money judgment rendered in a civil cause of action in another state, even though the forum state would have been under no duty to entertain the suit on which the judgment was founded, because a state cannot, by the adoption of a particular rule of liability or of procedure, exclude from its courts a suit on a judgment;[25] and (5) that, similarly, tort claimants in State A who obtain a judgment against a foreign insurance company, notwithstanding that, prior to judgment, domiciliary State B appointed a liquidator for the company, vested company assets in him, and ordered suits against the company stayed, are entitled to have such judgment recognized in State B for purposes of determining the amount of the claim, although not for determination of what priority, if any, their claim should have.[26]

Jurisdiction: A Prerequisite to Enforcement of Judgments

The jurisdictional question arises both in connection with judgments *in personam* against nonresident defendants to whom it is alleged personal service was not obtained in the state originating the judgment and in relation to judgments *in rem* against property or a status alleged not to have been within the jurisdiction of the

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[22] Broderick v. Rosner, 294 U.S. 629 (1935), approved in Hughes v. Fetter, 341 U.S. 609 (1951).

[23] Union Nat'l Bank v. Lamb, 337 U.S. 38 (1949); *see also* Roche v. McDonald, 275 U.S. 449 (1928).

[24] Embry v. Palmer, 107 U.S. 3, 13 (1883).

[25] Titus v. Wallick, 306 U.S. 282, 291–292 (1939).

[26] Morris v. Jones, 329 U.S. 545 (1947). Moreover, there is no apparent reason why Congress, acting on the implications of Marshall's words in Hampton v. McConnell, 16 U.S. (3 Wheat.) 234 (1818), should not clothe extrastate judgments of any particular type with the full status of domestic judgments of the same type in the several states. Thus, why should not a judgment for alimony be made directly enforceable in sister states instead of merely furnishing the basis of an action in debt?

court which handed down the original decree.[27] Records and proceedings of courts wanting jurisdiction are not entitled to credit.[28]

Judgments in Personam.—When the subject matter of a suit is merely the defendant's liability, it is necessary that it should appear from the record that the defendant has been brought within the jurisdiction of the court by personal service of process, or by his voluntary appearance, or that he had in some manner authorized the proceeding.[29] Thus, when a state court endeavored to acquire jurisdiction of a nonresident defendant by an attachment of his property within the state and constructive notice to him, its judgment was defective for want of jurisdiction and hence could not afford the basis of an action against the defendant in the court of another state, although it bound him so far as the property attached by virtue of the inherent right of a state to assist its own citizens in obtaining satisfaction of their just claims.[30]

The fact that a nonresident defendant was only temporarily in the state when he was served in the original action does not vitiate the judgment thus obtained and later relied upon as the basis of an action in his home state.[31] Also a judgment rendered in the state of his domicile against a defendant who, pursuant to the statute thereof providing for the service of process on absent defendants, was personally served in another state is entitled to full faith and

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[27] Cooper v. Reynolds, 77 U.S. (10 Wall.) 308 (1870); Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961). Full faith and credit extends to the issue of the original court's jurisdiction, when the second court's inquiry discloses that the question of jurisdiction had been fully and fairly litigated and finally decided in the court which rendered the original judgment. Durfee v. Duke, 375 U.S. 106 (1963); Underwriters Assur. Co. v. North Carolina Life Ins. Ass'n, 455 U.S. 691 (1982).

[28] Board of Public Works v. Columbia College, 84 U.S. (17 Wall.) 521, 528 (1873). *See also* Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 291 (1888); Huntington v. Attrill, 146 U.S. 657, 685 (1892); Brown v. Fletcher's Estate, 210 U.S. 82 (1908); Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912); Spokane Inland R.R. v. Whitley, 237 U.S. 487 (1915). However, a denial of credit, founded upon a mere suggestion of want of jurisdiction and unsupported by evidence, violates the clause. *See* V.L. v. E.L., 577 U.S. ___, No. 15–648, slip op. at 6 (2016) (per curiam) (holding that where a Georgia judgment appeared on its face to have been issued by a court with jurisdiction and there was no established Georgia law to the contrary, the Alabama Supreme Court erred in refusing to grant the Georgia judgment full faith and credit); *see also* Rogers v. Alabama, 192 U.S. 226, 231 (1904); Wells Fargo & Co. v. Ford, 238 U.S. 503 (1915).

[29] Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287 (1890). *See also* Galpin v. Page, 85 U.S. (18 Wall.) 350 (1874); Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907); Brown v. Fletcher's Estate, 210 U.S. 82 (1908).

[30] Pennoyer v. Neff, 95 U.S. 714 (1878). *See*, for a reformulation of this case's due process foundation, Shaffer v. Heitner, 433 U.S. 186 (1977).

[31] Renaud v. Abbot, 116 U.S. 277 (1886); Jaster v. Currie, 198 U.S. 144 (1905); Reynolds v. Stockton, 140 U.S. 254 (1891).

credit.[32] When the matter of fact or law on which jurisdiction depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment.[33]

Because the principle of *res judicata* applies only to proceedings between the same parties and privies, the plea by defendant in an action based on a judgment that he was not party or privy to the original action raises the question of jurisdiction; although a judgment against a corporation in one state may validly bind a stockholder in another state to the extent of the par value of his holdings,[34] an administrator acting under a grant of administration in one state stands in no sort of relation of privity to an administrator of the same estate in another state.[35] But where a judgment of dismissal was entered in a federal court in an action against one of two joint tortfeasors, in a state in which such a judgment would constitute an estoppel in another action in the same state against the other tortfeasor, such judgment is not entitled to full faith and credit in an action brought against the tortfeasor in another state.[36]

Service on Foreign Corporations.—In 1856, the Court decided *Lafayette Ins. Co. v. French*,[37] a pioneer case in its general class. It held that, where a corporation chartered by the State of Indiana was allowed by a law of Ohio to transact business in the latter state upon the condition that service of process upon the agent of the corporation should be considered as service upon the corporation itself, a judgment obtained against the corporation by means of such process ought to receive in Indiana the same faith and credit

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[32] Milliken v. Meyer, 311 U.S. 457, 463 (1940). In the pioneer case of D'Arcy v. Ketchum, 52 U.S. (1 How.) 165 (1851), the question presented was whether a judgment rendered by a New York court, under a statute which provided that, when joint debtors were sued and one of them was brought into court on a process, a judgment in favor of the plaintiff would entitle him to execute against all, must be accorded full faith and credit in Louisiana when offered as a basis of an action in debt against a resident of that state who had not been served by process in the New York action. The Court ruled that the original implementing statute, 1 Stat. 122 (1790), did not reach this type of case, and hence the New York judgment was not enforceable in Louisiana against defendant. Had the Louisiana defendant thereafter ventured to New York, however, he could, as the Constitution then stood, have been subjected to the judgment to the same extent as the New York defendant who had been personally served. Subsequently, the disparity between operation of personal judgment in the home state has been eliminated, because of the adoption of the Fourteenth Amendment. In divorce cases, however, it still persists in some measure. *See infra*.

[33] Adam v. Saenger, 303 U.S. 59, 62 (1938).

[34] Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900).

[35] Stacy v. Thrasher, 47 U.S. (6 How.) 44, 58 (1848).

[36] Bigelow v. Old Dominion Copper Co., 225 U.S. 111 (1912).

[37] 59 U.S. (18 How.) 404 (1856).

as it was entitled to in Ohio.[38] Later cases establish under both the Fourteenth Amendment and Article IV, § 1, that the cause of action must have arisen within the state obtaining service in this way,[39] that service on an officer of a corporation, not its resident agent and not present in the state in an official capacity, will not confer jurisdiction over the corporation,[40] that the question whether the corporation was actually "doing business" in the state may be raised.[41] On the other hand, the fact that the business was interstate is no objection.[42]

Service on Nonresident Motor Vehicle Owners.—By analogy to the above cases, it has been held that a state may require nonresident owners of motor vehicles to designate an official within the state as an agent upon whom process may be served in any legal proceedings growing out of their operation of a motor vehicle within the state.[43] Although these cases arose under the Fourteenth Amendment alone, unquestionably a judgment validly obtained upon this species of service could be enforced upon the owner of a car through the courts of his home state.

Judgments in Rem.—In sustaining the challenge to jurisdiction in cases involving judgments *in personam*, the Court in the main was making only a somewhat more extended application of recognized principles. In order to sustain the same kind of challenge in cases involving judgments *in rem* it has had to make law outright. The leading case is *Thompson v. Whitman*.[44] Thompson, sheriff of Monmouth County, New Jersey, acting under a New Jersey statute, had seized a sloop belonging to Whitman and by a proceeding *in rem* had obtained its condemnation and forfeiture in a local court. Later, Whitman, a citizen of New York, brought an action for trespass against Thompson in the United States Circuit Court for the Southern District of New York, and Thompson answered by producing a record of the proceedings before the New Jersey tribunal. Whitman thereupon set up the contention that the New Jersey court had acted without jurisdiction, inasmuch as the sloop which was the subject matter of the proceedings had been seized outside the

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[38] To the same effect is Connecticut Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

[39] Simon v. Southern Ry., 236 U.S. 115 (1915).

[40] Goldey v. Morning News, 156 U.S. 518 (1895); Riverside Mills v. Menefee, 237 U.S. 189 (1915).

[41] International Harvester v. Kentucky, 234 U.S. 579 (1914); Riverside Mills v. Menefee, 237 U.S. 189 (1915).

[42] International Harvester v. Kentucky, 234 U.S. 579 (1914).

[43] Kane v. New Jersey, 242 U.S. 160 (1916); Hess v. Pawloski, 274 U.S. 352 (1927), limited in Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[44] 85 U.S. (18 Wall.) 457 (1874).

county to which, by the statute under which it had acted, its jurisdiction was confined.

As previously explained, the plea of lack of privity cannot be set up in defense in a sister state against a judgment *in rem*. In a proceeding *in rem*, however, the presence of the *res* within the court's jurisdiction is a prerequisite, and this, it was urged, had not been the case in *Thompson v. Whitman*. Could, then, the Court consider this challenge with respect to a judgment which was offered, not as the basis for an action for enforcement through the courts of a sister state but merely as a defense in a collateral action? As the law stood in 1873, it apparently could not.[45] All difficulties, nevertheless, to its consideration of the challenge to jurisdiction in the case were brushed aside by the Court. Whenever, it said, the record of a judgment rendered in a state court is offered "in evidence" by either of the parties to an action in another state, it may be contradicted as to the facts necessary to sustain the former court's jurisdiction; "and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding the claim that they did exist."[46]

Divorce Decrees: Domicile as the Jurisdictional Prerequisite

This, however, was only the beginning of the Court's lawmaking in cases *in rem*. The most important class of such cases is that in which the respondent to a suit for divorce offers in defense an earlier decree from the courts of a sister state. By the almost universally accepted view prior to 1906, a proceeding in divorce was one against the marriage status, *i.e.*, *in rem*, and hence might be validly brought by either party in any state where he or she was *bona fide* domiciled;[47] and, conversely, when the plaintiff did not have a *bona fide* domicile in the state, a court could not render a decree binding in other states even if the nonresident defendant entered a personal appearance.[48]

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[45] 1 H. Black, A Treatise on the Law of Judgments § 246 (1891).

[46] *See also* Simmons v. Saul, 138 U.S. 439, 448 (1891). In other words, the challenge to jurisdiction is treated as equivalent to the plea nul tiel record, a plea that was recognized even in Mills v. Duryee as available against an attempted invocation of the full faith and credit clause. What is not pointed out by the Court is that it was also assumed in the earlier case that such a plea could always be rebutted by producing a transcript, properly authenticated in accordance with the act of Congress, of the judgment in the original case. *See also* Brown v. Fletcher's Estate, 210 U.S. 82 (1908); German Savings Soc'y v. Dormitzer, 192 U.S. 125, 128 (1904); Grover & Baker Machine Co. v. Radcliffe, 137 U.S. 287, 294 (1890).

[47] Cheever v. Wilson, 76 U.S. (9 Wall.) 108 (1870).

[48] Andrews v. Andrews, 188 U.S. 14 (1903). *See also* German Savings Soc'y v. Dormitzer, 192 U.S. 125 (1904).

Sec. 1—Full Faith and Credit

Divorce Suit: In Rem or in Personam; Judicial Indecision.—In 1906, however, by a vote of five to four, the Court departed from its earlier ruling, rendered five years previously in *Atherton v. Atherton*,[49] and in *Haddock v. Haddock*,[50] it announced that a divorce proceeding might be viewed as one *in personam*. In the former case it was held, in the latter case denied, that a divorce granted a husband without personal service upon the wife, who at the time was residing in another state, was entitled to recognition under the full faith and credit clause and the acts of Congress; the difference between the cases consisted solely in the fact that in the *Atherton* case the husband had driven the wife from their joint home by his conduct, while in the *Haddock* case he had deserted her. The court that granted the divorce in *Atherton v. Atherton* was held to have had jurisdiction of the marriage status, with the result that the proceeding was one *in rem* and hence required only service by publication upon the respondent. Haddock's suit, on the contrary, was held to be as to the wife *in personam* and so to require personal service upon her or her voluntary appearance, neither of which had been had; although, notwithstanding this, the decree in the latter case was held to be valid in the state where obtained because of the state's inherent power to determine the status of its own citizens. The upshot was a situation in which a man and a woman, when both were in Connecticut, were divorced; when both were in New York, were married; and when the one was in Connecticut and the other in New York, the former was divorced and the latter married. In *Atherton v. Atherton* the Court had earlier acknowledged that "a husband without a wife, or a wife without a husband, is unknown to the law."

The practical difficulties and distresses likely to result from such anomalies were pointed out by critics of the decision at the time. In point of fact, they have been largely avoided, because most of the state courts have continued to give judicial recognition and full faith and credit to one another's divorce proceedings on the basis of the older idea that a divorce proceeding is one *in rem*, and that if the applicant is *bona fide* domiciled in the state the court has jurisdiction in this respect. Moreover, until the second of the *Williams v. North Carolina* cases[51] was decided in 1945, there had not been manifested the slightest disposition to challenge judicially the power of the states to determine what shall constitute domicile for divorce purposes. A few years before, the Court in *Davis v. Davis*[52]

[49] 181 U.S. 155, 162 (1901).
[50] 201 U.S. 562 (1906).
[51] 317 U.S. 287 (1942) 325 U.S. 226 (1945).
[52] 305 U.S. 32 (1938).

rejected contentions adverse to the validity of a Virginia decree of which enforcement was sought in the District of Columbia. In this case, a husband, after having obtained in the District a decree of separation subject to payment of alimony, established years later a residence in Virginia and sued there for a divorce. Personally served in the District, where she continued to reside, the wife filed a plea denying that her husband was a resident of Virginia and averred that he was guilty of a fraud on the court in seeking to establish a residence for purposes of jurisdiction. In ruling that the Virginia decree, granting to the husband an absolute divorce minus any alimony payment, was enforceable in the District, the Court stated that in view of the wife's failure, while in Virginia litigating her husband's status to sue, to answer the husband's charges of willful desertion, it would be unreasonable to hold that the husband's domicile in Virginia was not sufficient to entitle him to a divorce effective in the District. The finding of the Virginia court on domicile and jurisdiction was declared to bind the wife. *Davis v. Davis* is distinguishable from the *Williams v. North Carolina* decisions in that in the former determination of the jurisdictional prerequisite of domicile was made in a contested proceeding whereas in the *Williams* cases it was not.

Williams I and Williams II.—In *Williams* I and *Williams* II, the husband of one marriage and the wife of another left North Carolina, obtained six-week divorce decrees in Nevada, married there, and resumed their residence in North Carolina where both previously had been married and domiciled. Prosecuted for bigamy, the defendants relied upon their Nevada decrees and won the preliminary round of this litigation, that is, in *Williams* I,[53] when a majority of the Justices, overruling *Haddock v. Haddock*, declaring that in this case, the Court must assume that the petitioners for divorce had a *bona fide* domicile in Nevada and not that their Nevada domicile was a sham. "[E]ach State, by virtue of its command over the domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of substituted service meet the requirements of due process." Accordingly, a decree granted by Nevada to one, who, it is assumed, is at the time *bona fide* domiciled therein, is binding upon the courts of other states, including North Carolina in which the marriage was performed and where the other party to the marriage is still domiciled when the divorce was decreed. In view of its assumptions, which it justified

[53] 317 U.S. 287, 298–99 (1942).

on the basis of an inadequate record, the Court did not here pass upon the question whether North Carolina had the power to refuse full faith and credit to a Nevada decree because it was based on residence rather than domicile or because, contrary to the findings of the Nevada court, North Carolina found that no *bona fide* domicile had been acquired in Nevada.[54]

Presaging what ruling the Court would make when it did get around to passing upon the latter question, Justice Jackson, dissenting in *Williams* I, protested that "this decision repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages one of the parties to which can afford a short trip there. . . . While a state can no doubt set up its own standards of domicile as to its internal concerns, I do not think it can require us to accept and in the name of the Constitution impose them on other states. . . . The effect of the Court's decision today—that we must give extraterritorial effect to any judgment that a state honors for its own purposes—is to deprive this Court of control over the operation of the full faith and credit and the due process clauses of the Federal Constitution in cases of contested jurisdiction and to vest it in the first state to pass on the facts necessary to jurisdiction." [55]

Notwithstanding that one of the deserted spouses had died since the initial trial and that another had remarried, North Carolina, without calling into question the status of the latter marriage, began a new prosecution for bigamy; when the defendants appealed the conviction resulting therefrom, the Supreme Court, in *Williams* II,[56] sustained the adjudication of guilt as not denying full faith and credit to the Nevada divorce decree. Reiterating the doctrine that jurisdiction to grant divorce is founded on domicile,[57] the Court held that a decree of divorce rendered in one state may be collaterally impeached in another by proof that the court that rendered the decree lacked jurisdiction (the parties not having been domiciled therein), even though the record of proceedings in that court purports to show jurisdiction.[58]

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[54] 317 U.S. at 302.

[55] 317 U.S. at 312, 321, 315.

[56] 325 U.S. 226, 229 (1945).

[57] Bell v. Bell, 181 U.S. 175 (1901); Andrews v. Andrews, 188 U.S. 14 (1903).

[58] Strong dissents were filed, which have influenced subsequent holdings. Among these was that of Justice Rutledge, which attacked both the consequences of the decision as well as the concept of jurisdictional domicile on which it was founded:

"Unless 'matrimonial domicil,' banished in *Williams I* [by the overruling of *Haddock v. Haddock*], has returned renamed ['domicil of origin'] in *Williams II*, every decree becomes vulnerable in every state. Every divorce, wherever granted . . . may now be reexamined by every other state, upon the same or different evidence, to redetermine the 'jurisdiction fact,' always the ultimate conclusion of 'domicil.' . . . " 325 U.S. at 248.

Sec. 1—Full Faith and Credit

Cases Following Williams II.—Fears registered by the dissenters in the second *Williams* case that it might undermine the stability of all divorces and that the court of each forum state, by its own independent determination of domicile, might refuse recognition of foreign decrees, were temporarily set at rest by *Sherrer v. Sherrer*,[59] which required Massachusetts, a state of domiciliary origin, to accord full faith and credit to a 90-day Florida decree that the husband had contested. The husband, upon receiving notice by mail, retained Florida counsel who entered a general appearance and denied all allegations in the complaint, including the wife's residence. At the hearing, the husband, though present in person and by counsel, did not offer evidence in rebuttal of the wife's proof of her Florida residence, and, when the Florida court ruled that she was a *bona fide* resident, the husband did not appeal. Because the findings of the requisite jurisdictional facts, unlike those in the second *Williams* case, were made in proceedings in which the defendant appeared and participated, the requirements of full faith and credit were held to bar him from collaterally attacking such findings in a suit instituted by him in his home state of Massachu-

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"The Constitution does not mention domicil. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common law conception. . . . No legal conception, save possibly 'jurisdiction' . . . affords such possibilities for uncertain application. . . . Apart from the necessity for travel, [to effect a change of domicile, the latter] criterion comes down to a purely subjective mental state, related to remaining for a length of time never yet defined with clarity. . . . When what must be proved is a variable, the proof and the conclusion which follows upon it inevitably take on that character. . . . [The majority has] not held that denial of credit will be allowed, only if the evidence [as to the place of domicile] is different or depending in any way upon the character or the weight of the difference. The test is not different evidence. It is evidence, whether the same or different and, if different, without regard to the quality of the difference, from which an opposing set of inferences can be drawn by the trier of fact 'not unreasonably.' . . . But [the Court] does not define 'not unreasonably.' It vaguely suggests a supervisory function, to be exercised when the denial [of credit] strikes its sensibilities as wrong, by some not stated standard. . . . There will be no 'weighing' [of evidence]. There will be only examination for sufficiency, with the limits marked by 'scintillas' and the like." 325 U.S. at 255, 258, 259, 251.

No less disposed to prophesy undesirable results from this decision was Justice Black whose dissenting opinion Justice Douglas joined:

"[T]oday, as to divorce decrees, [the Full Faith and Credit Clause] . . . has become a nationally disruptive force. . . . [T]he Court has in effect [held] . . . that 'the full faith and credit clause does not apply to actions for divorce, and that the states alone have the right to determine what effect shall be given to the decrees of other states in this class of cases.' . . . If the Court is today abandoning that principle . . . that a marriage validly consummated under one state's laws is valid in every other state [, then a] . . . consequence is to subject people to criminal prosecutions for adultery and bigamy merely because they exercise their constitutional right to pass from a state in which they were validly married on to another state which refuses to recognize their marriage. Such a consequence runs counter to the basic guarantees of our federal union." 325 U.S. at 264, 265.

[59] 334 U.S. 343 (1948).

setts, particularly in the absence of proof that the divorce decree was subject to such collateral attack in a Florida court. Having failed to take advantage of the opportunities afforded him by his appearance in the Florida proceeding, the husband was thereafter precluded from relitigating in another state the issue of his wife's domicile already passed upon by the Florida court.

In *Coe v. Coe*,[60] embracing a similar set of facts, the Court applied like reasoning to reach a similar result. Massachusetts again was compelled to recognize the validity of a six-week Nevada decree obtained by a husband who had left Massachusetts after a court of that state had refused him a divorce and had granted his wife separate support. In the Nevada proceeding, the wife appeared personally and by counsel filed a cross-complaint for divorce, admitted the husband's residence, and participated personally in the proceedings. After finding that it had jurisdiction of the plaintiff, defendant, and the subject matter involved, the Nevada court granted the wife a divorce, which was valid, final, and not subject to collateral attack under Nevada law. The husband married again, and on his return to Massachusetts, his ex-wife petitioned the Massachusetts court to adjudge him in contempt for failing to make payments for her separate support under the earlier Massachusetts decree. Inasmuch as there was no intimation that under Massachusetts law a decree of separate support would survive a divorce, recognition of the Nevada decree as valid accordingly necessitated a rejection of the ex-wife's contention.

Appearing to review *Williams* II, and significant for the social consequences produced by the result it decreed, is *Rice v. Rice*.[61] To

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[60] 334 U.S. 378 (1948). In a dissenting opinion filed in Sherrer v. Sherrer, but applicable also to Coe v. Coe, Justice Frankfurter, with Justice Murphy concurring, asserted his inability to accept the proposition advanced by the majority that "regardless of how overwhelming the evidence may have been that the asserted domicile in the State offering bargain-counter divorces was a sham, the home State of the parties is not permitted to question the matter if the form of a controversy has been gone through." 334 U.S. at 377.

[61] 336 U.S. 674 (1949). Of four justices dissenting, Black, Douglas, Rutledge, and Jackson, Justice Jackson alone filed a written opinion. To him the decision was "an example of the manner in which, in the law of domestic relations, 'confusion now hath made his masterpiece,' . . . I think that the judgment of the Connecticut court, but for the first *Williams* case and its progeny, might properly have held that the Rice divorce decree was void for every purpose because it was rendered by a state court which never obtained jurisdiction of the nonresident defendant and which had no power to reach into another state and summon her before it. But if we adhere to the holdings that the Nevada court had power over her for the purpose of blasting her marriage and opening the way to a successor, I do not see the justice of inventing a compensating confusion in the device of divisible divorce by which the parties are half-bound and half-free and which permits Rice to have a wife who cannot become his widow and to leave a widow who was no longer his wife." Id. at 676, 679–680.

determine the widowhood status of the party litigants in relation to inheritance of property of a husband who had deserted his first wife in Connecticut, had obtained an *ex parte* divorce in Nevada, and after remarriage, had died without ever returning to Connecticut, the first wife, joining the second wife and the administrator of his estate as defendants, petitioned a Connecticut court for a declaratory judgment. After having placed upon the first wife the burden of proving that the decedent had not acquired a *bona fide* domicile in Nevada, and after giving proper weight to the claims of power by the Nevada court, the Connecticut court concluded that the evidence sustained the contentions of the first wife, and in so doing, it was upheld by the Supreme Court. *Sherrer v. Sherrer* and *Coe v. Coe*, previously discussed, were declared not to be in point, because no personal service had been made upon the first wife, nor had she in any way participated in the Nevada proceedings. She was not, therefore, precluded from challenging the findings of the Nevada court that the decedent was, at the time of the divorce, domiciled in that state.[62]

Claims for Alimony or Property in Forum State.—In *Esenwein v. Commonwealth*,[63] decided on the same day as the second *Williams* case, the Supreme Court also sustained a Pennsylvania court in its refusal to recognize an *ex parte* Nevada decree on the ground that the husband who obtained it never acquired a *bona fide* domicile in the latter state. In this instance, the husband and wife had separated in Pennsylvania, where the wife was granted a support order; after two unsuccessful attempts to win a divorce in that state, the husband departed for Nevada. Upon the receipt of a Nevada decree, the husband thereafter established a residence in Ohio and filed an action in Pennsylvania for total relief from the support order. In a concurring opinion, in which he was joined by Justice Black, Justice Douglas stressed the "basic difference between the problem of marital capacity and the problem of support," and stated that it was "not apparent that the spouse who obtained the decree can de-

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[62] Vermont violated the clause in sustaining a collateral attack on a Florida divorce decree, the presumption of Florida's jurisdiction over the cause and the parties not having been overcome by extrinsic evidence or the record of the case. Cook v. Cook, 342 U.S. 126 (1951). *Sherrer* and *Coe* were relied upon. There seems, therefore, to be no doubt of their continued vitality.

A Florida divorce decree was also at the bottom of another case in which the daughter of a divorced man by his first wife and his legatee under his will sought to attack his divorce in the New York courts and thereby indirectly his third marriage. The Court held that, because the attack would not have been permitted in Florida under the doctrine of *res judicata*, it was not permissible under the Full Faith and Credit Clause in New York. On the whole, it appears that the principle of *res judicata* is slowly winning out against the principle of domicile. Johnson v. Muelberger, 340 U.S. 581 (1951).

[63] 325 U.S. 279 (1945).

feat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree," unless the other spouse appeared or was personally served. "The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardized." Or, as Justice Rutledge succinctly stated in a concurring opinion, "the jurisdictional foundation for a decree in one state capable of foreclosing an action for maintenance or support in another may be different from that required to alter the marital status with extraterritorial effect."[64]

Three years later, but on this occasion speaking for a majority of the Court, Justice Douglas reiterated these views in *Estin v. Estin*.[65] In this case, a New York court had granted a wife a decree of separation and awarded her alimony. Subsequently, in Nevada, her husband obtained an *ex parte* divorce decree, which made no provision for alimony. He ceased paying the New York-awarded alimony, and the wife sued him in New York. The husband argued that the Nevada decree had wiped out the alimony claim, but Justice Douglas found that "Nevada had no power to adjudicate [the wife's] rights in the New York judgment, [and] New York need not give full faith and credit to that phase of Nevada's judgment. . . . . The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony."[66] Accordingly, the Nevada decree could not prevent New York from applying its own rule of law which, unlike that of Pennsylvania,[67] does permit a support order to survive a divorce decree.[68]

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[64] 325 U.S. at 281–83.

[65] 334 U.S. 541 (1948). *See also* the companion case of Kreiger v. Kreiger, 334 U.S. 555 (1948).

[66] 334 U.S. at 549.

[67] Esenwein v. Commonwealth, 325 U.S. 279, 280 (1945).

[68] Because the record, in his opinion, did not make it clear whether New York "law" held that no "*ex parte*" divorce decree could terminate a prior New York separate maintenance decree, or merely that no "*ex parte*" decree of divorce *of another State* could, Justice Frankfurter dissented and recommended that the case be remanded for clarification. Justice Jackson dissented on the ground that under New York law, a New York divorce would terminate the wife's right to alimony, and if the Nevada decree is good, it was entitled to no less effect in New York than a local decree. However, for reasons stated in his dissent in the first *Williams* case, 317 U.S. 287, he would have preferred not to give standing to constructive service divorces obtained on short residence. 334 U.S. 541, 549–54 (1948). These two Justices filed similar dissents in the companion case of Kreiger v. Kreiger, 334 U.S. 555, 557 (1948).

Sec. 1—Full Faith and Credit

Such a result was justified as "accommodat[ing] the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern,"[69] the concern of New York being that of protecting the abandoned wife against impoverishment. In *Simons v. Miami National Bank*,[70] the Court held that a dower right in the deceased husband's estate is extinguished even though a divorce decree was obtained in a proceeding in which the nonresident wife was served by publication only and did not make a personal appearance.[71] The Court found the principle of *Estin v. Estin* [72] inapplicable. In *Simons*, the Court rejected the contention that the forum court, in giving recognition to the foreign court's separation decree providing for maintenance and support, has to allow for dower rights in the deceased husband's estate in the forum state.[73] Full faith and credit is not denied to a sister state's separation decree, including an award of monthly alimony, where nothing in the foreign state's separation decree could be construed as creating or preserving any interest in the nature of or in lieu of dower in any property of the decedent, wherever located and where the law of the forum state did not treat such a decree as having such effect nor indicate such an effect irrespective of the existence of the foreign state's decree.[74]

Decrees Awarding Alimony, Custody of Children.—A by-product of divorce litigation are decrees for the payment of alimony, judgments for accrued and unpaid installments of alimony, and judicial awards of the custody of children, all of which necessitate application of the Full Faith and Credit Clause when extrastate enforcement is sought for them. Thus, a judgment in State A for alimony in arrears and payable under a prior judgment of separation that is not by its terms conditional nor subject by the law of State A to modification or recall, and on which execution was directed to issue, is entitled to recognition in the forum state. Although an obligation for accrued alimony could have been modified or set aside in State A prior to its merger in the judgment, such a judgment, by the law of State A, is not lacking in finality.[75] As to the finality of alimony decrees in general, the Court had previously ruled that where such a decree is rendered, payable in future installments, the right to such installments becomes absolute and vested on becoming due, provided no modification of the decree has been

[69] 334 U.S. at 549.
[70] 381 U.S. 81 (1965).
[71] 381 U.S. at 84–85.
[72] 334 U.S. 541 (1948).
[73] 381 U.S. at 84–85.
[74] 381 U.S. at 85.
[75] Barber v. Barber, 323 U.S. 77, 84 (1944).

made prior to the maturity of the installments.[76] However, a judicial order requiring the payment of arrearages in alimony, which exceeded the alimony previously decreed, is invalid for want of due process, the respondent having been given no opportunity to contest it.[77] "A judgment obtained in violation of procedural due process," said Chief Justice Stone, "is not entitled to full faith and credit when sued upon in another jurisdiction." [78]

An example of a custody case was one involving a Florida divorce decree that was granted *ex parte* to a wife who had left her husband in New York, where he was served by publication. The decree carried with it an award of the exclusive custody of the child, whom the day before the husband had secretly seized and brought back to New York. The Court ruled that the decree was adequately honored by a New York court when, in *habeas corpus* proceedings, it gave the father rights of visitation and custody of the child during stated periods and exacted a surety bond of the wife conditioned on her delivery of the child to the father at the proper times,[79] it having not been "shown that the New York court in modifying the Florida decree exceeded the limits permitted under Florida laws. There is therefore a failure of proof that the Florida decree received less credit in New York than it had in Florida."

Answering a question left open in the preceding holding as to the binding effect of the *ex parte* award, the Court more recently acknowledged that, in a proceeding challenging a mother's right to retain custody of her children, a state is not required to give effect to the decree of another state's court, which had never acquired personal jurisdiction over the mother of her children, and which awarded custody to the father as the result of an *ex parte* divorce action in-

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[76] Sistare v. Sistare, 218 U.S. 1, 11 (1910). *See also* Barber v. Barber, 62 U.S. (21 How.) 582 (1859); Lynde v. Lynde, 181 U.S. 183, 186–187 (1901); Audubon v. Shufeldt, 181 U.S. 575, 577 (1901); Bates v. Bodie, 245 U.S. 520 (1918); Yarborough v. Yarborough, 290 U.S. 202 (1933); Loughran v. Loughran, 292 U.S. 216 (1934).

[77] Griffin v. Griffin, 327 U.S. 220 (1946).

[78] 327 U.S. at 228. An alimony case of a quite extraordinary pattern was that of Sutton v. Leib, 342 U.S. 402 (1952). Because of the diverse citizenship of the parties, who had once been husband and wife, the case was brought by the latter in a federal court in Illinois. Her suit was to recover unpaid alimony that was to continue until her remarriage. To be sure, she had, as she confessed, remarried in Nevada, but the marriage had been annulled in New York on the ground that the man was already married, because his divorce from his previous wife was null and void, she having neither entered a personal appearance nor been personally served. The Court, speaking by Justice Reed, held that the New York annulment of the Nevada marriage must be given full faith and credit in Illinois but left Illinois to decide for itself the effect of the annulment upon the obligations of petitioner's first husband.

[79] Halvey v. Halvey, 330 U.S. 610, 615 (1947).

stituted by him.[80] In *Kovacs v. Brewer*,[81] however, the Court indicated that a finding of changed circumstances rendering observance of an absentee foreign custody decree inimical to the best interests of the child is essential to sustain the validity of the forum court's refusal to enforce a foreign decree, rendered with jurisdiction over all the parties but the child, and revising an initial decree by transferring custody from the paternal grandfather to the mother. However, when, as is true in Virginia, agreements by parents as to shared custody of a child do not bind the state's courts, the dismissal by a Virginia court of a *habeas corpus* petition instituted by a father to obtain custody was not *res judicata* in that state; therefore, even if the Full Faith and Credit Clause were applicable to child custody decrees, it would not require a South Carolina court, in a custody suit instituted by the wife, to recognize a court order not binding in Virginia.[82]

Status of the Law.—The doctrine of divisible divorce, as developed by Justice Douglas in *Estin v. Estin*,[83] may have become the prevailing standard for determining the enforceability of foreign divorce decrees. If this is the case, then it may be that an *ex parte* divorce, founded upon acquisition of domicile by one spouse in the state that granted it, is effective to destroy the marital status of both parties in the state of domiciliary origin and probably in all other states. The effect is to preclude subsequent prosecutions for bigamy but not to alter rights as to property, alimony, or custody of children in the state of domiciliary origin of a spouse who neither was served nor appeared personally.

In any event, the accuracy of these conclusions has not been impaired by any decision of the Court since 1948. Thus, in *Armstrong v. Armstrong*,[84] an *ex parte* divorce decree obtained by the husband in Florida was deemed to have been adequately recognized by an Ohio court when, with both parties before it, it disposed of the wife's suit for divorce and alimony with a decree limited solely to an award

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[80] May v. Anderson, 345 U.S. 528 (1953). Justices Jackson, Reed, and Minton dissented.

[81] 356 U.S. 604 (1958). Rejecting the implication that recognition must be accorded unless the circumstances have changed, Justice Frankfurter dissented on the ground that in determining what is best for the welfare of the child, the forum court cannot be bound by an absentee, foreign custody decree, "irrespective of whether changes in circumstances are objectively provable."

[82] Ford v. Ford, 371 U.S. 187, 192–94 (1962). As part of a law dealing with parental kidnaping, Congress, in Pub. L. 96–611, 8(a), 94 Stat. 3569, 28 U.S.C. § 1738A, required states to give full faith and credit to state court custody decrees provided the original court had jurisdiction and is the home state of the child.

[83] 334 U.S. 541 (1948).

[84] 350 U.S. 568 (1956).

of alimony.[85] Similarly, a New York court was held not bound by an *ex parte* Nevada divorce decree, rendered without personal jurisdiction over the wife, to the extent that it relieved the husband of all marital obligations, and in an *ex parte* action for separation and alimony instituted by the wife, it was competent to sequester the husband's property in New York to satisfy his obligations to the wife.[86]

Other Types of Decrees

Probate Decrees.—Many judgments, enforcement of which has given rise to litigation, embrace decrees of courts of probate respecting the distribution of estates. In order that a court have jurisdiction of such a proceeding, the decedent must have been domiciled in the state, and the question whether he was so domiciled at the time of his death may be raised in the court of a sister state.[87] Thus, when a court of State A, in probating a will and issuing letters, in a proceeding to which all distributees were parties, expressly found that the testator's domicile at the time of death was in State A, such adjudication of domicile was held not to bind one subsequently appointed as domiciliary administrator c.t.a. in State B, in which he was liable to be called upon to deal with claims of local creditors and that of the State itself for taxes, he having not been a party to the proceeding in State A. In this situation, it was held, a court of State C, when disposing of local assets claimed by both personal representatives, was free to determine domicile in accordance with the law of State C.[88]

Similarly, there is no such relation of privity between an executor appointed in one state and an administrator c.t.a. appointed in another state as will make a decree against the latter binding upon the former.[89] On the other hand, judicial proceedings in one state, under which inheritance taxes have been paid and the administration upon the estate has been closed, are denied full faith and credit by the action of a probate court in another state in assuming jurisdiction and assessing inheritance taxes against the beneficiaries of

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[85] Four Justices, Black, Douglas, Clark, and Chief Justice Warren, disputed the Court's contention that the Florida decree contained no ruling on the wife's entitlement to alimony and mentioned that for want of personal jurisdiction over the wife, the Florida court was not competent to dispose of that issue. 350 U.S. at 575.

[86] Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). Two Justices dissented. Justice Frankfurter was unable to perceive "why dissolution of the marital relation is not so personal as to require personal jurisdiction over the absent spouse, while the denial of alimony . . . is." Justice Harlan maintained that, because the wife did not become a domiciliary of New York until after the Nevada decree, she had no pre-divorce rights in New York that the latter was obligated to protect.

[87] Tilt v. Kelsey, 207 U.S. 43 (1907); Burbank v. Ernst, 232 U.S. 162 (1914).

[88] Riley v. New York Trust Co., 315 U.S. 343 (1942).

[89] Brown v. Fletcher's Estate, 210 U.S. 82, 90 (1908). *See also* Stacy v. Thrasher, 47 U.S. (6 How.) 44, 58 (1848); McLean v. Meek, 59 U.S. (18 How.) 16, 18 (1856).

the estate, when under the law of the former state the order of the probate court barring all creditors who had failed to bring in their demand from any further claim against the executors was binding upon all.[90] What is more important, however, is that the *res* in such a proceeding, that is, the estate, in order to entitle the judgment to recognition under Article IV, 1, must have been located in the state or legally attached to the person of the decedent. Such a judgment is accordingly valid, generally speaking, to distribute the intangible property of the decedent, though the evidences thereof were actually located elsewhere.[91] This is not so, on the other hand, as to tangibles and realty. In order that the judgment of a probate court distributing these be entitled to recognition under the Constitution, they must have been located in the state; as to tangibles and realty outside the state, the decree of the probate court is entirely at the mercy of the *lex rei sitae*.[92] So, the probate of a will in one state, while conclusive in that state, does not displace legal provisions necessary to its validity as a will of real property in other states.[93]

Adoption Decrees.—That a statute legitimizing children born out of wedlock does not entitle them by the aid of the Full Faith and Credit Clause to share in the property located in another state is not surprising, in view of the general principle (to which there are exceptions) that statutes do not have extraterritorial operation.[94] For the same reason, adoption proceedings in one state are not denied full faith and credit by the law of the sister state that excludes children adopted by proceedings in other states from the right to inherit land in the sister state.[95]

Garnishment Decrees.—Garnishment proceedings combine some of the elements of both an *in rem* and an *in personam* action. Sup-

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[90] Tilt v. Kelsey, 207 U.S. 43 (1907). In the case of Borer v. Chapman, 119 U.S. 587, 599 (1887), involving a complicated set of facts, it was held that a judgment in a probate proceeding, which was merely ancillary to proceedings in another State and which ordered the residue of the estate to be assigned to the legatee and discharged the executor from further liability, did not prevent a creditor, who was not a resident of the State in which the ancillary judgment was rendered, from setting up his claim in the state probate court which had the primary administration of the estate.

[91] Blodgett v. Silberman, 277 U.S. 1 (1928).

[92] Kerr v. Moon, 22 U.S. (9 Wheat.) 565 (1824); McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825); Clarke v. Clarke, 178 U.S. 186 (1900). The controlling principle of these cases is not confined to proceedings in probate. A court of equity "not having jurisdiction of the *res* cannot affect it by its decree nor by a deed made by a master in accordance with the decree." Fall v. Eastin, 215 U.S. 1, 11 (1909).

[93] Robertson v. Pickrell, 109 U.S. 608, 611 (1883). *See also* Darby v. Mayer, 23 U.S. (10 Wheat.) 465 (1825); Gasquet v. Fenner, 247 U.S. 16 (1918).

[94] Olmstead v. Olmstead, 216 U.S. 386 (1910).

[95] Hood v. McGehee, 237 U.S. 611 (1915).

pose that A owes B and B owes C, and that the two former live in a different state from C. A, while on a brief visit to C's state, is presented with a writ attaching his debt to B and also a summons to appear in court on a named day. The result of the proceedings thus instituted is that a judgment is entered in C's favor against A to the amount of his indebtedness to B. Subsequently A is sued by B in their home state and offers the judgment, which he has in the meantime paid, in defense. It was argued on behalf of B that A's debt to him had a *situs* in their home state and furthermore that C could not have sued B in this same state without formally acquiring a domicile there. Both propositions were, however, rejected by the Court, which held that the judgment in the garnishment proceedings was entitled to full faith and credit as against B's action.[96]

Penal Judgments: Types Entitled to Recognition

The Full Faith and Credit Clause has been interpreted in the light of the "incontrovertible maxim" that "the courts of no country execute the penal laws of another."[97] In the leading case of *Huntington v. Attrill*,[98] however, the Court so narrowly defined "penal" in this connection as to make it substantially synonymous with "criminal" and on this basis held a judgment which had been recovered under a state statute making the officers of a corporation who signed and recorded a false certificate of the amount of its capital stock liable for all of its debts to be entitled under Article IV, § 1, to recognition and enforcement in the courts of sister states. Nor, in general, is a judgment for taxes to be denied full faith and credit in state and federal courts merely because it is for taxes. In *Nelson v. George*,[99] in which a prisoner was tried in California and North Carolina and convicted and sentenced in both states for various felonies, the Court determined that the Full Faith and Credit Clause did not require California to enforce a penal judgment handed down by North Carolina; California was free to consider what effect if any it would give to the North Carolina detainer.[100] Until the obligation to extradite matured, the Full Faith and Credit Clause did not

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[96] Harris v. Balk, 198 U.S. 215 (1905). *See also* Chicago, R.I. & P. Ry. v. Sturm, 174 U.S. 710 (1899); King v. Cross, 175 U.S. 396, 399 (1899); Louisville & Nashville Railroad v. Deer, 200 U.S. 176 (1906); Baltimore & Ohio R.R. v. Hostetter, 240 U.S. 620 (1916). *Harris* itself has not survived the due process reformulation of Shaffer v. Heitner, 433 U.S. 186 (1977). *See* Rush v. Savchuk, 444 U.S. 320 (1980).

[97] *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825). *See also* Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

[98] 146 U.S. 657 (1892). *See also* Dennick v. Railroad Co., 103 U.S. 11 (1881); Moore v. Mitchell, 281 U.S. 18 (1930); Milwaukee County v. White Co., 296 U.S. 268 (1935).

[99] 399 U.S. 224 (1970).

[100] 399 U.S. at 229.

require California to enforce the North Carolina penal judgment in any way.

Fraud as a Defense to Suits on Foreign Judgments

With regard to whether recognition of a state judgment can be refused by the forum state on other than jurisdictional grounds, there are dicta to the effect that judgments for which extraterritorial operation is demanded under Article IV, § 1 and acts of Congress are "impeachable for manifest fraud." But unless the fraud affected the jurisdiction of the court, the vast weight of authority is against the proposition. Also, it is universally agreed that a judgment may not be impeached for alleged error or irregularity,[101] or as contrary to the public policy of the state where recognition is sought for it under the Full Faith and Credit Clause.[102] Previously listed cases indicate, however, that the Court in fact has permitted local policy to determine the merits of a judgment under the pretext of regulating jurisdiction.[103] Thus, in *Cole v. Cunningham*,[104] the Court sustained a Massachusetts court in enjoining, in connection with insolvency proceedings instituted in that state, a Massachusetts creditor from continuing in New York courts an action that had been commenced there before the insolvency suit was brought. This was done on the theory that a party within the jurisdiction of a court may be restrained from doing something in another jurisdiction opposed to principles of equity, it having been shown that the creditor was aware of the debtor's embarrassed condition when the New York action was instituted. The injunction unquestionably denied full faith and credit and commanded the assent of only five Justices.

RECOGNITION OF RIGHTS BASED UPON CONSTITUTIONS, STATUTES, COMMON LAW

Development of the Modern Rule

Although the language of section one suggests that the same respect should be accorded to "public acts" that is accorded to "judicial proceedings" ("full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"), and the Court has occasionally relied on this parity of treat-

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[101] Christmas v. Russell, 72 U.S. (5 Wall.) 290 (1866); Maxwell v. Stewart, 88 U.S. (21 Wall.) 71 (1875); Hanley v. Donoghue, 116 U.S. 1 (1885); Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888); Simmons v. Saul, 138 U.S. 439 (1891); American Express Co. v. Mullins, 212 U.S. 311 (1909).

[102] Fauntleroy v. Lum, 210 U.S. 230 (1908).

[103] Anglo-American Prov. Co. v. Davis Prov. Co., 191 U.S. 373 (1903).

[104] 133 U.S. 107 (1890).

ment,[105] the Court has usually differentiated "the credit owed to laws (legislative measures and common law) and to judgments." [106] The current understanding is that the Full Faith and Credit Clause is "exacting" with respect to final judgments of courts, but "is less demanding with respect to choice of laws." [107]

The Court has explained that, where a statute or policy of the forum state is set up as a defense to a suit brought under the statute of another state or territory, or where a foreign statute is set up as a defense to a suit or proceedings under a local statute, the conflict is to be resolved, not by giving automatic effect to the Full Faith and Credit Clause and thus compelling courts of each state to subordinate their own statutes to those of others, but by weighing the governmental interests of each jurisdiction.[108] That is, the Full Faith and Credit Clause, in its design to transform the states from independent sovereigns into a single unified nation, directs that a state, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other states and avoid infringement upon their sovereignty. But because the forum state is also a sovereign in its own right, in appropriate cases it may attach paramount importance to its own legitimate interests.[109]

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[105] *See* Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887) (statutes); and Smithsonian Institution v. St. John, 214 U.S. 19 (1909) (state constitutional provision).

[106] Baker v. General Motors Corp., 522 U.S. 222, 232 (1998), quoted in Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 494 (2003). Justice Nelson, in the *Dred Scott* case, drew an analogy to international law, concluding that states, as well as nations, judge for themselves the rules governing property and persons within their territories. Scott v. Sandford, 60 U.S. (19 How.) 393, 460 (1857). "One State cannot exempt property from taxation in another," the Court concluded in Bonaparte v. Tax Court, 104 U.S. 592 (1882), holding that no provision of the Constitution, including the Full Faith and Credit Clause, enabled a law exempting from taxation certain debts of the enacting state to prevent another state (the state in which the creditor resided) from taxing the debts. *See also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589–96 (1839); Kryger v. Wilson, 242 U.S. 171 (1916); and Bond v. Hume, 243 U.S. 15 (1917).

[107] Baker v. General Motors Corp., 522 U.S. at 232.

[108] Alaska Packers Ass'n. v. Industrial Accident Comm'n, 294 U.S. 532 (1935); Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932). When, in a state court, the validity of an act of the legislature of another state is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the Full Faith and Credit Clause. *See also* Western Life Indemnity Co. v. Rupp, 235 U.S. 261 (1914), citing Glenn v. Garth, 147 U.S. 360 (1893); Lloyd v. Matthews, 155 U.S. 222, 227 (1894); Banholzer v. New York Life Ins. Co., 178 U.S. 402 (1900); Allen v. Alleghany Co., 196 U.S. 458, 465 (1905); Texas & N.O.R.R. v. Miller, 221 U.S. 408 (1911). *See also* National Mut. B. & L. Ass'n v. Brahan, 193 U.S. 635 (1904); Johnson v. New York Life Ins. Co., 187 U.S. 491, 495 (1903); Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U.S. 93 (1917).

[109] *E.g.*, Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981); Nevada v. Hall, 440 U.S. 410 (1979); Carroll v. Lanza, 349 U.S. 408 (1955); Pacific Employers Ins. Co. v.

Sec. 1—Full Faith and Credit

As such, a state need not "substitute for its own statute, applicable to persons and events within it, the statute of another state reflecting a conflicting and opposed policy," so long as the state does not adopt a "policy of hostility to the" public acts of that other state in so doing.[110] In recent years, the Court has, in protracted litigation by a Nevada citizen in a Nevada court over alleged abusive practices by a California state agency, twice interpreted the "policy of hostility" standard.[111] In 2003, in *Franchise Tax Board of California v. Hyatt*, the Supreme Court held that the Nevada Supreme Court did not exhibit "hostility" in declining to apply a California law affording *complete* immunity to state agencies, because the state high court had, in considering "comity principles with a healthy regard for California's sovereign status," legitimately relied on "the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis."[112] Thirteen years later, after the case had been remanded and the Nevada Supreme Court had crafted a "special rule" for damages in the matter wherein the California state agency could not rely on the Nevada sovereign immunity statute limiting liability to $50,000, the Supreme Court reviewed whether the Nevada court's ruling conflicted with the Full Faith and Credit Clause.[113] In contrast to the 2003 ruling, the 2016 ruling held that the Nevada Supreme Court *had* acted in violation of the Full Faith and Credit Clause. Specifically, the High Court concluded that upholding the Nevada Supreme Court's "special rule"—which was supported by a "conclusory statement" respecting California's lack of oversight of its own agencies and was viewed by the Court as reflecting a "policy of hostility to the public Acts' of a sister State"—would allow for a "system of special and discriminatory rules" that conflicted with the Constitution's "vision of 50 individual and equally dignified States."[114] While the Franchise Tax Board litigation demonstrates that the "policy of hostility" standard still exists as a threshold inquiry into whether a state is providing full faith and credit to the public acts of a sister state, ordinarily a state has significant discretion in applying their own choice of law provisions in matters arising in that state's courts, and the Court will not engage in any

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Industrial Accident Comm'n, 306 U.S. 493 (1939); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935).

[110] *See Carroll*, 349 U.S. at 412–13.

[111] *See* Franchise Tax Bd. of Cal. v. Hyatt (*Franchise Tax Bd. II*), 578 U.S. ___, No. 14–1175, slip op. (2016); Franchise Tax Bd. of Cal. v. Hyatt (*Franchise Tax Bd. I*), 538 U.S. 488 (2003).

[112] *See Franchise Tax Bd. I*, 538 U.S. at 499.

[113] *See Franchise Tax Bd. II*, slip op. at 3–4.

[114] *See id.* at 7.

broad "balancing-of-interests" approach to determine the appropriate application of a given state law.[115]

Transitory Actions: Death Statutes.—The initial effort in this direction was made in connection with transitory actions based on statute. Earlier, such actions had rested upon the common law, which was fairly uniform throughout the states, so that there was usually little discrepancy between the law under which the plaintiff from another jurisdiction brought his action (*lex loci*) and the law under which the defendant responded (*lex fori*). In the late 1870s, however, the states, abandoning the common law rule on the subject, began passing laws that authorized the representatives of a decedent whose death had resulted from injury to bring an action for damages.[116] The question at once presented itself whether, if such an action was brought in a state other than that in which the injury occurred, it was governed by the statute under which it arose or by the law of the forum state, which might be less favorable to the defendant. Nor was it long before the same question presented itself with respect to transitory action *ex contractu,* where the contract involved had been made under laws peculiar to the state where made, and with those laws in view.

Actions Upon Contract.—In *Chicago & Alton R.R. v. Wiggins Ferry Co.*,[117] the Court indicated that it was the law under which the contract was made, not the law of the forum state, that should govern. Its utterance on the point was, however, not merely *dictum*, but was based on an error, namely, the false supposition that the Constitution gives "acts" the same extraterritorial operation as the Act of 1790 does "judicial records and proceedings." Notwith-

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[115] *Id.* at 7–8 (noting that while the Court, in the instant case, could "safely conclude" that Nevada's special rule violated the Constitution, the Court had "abandoned" any broader balancing test with respect to the Full Faith and Credit Clause and "public acts").

[116] Dennick v. Railroad Co., 103 U.S. 11 (1881), was the first so-called "Death Act" case to reach the Supreme Court. *See also* Stewart v. Baltimore & O.R.R., 168 U.S. 445 (1897). Even today the obligation of a state to furnish a forum for the determination of death claims arising in another state under the laws thereof appears to rest on a rather precarious basis. In Hughes v. Fetter, 341 U.S. 609 (1951), the Court, by a narrow majority, held invalid under the full faith and credit clause a statute of Wisconsin which, as locally interpreted, forbade its courts to entertain suits of this nature; in First Nat'l Bank v. United Air Lines, 342 U.S. 396 (1952), a like result was reached under an Illinois statute. More recently, the Court has acknowledged that the Full Faith and Credit Clause does not compel the forum state, in an action for wrongful death occurring in another jurisdiction, to apply a longer period of limitations set out in the wrongful death statute of the state in which the fatal injury was sustained. Wells v. Simonds Abrasive Co., 345 U.S. 514 (1953). Justices Jackson, Black, and Minton, in dissenting, advanced the contrary principle that the clause requires that the law where the tort action arose should follow said action in whatever forum it is pursued.

[117] 119 U.S. 615 (1887).

standing which, this *dictum* is today the basis of "the settled rule" that the defendant in a transitory action is entitled to all the benefits resulting from whatever material restrictions the statute under which plaintiff's rights of action originated sets thereto, except that courts of sister states cannot be thus prevented from taking jurisdiction in such cases.[118]

However, the modern doctrine permits a forum state with sufficient contacts with the parties or the matter in dispute to follow its own law. In *Allstate Ins. Co. v. Hague*,[119] the decedent was a Wisconsin resident who had died in an automobile accident within Wisconsin near the Minnesota border in the course of his daily employment commute to Wisconsin. He had three automobile insurance policies on three automobiles, each limited to $15,000. Following his death, his widow and personal representative moved to Minnesota, and she sued in that state. She sought to apply Minnesota law, under which she could "stack" or aggregate all three policies, permissible under Minnesota law but not allowed under Wisconsin law, where the insurance contracts had been made. The Court, in a divided opinion, permitted resort to Minnesota law, because of the number of contacts the state had with the matter. On the other hand, an earlier decision is in considerable conflict with *Hague*. There, a life insurance policy was executed in New York, on a New York insured, with a New York beneficiary. The insured died in New York, and his beneficiary moved to Georgia and sued to recover on the policy. The insurance company defended on the ground that the insured, in the application for the policy, had made materially false statements that rendered it void under New York law. The defense was good under New York law, impermissible under Georgia law, and Georgia's decision to apply its own law was overturned, the Court stressing the surprise to the parties of the resort to the law of another state and the absence of any occurrence in Georgia to which its law could apply.[120]

Stockholder Corporation Relationship.—The protections of the Full Faith and Credit Clause extend beyond transitory actions. Some legal relationships are so complex, the Court holds, that the law under which they were formed ought always to govern them as long as they persist.[121] One such relationship is that of a stockholder and his corporation. Hence, if a question arises as to the liability of the stockholders of a corporation, the courts of the forum

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[118] Northern Pacific R.R. v. Babcock, 154 U.S. 190 (1894); Atchison, T. & S.F. Ry. v. Sowers, 213 U.S. 55, 67 (1909).

[119] 449 U.S. 302 (1981). *See also* Clay v. Sun Ins. Office, 377 U.S. 179 (1964).

[120] John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936).

[121] Modern Woodmen v. Mixer, 267 U.S. 544 (1925).

state are required by the Full Faith and Credit Clause to determine the question in accordance with the constitution, laws and judicial decisions of the corporation's home states.[122] Illustrative applications of the latter rule are to be found in the following cases. A New Jersey statute forbidding an action at law to enforce a stockholder's liability arising under the laws of another state and providing that such liability may be enforced only in equity, and that in such a case the corporation, its legal representatives, all its creditors, and stockholders, should be necessary parties, was held not to preclude an action at law in New Jersey by the New York superintendent of banks against 557 New Jersey stockholders in an insolvent New York bank to recover assessments made under the laws of New York.[123] Also, in a suit to enforce double liability, brought in Rhode Island against a stockholder in a Kansas trust company, the courts of Rhode Island were held to be obligated to extend recognition to the statutes and court decisions of Kansas whereunder it is established that a Kansas judgment recovered by a creditor against the trust company is not only conclusive as to the liability of the corporation but also an adjudication binding each stockholder therein. The only defenses available to the stockholder are those which he could make in a suit in Kansas.[124]

Fraternal Benefit Society: Member Relationship.—The same principle applies to the relationship that is formed when one takes out a policy in a "fraternal benefit society." Thus, in *Royal Arcanum v. Green*,[125] in which a fraternal insurance association chartered under the laws of Massachusetts had been sued in the courts of New York by a citizen of the latter state on a contract of insurance made in that state, the Court held that the defendant company was entitled under the full faith and credit clause to have the case determined in accordance with the laws of Massachusetts and its own constitution and by-laws as these had been construed by the Massachusetts courts.

Nor has the Court manifested any disposition to depart from this rule. In *Sovereign Camp v. Bolin*,[126] it declared that a state in which a certificate of life membership of a foreign fraternal benefit association is issued, which construes and enforces the certificate according to its own law rather than according to the law of the

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[122] Converse v. Hamilton, 224 U.S. 243 (1912); Selig v. Hamilton, 234 U.S. 652 (1914); Marin v. Augedahl, 247 U.S. 142 (1918).

[123] Broderick v. Rosner, 294 U.S. 629 (1935). *See also* Thormann v. Frame, 176 U.S. 350, 356 (1900); Reynolds v. Stockton, 140 U.S. 254, 264 (1891).

[124] Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900).

[125] 237 U.S. 531 (1915), followed in Modern Woodmen v. Mixer, 267 U.S. 544 (1925).

[126] 305 U.S. 66, 75, 79 (1938).

state in which the association is domiciled, denies full faith and credit to the association's charter embodied in the status of the domiciliary state as interpreted by the latter's court. "The beneficiary certificate was not a mere contract to be construed and enforced according to the laws of the State where it was delivered. Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the State of incorporation. [Hence] another State, wherein the certificate of membership was issued, cannot attach to membership rights against the society which are refused by the law of domicile." Consistent with that, the Court also held, in *Order of Travelers v. Wolfe*,[127] that South Dakota, in a suit brought therein by an Ohio citizen against an Ohio benefit society, must give effect to a provision of the constitution of the society prohibiting the bringing of an action on a claim more than six months after disallowance by the society, notwithstanding that South Dakota's period of limitation was six years and that its own statutes voided contract stipulations limiting the time within which rights may be enforced. Objecting to these results, Justice Black dissented on the ground that fraternal insurance companies are not entitled, either by the language of the Constitution, or by the nature of their enterprise, to such unique constitutional protection.

Insurance Company, Building and Loan Association: Contractual Relationships.—Whether or not distinguishable by nature of their enterprise, stock and mutual insurance companies and mutual building and loan associations, unlike fraternal benefit societies, have not been accorded the same unique constitutional protection; with few exceptions,[128] they have had controversies arising out of their business relationships settled by application of the law of the forum state. In *National Mutual B. & L. Ass'n v. Brahan*,[129] the principle applicable to these three forms of business organizations was stated as follows: where a corporation has become localized in a state and has accepted the laws of the state as a condition of doing business there, it cannot abrogate those laws by attempting to make contract stipulations, and there is no violation of the Full Faith and Credit Clause in instructing a jury to find according to local law notwithstanding a clause in a contract that it should be construed according to the laws of another state.

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[127] 331 U.S. 586, 588–89, 637 (1947).

[128] New York Life Ins. Co. v. Head, 234 U.S. 149 (1914); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924).

[129] 193 U.S. 635 (1904).

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Thus, the Court held in *Brahan*, when a Mississippi borrower, having repaid a mortgage loan to a New York building and loan association, sued in a Mississippi court to recover, as usurious, certain charges collected by the association, the usury law of Mississippi rather than that of New York controlled. In this case, the loan contract, which was negotiated in Mississippi subject to approval by the New York office, did not expressly state that it was governed by New York law. Similarly, when the New York Life Insurance Company, which had expressly stated in its application and policy forms that they would be controlled by New York law, was sued in Missouri on a policy sold to a resident thereof, the court of that state was sustained in its application of Missouri, rather than New York law.[130] Also, in an action in a federal court in Texas to collect the amount of a life insurance policy which had been made in New York and later changed by instruments assigning beneficial interest, it was held that questions (1) whether the contract remained one governed by the law of New York with respect to rights of assignees, rather than by the law of Texas, (2) whether the public policy of Texas permits recovery by one named beneficiary who has no beneficial interest in the life of the insured, and (3) whether lack of insurable interest becomes material when the insurer acknowledges liability and pays the money into court, were questions of Texas law, to be decided according to Texas decisions.[131] Similarly, a state, by reason of its potential obligation to care for dependents of persons injured or killed within its limits, is conceded to have a substantial interest in insurance policies, wherever issued, which may afford compensation for such losses; accordingly, it is competent, by its own direct action statute, to grant the injured party a direct cause of action against the insurer of the tortfeasor, and to refuse to enforce the law of the state, in which the policy is issued or delivered, which recognizes as binding a policy stipulation which forbids direct actions until after the determination of the liability of the insured tortfeasor.[132]

Consistent with the latter holding are the following two involving mutual insurance companies. In *Pink v. A.A.A. Highway Ex-*

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[130] New York Life Ins. Co. v. Cravens, 178 U.S. 389 (1900). *See also* American Fire Ins. Co v. King Lumber Co., 250 U.S. 2 (1919).

[131] Griffin v. McCoach, 313 U.S. 498 (1941).

[132] Watson v. Employers Liability Corp., 348 U.S. 66 (1954). In Clay v. Sun Ins. Office, 363 U.S. 207 (1960), three dissenters, Justices Black, and Douglas, and Chief Justice Warren, would have resolved the constitutional issue which the Court avoided, and would have sustained application of the forum state's statute of limitations fixing a period in excess of that set forth in the policy.

press,[133] the New York insurance commissioner, as a statutory liquidator of an insolvent auto mutual company organized in New York, sued resident Georgia policyholders in a Georgia court to recover assessments alleged to be due by virtue of their membership in it. The Supreme Court held that, although by the law of the state of incorporation, policyholders of a mutual insurance company become members thereof and as such liable to pay assessments adjudged to be required in liquidation proceedings in that state, the courts of another state are not required to enforce such liability against local resident policyholders who did not appear and were not personally served in the foreign liquidation proceedings but are free to decide according to local law the questions whether, by entering into the policies, residents became members of the company. Again, in *State Farm Ins. Co. v. Duel*,[134] the Court ruled that an insurance company chartered in State A, which does not treat membership fees as part of premiums, cannot plead denial of full faith and credit when State B, as a condition of entry, requires the company to maintain a reserve computed by including membership fees as well as premiums received in all states. Were the company's contention accepted, "no State," the Court observed, "could impose stricter financial standards for foreign corporations doing business within its borders than were imposed by the State of incorporation." It is not apparent, the Court added, that State A has an interest superior to that of State B in the financial soundness and stability of insurance companies doing business in State B.

Workers' Compensation Statutes.—Finally, the relationship of employer and employee, insofar as the obligations of the one and the rights of the other under worker's compensation acts are concerned, has been the subject of differing and confusing treatment. In an early case, the injury occurred in New Hampshire, resulting in death to a workman who had entered the defendant company's employ in Vermont, the home state of both parties. The Court required the New Hampshire courts to respect a Vermont statute which precluded a worker from bringing a common-law action against his employer for job related injuries where the employment relation was formed in Vermont, prescribing a constitutional rule giving priority to the place of the establishment of the employment relationship

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[133] 314 U.S. 201, 206–08 (1941). However, a decree of a Montana Supreme Court, insofar as it permitted judgment creditors of a dissolved Iowa surety company to levy execution against local assets to satisfy judgment, as against title to such assets of the Iowa insurance commissioner as statutory liquidator and successor to the dissolved company, was held to deny full faith and credit to the statutes of Iowa. Clark v. Williard, 292 U.S. 112 (1934).

[134] 324 U.S. 154, 159–60 (1945).

over the place of injury.[135] The same result was achieved in a subsequent case, but the Court promulgated a new rule, applied thereafter, which emphasized a balancing of the governmental interests of each jurisdiction, rather than the mere application of the statutory rule of one or another state under full faith and credit.[136] Thus, the Court held that the clause did not preclude California from disregarding a Massachusetts's workmen's compensation statute, making its law exclusive of any common law action or any law of any other jurisdiction, and applying its own act in the case of an injury suffered by a Massachusetts employee of a Massachusetts employer while in California in the course of his employment.[137] It is therefore settled that an injured worker may seek a compensation award either in the state in which the injury occurred or in the state in which the employee resided, his employer was principally located, and the employment relation was formed, even if one statute or the other purported to confer an exclusive remedy on the workman.[138]

Less settled is the question whether a second state, with interests in the matter, may supplement a workers' compensation award provided in the first state. At first, the Court ruled that a Louisiana employee of a Louisiana employer, who was injured on the job in Texas and who received an award under the Texas act, which did not grant further recovery to an employee who received compensation under the laws of another state, could not obtain additional compensation under the Louisiana statute.[139] Shortly, however, the Court departed from this holding, permitting Wisconsin, the state of the injury, to supplement an award pursuant to the laws of Illinois, where the worker resided and where the employment contract had been entered into.[140] Although the second case could have been factually distinguished from the first,[141] the Court instead chose to depart from the principle of the first, saying that only if the laws of the first state making an award contained "unmistakable lan-

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[135] Bradford Elec. Co. v. Clapper, 286 U.S. 145 (1932).

[136] Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935). The state where the employment contract was made was permitted to apply its workmen's compensation law despite the provision in the law of the state of injury making its law the exclusive remedy for injuries occurring there. *See* id. at 547 (stating the balancing test).

[137] Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939).

[138] In addition to *Alaska Packers* and Pacific Ins., *see* Carroll v. Lanza, 349 U.S. 408 (1955); Cardillo v. Liberty Mutual Co., 330 U.S. 469 (1947); Crider v. Zurich Ins. Co., 380 U.S. 39 (1965); Nevada v. Hall, 440 U.S. 410, 421–24 (1979).

[139] Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943).

[140] Industrial Comm'n v. McCartin, 330 U.S. 622 (1947).

[141] Employer and employee had entered into a contract of settlement under the Illinois act, the contract expressly providing that it did not affect any rights the employee had under Wisconsin law. 330 U.S. at 624.

guage" to the effect that those laws were exclusive of any remedy under the laws of any other state would supplementary awards be precluded.[142] Although the overwhelming number of state court decisions since follow *McCartin*, and *Magnolia* has been little noticed, all the Justices expressed dissatisfaction with the former case as a rule of the Full Faith and Credit Clause, although a majority of the Court followed it and permitted a supplementary award.[143]

Full Faith and Credit and Statutes of Limitation.—The Full Faith and Credit Clause is not violated by a state statute providing that all suits upon foreign judgments shall be brought within five years after such judgment shall have been obtained, where the statute has been construed by the state courts as barring suits on foreign judgments, only if the plaintiff could not revive his judgment in the state where it was originally obtained.[144]

FULL FAITH AND CREDIT: MISCELLANY

Full Faith and Credit in Federal Courts

The rule of 28 U.S.C. §§ 1738–1739 pertains not merely to recognition by state courts of the records and judicial proceedings of courts of sister states but to recognition by "every court within the United States," including recognition of the records and proceedings of the courts of any territory or any country subject to the jurisdiction of the United States. The federal courts are bound to give to the judgments of the state courts the same faith and credit that the courts of one state are bound to give to the judgments of the courts of her sister states.[145] Where suits to enforce the laws of one state are entertained in courts of another on principles of comity, federal district courts sitting in that state may entertain them and

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[142] 330 U.S. at 627–28, 630.

[143] Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980). For the disapproval of *McCartin*, *see* id. at 269–72 (plurality opinion of four), 289 (concurring opinion of three), 291 (dissenting opinion of two). But the four Justice plurality would have instead overruled *Magnolia*, id. at 277–86, and adopted the rule of interest balancing used in deciding which state may apply its laws in the first place. The dissenting two Justices would have overruled *McCartin* and followed *Magnolia*. Id. at 290. The other Justices considered *Magnolia* the sounder rule but decided to follow *McCurtin* because it could be limited to workmen's compensation cases, thus requiring no evaluation of changes throughout the reach of the Full Faith and Credit Clause. Id. at 286.

[144] Watkins v. Conway, 385 U.S. 188, 190–91 (1965).

[145] Cooper v. Newell, 173 U.S. 555, 567 (1899), *See also* Pennington v. Gibson, 57 U.S. (16 How.) 65, 81 (1854); Cheever v. Wilson, 76 U.S. (9 Wall.) 108, 123 (1870); Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 291 (1888); Swift v. McPherson, 232 U.S. 51 (1914); Baldwin v. Traveling Men's Ass'n, 283 U.S. 522 (1931); American Surety Co. v. Baldwin, 287 U.S. 156 (1932); Sanders v. Fertilizer Works, 292 U.S. 190 (1934); Durfee v. Duke, 375 U.S. 106 (1963); Allen v. McCurry, 449 U.S. 90 (1980); Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982).

should, if they do not infringe federal law or policy.[146] However, the refusal of a territorial court in Hawaii, which had jurisdiction of the action on a policy issued by a New York insurance company, to admit evidence that an administrator had been appointed and a suit brought by him on a bond in the federal court in New York in which no judgment had been entered, did not violate this clause.[147]

The power to prescribe the effect to be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those that declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgment of its courts is coextensive with its territorial jurisdiction.[148]

Evaluation Of Results Under Provision

The Court, after according an extrastate operation to statutes and judicial decisions in favor of defendants in transitory actions, proceeded next to confer the same protection upon certain classes of defendants in local actions in which the plaintiff's claim was the outgrowth of a relationship formed extraterritorially. But can the Court stop at this point? If it is true, as Chief Justice Marshall once remarked, that "the Constitution was not made for the benefit of plaintiffs alone," so also it is true that it was not made for the benefit of defendants alone. The day may come when the Court will approach the question of the relation of the Full Faith and Credit Clause to the extrastate operation of laws from the same angle as it today views the broader question of the scope of state legislative power. When and if this day arrives, state statutes and judicial decisions will be given such extraterritorial operation as seems reasonable to the Court to give them. In short, the rule of the dominance of legal policy of the forum state will be superseded by that of judicial review.[149]

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[146] Milwaukee County v. White Co., 296 U.S. 268 (1935).

[147] Equitable Life Assurance Society v. Brown, 187 U.S. 308 (1902). *See also* Gibson v. Lyon, 115 U.S. 439 (1885).

[148] Embry v. Palmer, 107 U.S. 3, 9 (1883). *See also* Northern Assurance Co. v. Grand View Ass'n, 203 U.S. 106 (1906); Louisville & Nashville R.R. v. Stock Yards Co., 212 U.S. 132 (1909); Atchison, T. & S.F. Ry. v. Sowers, 213 U.S. 55 (1909); West Side R.R. v. Pittsburgh Const. Co., 219 U.S. 92 (1911); Knights of Pythias v. Meyer, 265 U.S. 30, 33 (1924).

[149] Reviewing some of the cases treated in this section, a writer in 1926 said: "It appears, then, that the Supreme Court has quite definitely committed itself to a program of making itself, to some extent, a tribunal for bringing about uniformity

Sec. 1—Full Faith and Credit

The question arises whether the application to date, not by the Court alone but by Congress as well, of Article IV, § 1, can be said to have met the expectations of its Framers. In the light of some things said at the time of the framing of the clause, this may be doubted. The protest was raised against the clause that, in vesting Congress with power to declare the effect state laws should have outside the enacting state, it enabled the new government to usurp the powers of the states, but the objection went unheeded. The main concern of the Convention, undoubtedly, was to render the judgments of the state courts in civil cases effective throughout the Union. Yet even this object has been by no means completely realized, owing to the doctrine of the Court, that before a judgment of a state court can be enforced in a sister state, a new suit must be brought on it in the courts of the latter, and the further doctrine that with respect to such a suit, the judgment sued on is only evidence; the logical deduction from this proposition is that the sister state is under no constitutional compulsion to give it a forum. These doctrines were first clearly stated in *McElmoyle* and flowed directly from the new states' rights premises of the Court, but they are no longer in harmony with the prevailing spirit of constitutional construction nor with the needs of the times. Also, the clause seems always to have been interpreted on the basis of the assumption that the term "judicial proceedings" refers only to final judgments and does not include intermediate processes and writs, but the assumption would seem to be groundless, and if it is, then Congress has the power under the clause to provide for the service and execution throughout the United States of the judicial processes of the several states.

SCOPE OF POWERS OF CONGRESS UNDER PROVISION

Under the present system, suit ordinarily must be brought where the defendant, the alleged wrongdoer, resides, which means generally where no part of the transaction giving rise to the action took place. What could be more irrational? "Granted that no state can of its own volition make its process run beyond its borders . . . is it unreasonable that the United States should by federal action be made a unit in the manner suggested?" [150]

Indeed, there are few clauses of the Constitution, the merely literal possibilities of which have been so little developed as the Full

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in the field of conflicts . . . although the precise circumstances under which it will regard itself as having jurisdiction for this purpose are far from clear." Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 562 (1926). It can hardly be said that the law has been subsequently clarified on this point.

[150] Cook, *The Power of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 430 (1919).

Faith and Credit Clause. Congress has the power under the clause to decree the effect that the statutes of one state shall have in other states. This being so, it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union and that no other kind shall. Or to speak in more general terms, Congress has under the clause power to enact standards whereby uniformity of state legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable.

JUDGMENTS OF FOREIGN STATES

Doubtless Congress, by virtue of its powers in the field of foreign relations, might also lay down a mandatory rule regarding recognition of foreign judgments in every court of the United States. At present the duty to recognize judgments even in national courts rests only on comity and is qualified in the judgment of the Supreme Court, by a strict rule of parity.[151]

SECTION 2. Clause 1. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

STATE CITIZENSHIP: PRIVILEGES AND IMMUNITIES

Origin and Purpose

"The primary purpose of this clause, like the clauses between which it is located . . . was to help fuse into one Nation a collection of independent sovereign States." [152] Precedent for this clause was a much

[151] No right, privilege, or immunity is conferred by the Constitution in respect to judgments of foreign states and nations. Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185 (1912). *See also* Hilton v. Guyot, 159 U.S. 113, 234 (1895), where a French judgment offered in defense was held not a bar to the suit. Four Justices dissented on the ground that "the application of the doctrine of *res judicata* does not rest in discretion; and it is for the Government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." At the same sitting of the Court, an action in a United States circuit court on a Canadian judgment was sustained on the same ground of reciprocity, Ritchie v. McMullen, 159 U.S. 235 (1895). *See also* Ingenohl v. Olsen & Co., 273 U.S. 541 (1927), where a decision of the Supreme Court of the Philippine Islands was reversed for refusal to enforce a judgment of the Supreme Court of the British colony of Hong Kong, which was rendered "after a fair trial by a court having jurisdiction of the parties." Another instance of international cooperation in the judicial field is furnished by letters rogatory. *See* 28 U.S.C. § 1781. Several States have similar provisions, 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 108–109 (1906).

[152] Toomer v. Witsell, 334 U.S. 385, 395 (1948).

wordier and a somewhat unclear [153] clause of the Articles of Confederation. "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively . . . ." [154] In the Convention, the present clause was presented, reported by the Committee on Detail, and adopted all in the language ultimately approved.[155] Little commentary was addressed to it,[156] and we may assume with Justice Miller that "[t]here can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Articles of Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase." [157] At least four theories have been proffered regarding the purpose of this clause. First, the clause is a guaranty to the citizens of the different states of equal treatment by Congress; in other words, it is a species of equal protection clause binding on the National Government. Though it received some recognition in the *Dred Scott* case,[158] particularly in the opinion of Justice Catron,[159] this theory is today obsolete.[160] Second, the

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[153] THE FEDERALIST, No. 42 (J. Cooke ed. 1961), 285–286 (Madison).

[154] 1 F. Thorpe ed., *The Federal and State Constitutions*, H. DOC. NO. 357, 59th Cong., 2d Sess. (1909), 10.

[155] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 173, 187, 443 (rev. ed. 1937).

[156] "It may be esteemed the basis of the Union, that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which its is founded." THE FEDERALIST, No. 80 (J. Cooke ed. 1961), 537–538 (Hamilton).

[157] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 75 (1873).

[158] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[159] 60 U.S. at 518, 527–29.

[160] Today, the Due Process Clause of the Fifth Amendment imposes equal protection standards on the Federal Government. Bolling v. Sharpe, 347 U.S. 497 (1954); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Shapiro v. Thompson, 394 U.S. 618, 641–42 (1969).

clause is a guaranty to the citizens of each state of the natural and fundamental rights inherent in the citizenship of persons in a free society, the privileges and immunities of free citizens, which no state could deny to citizens of other states, without regard to the manner in which it treated its own citizens. This theory found some expression in a few state cases [161] and best accords with the natural law-natural rights language of Justice Washington in *Corfield v. Coryell*.[162]

If it had been accepted by the Court, this theory might well have endowed the Supreme Court with a reviewing power over restrictive state legislation as broad as that which it later came to exercise under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, but it was firmly rejected by the Court.[163] Third, the clause guarantees to the citizen of any state the rights which he enjoys as such even when he is sojourning in another state; that is, it enables him to carry with him his rights of state citizenship throughout the Union, unembarrassed by state lines. This theory, too, the Court rejected.[164] Fourth, the clause merely forbids any state to discriminate against citizens of other states in favor of its own. It is this narrow interpretation that has become the settled one. "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other

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[161] Campbell v. Morris, 3 H. & McH. 288 (Md. 1797); Murray v. McCarty, 2 Munf. 373 (Va. 1811); Livingston v. Van Ingen, 9 Johns. Case. 507 (N.Y. 1812); Douglas v. Stephens, 1 Del. Ch. 465 (1821); Smith v. Moody, 26 Ind. 299 (1866).

[162] 6 Fed. Cas. 546, 550 (No. 3230) (C.C.E.D. Pa. 1823). (Justice Washington on circuit), quoted infra, "All Privileges and Immunities of Citizens in the Several States." "At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as 'natural rights'; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington." Hague v. CIO, 307 U.S. 496, 511 (1939) (Justice Roberts for the Court). This view of the clause was asserted by Justices Field and Bradley, *Slaughter House Cases*, 83 U.S. (16 Wall.) 97, 117–18 (1873) (dissenting opinions); Butchers' Union Slaughter-House and Live-Stock Landing Co. v. Crescent City Live-Stock Landing and Slaughter-House Co., 111 U.S. 746, 760 (1884) (Justice Field concurring), *but see infra*, and was possibly understood so by Chief Justice Taney. Scott v. Sandford, 60 U.S. (19 How.) 393, 423 (1857). *See also* id. at 580 (Justice Curtis dissenting). The natural rights concept of privileges and immunities was strongly held by abolitionists and their congressional allies who drafted the similar clause into 1 of the Fourteenth Amendment. Graham, *Our 'Declaratory' Fourteenth Amendment*, reprinted in H. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory, and American Constitutionalism 295 (1968).

[163] McKane v. Durston, 153 U.S. 684, 687 (1894); *see also* cases cited infra.

[164] City of Detroit v. Osborne, 135 U.S. 492 (1890).

States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws." [165]

The recent cases emphasize that interpretation of the clause is tied to maintenance of the Union. "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." [166] Although the clause "was intended to create a national economic union," it also protects noneconomic interests relating to the Union.[167]

Hostile discrimination against all nonresidents infringes the clause,[168] but controversies between a state and its own citizens are not covered by the provision.[169] However, a state discrimination in favor of residents of one of its municipalities implicates the clause, even though the disfavored class consists of in-state as well as out-of-state inhabitants.[170] The clause should not be read so literally, the Court held, as to permit states to exclude out-of-state residents from benefits through the simple expediency of delegating authority to political subdivisions.[171] A violation can occur whether or not a statute explicitly discriminates against out-of-state interests.[172]

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[165] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) (Justice Field for the Court; *but see* supra); *see also Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873); Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907); Whitfield v. Ohio, 297 U.S. 431 (1936).

[166] Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978). *See also* Austin v. New Hampshire, 420 U.S. 656, 660–65 (1975) (clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." Id. at 662); Hicklin v. Orbeck, 437 U.S. 518, 523–24 (1978).

[167] Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 281–82 (1985). *See also* Doe v. Bolton, 410 U.S. 179, 200 (1973) (discrimination against out-of-state residents seeking medical care violates clause).

[168] Blake v. McClung, 172 U.S. 239, 246 (1898); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

[169] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138 (1873); Cove v. Cunningham, 133 U.S. 107 (1890). *But see* Zobel v. Williams, 457 U.S. 55, 71 (1982) (Justice O'Connor concurring).

[170] United Building & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

[171] 465 U.S. at 217. The holding illustrates what the Court has referred to as the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause. Supreme Court of New Hampshire v. Piper, 470 U.S.

How Implemented

The Privileges and Immunities Clause is self-executory, that is to say, its enforcement is dependent upon the judicial process. It does not authorize penal legislation by Congress. Federal statutes prohibiting conspiracies to deprive any person of rights or privileges secured by state laws,[173] or punishing infractions by individuals of the right of citizens to reside peacefully in the several states and to have free ingress into and egress from such states,[174] have been held void.

Citizens of Each State

A question much mooted before the Civil War was whether the term could be held to include free Negroes. In the *Dred Scott* case,[175] the Court answered it in the negative. "Citizens of each State," Chief Justice Taney argued, meant citizens of the United States as understood at the time the Constitution was adopted, and Negroes were not then regarded as capable of citizenship. The only category of national citizenship added under the Constitution comprised aliens, naturalized in accordance with acts of Congress.[176] In dissent, Justice Curtis not only denied the Chief Justice's assertion that there were no Negro citizens of states in 1789 but further argued that, although Congress alone could determine what classes of aliens should be naturalized, the states retained the right to extend citizenship to classes of persons born within their borders who had not previously enjoyed citizenship and that one upon whom state citizenship was thus conferred became a citizen of the state in the full sense of the Constitution.[177] So far as persons born in the United States, and subject to the jurisdiction thereof are concerned, the question was put at rest by the Fourteenth Amendment.

Corporations.—At a comparatively early date, the claim was made that a corporation chartered by a state and consisting of its citizens was entitled to the benefits of the comity clause in the transaction of business in other states. It was argued that the Court was

274, 280 n.8 (1985) (quoting Hicklin v. Orbeck, 437 U.S. 518, 531 (1978)). *See*, *e.g.*, Dean Milk Co. v. City of Madison, 424 U.S. 366 (1976) (city protectionist ordinance that disadvantages both out-of-state producers and some in-state producers violates the Commerce Clause).

[172] "[A]bsence of an express statement . . . identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [a] claim." Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 67 (2003).

[173] United States v. Harris, 106 U.S. 629, 643 (1883). *See also* Baldwin v. Franks, 120 U.S. 678 (1887).

[174] United States v. Wheeler, 254 U.S. 281 (1920).

[175] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[176] 60 U.S. at 403–11.

[177] 60 U.S. at 572–90.

bound to look beyond the act of incorporation and see who were the incorporators. If it found these to consist solely of citizens of the incorporating state, it was bound to permit them through the agency of the corporation to exercise in other states such privileges and immunities as the citizens thereof enjoyed. In *Bank of Augusta v. Earle*,[178] this view was rejected. The Court held that the comity clause was never intended "to give to the citizens of each State the privileges of citizens in the several States, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the State. This would be to give the citizens of other States far higher and greater privileges than are enjoyed by the citizens of the State itself." [179] A similar result was reached in *Paul v. Virginia*,[180] but by a different course of reasoning. The Court there held that a corporation, in this instance, an insurance company, was "the mere creation of local law" and could "have no legal existence beyond the limits of the sovereignty" [181] which created it; even recognition of its existence by other states rested exclusively in their discretion. Later recent cases held that this discretion is qualified by other provisions of the Constitution notably the Commerce Clause and the Fourteenth Amendment.[182] By reason of its similarity to the corporate form of organization, a Massachusetts trust has been denied the protection of this clause.[183]

All Privileges and Immunities of Citizens in the Several States

The classical judicial exposition of the meaning of this phrase is that of Justice Washington in *Corfield v. Coryell*,[184] which was decided by him on circuit in 1823. The question at issue was the validity of a New Jersey statute that prohibited "any person who is not, at the time, an actual inhabitant and resident in this State" from raking or gathering "clams, oysters or shells" in any of the waters of the state, on board any vessel "not wholly owned by some person, inhabitant of and actually residing in this State. . . . The inquiry is," wrote Justice Washington, "what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to

[178] 38 U.S. (13 Pet.) 519 (1839).
[179] 38 U.S. at 586.
[180] 75 U.S. (8 Wall.) 168 (1869).
[181] 75 U.S. at 181.
[182] Crutcher v. Kentucky, 141 U.S. 47 (1891).
[183] Hemphill v. Orloff, 277 U.S. 537 (1928).
[184] 6 Fed. Cas. 546 (No. 3,230) (C.C.E.D. Pa., 1823).

the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several States which compose this Union . . . ." [185] He specified the following rights as answering this description: "Protection by the Government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government must justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefits of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State . . . ." [186]

After thus defining broadly the private and personal rights which were protected, Justice Washington went on to distinguish them from the right to a share in the public patrimony of the state. "[W]e cannot accede" the opinion proceeds, "to the proposition . . . that, under this provision of the Constitution, the citizens of the several States are permitted to participate in all the rights which belong exclusively to the citizens of any particular State, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such State, the legislature is bound to extend to the citizens of all other States the same advantages as are secured to their own citizens." [187] The right of a state to the fisheries within its borders he then held to be in the nature of a property right, held by the state "for the use of the citizens thereof;" the state was under no obligation to grant "co-tenancy in the common property of the State, to the citizens of all the other States." [188] The precise holding of this case was confirmed in *McCready v. Virginia*; [189] the logic of *Geer v. Connecticut* [190] extended the same rule to wild game, and *Hudson Water Co. v. McCarter* [191] applied it to the running water of a state. In *Toomer v. Witsell*,[192] however, the Court refused to apply this rule to free-swimming fish caught in the three-mile belt off the coast of South Carolina. It held instead that "commercial shrimping in the

[185] 6 Fed. Cas. at 551–52.
[186] 6 Fed. Cas. at 552.
[187] 6 Fed. Cas. at 552.
[188] 6 Fed. Cas. at 552.
[189] 94 U.S. 391 (1877).
[190] 161 U.S. 519 (1896).
[191] 209 U.S. 349 (1908).
[192] 334 U.S. 385 (1948).

marginal sea, like other common callings, is within the purview of the privileges and immunities clause" and that a severely discriminatory license fee exacted from nonresidents was unconstitutional.[193]

The virtual demise of the state ownership theory of animals and natural resources[194] compelled the Court to review and revise its mode of analysis of state restrictions that distinguished between residents and nonresidents[195] in respect to hunting and fishing and working with natural resources. A two-pronged test emerged. First, the Court held, it must be determined whether an activity in which a nonresident wishes to engage is within the protection of the clause. Such an activity must be "fundamental," must, that is, be essential or basic, "interference with which would frustrate the purposes of the formation of the Union, . . . " Justice Washington's opinion on Circuit in *Coryell* afforded the Court the standard; while recognizing that the opinion relied on notions of natural rights, the Court thought he used the term "fundamental" in the modern sense as well. Such activities as the pursuit of common callings within the state, the ownership and disposition of privately held property within the state, and the access to the courts of the state, had been recognized in previous cases as fundamental and protected against unreasonable burdening; but sport and recreational hunting, the issue in the particular case, was not a fundamental activity. It had nothing to do with one's livelihood and implicated no other interest recognized as fundamental.[196] Subsequent cases have recognized that the right to practice law[197] and the right to seek employment on public contracts[198] are to be considered fundamental activity. Contrariwise, accessing public records through a state freedom of infor-

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[193] 334 U.S. at 403. In Mullaney v. Anderson, 342 U.S. 415 (1952), an Alaska statute providing for the licensing of commercial fishermen in territorial waters and levying a license fee of $50.00 on nonresident and only $5.00 on resident fishermen was held void under Art. IV, § 2 on the authority of Toomer v. Witsell.

[194] The cases arose in the Commerce Clause context. *See* Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977) (dictum). Geer v. Connecticut, 161 U.S. 519 (1896), was overruled in Hughes v. Oklahoma, 441 U.S. 322 (1979); Hudson Water Co. v. McCarter, 209 U.S. 349 (1908), was overruled in Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982).

[195] Although the clause specifically refers to "citizens," the Court treats the terms "citizens" and "residents" as "essentially interchangeable." Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975); Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978).

[196] Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 387 (1978).

[197] Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

[198] United Building & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

mation act was held not to be a fundamental activity, and a state may limit such access to its own citizens.[199]

Second, finding a fundamental interest protected under the clause, in the particular case the right to pursue an occupation or common calling, the Court used a two-pronged analysis to determine whether the state's distinction between residents and nonresidents was justified. Thus, the state was compelled to show that nonresidents constituted a peculiar source of the evil at which the statute was aimed and that the discrimination bore a substantial relationship to the particular "evil" they are said to represent, *e.g.*, that it is "closely tailored" to meet the actual problem. An Alaska statute giving residents preference over nonresidents in hiring for work on the oil and gas pipelines within the state failed both elements of the test.[200] No state justification for exclusion of new residents from the practice of law on grounds not applied to long-term residents has been approved by the Court.[201]

Universal practice has also established a political exception to the clause to which the Court has given its approval. "A State may, by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office." [202]

Discrimination in Private Rights

Not only has judicial construction of the comity clause excluded certain privileges of a public nature from its protection, but the courts also have established the proposition that the purely private and

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[199] McBurney v. Young, 569 U.S. ___, No. 12–17, slip op. at 4 (2013). The Court further found that any incidental burden on a nonresident's ability to earn a living, own property, or exercise another "fundamental" activity could largely be ameliorated by using other available authorities. The Court emphasized that the primary purpose of the state freedom of information act was to provide state citizens with a means to obtain an accounting of their public officials.

[200] Hicklin v. Orbeck, 437 U.S. 518 (1978). Activity relating to pursuit of an occupation or common calling the Court recognized had long been held to be protected by the clause. The burden of showing constitutional justification was clearly placed on the state, id. at 526–28, rather than giving the statute the ordinary presumption of constitutionality. *See* Mullaney v. Anderson, 342 U.S. 415, 418 (1952).

[201] Barnard v. Thorstenn, 489 U.S. 546 (1989); Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988); Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985). For the application of this test, *see* Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 296–99 (1998).

[202] Blake v. McClung, 172 U.S. 239, 256 (1898). Of course as to suffrage, *see* Dunn v. Blumstein, 405 U.S. 330 (1972), but not as to candidacy, the principle is now qualified under the Equal Protection Clause of the Fourteenth Amendment. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978) (citing Kanapaux v. Ellisor, 419 U.S. 891 (1974); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), *aff'd*, 414 U.S. 802 (1973)).

personal rights to which the clause admittedly extends are not in all cases beyond the reach of state legislation which differentiates citizens and noncitizens. Broadly speaking, these rights are held subject to the reasonable exercise by a state of its police power, and the Court has recognized that there are cases in which discrimination against nonresidents may be reasonably resorted to by a state in aid of its own public health, safety and welfare. To that end a state may reserve the right to sell insurance to persons who have resided within the state for a prescribed period of time.[203] It may require a nonresident who does business within the state[204] or who uses the highways of the state[205] to consent, expressly or by implication, to service of process on an agent within the state. Without violating this section, a state may limit the dower rights of a nonresident to lands of which the husband died seized while giving a resident dower in all lands held during the marriage,[206] or may leave the rights of nonresident married persons in respect of property within the state to be governed by the laws of their domicile, rather than by the laws it promulgates for its own residents.[207] But a state may not give a preference to resident creditors in the administration of the property of an insolvent foreign corporation.[208] An act of the Confederate Government, enforced by a state, to sequester a debt owed by one of its residents to a citizen of another state was held to be a flagrant violation of this clause.[209]

Access to Courts

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be allowed by each state to the citizens of all other states to the same extent that it is allowed to its own citizens.[210] The constitutional requirement is satisfied if the nonresident is given access to the courts of the state upon terms that, in themselves, are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically the same as those accorded to resident citizens.[211] The Supreme Court upheld a state statute of limitations that prevented a nonresident from suing in the state's courts after

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[203] La Tourette v. McMaster, 248 U.S. 465 (1919).

[204] Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[205] Hess v. Pawloski, 274 U.S. 352, 356 (1927).

[206] Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922), followed in Ferry v. Corbett, 258 U.S. 609 (1922).

[207] Conner v. Elliott, 59 U.S. (18 How.) 591, 593 (1856).

[208] Blake v. McClung, 172 U.S. 239, 248 (1898).

[209] Williams v. Bruffy, 96 U.S. 176, 184 (1878).

[210] Chambers v. Baltimore & O.R.R., 207 U.S. 142, 148 (1907); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 233 (1934).

[211] Canadian Northern Ry. v. Eggen, 252 U.S. 553 (1920).

expiration of the time for suit in the place where the cause of action arose [212] and another such statute which that suspended its operation as to resident plaintiffs, but not as to nonresidents, during the period of the defendant's absence from the state.[213] A state law making it discretionary with the courts to entertain an action by a nonresident of the state against a foreign corporation doing business in the state was sustained because it was applicable alike to citizens and noncitizens residing out of the state.[214] A statute permitting a suit in the courts of the state for wrongful death occurring outside the state, only if the decedent was a resident of the state, was sustained, because it operated equally upon representatives of the deceased whether citizens or noncitizens.[215] Being patently nondiscriminatory, a Uniform Reciprocal State Law to secure the attendance of witnesses from within or without a state in criminal proceedings, whereunder an Illinois resident, while temporarily in Florida, was summoned to appear at a hearing for determination as to whether he should be surrendered to a New York officer for testimony in the latter state, does not violate this clause.[216]

Taxation

In the exercise of its taxing power, a state may not discriminate substantially between residents and nonresidents. In *Ward v. Maryland*,[217] the Court set aside a state law that imposed specific taxes upon nonresidents for the privilege of selling within the state goods that were produced in other states. Also found to be incompatible with the comity clause was a Tennessee license tax, the amount of which was dependent upon whether the person taxed had his chief office within or without the state.[218] In *Travis v. Yale & Towne Mfg. Co.*,[219] the Court, although sustaining the right of a state to tax income accruing within its borders to nonresidents,[220] held the particular tax void because it denied to nonresidents exemptions which were allowed to residents. The "terms 'resident' and 'citizen' are not

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[212] 252 U.S. at 563.

[213] Chemung Canal Bank v. Lowery, 93 U.S. 72, 76 (1876).

[214] Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929).

[215] Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907).

[216] New York v. O'Neill, 359 U.S. 1 (1959). Justices Douglas and Black dissented.

[217] 79 U.S. (12 Wall.) 418, 424 (1871). *See also* Downham v. Alexandria Council, 77 U.S. (10 Wall.) 173, 175 (1870).

[218] Chalker v. Birmingham & N.W. Ry., 249 U.S. 522 (1919).

[219] 252 U.S. 60 (1920).

[220] 252 U.S. at 62–64. *See also* Shaffer v. Carter, 252 U.S. 37 (1920). In Austin v. New Hampshire, 420 U.S. 656 (1975), the Court held void a state commuter income tax, inasmuch as the State imposed no income tax on its own residents and thus the tax fell exclusively on nonresidents' income and was not offset even approximately by other taxes imposed upon residents alone.

synonymous," wrote Justice Pitney, ". . . but a general taxing scheme . . . if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other States . . . ."[221] Where there were no discriminations between citizens and noncitizens, a state statute taxing the business of hiring persons within the state for labor outside the state was sustained.[222]

The Court returned to the privileges-and-immunities restrictions upon disparate state taxation of residents and nonresidents in *Lunding v. New York Tax Appeals Tribunal*.[223] In this case, the state denied nonresidents any deduction from taxable income for alimony payments, although it permitted residents to deduct such payments. Although it observed that approximate equality between residents and nonresidents was required by the clause, the Court acknowledged that precise equality was neither necessary nor in most instances possible. But it was required of the challenged state that it demonstrate a "substantial reason" for the disparity, and the discrimination must bear a "substantial relationship" to that reason.[224] A state, under this analysis, may not deny nonresidents a general tax exemption provided to residents that would reduce their tax burdens, but it could limit specific expense deductions based on some relationship between the expenses and their in-state property or income. Here, the state flatly denied the exemption. Moreover, the Court rejected various arguments that had been presented, finding that most of those arguments, while they might support targeted denials or partial denials, simply reiterated the state's contention that it need not afford any exemptions at all. This section of the Constitution does not prevent a territorial government, exercising powers delegated by Congress, from imposing a discriminatory license tax on nonresident fishermen operating within its waters.[225]

However, what at first glance may appear to be a discrimination may turn out not to be when the entire system of taxation prevailing in the enacting state is considered. On the basis of overall fairness, the Court sustained a Connecticut statute that required nonresident stockholders to pay a state tax measured by the full market value of their stock while resident stockholders were subject to local taxation on the market value of that stock reduced by

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[221] 252 U.S. 60, 78–79 (1920).
[222] Williams v. Fears, 179 U.S. 270, 274 (1900).
[223] 522 U.S. 287 (1998).
[224] 522 U.S. at 298.
[225] Haavik v. Alaska Packers Ass'n, 263 U.S. 510 (1924).

the value of the real estate owned by the corporation.[226] Occasional or accidental inequality to a nonresident taxpayer is not sufficient to defeat a scheme of taxation whose operation is generally equitable.[227] In an early case the Court brushed aside as frivolous the contention that a state violated this clause by subjecting one of its own citizens to a property tax on a debt due from a nonresident secured by real estate situated where the debtor resided.[228]

Clause 2. A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

INTERSTATE RENDITION

Duty to Surrender Fugitives From Justice

Although this provision is not in its nature self-executing, and there is no express grant to Congress of power to carry it into effect, that body passed a law shortly after the Constitution was adopted, imposing upon the governor of each state the duty to deliver up fugitives from justice found in such state.[229] The Supreme Court has accepted this contemporaneous construction as establishing the validity of this legislation.[230] The duty to surrender is not absolute and unqualified; if the laws of the state to which the fugitive has fled have been put in force against him, and he is imprisoned there,

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[226] Travellers' Ins. Co. v. Connecticut, 185 U.S. 364, 371 (1902).

[227] Maxwell v. Bugbee, 250 U.S. 525 (1919).

[228] Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879). *Cf.* Colgate v. Harvey, 296 U.S. 404 (1935), in which discriminatory taxation of bank deposits outside the state owned by a citizen of the state was held to infringe a privilege of national citizenship, in contravention of the Fourteenth Amendment. Colgate v. Harvey was overruled by Madden v. Kentucky, 309 U.S. 83, 93 (1940).

[229] 1 Stat. 302 (1793), 18 U.S.C. § 3182. The Act requires rendition of fugitives at the request of a demanding "Territory," as well as of a State, thus extending beyond the terms of the clause. In New York ex rel. Kopel v. Bingham, 211 U.S. 468 (1909), the Court held that the legislative extension was permissible under the territorial clause. *See* Puerto Rico v. Branstad, 483 U.S. 219, 229–230 (1987).

[230] Roberts v. Reilly, 116 U.S. 80, 94 (1885). *See also* Innes v. Tobin, 240 U.S. 127 (1916). Justice Story wrote: "[T]he natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution"; and again, "it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined thereby." Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616, 618–19 (1842).

the demands of those laws may be satisfied before the duty of obedience to the requisition arises.[231] But, in *Kentucky v. Dennison*,[232] the Court held that this statute was merely declaratory of a moral duty; that the Federal Government "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,"[233] and consequently that a federal court could not issue a mandamus to compel the governor of one state to surrender a fugitive to another. Long considered a constitutional derelict, *Dennison* was finally formally overruled in 1987.[234] Now, states and territories may invoke the power of federal courts to enforce against state officers this and other rights created by federal statute, including equitable relief to compel performance of federally imposed duties.[235]

Fugitive From Justice Defined.—To be a fugitive from justice within the meaning of this clause, it is necessary that, in the regular course of judicial proceedings, one have been charged with a crime, but it is not necessary that one have left the state *after* having been charged. It is sufficient that, having been charged with a crime in one state, one is found in another state.[236] And the motive that induced the departure is immaterial.[237] Even if a fugitive were brought involuntarily into the state where found by requisition from another state, he may be surrendered to a third state upon an extradition warrant.[238] A person indicted a second time for the same offense is nonetheless a fugitive from justice by reason of the fact that after dismissal of the first indictment, on which he was originally indicted, he left the state with the knowledge of, or without objection by, state authorities.[239] But a defendant cannot be extradited if he was only constructively present in the demanding state

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[231] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371 (1873).

[232] 65 U.S. (24 How.) 66 (1861); *cf.* Prigg v. Pennsylvania 41 U.S. (16 Pet.) 539, 612 (1842).

[233] 65 U.S. (24 How.) 66, 107 (1861). Congress in 1934 plugged the loophole created by this decision by making it unlawful for any person to flee from one state to another for the purpose of avoiding prosecution in certain cases. 48 Stat. 782, 18 U.S.C. § 1073.

[234] Puerto Rico v. Branstad, 483 U.S. 219 (1987). "*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development." Id. at 230.

[235] 483 U.S. at 230.

[236] Roberts v. Reilly, 116 U.S. 80, 95 (1885). *See also* Strassheim v. Daily, 221 U.S. 280 (1911); Appleyard v. Massachusetts, 203 U.S. 222 (1906); *Ex parte* Reggel, 114 U.S. 642, 650 (1885).

[237] Drew v. Thaw, 235 U.S. 432, 439 (1914).

[238] Innes v. Tobin, 240 U.S. 127 (1916).

[239] Bassing v. Cady, 208 U.S. 386 (1908).

at the time of the commission of the crime charged.[240] For the purpose of determining who is a fugitive from justice, the words "treason, felony or other crime" embrace every act forbidden and made punishable by a law of a state,[241] including misdemeanors.[242]

Procedure for Removal.—Only after a person has been charged with a crime in the regular course of judicial proceedings is the governor of a state entitled to make demand for his return from another state.[243] The person demanded has no constitutional right to be heard before the governor of the state in which he is found on the question whether he has been substantially charged with crime and is a fugitive from justice.[244] The constitutionally required surrender is not to be interfered with by *habeas corpus* upon speculations as to what ought to be the result of a trial.[245] Nor is it proper thereby to inquire into the motives controlling the actions of the governors of the demanding and surrendering states.[246] Matters of defense, such as the running of the statute of limitations,[247] or the contention that continued confinement in the prison of the demanding state would amount to cruel and unjust punishment,[248] cannot be heard on *habeas corpus* but should be tested in the courts of the demanding state, where all parties may be heard, where all pertinent testimony will be readily available, and where suitable relief, if any, may be fashioned. A defendant will, however, be discharged on *habeas corpus* if he shows by clear and satisfactory evidence that he was outside the demanding state at the time of the crime.[249] If, however, the evidence is conflicting, *habeas corpus* is not a proper proceeding to try the question of alibi.[250] The *habeas* court's role is, therefore, very limited.[251]

Trial of Fugitives After Removal.—There is nothing in the Constitution or laws of the United States that exempts an offender,

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[240] Hyatt v. People ex rel. Corkran, 188 U.S. 691 (1903).

[241] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 103 (1861).

[242] Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 375 (1873).

[243] Kentucky v. Dennison, 65 U.S. (24 How.) 66, 104 (1861); Pierce v. Creecy, 210 U.S. 387 (1908). *See also Matter of Strauss*, 197 U.S. 324, 325 (1905); Marbles v. Creecy, 215 U.S. 63 (1909); Strassheim v. Daily, 221 U.S. 280 (1911).

[244] Munsey v. Clough, 196 U.S. 364 (1905); Pettibone v. Nichols, 203 U.S. 192 (1906).

[245] Drew v. Thaw, 235 U.S. 432 (1914).

[246] Pettibone v. Nichols, 203 U.S. 192 (1906).

[247] Biddinger v. Commissioner of Police, 245 U.S. 128 (1917). *See also* Rodman v. Pothier, 264 U.S. 399 (1924).

[248] Sweeney v. Woodall, 344 U.S. 86 (1952).

[249] Hyatt v. People ex rel. Corkran, 188 U.S. 691 (1903). *See also* South Carolina v. Bailey, 289 U.S. 412 (1933).

[250] Munsey v. Clough, 196 U.S. 364, 375 (1905).

[251] Michigan v. Doran, 439 U.S. 282, 289 (1978). In California v. Superior Court, 482 U.S. 400 (1987), the Court reiterated that extradition is a "summary procedure."

brought before the courts of a state for an offense against its laws, from trial and punishment, even though he was brought from another state by unlawful violence,[252] or by abuse of legal process,[253] and a fugitive lawfully extradited from another state may be tried for an offense other than that for which he was surrendered.[254] The rule is different, however, with respect to fugitives surrendered by a foreign government, pursuant to treaty. In that case the offender may be tried only "for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings." [255]

Clause 3. No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

FUGITIVES FROM LABOR

This clause contemplated the existence of a positive unqualified right on the part of the owner of a slave which no state law could in any way regulate, control, or restrain. Consequently the owner of a slave had the same right to seize and repossess him in another state, as the local laws of his own state conferred upon him, and a state law that penalized such seizure was held unconstitutional.[256] Congress had the power and the duty, which it exercised by the Act of February 12, 1793,[257] to carry into effect the rights given by this section,[258] and the states had no concurrent power to legislate on the subject.[259] However, a state statute providing a penalty for harboring a fugitive slave was held not to conflict with this clause because it did not affect the right or remedy either of the

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[252] Ker v. Illinois, 119 U.S. 436, 444 (1886); Mahon v. Justice, 127 U.S. 700, 707, 712, 714 (1888).

[253] Cook v. Hart, 146 U.S. 183, 193 (1892); Pettibone v. Nichols, 203 U.S. 192, 215 (1906).

[254] Lascelles v. Georgia, 148 U.S. 537, 543 (1893).

[255] United States v. Rauscher, 119 U.S. 407, 430 (1886).

[256] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842).

[257] 1 Stat. 302 (1793).

[258] Jones v. Van Zandt, 46 U.S. (5 How.) 215, 229 (1847); Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).

[259] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 625 (1842).

master or the slave; by it the state simply prescribed a rule of conduct for its own citizens in the exercise of its police power.[260]

SECTION 3. Clause 1. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

DOCTRINE OF THE EQUALITY OF STATES

"Equality of constitutional right and power is the condition of all the States of the Union, old and new."[261] This doctrine, now a truism of constitutional law, did not find favor in the Constitutional Convention. That body struck out from this section, as reported by the Committee on Detail, two sections to the effect that "new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States concerning the public debt which shall be subsisting."[262] Opposing this action, Madison insisted that "the Western States neither would nor ought to submit to a union which degraded them from an equal rank with the other States."[263] Nonetheless, after further expressions of opinion pro and con, the Convention voted nine states to two to delete the requirement of equality.[264]

Prior to this time, however, Georgia and Virginia had ceded to the United States large territories held by them, upon condition that new states should be formed therefrom and admitted to the Union on an equal footing with the original states.[265] Since the admission of Tennessee in 1796, Congress has included in each state's act of

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[260] Moore v. Illinois, 55 U.S. (14 How.) 13, 17 (1853).

[261] Escanaba Co. v. City of Chicago, 107 U.S. 678, 689 (1883).

[262] 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 454 (rev. ed. 1937).

[263] Id.

[264] Id. The present provision was then adopted as a substitute. Id. at 455.

[265] Pollard v. Hagan, 44 U.S. (3 How.) 212, 221 (1845). The Continental Congress in responding in the Northwest Ordinance, on July 13, 1787, provided that when each of the designated states in the territorial area achieved a population of 60,000 free inhabitants it was to be admitted "on an equal footing with the original States, in all respects whatever." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. V*, 5 JOURNALS OF CONGRESS 752–754 (1823 ed.), reprinted in C. Tansill ed., *Documents Illustrative of the Formation of the Union of the American States*, H. DOC. NO. 398, 69th Cong., 1st Sess. (1927), 47, 54.

admission a clause providing that the state enters the Union "on an equal footing with the original States in all respects whatever." [266] With the admission of Louisiana in 1812, the principle of equality was extended to states created out of territory purchased from a foreign power.[267] By the Joint Resolution of December 29, 1845, Texas, then an independent Nation, "was admitted into the Union on an equal footing with the original States in all respects whatever." [268]

However, if the doctrine rested merely on construction of the declarations in the admission acts, then the conditions and limitations imposed by Congress and agreed to by the states in order to be admitted would nonetheless govern, since they must be construed along with the declarations. Again and again, however, in adjudicating the rights and duties of states admitted after 1789, the Supreme Court has referred to the condition of equality as if it were an inherent attribute of the Federal Union.[269] That the doctrine is of constitutional stature was made evident at least by the time of the decision in *Pollard's Lessee*, if not before.[270] *Pollard's Lessee* involved conflicting claims by the United States and Alabama of ownership of certain partially inundated lands on the shore of the Gulf of Mexico in Alabama. The enabling act for Alabama had contained both a declaration of equal footing and a reservation to the United States of these lands.[271] Rather than an issue of mere land ownership, the Court saw the question as one concerning sovereignty and jurisdiction of the states. Because the original states retained sovereignty and jurisdiction over the navigable waters and the soil beneath them within their boundaries, retention by the United States of either title to or jurisdiction over common lands in the new states would bring those states into the Union on less than an equal footing with the original states. This, the Court would not permit. "Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it, before she

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[266] 1 Stat. 491 (1796). Prior to Tennessee's admission, Vermont and Kentucky were admitted with different but conceptually similar terminology. 1 Stat. 191 (1791); 1 Stat. 189 (1791).

[267] 2 Stat. 701, 703 (1812).

[268] Justice Harlan, speaking for the Court, in United States v. Texas, 143 U.S. 621, 634 (1892) (citing 9 Stat. 108).

[269] Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 434 (1892); Knight v. U.S. Land Association, 142 U.S. 161, 183 (1891); Weber v. Harbor Commissioners, 85 U.S. (18 Wall.) 57, 65 (1873).

[270] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845). *See* Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 588 (1845).

[271] 3 Stat. 489, 492 (1819).

ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding. . . . [T]o Alabama belong the navigable waters and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; *and no compact that might be made between her and the United States could diminish or enlarge these rights.*" [272]

Finally, in 1911, the Court invalidated a restriction on the change of location of the state capital, which Congress had imposed as a condition for the admission of Oklahoma, on the ground that Congress may not embrace in an enabling act conditions relating wholly to matters under state control.[273] In an opinion, from which Justices Holmes and McKenna dissented, Justice Lurton argued: "The power is to admit 'new States into this Union,' 'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission." [274]

The equal footing doctrine is generally a limitation upon the terms by which Congress admits a state.[275] That is, states must be admitted on an equal footing in the sense that Congress may not

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[272] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 228–29 (1845) (emphasis supplied). *See also* id. at 222–23. A unanimous Court explained the rule on state ownership of navigable waters in PPL Montana, LLC v. Montana, 565 U.S. ___, No. 10–218, slip op. (2012). Under the equal footing doctrine, a State, upon entering the Union, gains title to the beds of waters then navigable or tidally influenced, subject only to federal powers under the Constitution (*e.g.*, the Commerce Clause). By contrast, the United States retains any title vested in it to lands beneath waters not then navigable or tidally influenced. For the distinct purpose of the equal footing doctrine, "navigable waters" are those waters used, or susceptible to use, for trade and travel by customary means at the time of statehood. Furthermore, the "navigability" of rivers is determined on a segment-by-segment basis, and lands under portions of a stream that were impassable at statehood were not conveyed by force of the doctrine.

[273] Coyle v. Smith, 221 U.S. 559 (1911).

[274] 221 U.S. at 567.

[275] *See* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966). However, in recent years the Court has relied on the general principle of "constitutional equality" among the states to strike down both federal and state laws. *See, e.g.*, Franchise Tax Bd. of Cal. v. Hyatt, 578 U.S. ___, No. 14–1175, slip op. at 7 (2016); Shelby Cty. v. Holder, 570 U.S. ___, No. 12–96, slip op. at 9 (citing Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).

exact conditions solely as a tribute for admission, but it may, in the enabling or admitting acts or subsequently impose requirements that would be or are valid and effectual if the subject of congressional legislation after admission.[276] Thus, Congress may embrace in an admitting act a regulation of commerce among the states or with Indian tribes or rules for the care and disposition of the public lands or reservations within a state. "[I]n every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress." [277]

Until recently the requirement of equality has applied primarily to political standing and sovereignty rather than to economic or property rights.[278] Broadly speaking, every new state is entitled to exercise all the powers of government which belong to the original states of the Union.[279] It acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property throughout its limits even as to federal lands, except where the Federal Government has reserved [280] or the state has ceded some degree of jurisdiction to the United States, and, of course, no state may enact a law that would conflict with the constitutional powers of the United States. Consequently, it has jurisdiction to tax private activities carried on within the public domain (although not to tax the Federal lands), if the tax does not constitute an unconstitutional burden on the Federal Government.[281] Statutes applicable to territories, *e.g.*, the Northwest Territory Ordinance of 1787, cease to have any operative force when the territory,

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[276] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 224–25, 229–30 (1845); Coyle v. Smith, 221 U.S. 559, 573–74 (1911). *See also* Bolln v. Nebraska, 176 U.S. 83, 89 (1900); Ward v. Race Horse, 163 U.S. 504, 514 (1895); Escanaba Co. v. City of Chicago, 107 U.S. 678, 688 (1882); Withers v. Buckley, 61 U.S. (20 How.) 84, 92 (1857).

[277] Coyle v. Smith, 221 U.S. 559, 574 (1911). Examples include Stearns v. Minnesota, 179 U.S. 223 (1900) (congressional authority to dispose of and to make rules and regulations respecting the property of the United States); United States v. Sandoval, 231 U.S. 28 (1913) (regulating Indian tribes and intercourse with them); United States v. Chavez, 290 U.S. 357 (1933) (same); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 9–10 (1888) (prevention of interference with navigability of waterways under Commerce Clause).

[278] United States v. Texas, 339 U.S. 707, 716 (1950); Stearns v. Minnesota, 179 U.S. 223, 245 (1900).

[279] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 223 (1845); McCabe v. Atchison T. & S.F. Ry., 235 U.S. 151 (1914).

[280] Van Brocklin v. Tennessee, 117 U.S. 151, 167 (1886).

[281] Wilson v. Cook, 327 U.S. 474 (1946).

or any part thereof, is admitted to the Union, except as adopted by state law.[282] When the enabling act contains no exclusion of jurisdiction as to crimes committed on Indian reservations by persons other than Indians, state courts are vested with jurisdiction.[283] But the constitutional authority of Congress to regulate commerce with Indian tribes is not inconsistent with the equality of new states,[284] and conditions inserted in the New Mexico Enabling Act forbidding the introduction of liquor into Indian territory were therefore valid.[285] Similarly, Indian treaty rights to hunt, fish, and gather on lands ceded to the Federal Government were not extinguished by statehood. These "usufructuary" rights were subject to reasonable state regulation, and hence were not irreconcilable with state sovereignty over natural resources.[286]

Admission of a state on an equal footing with the original states involves the adoption as citizens of the United States of those whom Congress makes members of the political community and who are recognized as such in the formation of the new state.[287]

Judicial Proceedings Pending on Admission of New States

Whenever a territory is admitted into the Union, the cases pending in the territorial court that are of exclusive federal cognizance are transferred to the federal court having jurisdiction over the area; cases not cognizable in the federal courts are transferred to the tribunals of the new state, and those over which federal and state courts have concurrent jurisdiction may be transferred either to the state or federal courts by the party possessing the option under existing law.[288] Where Congress neglected to make provision for disposition of certain pending cases in an enabling act for the admission of a state to the Union, a subsequent act supplying the omission was held valid.[289] After a case, begun in a United States court of a territory, is transferred to a state court under the operation of the en-

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[282] Permoli v. First Municipality, 44 U.S. (3 How.) 589, 609 (1845); Sands v. Manistee River Imp. Co., 123 U.S. 288, 296 (1887); *see also* Withers v. Buckley, 61 U.S. (20 How.) 84, 92 (1858); Huse v. Glover, 119 U.S. 543 (1886); Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 9 (1888); Cincinnati v. Louisville & Nashville R.R., 223 U.S. 390 (1912).

[283] Draper v. United States, 164 U.S. 240 (1896), following United States v. McBratney, 104 U.S. 621 (1882).

[284] Dick v. United States, 208 U.S. 340 (1908); *Ex parte* Webb, 225 U.S. 663 (1912).

[285] United States v. Sandoval, 231 U.S. 28 (1913).

[286] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 204 (1999) (overruling Ward v. Race Horse, 163 U.S. 504 (1896)).

[287] Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135, 170 (1892).

[288] Baker v. Morton, 79 U.S. (12 Wall.) 150, 153 (1871).

[289] Freeborn v. Smith, 69 U.S. (2 Wall.) 160 (1865).

abling act and the state constitution, the appellate procedure is governed by the state statutes and procedures.[290]

The new state, without the express or implied assent of Congress, cannot enact that the records of the former territorial court of appeals should become records of its own courts or provide by law for proceedings based thereon.[291]

Property Rights of States to Soil Under Navigable Waters

The "equal footing" doctrine has had an important effect on the property rights of new states to soil under navigable waters[292] and tidally influenced waters.[293] In *Pollard's Lessee v. Hagan*,[294] as was observed above, the Court held that the original states had reserved to themselves the ownership of the shores of navigable waters and the soils under them, and that under the principle of equality the title to the soils beneath navigable water passes to a new state upon admission. The principle of this case, which also applies to tidally influenced waters, supplies the rule of decision in many property-claims cases.[295]

After refusing to extend the inland-water rule of *Pollard's Lessee* to the three mile marginal belt under the ocean along the coast,[296] the Court applied the principle in reverse in *United States v. Texas*.[297] Because the original states had been found not to own the soil un-

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[290] John v. Paullin, 231 U.S. 583 (1913).

[291] Hunt v. Palao, 45 U.S. (4 How.) 589 (1846). *Cf.* Benner v. Porter, 50 U.S. (9 How.) 235, 246 (1850).

[292] "Navigable waters", for equal footing purposes, are those waters used, or susceptible to use, for trade and travel at the time of statehood. PPL Montana, LLC v. Montana, 565 U.S. ___, No. 10–218, slip op. at 11–13 (2012).

[293] *E.g.*, Knight v. U.S. Land Association, 142 U.S. 161, 183 (1891).

[294] 44 U.S. (3 How.) 212, 223 (1845). *See also* Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

[295] *See* PPL Montana, LLC v. Montana, 565 U.S. ___, No. 10–218, slip op. (2012) (Montana not able to charge rent to hydroelectric facilities located on portions of rivers that were impassable when Montana became a State); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) (confirming language in earlier cases recognizing state sovereignty over tidal but nonnavigable lands); Utah Division of State Lands v. United States, 482 U.S. 193 (1987) (applying presumption against congressional intent to defeat state title to find inadequate federal reservation of lake bed); Idaho v. United States, 533 U.S. 262 (2001) (presumption rebutted by indications—some occurring after statehood—that Congress intended to reserve certain submerged lands for benefit of an Indian tribe); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) (doctrine requires utilization of state common law rather than federal to determine ownership of land underlying river that is navigable but not an interstate boundary); Shively v. Bowlby, 152 U.S. 1 (1894) (whether Oregon or a pre-statehood grantee from the United States of riparian lands near mouth of Columbia River owned soil below high-water mark).

[296] United States v. California, 332 U.S. 19, 38 (1947); United States v. Louisiana, 339 U.S. 699 (1950).

[297] 339 U.S. 707, 716 (1950). *See* United States v. Maine, 420 U.S. 515 (1975) (unanimously reaffirming the California, Louisiana, and Texas cases).

der the three mile belt, Texas, which concededly did own this soil before its annexation to the United States, was held to have surrendered its dominion and sovereignty over it, upon entering the Union on terms of equality with the existing states. To this extent, the earlier rule that unless otherwise declared by Congress the title to every species of property owned by a territory passes to the state upon admission[298] has been qualified. However, when Congress, through passage of the Submerged Lands Act of 1953,[299] surrendered its paramount rights to natural resources in the marginal seas to certain states, without any corresponding cession to all states, the transfer was held to entail no abdication of national sovereignty over control and use of the oceans in a manner destructive of the equality of the states.[300]

While the territorial status continues, the United States has power to convey property rights, such as rights in soil below the high-water mark along navigable waters,[301] or the right to fish in designated waters,[302] which will be binding on the state.

Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

PROPERTY AND TERRITORY: POWERS OF CONGRESS

Methods of Disposing of Property

The Constitution is silent as to the methods of disposing of property of the United States. In *United States v. Gratiot*,[303] in which the validity of a lease of lead mines on government lands was put

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[298] Brown v. Grant, 116 U.S. 207, 212 (1886).

[299] 67 Stat. 29, 43 U.S.C. §§ 1301–1315.

[300] Alabama v. Texas, 347 U.S. 272, 274–77, 281 (1954). Justice Black and Douglas dissented.

[301] Shively v. Bowlby, 152 U.S. 1, 47 (1894). *See also* Joy v. St. Louis, 201 U.S. 332 (1906).

[302] United States v. Winans, 198 U.S. 371, 378 (1905); Seufert Bros. v. United States, 249 U.S. 194 (1919). A fishing right granted by treaty to Indians does not necessarily preclude the application to Indians of state game laws regulating the time and manner of taking fish. New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916). *See also* Metlakatla Indians v. Egan, 369 U.S. 45, 54, 57–59 (1962); Kake Village v. Egan, 369 U.S. 60, 64–65, 67–69, 75–76 (1962). But it has been held to be violated by exacting a license fee that is both regulatory and revenue-producing. Tulee v. Washington, 315 U.S. 681 (1942).

[303] 39 U.S. (14 Pet.) 526 (1840).

in issue, the contention was advanced that "disposal is not letting or leasing," and that Congress has no power "to give or authorize leases." The Court sustained the leases, saying "the disposal must be left to the discretion of Congress." [304] Nearly a century later this power to dispose of public property was relied upon to uphold the generation and sale of electricity by the Tennessee Valley Authority. The reasoning of the Court ran thus: the potential electrical energy made available by the construction of a dam in the exercise of its constitutional powers is property which the United States is entitled to reduce to possession; to that end it may install the equipment necessary to generate such energy. In order to widen the market and make a more advantageous disposition of the product, it may construct transmission lines and may enter into a contract with a private company for the interchange of electric energy.[305]

Public Lands: Federal and State Powers Thereover

No appropriation of public lands may be made for any purpose except by authority of Congress.[306] However, Congress was held to have acquiesced in the long-continued practice of withdrawing land from the public domain by Executive Orders.[307] In 1976 Congress enacted legislation that established procedures for withdrawals and that explicitly disclaimed continued acquiescence in any implicit executive withdrawal authority.[308] The comprehensive authority of Congress over public lands includes the power to prescribe the times, conditions, and mode of transfer thereof and to designate the persons to whom the transfer shall be made,[309] to declare the dignity and effect of titles emanating from the United States,[310] to determine the validity of grants which antedate the government's acquisition of the property,[311] to exempt lands acquired under the homestead laws from previously contracted debts,[312] to withdraw land

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[304] 39 U.S. at 533, 538.

[305] Ashwander v. TVA, 297 U.S. 288, 335–40 (1936). *See also* Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

[306] United States v. Fitzgerald, 40 U.S. (15 Pet.) 407, 421 (1841). *See also* California v. Deseret Water, Oil & Irrigation Co., 243 U.S. 415 (1917); Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).

[307] Sioux Tribe v. United States, 316 U.S. 317 (1942); United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915).

[308] Federal Land Policy and Management Act, Pub. L. 94–579, § 704(a); 90 Stat. 2792 (1976).

[309] Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872); *see also* Irvine v. Marshall, 61 U.S. (20 How.) 558 (1858); Emblem v. Lincoln Land Co., 184 U.S. 660, 664 (1902).

[310] Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839). *See also* Field v. Seabury, 60 U.S. (19 How.) 323, 332 (1857).

[311] Tameling v. United States Freehold & Immigration Co., 93 U.S. 644, 663 (1877). *See also Maxwell Land-Grant Case*, 121 U.S. 325, 366 (1887).

[312] Ruddy v. Rossi, 248 U.S. 104 (1918).

from settlement and to prohibit grazing thereon,[313] to prevent unlawful occupation of public property and to declare what are nuisances, as affecting such property, and provide for their abatement,[314] and to prohibit the introduction of liquor on lands purchased and used for an Indian colony.[315] Congress may limit the disposition of the public domain to a manner consistent with its views of public policy. A restriction inserted in a grant of public lands to a municipality which prohibited the grantee from selling or leasing to a private corporation the right to sell or sublet water or electric energy supplied by the facilities constructed on such land was held valid.[316]

Unanimously upholding a federal law to protect wild-roaming horses and burros on federal lands, the Court restated the applicable principles governing Congress's power under this clause. It empowers Congress to act as both proprietor and legislature over the public domain; Congress has complete power to make those "needful rules" which in its discretion it determines are necessary. When Congress acts with respect to those lands covered by the clause, its legislation overrides conflicting state laws.[317] Absent action by Congress, however, states may in some instances exercise some jurisdiction over activities on federal lands.[318]

No state may tax public lands of the United States within its borders,[319] nor may state legislation interfere with the power of Congress under this clause or embarrass its exercise.[320] Thus, by virtue of a Treaty of 1868, according self-government to Navajos living on an Indian Reservation in Arizona, the tribal court, rather than the courts of that state, had jurisdiction over a suit for a debt owed by an Indian resident thereof to a non-Indian conducting a store on the reservation under federal license.[321] The question whether title to land that has once been the property of the United States has passed from it must be resolved by the laws of the United States; after title has passed, "that property, like all other property in the state, is subject to the state legislation; so far as that legislation is

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[313] Light v. United States, 220 U.S. 523 (1911). *See also The Yosemite Valley Case*, 82 U.S. (15 Wall.) 77 (1873).

[314] Camfield v. United States, 167 U.S. 518, 525 (1897). *See also* Jourdan v. Barrett, 45 U.S. (4 How.) 169 (1846); United States v. Waddell, 112 U.S. 76 (1884).

[315] United States v. McGowan, 302 U.S. 535 (1938).

[316] United States v. City of San Francisco, 310 U.S. 16 (1940).

[317] Kleppe v. New Mexico, 426 U.S. 529 (1976).

[318] California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987).

[319] Van Brocklin v. Tennessee, 117 U.S. 151 (1886); *cf.* Wilson v. Cook, 327 U.S. 474 (1946).

[320] Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 99 (1872). *See also* Irvine v. Marshall, 61 U.S. (20 How.) 558 (1858); Emblem v. Lincoln Land Co., 184 U.S. 660, 664 (1902).

[321] Williams v. Lee, 358 U.S. 217 (1959).

consistent with the admission that the title passed and vested according to the laws of the United States." [322] In construing a conveyance by the United States of land within a state, the settled and reasonable rule of construction of the state affords a guide in determining what impliedly passes to the grantee as an incident to land expressly granted.[323] But a state statute enacted subsequently to a federal grant cannot operate to vest in the state rights that either remained in the United States or passed to its grantee.[324]

Territories: Powers of Congress Thereover

In the territories, Congress has the entire dominion and sovereignty, national and local, and has full legislative power over all subjects upon which a state legislature might act.[325] It may legislate directly with respect to the local affairs of a territory or it may transfer that function to a legislature elected by the citizens thereof,[326] which will then be invested with all legislative power except as limited by the Constitution of the United States and acts of Congress.[327] In 1886, Congress prohibited the enactment by territorial legislatures of local or special laws on enumerated subjects.[328] The constitutional guarantees of private rights are applicable in territories which have been made a part of the United States by congressional action [329] but not in unincorporated territories.[330] Congress

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[322] Wilcox v. McConnel, 38 U.S. (13 Pet.) 498, 517 (1839).

[323] Oklahoma v. Texas, 258 U.S. 574, 595 (1922).

[324] United States v. Oregon, 295 U.S. 1, 28 (1935).

[325] Simms v. Simms, 175 U.S. 162, 168 (1899). *See also* United States v. McMillan, 165 U.S. 504, 510 (1897); El Paso & N.E. Ry. v. Gutierrez, 215 U.S. 87 (1909); First Nat'l Bank v. County of Yankton, 101 U.S. 129, 133 (1880).

[326] Binns v. United States, 194 U.S. 486, 491 (1904). *See also* Sere v. Pitot, 10 U.S. (6 Cr.) 332, 336 (1810); Murphy v. Ramsey, 114 U.S. 15, 44 (1885).

[327] Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593, 604 (1897); Simms v. Simms, 175 U.S. 162, 163 (1899); Wagoner v. Evans, 170 U.S. 588, 591 (1898).

[328] 24 Stat. 170 (1886).

[329] Downes v. Bidwell, 182 U.S. 244, 271 (1901). *See also* Mormon Church v. United States, 136 U.S. 1, 14 (1890); ICC v. United States ex rel. Humboldt Steamship Co., 224 U.S. 474 (1912).

[330] Downes v. Bidwell, 182 U.S. 244 (1901); Dorr v. United States, 195 U.S. 138 (1904); Balzac v. Porto Rico, 258 U.S. 298 (1922) (collectively, the *Insular Cases*). The guarantees of fundamental rights apply to persons in Puerto Rico, id. at 312–13, but what these are and how they are to be determined, in light of *Balzac's* holding that the right to a civil jury trial was not protected. The vitality of the *Insular Cases* has been questioned by some Justices (Reid v. Covert, 354 U.S. 1, 14 (1957) (plurality opinion); Torres v. Puerto Rico, 442 U.S. 465, 474, 475 (1979) (concurring opinion of four Justices)), but there is no doubt that the Court adheres to it (United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990); Harris v. Rosario, 446 U.S. 651 (1980)). Applying stateside rights in Puerto Rico are Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) (procedural due process); Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976) (equal protection principles); Torres v. Puerto Rico, 442 U.S. 465 (1979) (search and seizure); Harris v. Rosario, *supra* (same); Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7–8 (1982) (equality of voting rights);

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may establish, or may authorize the territorial legislature to create, legislative courts whose jurisdiction is derived from statutes enacted pursuant to this section other than from Article III.[331] Such courts may exercise admiralty jurisdiction despite the fact that such jurisdiction may be exercised in the states only by constitutional courts.[332]

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

GUARANTEE OF REPUBLICAN FORM OF GOVERNMENT

The first clause of this section, in somewhat different language, was contained in the Virginia Plan introduced in the Convention and was obviously attributable to Madison.[333] Through the various permutations into its final form,[334] the object of the clause seems

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Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 331 n.1 (1986) (First Amendment speech). *See also* Califano v. Torres, 435 U.S. 1, 4 n.6 (1978) (right to travel assumed). Puerto Rico is, of course, not the only territory that is the subject of the doctrine of the *Insular Cases*. *E.g.*, Ocampo v. United States, 234 U.S. 91 (1914) (Philippines and Sixth Amendment jury trial); Hawaii v. Mankichi, 190 U.S. 197 (1903) (grand jury indictment and trial by jury).

[331] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). *See also* Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434, 447 (1872); Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 655 (1874); Reynolds v. United States, 98 U.S. 145, 154 (1879); *The "City of Panama,"* 101 U.S. 453, 460 (1880); McAllister v. United States, 141 U.S. 174, 180 (1891); United States v. McMillan, 165 U.S. 504, 510 (1897); Romeu v. Todd, 206 U.S. 358, 368 (1907).

[332] American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828).

[333] "Resd. that a Republican government . . . ought to be guaranteed by the United States to each state." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 22 (rev. ed. 1937). In a letter in April, 1787, to Randolph, who formally presented the Virginia Plan to the Convention, Madison had suggested that "an article ought to be inserted expressly guaranteeing the tranquility of the states against internal as well as external danger. . . . Unless the Union be organized efficiently on republican principles innovations of a much more objectionable form may be obtruded." 2 WRITINGS OF JAMES MADISON 336 (G. Hunt ed., 1900). On the background of the clause, *see* W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION ch. 1 (1972).

[334] Thus, on June 11, the language of the provision was on Madison's motion changed to: "Resolved that a republican constitution and its existing laws ought to be guaranteed to each state by the United States." 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 193–194, 206 (rev. ed. 1937). Then, on July 18, Gouverneur Morris objected to this language on the ground that "[h]e should be very unwilling that such laws as exist in R. Island ought to be guaranteed to each State of the Union." 2 id. at 47. Madison then suggested language "that the Constitutional authority of the States shall be guaranteed to them respectively against domestic as

clearly to have been more than an authorization for the Federal Government to protect states against foreign invasion or internal insurrection,[335] a power seemingly already conferred in any case.[336] No one can now resurrect the full meaning of the clause and intent which moved the Framers to adopt it, but with the exception of the reliance for a brief period during Reconstruction the authority contained within the confines of the clause has been largely unexplored.[337]

In *Luther v. Borden*,[338] the Supreme Court established the doctrine that questions arising under this section are political, not judicial, in character and that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character."[339] *Texas v. White*[340] held that the action of the President in setting up provisional governments at the conclusion of the war was justified, if at all, only as an exercise of his powers as Commander-in-Chief and that such governments were to be regarded merely as provisional regimes to perform the functions of government pending action by Congress. On the ground that the issues were not justiciable, the Court in the early part of this century refused to pass on a number of challenges to state governmental reforms and thus made the clause in effect noncognizable by the courts in any matter,[341] a status from which the Court's opinion in

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well as foreign violence," whereas Randolph wanted to add to this the language "and that no State be at liberty to form any other than a Republican Govt." Wilson then moved, "as a better expression of the idea," almost the present language of the section, which was adopted. Id. at 47–49.

[335] Thus, Randolph on June 11, supporting Madison's version pending then, said that "a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy." 1 id. at 206. Again, on July 18, when Wilson and Mason indicated their understanding that the object of the proposal was "merely" to protect states against violence, Randolph asserted: "The Resoln. has 2 Objects. 1. to secure Republican government. 2. to suppress domestic commotions. He urged the necessity of both these provisions." 2 id. at 47. Following speakers alluded to the dangers of monarchy being created peacefully as necessitating the provision. Id. at 48. *See* W. Wiecek, The Guarantee Clause of the U.S. Constitution ch. 2 (1972).

[336] *See* Article I, § 8, cl. 15.

[337] *See generally* W. Wiecek, The Guarantee Clause of the U.S. Constitution (1972).

[338] 48 U.S. (7 How.) 1 (1849).

[339] 48 U.S. at 42.

[340] 74 U.S. (7 Wall.) 700, 729 (1869). In Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1868), the state attempted to attack Reconstruction legislation on the premise that it already had a republican form of government and that Congress was thus not authorized to act. The Court viewed the congressional decision as determinative.

[341] Pacific States Tel. Co. v. Oregon, 223 U.S. 118 (1912); Kiernan v. City of Portland, 223 U.S. 151 (1912); Davis v. Ohio, 241 U.S. 565 (1916); Ohio v. Akron Park Dist., 281 U.S. 74 (1930); O'Neill v. Leamer, 239 U.S. 244 (1915); Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937). But in certain earlier cases the Court had disposed of Guarantee Clause questions on the merits. Forsyth v. City of Hammond, 166 U.S. 506 (1897); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875).

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Baker v. Carr,[342] despite its substantial curbing of the political question doctrine, did not release it.[343]

Similarly, in *Luther v. Borden*,[344] the Court indicated that it rested with Congress to determine the means proper to fulfill the guarantee of protection to the states against domestic violence. Chief Justice Taney declared that Congress might have placed it in the power of a court to decide when the contingency had happened that required the Federal Government to interfere, but that instead Congress had by the act of February 28, 1795,[345] authorized the President to call out the militia in case of insurrection against the government of any state. It followed, said Taney, that the President "must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress,"[346] which determination was not subject to review by the courts.

In recent years, the authority of the United States to use troops and other forces in the states has not generally been derived from this clause and it has been of little importance.

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[342] 369 U.S. 186, 218–32 (1962). In the Court's view, Guarantee Clause questions were nonjusticiable because resolution of them had been committed to Congress and not because they involved matters of state governmental structure.

[343] Subsequently, the Court, speaking through Justice O'Connor, raised without deciding the possibility that the Guarantee Clause is justiciable and is a constraint upon Congress's power to regulate the activities of the states. New York v. United States, 505 U.S. 144, 183–85 (1992); Gregory v. Ashcroft, 501 U.S. 452, 463 (1991). The opinions draw support from a powerful argument for using the Guarantee Clause as a judicially enforceable limit on federal power. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

[344] 48 U.S. (7 How.) 1 (1849).

[345] 1 Stat. 424.

[346] Luther v. Borden, 48 U.S. (7 How.) 1, 43 (1849).

ARTICLE V

MODE OF AMENDMENT

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MODE OF AMENDMENT

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

AMENDMENT OF THE CONSTITUTION

Scope of the Amending Power

When Article V was before the Constitutional Convention, a motion to insert a provision that "no State shall without its consent be affected in its internal policy" was made and rejected.[1] A further attempt to impose a substantive limitation on the amending power was made in 1861, when Congress submitted to the states a proposal to bar any future amendments which would authorize Congress to "interfere, within any State, with the domestic institutions thereof . . . ."[2] Three states ratified this article before the outbreak of the Civil War made it academic.[3] Members of Congress opposed passage by Congress of the Thirteenth Amendment on the

[1] 2 M. Farrand, The Records of the Federal Convention of 1787 630 (rev. ed. 1937).
[2] 57 Cong. Globe 1263 (1861).
[3] H. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History*, H. Doc. 353, pt. 2, 54th Congress, 2d Sess. (1897), 363.

basis that the amending process could not be used to work such a major change in the internal affairs of the states, but the protest was in vain.[4] Many years later the validity of both the Eighteenth and Nineteenth Amendments was challenged because of their content. The arguments against the former took a wide range. Counsel urged that the power of amendment is limited to the correction of errors in the framing of the Constitution and that it does not comprehend the adoption of additional or supplementary provisions. They contended further that ordinary legislation cannot be embodied in a constitutional amendment and that Congress cannot constitutionally propose any amendment that involves the exercise or relinquishment of the sovereign powers of a state.[5] The Nineteenth Amendment was attacked on the narrower ground that a state that had not ratified the amendment would be deprived of its equal suffrage in the Senate because its representatives in that body would be persons not of its choosing, *i.e.*, persons chosen by voters whom the state itself had not authorized to vote for Senators.[6] Brushing aside these arguments as unworthy of serious attention, the Supreme Court held both amendments valid.

Proposing a Constitutional Amendment

Thirty-three proposed amendments to the Constitution have been submitted to the states pursuant to this Article, all of them upon the vote of the requisite majorities in Congress and none by the alternative convention method.[7] In the Convention, much controversy surrounded the issue of the process by which the document then being drawn should be amended. At first, it was voted that "provision ought to be made for the amendment [of the Constitution] whensoever it shall seem necessary" without the agency of Congress being at all involved.[8] Acting upon this instruction, the Committee on Detail submitted a section providing that upon the application of the legislatures of two-thirds of the states Congress was to call a convention for purpose of amending the Constitution.[9] Adopted,[10] the section was soon reconsidered on the motion of Framers of quite different points of view. Some worried that the provision would allow two-thirds of the states to subvert the others,[11]

[4] 66 CONG. GLOBE 921, 1424–1425, 1444–1447, 1483–1488 (1864).
[5] *National Prohibition Cases*, 253 U.S. 350 (1920).
[6] Leser v. Garnett, 258 U.S. 130 (1922).
[7] A recent scholarly study of the amending process and the implications for our polity is R. BERNSTEIN, AMENDING AMERICA (1993).
[8] 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1937), 22, 202–203, 237; 2 id. at 85.
[9] Id. at 188.
[10] Id. at 467–468.
[11] Id. at 557–558 (Gerry).

and some thought that Congress would be the first to perceive the need for amendment and that to leave the matter to the discretion of the states would mean that no alterations but those increasing the powers of the states would ever be proposed.[12] Madison's proposal was adopted, empowering Congress to propose amendments either on its own initiative or upon application by the legislatures of two-thirds of the states.[13] When this provision came back from the Committee on Style, however, Gouverneur Morris and Gerry succeeded in inserting the language providing for a convention upon the application of the legislatures of two-thirds of the states.[14]

Proposals by Congress.—Few difficulties of a constitutional nature have arisen with regard to this method of initiating constitutional change, the only method, as we noted above, so far successfully resorted to. When Madison submitted to the House of Representatives the proposals from which the Bill of Rights evolved, he contemplated that they should be incorporated in the text of the original instrument.[15] Instead, the House decided to propose them as supplementary articles, a method followed since.[16] It ignored a suggestion that the two Houses should first resolve that amendments are necessary before considering specific proposals.[17] In the *National Prohibition Cases*,[18] the Court ruled that, in proposing an amendment, the two Houses of Congress thereby indicated that they deemed revision necessary. The same case also established the proposition that the vote required to propose an amendment was a vote of two thirds of the Members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership.[19] The approval of the President is not necessary for a proposed amendment.[20]

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[12] Id. at 558 (Hamilton).

[13] Id. at 559

[14] Id. at 629–630. "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the state as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum etc. which in Constitutional regulations ought to be as much as possible avoided."

[15] 1 ANNALS OF CONGRESS 433–436 (1789).

[16] Id. at 717.

[17] Id. at 430.

[18] 253 U.S. 350, 386 (1920).

[19] 253 U.S. at 386.

[20] In Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798), the Court rejected a challenge to the Eleventh Amendment based on the argument that it had not been submitted to the President for approval or veto. The Court' s brief opinion merely determined that the Eleventh Amendment was "constitutionally adopted." Id. at 382. Apparently during oral argument, Justice Chase opined that "[t]he negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution." Id. at 381. *See*

The Convention Alternative.—Because it has never successfully been invoked, the convention method of amendment is surrounded by a lengthy list of questions.[21] When and how is a convention to be convened? Must the applications of the requisite number of states be identical or ask for substantially the same amendment, or merely deal with the same subject matter? Must the requisite number of petitions be contemporaneous with each other, substantially contemporaneous, or strung out over several years? Could a convention be limited to consideration of the amendment or the subject matter which it is called to consider? These are only a few of the obvious questions, and others lurk to be revealed on deeper consideration.[22] This method has been close to being used several times. Only one state was lacking when the Senate finally permitted passage of an amendment providing for the direct election of senators.[23] Two states were lacking in a petition drive for a constitutional limitation on income tax rates.[24] The drive for an amendment to limit the Supreme Court's legislative apportionment decisions came within one state of the required number, and a proposal for a balanced budget amendment has been but two states short of the requisite number for some time.[25] Arguments existed in each instance against counting all the petitions, but the political realities no doubt are that if there is an authentic national movement underlying a petitioning by two-thirds of the states there will be a response by Congress.

Ratification.—In 1992, the nation apparently ratified a long-quiescent 27th Amendment, to the surprise of just about everyone. Whether the new Amendment has any effect in the area of its sub-

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Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005), for extensive analysis of what *Hollingsworth's* delphic pronouncement could mean. Whatever the Court decided in *Hollingsworth*, it has since treated the issue as settled. *See* Hawke v. Smith (No. 1), 253 U.S. 221, 229 (1920) (in *Hollingsworth*, "this court settled that the submission of a constitutional amendment did not require the action of the President"); INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (in *Hollingsworth*, "the Court held Presidential approval was unnecessary for a proposed constitutional amendment . . . ").

[21] The matter is treated comprehensively in C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st Sess. (Comm. Print; House Judiciary Committee) (1957). A thorough and critical study of activity under the petition method can be found in R. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988).

[22] Id. *See also Federal Constitutional Convention: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 90th Congress, 1st Sess. (1967).

[23] C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st sess. (Comm. Print; House Judiciary Committee) (1957), 7, 89.

[24] Id. at 8–9, 89.

[25] R. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION 73–78, 78–89 (1988) .

ject matter, the effective date of congressional pay raises, the adoption of this provision has unsettled much of the supposed learning on the issue of the timeliness of pendency of constitutional amendments.

It has been accepted that Congress may, in proposing an amendment, set a reasonable time limit for its ratification. Beginning with the Eighteenth Amendment, save for the Nineteenth, Congress has included language in all proposals stating that the amendment should be inoperative unless ratified within seven years.[26] All the earlier proposals had been silent on the question, and two amendments proposed in 1789, one submitted in 1810 and another in 1861, and most recently one in 1924 had gone to the states and had not been ratified. In *Coleman v. Miller*,[27] the Court refused to pass upon the question whether the proposed child labor amendment, the one submitted to the states in 1924, was open to ratification thirteen years later. This it held to be a political question that Congress would have to resolve in the event three-fourths of the states ever gave their assent to the proposal.

In *Dillon v. Gloss*,[28] the Court upheld Congress's power to prescribe time limitations for state ratifications and intimated that proposals that were clearly out of date were no longer open for ratification. Finding nothing express in Article V relating to time constraints, the Court nevertheless found evidence that strongly suggests that proposed amendments are not open to ratification for all time or by states acting at widely separate times.[29]

Three related considerations were put forward. "First, proposal and ratification are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three-fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that

[26] Seven-year periods were included in the texts of the proposals of the 18th, 20th, 21st, and 22d amendments. Apparently concluding in proposing the 23d that putting the time limit in the text merely cluttered up the amendment, Congress in it and in subsequent amendments included the time limits in the authorizing resolution. After the extension debate over the Equal Rights proposal, Congress once again inserted into the text of the amendment the time limit with respect to the proposal of voting representation in Congress for the District of Columbia.

[27] 307 U.S. 433 (1939).

[28] 256 U.S. 368 (1921).

[29] 256 U.S. at 374.

number of States to reflect the will of the people in all sections at relatively the same period, which of course ratification scattered through a long series of years would not do." [30]

Continuing, the Court observed that this conclusion was the far better one, because the consequence of the opposite view was that the four amendments proposed long before, including the two sent out to the states in 1789 "are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, and in our opinion it is quite untenable." [31]

What seemed "untenable" to a unanimous Court in 1921 proved quite acceptable to both executive and congressional branches in 1992. After a campaign calling for the resurrection of the 1789 proposal, which was originally transmitted to the states as one of the twelve original amendments, enough additional states ratified to make up a three-fourths majority, and the responsible executive official proclaimed the amendment as ratified as both Houses of Congress concurred in resolutions.[32]

That there existed a "reasonable" time limit for ratification was strongly controverted.[33] The Office of Legal Counsel of the Department of Justice prepared for the White House counsel an elaborate memorandum that disputed all aspects of the *Dillon* opinion.[34] First, *Dillon's* discussion of contemporaneity was discounted as dictum.[35] Second, the three "considerations" relied on in *Dillon* were deemed unpersuasive. Thus, the Court simply assumes that, because pro-

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[30] 256 U.S. at 374–75.

[31] 256 U.S. at 375. One must observe that all the quoted language is dicta, the actual issue in *Dillon* being whether Congress could include a time limit in the text of a proposed amendment. In Coleman v. Miller, 307 U.S. 433, 453–54 (1939), Chief Justice Hughes, for a plurality, accepted the *Dillon* dictum, despite his opinion's forceful argument for judicial abstinence on constitutional amendment issues. The other four Justices in the Court majority thought Congress had complete and sole control over the amending process, subject to no judicial review. Id. at 459.

[32] Supra, "Congressional Pay"; infra, "Twenty-Seventh Amendment."

[33] Thus, Professor Tribe wrote: "Article V says an amendment 'shall be valid to all Intents and Purposes, as part of this Constitution' when 'ratified' by three-fourths of the states—not that it might face a veto for tardiness. Despite the Supreme Court's suggestion, no speedy ratification rule may be extracted from Article V's text, structure or history." Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, WALL STREET JOURNAL, May 13, 1992, A15.

[34] 16 Ops. of the Office of Legal Coun. 102 (1992) (prelim. pr.).

[35] Id. at 109–110. *Coleman's* endorsement of the dictum in the Hughes opinion was similarly pronounced dictum. Id. at 110. Both characterizations, as noted above, are correct.

posal and ratification are steps in a single process, the process must be short rather than lengthy; the argument that an amendment should reflect necessity says nothing about the length of time available, in that the more recent ratifying states obviously thought the pay amendment was necessary; and the fact that an amendment must reflect consensus does not so much as intimate contemporaneous consensus.[36] Third, the OLC memorandum argued that the proper mode of interpretation of Article V was to "provide a clear rule that is capable of mechanical application, without any need to inquire into the timeliness or substantive validity of the consensus achieved by means of the ratification process. Accordingly, any interpretation that would introduce confusion must be disfavored."[37] The rule ought to be, echoing Professor Tribe, that an amendment is ratified when three-fourths of the states have approved it.[38] The memorandum vigorously pursues a "plain-meaning" rule of constitutional construction. Article V says nothing about time limits, and elsewhere in the Constitution when the Framers wanted to include time limits they did so. The absence of any time language means there is no requirement of contemporaneity or of a "reasonable" period.[39]

Now that the Amendment has been proclaimed and has been accepted by Congress, where does this development leave the argument over the validity of proposals long distant in time? One may assume that this precedent stands for the proposition that proposals remain viable forever. It may, on the one hand, stand for the proposition that certain proposals, because they reflect concerns that are as relevant today, or perhaps in some future time, as at the time of transmission to the states, remain open to ratification. Certainly, the public concern with congressional pay made the Twenty-seventh Amendment particularly pertinent. The other 1789 proposal, relating to the number of representatives, might remain viable under this standard, whereas the other proposals would not. On the other hand, it is possible to argue that the precedent is an "aberration," that its acceptance owed more to a political and philosophical argument between executive and legislative branches and to the defensive posture of Congress in the political context of 1992 that led to an uncritical acceptance of the Amendment. In that latter light, the development is relevant to but not dispositive of the controversy. And, barring some judicial interpretation, that is likely to be where the situation rests.

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[36] Id. at 111–112.
[37] Id. at 113.
[38] Id. at 113–116.
[39] Id. at 103–106. The OLC also referenced previous debates in Congress in which Members had assumed this proposal and the others remained viable. Id.

Nothing in the status of the precedent created by the Twenty-seventh Amendment suggests that Congress may not, when it proposes an amendment, include a time limitation either in the text or in the accompanying resolution, simply as an exercise of its necessary and proper power.

Whether Congress may extend a ratification period without necessitating new action by states that have already ratified embroiled Congress, the states, and the courts in argument with respect to the proposed Equal Rights Amendment.[40] Proponents argued and opponents doubted that the fixing of a time limit and the extending of it were powers committed exclusively to Congress under the political question doctrine and that in any event Congress had power to extend. It was argued that inasmuch as the fixing of a reasonable time was within Congress's power and that Congress could fix the time either in advance or at some later point, based upon its evaluation of the social and other bases of the necessities of the amendment, Congress did not do violence to the Constitution when, once having fixed the time, it subsequently extended the time. Proponents recognized that if the time limit was fixed in the text of the amendment Congress could not alter it because the time limit as well as the substantive provisions of the proposal had been subject to ratification by a number of states, making it unalterable by Congress except through the amending process again. Opponents argued that Congress, having by a two-thirds vote sent the amendment and its authorizing resolution to the states, had put the matter beyond changing by passage of a simple resolution, that states had either acted upon the entire package or at least that they had or could have acted affirmatively upon the promise of Congress that if the amendment had not been ratified within the prescribed period it would expire and their assent would not be compelled for longer than they had intended. Congress did pass a resolution extending by three years the period for ratification.[41]

Litigation followed and a federal district court, finding the issue to be justiciable, held that Congress did not have the power to extend, but before the Supreme Court could review the decision the extended time period expired and mooted the matter.[42]

Also much disputed during consideration of the proposed Equal Rights Amendment was the question whether, once a state had rati-

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[40] *See Equal Rights Amendment Extension: Hearings Before the Senate Judiciary Subcommittee on the Constitution*, 95th Congress, 2d Sess. (1978); *Equal Rights Amendment Extension: Hearings Before the House Judiciary Subcommittee on Civil and Constitutional Rights*, 95th Congress, 1st/2d Sess. (1977–78).

[41] H.J. Res. 638, 95th Congress, 2d Sess. (1978); 92 Stat. 3799.

[42] Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho, 1981), *prob. juris. noted*, 455 U.S. 918 (1982), *vacated and remanded to dismiss*, 459 U.S. 809 (1982).

fied, it could thereafter withdraw or rescind its ratification, precluding Congress from counting that state toward completion of ratification. Four states had rescinded their ratifications and a fifth had declared that its ratification would be void unless the amendment was ratified within the original time limit.[43] The issue was not without its history. The Fourteenth Amendment was ratified by the legislatures of Ohio and New Jersey, both of which subsequently passed rescinding resolutions. Contemporaneously, the legislatures of Georgia, North Carolina, and South Carolina rejected ratification resolutions. Pursuant to the Act of March 2, 1867,[44] the governments of those states were reconstituted and the new legislatures ratified. Thus, there were presented both the question of the validity of a withdrawal and the question of the validity of a ratification following rejection. Congress requested the Secretary of State[45] to report on the number of states ratifying the proposal, and the Secretary's response specifically noted the actions of the Ohio and New Jersey legislatures. The Secretary then issued a proclamation reciting that 29 states, including the two that had rescinded and the three which had ratified after first rejecting, had ratified, which was one more than the necessary three-fourths. He noted the attempted withdrawal of Ohio and New Jersey and observed that it was doubtful whether such attempts were effectual in withdrawing consent.[46] He therefore certified the amendment to be in force if the rescissions by Ohio and New Jersey were invalid. The next day Congress adopted a resolution listing all 29 states, including Ohio and New Jersey, as having ratified and concluded that the ratification process was completed.[47] The Secretary of State then proclaimed the Amendment as part of the Constitution.

In *Coleman v. Miller*,[48] the congressional action was interpreted as going directly to the merits of withdrawal after ratifica-

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[43] Nebraska (March 15, 1973), Tennessee (April 23, 1974), and Idaho (February 8, 1977) all passed rescission resolutions without dispute about the actual passage. The Kentucky rescission was attached to another bill and was vetoed by the Lieutenant Governor, acting as Governor, citing grounds that included a state constitutional provision prohibiting the legislature from passing a law dealing with more than one subject and a senate rule prohibiting the introduction of new bills within the last ten days of a session. Both the resolution and the veto message were sent by the Kentucky Secretary of State to the General Services Administration. South Dakota was the fifth state.

[44] 14 Stat. 428.

[45] The Secretary was then responsible for receiving notices of ratification and proclaiming adoption.

[46] 15 Stat. 706, 707.

[47] 15 Stat. 709.

[48] 307 U.S. 433, 488–50 (1939) (plurality opinion). For an alternative construction of the precedent, *see* Corwin & Ramsey, *The Constitutional Law of Constitutional Amendment*, 27 Notre Dame Law. 185, 201–204 (1951). The legislature of New York attempted to withdraw its ratification of the 15th Amendment; although the

tion and of ratification after rejection. "Thus, the political departments of the Government dealt with the effect of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification."

Although rescission was hotly debated with respect to the Equal Rights Amendment, the failure of ratification meant that nothing definitive emerged from the debate. The questions that must be resolved are whether the matter is justiciable, that is, whether under the political question doctrine resolution of the issue is committed exclusively to Congress, and whether there is judicial review of what Congress's power is in respect to deciding the matter of rescission. The Fourteenth Amendment precedent and *Coleman v. Miller* combine to suggest that resolution is a political question committed to Congress, but the issue is not settled.

The Twenty-seventh Amendment precedent is relevant here. The Archivist of the United States proclaimed the Amendment as having been ratified a day previous to the time both Houses of Congress adopted resolutions accepting ratification.[49] There is no necessary conflict, because the Archivist and Congress concurred in their actions, but the Office of Legal Counsel of the Department of Justice opined that the *Coleman* precedent was not binding and that the Fourteenth Amendment action by Congress was an "aberration."[50] That is, the memorandum argued that the *Coleman* opinion by Chief Justice Hughes was for only a plurality of the Court and, moreover, was dictum, as it addressed an issue not before the Court.[51] On the merits, OLC argued that Article V gave Congress no role other than to propose amendments and to specify the mode of ratification. An amendment is valid when ratified by three-fourths of the states, no further action being required. Although someone must determine when the requisite number have acted, OLC argued that the executive officer charged with the function of certifying, now the Archivist, has only the ministerial duty of counting the notifications sent to him. Separation of powers and federalism concerns also counseled against a congressional role, and past practice, in which all but the Fourteenth Amendment were certified by an executive officer, was noted as supporting a decision against a congressional role.[52]

Secretary of State listed New York among the ratifying states, noted the withdrawal resolution, there were ratifications from three-fourths of the states without New York. 16 Stat. 1131.

[49] F. R. Doc. 92–11951, 57 Fed. Reg. 21187; 138 CONG. REC. (daily ed.) S6948–49, H3505–06.

[50] 16 Ops. of the Office of Legal Coun. 102, 125 (1992) (prelim. pr.).

[51] Id. at 118–121.

[52] Id. at 121–126.

What would be the result of adopting one view over the other?

First, finding that resolution of the question is committed to Congress merely locates the situs of the power and says nothing about what the resolution should be. That Congress in the past has refused to accept rescissions is but the starting point, because, unlike courts, Congress operates under no principle of *stare decisis* so that the decisions of one Congress on a subject do not bind future Congresses. If Congress were to be faced with a decision about the validity of rescission, to what standards should it look?

That a question of constitutional interpretation may be "political" in the sense of being committed to one or to both of the "political" branches is not, of course, a judgment that in its resolution the political branch may decide without recourse to principle. Resolution of political questions is not subject to judicial review, so the decisionmaker need not be troubled with the prospect of being overruled. But both legislators and executive are bound by oath to observe the Constitution,[53] and consequently the search for an answer must begin with the original document.

It may be, however, that the Constitution does not speak to the issue. Generally, in the exercise of judicial review, courts view the actions of the legislative and executive branches in terms not of the wisdom or desirability or propriety of their actions but in terms of the comportment of those actions with the constitutional grants of power and constraints upon those powers; if an action is within a granted power and violates no restriction, the courts will not interfere. How the legislature or the executive decides to deal with a question within the confines of the powers each constitutionally have is beyond judicial control.

Therefore, if the Constitution commits decision on an issue to, say, Congress, and imposes no standards to govern or control the reaching of that decision, Congress may be free to make a determination solely as a policy matter, restrained only by its sense of propriety or wisdom or desirability. The reason that these issues are not justiciable is not only that they are committed to a branch for decision without intervention by the courts but also that the Constitution does not contain an answer. This interpretation, in the context of amending the Constitution, may be what Chief Justice Hughes was deciding for the plurality of the Court in *Coleman*.[54]

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[53] Article VI, para. 3. "In the performance of assigned constitutional duties each branch of the government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." United States v. Nixon, 418 U.S. 683, 703 (1974).

[54] Coleman v. Miller, 307 U.S. 433, 450, 453 (1939) (plurality opinion). Thus, considering the question of ratification after rejection, the Chief Justice found "no

Article V may be read to contain a governing constitutional principle, however. Thus, it can be argued that, as written, the provision contains only language respecting ratification and that, inexorably, once a state acts favorably on a resolution of ratification it has exhausted its jurisdiction over the subject and cannot rescind,[55] nor can Congress even authorize a state to rescind.[56] This conclusion is premised on Madison's argument that a state may not ratify conditionally, that it must adopt "*in toto* and *for ever*." [57] Although the Madison principle may be unexceptionable in the context in which it was stated, one may doubt that it transfers readily to the significantly different issue of rescission.

A more pertinent principle seems to be that expressed in *Dillon v. Gloss*.[58] In that case, the action of Congress in fixing a seven-year period within which ratification was to occur or the proposal would expire was attacked as vitiating the amendment. The Court, finding no express provision in Article V, nonetheless concluded that the fair implication of Article V is "that the ratification must be within some reasonable time after the proposal." [59] Three reasons underlay the Court's finding of this implication and they are suggestive on the question of rescission.[60]

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basis in either Constitution or statute" to warrant the judiciary in restraining state officers from notifying Congress of a state's ratification, so that it could decide to accept or reject. "Article 5, speaking solely of ratification, contains no provision as to rejection." And in considering whether the Court could specify a reasonable time for an amendment to be before the state before it lost its validity as a proposal, Chief Justice Hughes asked: "Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute." His discussion of what Congress could look to in fixing a reasonable time, id. at 453–54, is overwhelmingly policy-oriented. On this approach generally, *see* Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L.J. 597 (1976).

[55] *See, e.g.*, the debate between Senator Conkling and Senator Davis on this point in 89 CONG. GLOBE 1477–1481 (1870).

[56] *Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment*, Memorandum of the Assistant Attorney General, Office of Legal Counsel, Department of Justice, in *Equal Rights Amendment Extension: Hearings Before the Senate Judiciary Subcommittee on the Constitution*, 95th Congress, 2d sess. (1978), 80, 91–99.

[57] During the debate in New York on ratification of the Constitution, it was suggested that the state approve the document on condition that certain amendments the delegates thought necessary be adopted. Madison wrote: "The Constitution requires an adoption in toto and for ever. It has been so adopted by the other states. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short any condition whatever must vitiate the ratification." 5 THE PAPERS OF ALEXANDER HAMILTON 184 (H. Syrett ed., 1962).

[58] 256 U.S. 368 (1921). Of course, we recognize, as indicated at various points above, that *Dillon*, and *Coleman* as well, insofar as they discuss points relied on here, express dictum and are not binding precedent. They are discussed solely for the persuasiveness of the views set out.

[59] 256 U.S. at 375.

[60] 256 U.S. at 374–75, quoted supra.

Although addressing a different issue, the Court's discussion of the length of time an amendment may reasonably pend before losing its viability is suggestive with respect to rescission. That is, first, with proposal and ratification as successive steps in a single endeavor, second, with the necessity of amendment forming the basis for adoption of the proposal, and, third, especially with the implication that an amendment's adoption should be "sufficiently contemporaneous" in the requisite number of states "to reflect the will of the people in all sections at relatively the same period," it would raise a large question were the ratification process to count one or more states that were acting to withdraw their expression of judgment that amendment was necessary at the same time other states were acting affirmatively. The "decisive expression of the people's will" that is to bind all might well be found lacking in those or similar circumstances. But employment of this analysis would not necessarily lead in specific circumstances to failures of ratification; the particular facts surrounding the passage of rescission resolutions, for example, might lead Congress to conclude that the requisite "contemporaneous" "expression of the people's will" was not undermined by the action.

And employment of this analysis would still seem, under these precedents, to leave to Congress the crucial determination of the success or failure of ratification. At the same time it was positing this analysis in the context of passing on the question of Congress's power to fix a time limit, the Court in *Dillon v. Gloss* observed that Article V left to Congress the authority "to deal with subsidiary matters of detail as the public interest and changing conditions may require." [61] And, in *Coleman v. Miller*, Chief Justice Hughes went further in respect to these "matters of detail" being "within the congressional province" in the resolution of which the decision by Congress "would not be subject to review by the courts." [62]

Thus, it may be that, if the *Dillon v. Gloss* construction is found persuasive, Congress would have constitutional standards to guide its decision on the validity of rescission. At the same time, if these

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[61] 256 U.S. at 375–76. It should be noted that the Court seemed to retain the power for itself to pass on the congressional decision, saying "[o]f the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt" and noting later than no question existed that the seven-year period was reasonable. Id.

[62] 307 U.S. 433, 452–54 (1939) (plurality opinion). It is, as noted above, not entirely clear to what extent the Hughes plurality exempted from judicial review congressional determinations made in the amending process. Justice Black's concurrence thought the Court "treated the amending process of the Constitution in some respects as subject to judicial review, in others as subject to the final authority of Congress" and urged that the Dillon v. Gloss "reasonable time" construction be disapproved. Id. at 456, 458.

precedents reviewed above are adhered to and strictly applied, it appears that the congressional determination to permit or to disallow rescission would not be subject to judicial review.

Adoption of the alternative view, that Congress has no role but that the appropriate executive official has the sole responsibility, would entail different consequences. That official, now the Archivist, appears to have no discretion but to certify once he receives state notification.[63] The official could, of course, request a Department of Justice legal opinion on some issue, such as the validity of rescissions. That is the course advocated by the executive branch, naturally, but it is one a little difficult to square with the ministerial responsibility of the Archivist.[64] In any event, there would seem to be no support for a political question preclusion of judicial review under these circumstances. Whether the Archivist certifies on the mere receipt of a ratification resolution or does so only after ascertaining the resolution's validity, it would appear that it is action subject to judicial review.[65]

Congress has complete freedom of choice between the two methods of ratification recognized by Article V: by the legislatures of the states or by conventions in the states. In *United States v. Sprague*,[66] counsel advanced the contention that the Tenth Amendment recognized a distinction between powers reserved to the states and powers reserved to the people, and that state legislatures were competent to delegate only the former to the National Government; delegation of the latter required action of the people through conventions in the several states. The Eighteenth Amendment being of the latter character, the ratification by state legislatures, so the argument ran, was invalid. The Supreme Court rejected the argument. It found the language of Article V too clear to admit of reading any exception into it by implication.

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[63] United States ex rel. Widenmann v. Colby, 265 F. 998, 999 (D.C. Cir. 1920), *aff'd mem.* 257 U.S. 619 (1921); United States v. Sitka, 666 F. Supp. 19, 22 (D. Conn. 1987), *aff'd*, 845 F.2d 43 (2d Cir.), *cert. denied*, 488 U.S. 827 (1988). *See* 96 CONG. REC. 3250 (Message from President Truman accompanying Reorg. Plan No. 20 of 1950); 16 Ops. of the Office of Legal Coun. 102, 117 (1992) (prelim. pr.).

[64] 16 Ops. of the Office of Legal Coun. at 116–118. Thus, OLC says that the statute "clearly requires that, before performing this ministerial function, the Archivist must determine whether he has received 'official notice' that an amendment has been adopted 'according to the provisions of the Constitution.' This is the question of law that the Archivist may properly submit to the Attorney General for resolution." Id. at 118. But if his duty is "ministerial," it seems, the Archivist may only notice the fact of receipt of a state resolution; if he may, in consultation with the Attorney General, determine whether the resolution is valid, that is considerably more than a "ministerial" function.

[65] No doubt under the Administrative Procedure Act, 5 U.S.C. §§ 701–706, although there may well be questions about one possible exception—the "committed to agency discretion" provision. Id. at § 701(a)(2).

[66] 282 U.S. 716 (1931).

The term "legislatures" as used in Article V means deliberative, representative bodies of the type which in 1789 exercised the legislative power in the several states. It does not comprehend the popular referendum, which has subsequently become a part of the legislative process in many of the states. A state may not validly condition ratification of a proposed constitutional amendment on its approval by such a referendum.[67] In the words of the Court: "[T]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State."[68]

Authentication and Proclamation.—Formerly, official notice from a state legislature, duly authenticated, that it had ratified a proposed amendment went to the Secretary of State, upon whom it was binding, "being certified by his proclamation, [was] conclusive upon the courts" as against any objection which might be subsequently raised as to the regularity of the legislative procedure by which ratification was brought about.[69] This function of the Secretary was first transferred to a functionary called the Administrator of General Services,[70] and then to the Archivist of the United States.[71] In *Dillon v. Gloss*,[72] the Supreme Court held that the Eighteenth Amendment became operative on the date of ratification by the thirty-sixth state, rather than on the later date of the proclamation issued by the Secretary of State, and doubtless the same rule holds as to a similar proclamation by the Archivist.

Judicial Review Under Article V

Prior to 1939, the Supreme Court had taken cognizance of a number of diverse objections to the validity of specific amendments. Apart from holding that official notice of ratification by the several states was conclusive upon the courts,[73] it had treated these questions as justiciable, although it had uniformly rejected them on the merits. In that year, however, the whole subject was thrown

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[67] Hawke v. Smith, 253 U.S. 221, 231 (1920).

[68] Leser v. Garnett, 258 U.S. 130, 137 (1922).

[69] Act of April 20, 1818, § 2, 3 Stat. 439. The language quoted in the text is from Leser v. Garnett, 258 U.S. 130, 137 (1922).

[70] 65 Stat. 710–711, § 2; Reorg. Plan No. 20 of 1950, § 1(c), 64 Stat. 1272.

[71] National Archives and Records Administration Act of 1984, 98 Stat. 2291, 1 U.S.C. § 106b.

[72] 256 U.S. 368, 376 (1921).

[73] Leser v. Garnett, 258 U.S. 130 (1922).

into confusion by the inconclusive decision in *Coleman v. Miller*.[74] This case came up on a writ of *certiorari* to the Supreme Court of Kansas to review the denial of a writ of mandamus to compel the Secretary of the Kansas Senate to erase an endorsement on a resolution ratifying the proposed child labor amendment to the Constitution to the effect that it had been adopted by the Kansas Senate. The attempted ratification was assailed on three grounds: (1) that the amendment had been previously rejected by the state legislature; (2) that it was no longer open to ratification because an unreasonable period of time, thirteen years, had elapsed since its submission to the states, and (3) that the lieutenant governor had no right to cast the deciding vote in the Kansas Senate in favor of ratification.

Four opinions were written in the Supreme Court, no one of which commanded the support of more than four members of the Court. The majority ruled that the plaintiffs, members of the Kansas State Senate, had a sufficient interest in the controversy to give the federal courts jurisdiction to review the case. Without agreement on the grounds for their decision, a different majority affirmed the judgment of the Kansas court denying the relief sought. Four members who concurred in the result had voted to dismiss the writ on the ground that the amending process "is 'political' in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." [75] In an opinion reported as "the opinion of the Court," but in which it appears that only two Justices joined Chief Justice Hughes who wrote it, it was declared that the writ of mandamus was properly denied, because the question whether a reasonable time had elapsed since submission of the proposal was a nonjusticiable political question, the kinds of considerations entering into deciding being fit for Congress to evaluate, and the question of the effect of a previous rejection upon a ratification was similarly nonjusticiable, because the 1868 Fourteenth Amendment

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[74] 307 U.S. 433 (1939). *Cf.* Fairchild v. Hughes, 258 U.S. 126 (1922), in which the Court held that a private citizen could not sue in the federal courts to secure an indirect determination of the validity of a constitutional amendment about to be adopted.

[75] Coleman v. Miller, 307 U.S. 433, 456, 459 (1939) (Justices Black, Roberts, Frankfurter, and Douglas concurring). Because the four believed that the parties lacked standing to bring the action, id. at 456, 460 (Justice Frankfurter dissenting on this point, joined by the other three Justices), the further discussion of the applicability of the political question doctrine is, strictly speaking, dicta. Justice Stevens, then a circuit judge, also felt free to disregard the opinion because a majority of the Court in Coleman "refused to accept that position." Dyer v. Blair, 390 F. Supp. 1291, 1299–1300 (N.D.Ill. 1975) (three-judge court). *See also* Idaho v. Freeman, 529 F. Supp. 1107, 1125–26 (D. Idaho, 1981), vacated and remanded to dismiss, 459 U.S. 809 (1982).

precedent of congressional determination "has been accepted." [76] But with respect to the contention that the lieutenant governor should not have been permitted to cast the deciding vote in favor of ratification, the Court found itself evenly divided, thus accepting the judgment of the Kansas Supreme Court that the state officer had acted validly.[77] However, the unexplained decision by Chief Justice Hughes and his two concurring Justices that the issue of the lieutenant governor's vote was justiciable indicates at the least that their position was in disagreement with the view of the other four Justices in the majority that all questions surrounding constitutional amendments are nonjusticiable.[78]

However, *Coleman* does stand as authority for the proposition that at least some decisions with respect to the proposal and ratification of constitutional amendments are exclusively within the purview of Congress, either because they are textually committed to Congress or because the courts lack adequate criteria of determination to pass on them.[79] But to what extent the political question

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[76] Coleman v. Miller, 307 U.S. 433, 447–56 (1939) (Chief Justice Hughes joined by Justices Stone and Reed).

[77] Justices Black, Roberts, Frankfurter, and Douglas thought this issue was nonjusticiable too. 307 U.S. at 456. Although all nine Justices joined the rest of the decision, *see* id. at 470, 474 (Justice Butler, joined by Justice McReynolds, dissenting), one Justice did not participate in deciding the issue of the lieutenant governor's participation; apparently, Justice McReynolds was the absent Member. Note, 28 Geo. L. J. 199, 200 n.7 (1940). Thus, Chief Justice Hughes and Justices Stone, Reed, and Butler would have been the four finding the issue justiciable.

[78] The strongest argument to the effect that constitutional amendment questions are justiciable is Rees, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 Tex. L. Rev. 875, 886–901 (1980), and his student note, Comment, *Rescinding Ratification of Proposed Constitutional Amendments: A Question for the Court*, 37 La. L. Rev. 896 (1977). Two perspicacious scholars of the Constitution have come to opposite conclusions on the issue. *Compare* Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 414–416 (1983) (there is judicial review), *with* Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 Harv. L. Rev. 433, 435–436 (1983). Much of the scholarly argument, up to that time, is collected in the ERA-time-extension hearings. Supra. The only recent judicial precedents directly on point found justiciability on at least some questions. Dyer v. Blair, 390 F. Supp. 1291 (N.D.Ill., 1975) (three-judge court); Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho, 1981), vacated and remanded to dismiss, 459 U.S. 809 (1982).

[79] In Baker v. Carr, 369 U.S. 186, 214 (1962), the Court, in explaining the political question doctrine and categorizing cases, observed that *Coleman* "held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp." Both characteristics were features that the Court in *Baker*, 369 U.S. at 217, identified as elements of political questions, *e.g.*, "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards or resolving it." Later formulations have adhered to this way of expressing the matter. Powell v. McCormack, 395 U.S. 486 (1969); O'Brien v. Brown, 409 U.S. 1

doctrine encompasses the amendment process and what the standards may be to resolve that particular issue remain elusive.

(1972); Gilligan v. Morgan, 413 U.S. 1 (1973). However, it could be argued that, whatever the Court may say, what it did, particularly in *Powell* but also in *Baker*, largely drains the political question doctrine of its force. *See* Uhler v. AFL–CIO, 468 U.S. 1310 (1984) (Justice Rehnquist on Circuit) (doubting *Coleman's* vitality in amendment context). *But see* Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (opinion of Justices Rehnquist, Stewart, Stevens, and Chief Justice Burger) (relying heavily upon *Coleman* to find an issue of treaty termination nonjusticiable). *Compare* id. at 1001 (Justice Powell concurring) (viewing *Coleman* as limited to its context).

ARTICLE VI

PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

CONTENTS

PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

ARTICLE VI

Clause 1. All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

PRIOR DEBTS

There have been no interpretations of this clause.

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

NATIONAL SUPREMACY

Marshall's Interpretation of the National Supremacy Clause

Although the Supreme Court had held, prior to Chief Justice John Marshall's appointment to it, that the Supremacy Clause rendered null and void a state constitutional or statutory provision that was inconsistent with a treaty executed by the Federal Government,[1] it was left for Marshall to develop the full significance of the clause as applied to acts of Congress. By his vigorous opinions in *McCulloch v. Maryland*[2] and *Gibbons v. Ogden*,[3] Marshall gave the principle a vitality that survived a century of vacillation under the doctrine of dual federalism. In the former case, he asserted broadly that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoid-

[1] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
[2] 17 U.S. (4 Wheat.) 316 (1819).
[3] 22 U.S. (9 Wheat.) 1 (1824).

able consequence of that supremacy which the constitution has declared."[4] From this he concluded that a state tax upon notes issued by a branch of the Bank of the United States was void.

In *Gibbons v. Ogden*, the Court held that certain New York statutes that granted an exclusive right to use steam navigation on the waters of the state were null and void insofar as they applied to vessels licensed by the United States to engage in coastal trade. Chief Justice Marshall wrote: "In argument, however, it has been contended, that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of an act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."[5]

Task of the Supreme Court Under the Clause: Preemption

In applying the Supremacy Clause to subjects that have been regulated by Congress, the Court's primary task is to ascertain whether a challenged state law is compatible with the policy expressed in the federal statute. When Congress legislates with regard to a subject, the extent and nature of the legal consequences of the regulation are federal questions, the answers to which are to be derived from a consideration of the language and policy of the state. If Congress expressly provides for exclusive federal dominion or if it expressly provides for concurrent federal-state jurisdiction, the Court's task is simplified, though, of course, there may still be doubtful areas in which interpretation will be necessary. Where Congress is

[4] 17 U.S. (4 Wheat.) at 436.

[5] 22 U.S. (9 Wheat.) at 210–11. *See* the Court's discussion of *Gibbons* in Douglas v. Seacoast Products, Inc., 431 U.S. 265, 274–79 (1977).

silent, however, the Court must itself decide whether the effect of the federal legislation is to oust state jurisdiction.[6]

The Operation of the Supremacy Clause

When Congress legislates pursuant to its delegated powers, conflicting state law and policy must yield.[7] Although the preemptive effect of federal legislation is best known in areas governed by the Commerce Clause, the same effect is present, of course, whenever Congress legislates pursuant to one of its enumerated powers. The Supremacy Clause operates whether the authority of Congress is express or implied, and whether plenary or dependent upon state acceptance. The latter may be seen in a series of cases concerning the validity of state legislation enacted to bring the states within the various programs authorized by Congress pursuant to the Social Security Act.[8] State participation in the programs is voluntary, technically speaking, and no state is compelled to enact legislation comporting with the requirements of federal law. Once a state is participating, however, any of its legislation that is contrary to federal requirements is void under the Supremacy Clause.[9]

At the same time, however, the Supremacy Clause is not the "source of any federal rights," [10] and the Clause "certainly does not create a cause of action." [11] As such, individual litigants cannot sue to enforce federal law through the Supremacy Clause, as such a reading of the Clause would prevent Congress from limiting enforce-

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[6] Treatment of preemption principles and standards is set out under the Commerce Clause, which is the greatest source of preemptive authority.

[7] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210–11 (1824). *See also* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Morales v. TWA, 504 U.S. 374 (1992); Maryland v. Louisiana, 451 U.S. 725, 746 (1981); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

[8] By the Social Security Act of 1935, 49 Stat. 620, 42 U.S.C. §§ 301 *et seq.*, Congress established a series of programs operative in those states that joined the system and enacted the requisite complying legislation. Although participation is voluntary, the underlying federal tax program induces state participation. *See* Steward Machine Co. v. Davis, 301 U.S. 548, 585–98 (1937).

[9] On the operation of federal spending programs upon state laws, *see* South Dakota v. Dole, 483 U.S. 203 (1987) (under highway funding programs). On the preemptive effect of federal spending laws, *see* Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256 (1985). An early example of states being required to conform their laws to the federal standards is King v. Smith, 392 U.S. 309 (1968). Private parties may compel state acquiescence in federal standards to which they have agreed by participation in the programs through suits under a federal civil rights law (42 U.S.C. § 1983). Maine v. Thiboutot, 448 U.S. 1 (1980). The Court has imposed some federalism constraints in this area by imposing a "clear statement" rule on Congress when it seeks to impose new conditions on states. Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 11, 17–18 (1981).

[10] *See* Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 107 (1989).

[11] *See* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. ___, No. 14–15, slip op. at 3 (2015).

ment of federal laws to federal actors.[12] Instead, without a statutory cause of action, those wishing to seek injunctive relief against a state actor that refuses to comply with federal law must rely on the inherent equitable power of courts, a judge-made remedy that may be overridden by Congress.[13]

Federal Immunity Laws and State Courts.—The operation of federal immunity acts[14] to preclude the use in state courts of incriminating statements and testimony given by a witness before a committee of Congress or a federal grand jury[15] illustrates direct federal preemption that is not contingent on state participation in a federal program. Because Congress in pursuance of its paramount authority to provide for the national defense, as complemented by the Necessary and Proper Clause, is competent to compel testimony of persons that is needed in order to legislate, it is competent to obtain such testimony over a witness's self-incrimination claim by immunizing him from prosecution on evidence thus revealed not only in federal courts but in state courts as well.[16]

Priority of National Claims Over State Claims.—Anticipating his argument in *McCulloch v. Maryland*,[17] Chief Justice Marshall in 1805 upheld an act of 1792 asserting for the United States a priority of its claims over those of the states against a debtor in bankruptcy.[18] The principle was later extended to federal enactments providing that taxes due to the United States by an insolvent shall have priority in payment over taxes he owes to a state.[19] Similarly, the Federal Government was held entitled to prevail over a citizen enjoying a preference under state law as creditor of an enemy alien bank in the process of liquidation by state authori-

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[12] *Id.*

[13] *Id.* at 5–6.

[14] Immunity laws operate to compel witnesses to testify even over self-incrimination claims by giving them an equivalent immunity from prosecution.

[15] Adams v. Maryland, 347 U.S. 179 (1954).

[16] Ullmann v. United States, 350 U.S. 422, 434–436 (1956). *See also* Reina v. United States, 364 U.S. 507, 510 (1960).

[17] 17 U.S. (4 Wheat.) 316 (1819).

[18] United States v. Fisher, 6 U.S. (2 Cr.) 358 (1805).

[19] Spokane County v. United States, 279 U.S. 80, 87 (1929). A state requirement that notice of a federal tax lien be filed in conformity with state law in a state office in order to be accorded priority was held to be controlling only insofar as Congress by law had made it so. Remedies for collection of federal taxes are independent of legislative action of the states. United States v. Union Central Life Ins. Co., 368 U.S. 291 (1961). *See also* United States v. Buffalo Savings Bank, 371 U.S. 228 (1963) (state may not avoid priority rules of a federal tax lien by providing that the discharge of state tax liens are to be part of the expenses of a mortgage foreclosure sale); United States v. Pioneer American Ins. Co., 374 U.S. 84 (1963) (Matter of federal law whether a lien created by state law has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien).

ties.[20] A federal law providing that when a veteran dies in a federal hospital without a will or heirs his personal property shall vest in the United States as trustee for the General Post Fund was held to operate automatically without prior agreement of the veteran with the United States for such disposition and to take precedence over a state claim founded on its escheat law.[21]

Obligation of State Courts Under the Supremacy Clause

The Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. Their obligation "is imperative upon the state judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the laws and treaties of the United States—'the supreme law of the land.'"[22] State courts are bound then to give effect to federal law when it is applicable and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitution and laws and treaties but also the interpretations of their meanings by the United States Supreme Court.[23] Although states may not have to specially create courts competent to hear federal claims or give courts authority specially,[24] it violates the Supremacy Clause for a state court to refuse to hear a category of

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[20] Brownell v. Singer, 347 U.S. 403 (1954).

[21] United States v. Oregon, 366 U.S. 643 (1961).

[22] Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816). State courts have both the power and the duty to enforce obligations arising under federal law, unless Congress gives the federal courts exclusive jurisdiction. Claflin v. Houseman, 93 U.S. 130 (1876); *Second Employers' Liability Cases*, 223 U.S. 1 (1912); Testa v. Katt, 330 U.S. 386 (1947).

[23] Cooper v. Aaron, 358 U.S. 1 (1958); *see also* James v. City of Boise, 577 U.S. ___, No. 15–493, slip op. at 2 (2016) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."); DIRECTV, Inc. v. Imburgia, 577 U.S. ___, No. 14–462, slip op. at 5 (2015) (holding that the Supreme Court's interpretation of a federal law is an "authoritative interpretation of that Act," requiring the "judges of every State" to "follow it."). Moreover, the Court has interpreted the Supremacy Clause to require that a state court, when reviewing a prisoner's collateral claims that are controlled by federal law, "has a duty to grant the relief that federal law requires." *See* Montgomery v. Louisiana, 577 U.S. ___, No. 14–280, slip op. at 13 (2016) (quoting Yates v. Aiken, 484 U.S. 211, 218 (1988)). For an extended discussion on *Montgomery* and the obligations of state collateral review courts when reviewing substantive constitutional rules, see *supra* Article III: Section 2. Judicial Power and Jurisdiction: Clause 1. Cases and Controversies; Grants of Jurisdiction: Judicial Power and Jurisdiction-Cases and Controversies: The Requirements of a Real Interest: Retroactivity Versus Prospectivity.

[24] In Haywood v. Drown, 556 U.S. ___, No. 07–10374, slip op. at 10 (2009), the Court noted, "this case does not require us to decide whether Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to [a federal statute]."

federal claims when the court entertains state law actions of a similar nature,[25] or sometimes even when it does not entertain state law actions of a similar nature.[26] The existence of inferior federal courts sitting in the states and exercising often concurrent jurisdiction of subjects has created problems with regard to the degree to which state courts are bound by their rulings. Though the Supreme Court has directed and encouraged the lower federal courts to create a corpus of federal common law,[27] it has not spoken to the effect of such lower court rulings on state courts.

Supremacy Clause Versus the Tenth Amendment

The logic of the Supremacy Clause would seem to require that the powers of Congress be determined by the fair reading of the express and implied grants contained in the Constitution itself, without reference to the powers of the states. For a century after Marshall's death, however, the Court proceeded on the theory that the Tenth Amendment had the effect of withdrawing various matters of internal police from the reach of power expressly committed to Congress. This point of view was originally put forward in *New York City v. Miln*,[28] which was first argued but not decided before Marshall's death. *Miln* involved a New York statute that required captains of vessels entering New York Harbor with aliens aboard to make a report in writing to the Mayor of the City, giving certain prescribed information. It might have been distinguished from *Gibbons v. Ogden* on the ground that the statute involved in the earlier case conflicted with an act of Congress, whereas the Court found that no such conflict existed in this case. But the Court was unwilling to rest its decision on that distinction.

Speaking for the majority, Justice Barbour seized the opportunity to proclaim a new doctrine. "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right,

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[25] Howlett v. Rose, 496 U.S. 356 (1990); Felder v. Casey, 487 U.S. 131 (1988). The Court's re-emphasis upon "dual federalism" has not altered this principle. *See*, *e.g.*, Printz v. United States, 521 U.S. 898, 905–10 (1997).

[26] See Haywood v. Drown, 556 U.S. ___, No. 07–10374, slip op. (2009), discussed in Art. III, "Use of State Courts in Enforcement of Federal Law," *supra*.

[27] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Textile Workers of America v. Lincoln Mills, 353 U.S. 448 (1957); Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

[28] 36 U.S. (11 Pet.) 102 (1837).

but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."[29] Justice Story, in dissent, stated that Marshall had heard the previous argument and reached the conclusion that the New York statute was unconstitutional.[30]

The conception of a "complete, unqualified and exclusive" police power residing in the states and limiting the powers of the national government was endorsed by Chief Justice Taney ten years later in the *License Cases*.[31] In upholding state laws requiring licenses for the sale of alcoholic beverages, including those imported from other states or from foreign countries, he set up the Supreme Court as the final arbiter in drawing the line between the mutually exclusive, reciprocally limiting fields of power occupied by the national and state governments.[32]

Until recently, it appeared that in fact and in theory the Court had repudiated this doctrine,[33] but, in *National League of Cities v. Usery*,[34] it revived part of this state police power limitation upon the exercise of delegated federal power. However, the decision was by a closely divided Court and subsequent interpretations closely cabined the development and then overruled the case.

Following the demise of the "doctrine of dual federalism" in the 1930s, the Court confronted the question whether Congress had the power to regulate state conduct and activities to the same extent, primarily under the Commerce Clause, as it did to regulate private conduct and activities to the exclusion of state law.[35] In *United States*

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[29] 36 U.S. at 139.

[30] 36 U.S. at 161.

[31] 46 U.S. (5 How.) 504, 528 (1847).

[32] 46 U.S. at 573–74.

[33] Representative early cases include NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937); United States v. Darby, 312 U.S. 100 (1941). Among the cases incompatible with the theory was Maryland v. Wirtz, 392 U.S. 183 (1968).

[34] 426 U.S. 833 (1976).

[35] On the doctrine of "dual federalism," *see* the commentary by the originator of the phrase, Professor Corwin. E. Corwin, The Twilight of the Supreme Court—A History of Our Constitutional Theory 10–51 (1934); The Commerce Power Versus States Rights 115–172 (1936); A Constitution of Powers in a Secular State 1–28 (1951).

v. California,[36] upholding the validity of the application of a federal safety law to a state-owned railroad being operated as a nonprofit entity, the Court, speaking through Justice Stone, denied the existence of an implied limitation upon Congress's plenary power to regulate commerce when a state instrumentality was involved. "The state can no more deny the power if its exercise has been authorized by Congress than can an individual." [37] Although the state in operating the railroad was acting as a sovereign and within the powers reserved to the states, the Court said, its exercise was "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the Federal Government in the Constitution." [38]

A series of cases followed in which the Court refused to construct any state immunity from regulation when Congress acted pursuant to a delegated power.[39] The culmination of this series had been thought to be *Maryland v. Wirtz*,[40] in which the Court upheld the constitutionality of applying the federal wage and hour law to nonprofessional employees of state-operated schools and hospitals. In an opinion by Justice Harlan, the Court saw a clear connection between working conditions in these institutions and interstate commerce. Labor conditions in schools and hospitals affect commerce; strikes and work stoppages involving such employees interrupt and burden the flow across state lines of goods purchased by state agencies, and the wages paid have a substantial effect. The Commerce Clause being thus applicable, the Justice wrote, Congress was not constitutionally required to "yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable. There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. . . . [I]t is clear that the Federal Govern-

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[36] 297 U.S. 175 (1936).

[37] 297 U.S. at 185.

[38] 297 U.S. at 184.

[39] California v. United States, 320 U.S. 577 (1944) (federal regulation of shipping terminal facilities owned by state); California v. Taylor, 353 U.S. 553 (1957) (Railway Labor Act applies on state-owned railroad); Case v. Bowles, 327 U.S. 92 (1946); Hubler v. Twin Falls County, 327 U.S. 103 (1946) (federal wartime price regulations applied to state transactions; Congress's power effectively to wage war); Board of Trustees v. United States, 289 U.S. 48 (1933) (state university required to pay federal customs duties on imported educational equipment); Oklahoma ex rel. Phillips v. Atkinson Co., 313 U.S. 508 (1941) (federal condemnation of state lands for flood control project); Sanitary Dist. v. United States, 206 U.S. 405 (1925) (prohibition of state from diverting water from Great Lakes).

[40] 392 U.S. 183 (1968). Justices Douglas and Stewart dissented. Id. at 201.

ment, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character. . . . [V]alid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." [41]

Wirtz was specifically reaffirmed in *Fry v. United States*,[42] in which the Court upheld the constitutionality of presidentially imposed wage and salary controls, pursuant to congressional statute, on all state governmental employees. In dissent, however, Justice Rehnquist propounded a doctrine that was to obtain majority approval in *League of Cities*,[43] in which he wrote for the Court: "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." [44] The standard, apparently, in judging between permissible and impermissible federal regulation, is whether there is federal interference with "functions essential to separate and independent existence." [45] In the context of this case, state decisions with respect to the pay of their employees and the hours to be worked were essential aspects of their "freedom to structure in-

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[41] 392 U.S. at 195–97 (internal quotation marks omitted).

[42] 421 U.S. 542 (1975).

[43] 421 U.S. at 549. Essentially, the Justice was required to establish an affirmative constitutional barrier to congressional action. Id. at 552–53. That is, if one asserts only the absence of congressional authority, one's chances of success are dim because of the breadth of the commerce power. But when he asserts that, say, the First or Fifth Amendment bars congressional action concededly within its commerce power, one interposes an affirmative constitutional defense that has a chance of success. It was the Justice's view that the state was "asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority." Id. at 553. But whence the affirmative barrier? "[I]t is not the Tenth Amendment *by its terms*. . . ." Id. at 557 (emphasis supplied). Rather, the Amendment was an example of the Framers' understanding that the sovereignty of the states imposed an implied affirmative barrier to the assertion of otherwise valid congressional powers. Id. at 557–59. But the difficulty with this construction is that the equivalence that Justice Rehnquist sought to establish lies *not* between an individual asserting a constitutional limit on delegated powers and a state asserting the same thing, but *is* rather between an individual asserting a lack of authority and a state asserting a lack of authority; this equivalence is evident on the face of the Tenth Amendment, which states that the powers not delegated to the United States "are reserved to the States respectively, *or to the people*." (emphasis supplied). The states are thereby accorded no greater interest in restraining the exercise of nondelegated power than are the people. *See* Massachusetts v. Mellon, 262 U.S. 447 (1923).

[44] National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

[45] 426 U.S. at 845.

tegral operations in areas of traditional governmental functions."[46] The line of cases exemplified by *United States v. California* was distinguished and preserved on the basis that the state activities there regulated were so unlike the traditional activities of a state that Congress could reach them;[47] *Case v. Bowles* was held distinguishable on the basis that Congress had acted pursuant to its war powers and to have rejected the power would have impaired national defense;[48] *Fry* was distinguished on the bases that it upheld emergency legislation tailored to combat a serious national emergency, the means were limited in time and effect, the freeze did not displace state discretion in structuring operations or force a restructuring, and the federal action "operated to reduce the pressure upon state budgets rather than increase them."[49] *Wirtz* was overruled; it permitted Congress to intrude into the conduct of integral and traditional state governmental functions and could not therefore stand.[50]

League of Cities did not prove to be much of a restriction upon congressional power in subsequent decisions. First, its principle was held not to reach to state regulation of private conduct that affects interstate commerce, even as to such matters as state jurisdiction over land within its borders.[51] Second, it was held not to immunize state conduct of a business operation, that is, proprietary activity not like "traditional governmental activities."[52] Third, it was held not to preclude Congress from regulating the way states regulate private activities within the state—even though such state activity is certainly traditional governmental action—on the theory that, because Congress could displace or preempt state regulation, it may require the states to regulate in a certain way if they wish to continue to act in this field.[53] Fourth, it was held not to limit Congress when it acts in an emergency or pursuant to its war powers, so that Congress may indeed reach even traditional governmental activity.[54] Fifth, it was held not to apply at all to Congress's enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments.[55] Sixth, it apparently was to have no application to the ex-

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[46] 426 U.S. at 852.
[47] 426 U.S. at 854.
[48] 426 U.S. at 854 n.18.
[49] 426 U.S. at 852–53.
[50] 426 U.S. at 853–55.
[51] Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981).
[52] United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982).
[53] FERC v. Mississippi, 456 U.S. 742 (1982).
[54] National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976).
[55] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); City of Rome v. United States, 446 U.S. 156, 178–80 (1980).

ercise of Congress's spending power with conditions attached.[56] Seventh, not because of the way the Court framed the statement of its doctrinal position, which is absolutist, but because of the way it accommodated precedent and because of Justice Blackmun's concurrence, it was always open to interpretation that Congress was enabled to reach traditional governmental activities not involving employer-employee relations or is enabled to reach even these relations if the effect is "to reduce the pressures upon state budgets rather than increase them."[57] In his concurrence, Justice Blackmun suggested his lack of agreement with "certain possible implications" of the opinion and recast it as a "balancing approach" that "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[58]

The Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,[59] and seemingly returned to the conception of federal supremacy embodied in *Wirtz* and *Fry*. For the most part, the Court indicated, states must seek protection from the impact of federal regulation in the political processes, and not in any limitations imposed on the commerce power or found in the Tenth Amendment. Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren."[60] State autonomy is both limited and protected by the terms of the Constitution itself, hence—ordinarily, at least—exercise of Congress's enu-

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[56] In Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 n.13 (1981), the Court suggested rather ambiguously that *League of Cities* may restrict the federal spending power, citing its reservation of the cases in *League of Cities*, 426 U.S. 852 n.17, but citing also spending clause cases indicating a rational basis standard of review of conditioned spending. Earlier, the Court had summarily affirmed a decision holding that the spending power was not affected by the case. North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), *aff'd*, 435 U.S. 962 (1978). No hint of such a limitation is contained in more recent decisions (to be sure, in the aftermath of *League of Cities*' demise). New York v. United States, 505 U.S. 144, 167, 171–72, 185 (1992); South Dakota v. Dole, 483 U.S. 203, 210–12 (1987).

[57] National League of Cities v. Usery, 426 U.S. 833, 846–51 (1976). The quotation in the text is at 853 (one of the elements distinguishing the case from *Fry*).

[58] 426 U.S. at 856.

[59] 469 U.S. 528 (1985). The issue was again decided by a 5-to-4 vote, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection. Justice Blackmun's opinion of the Court was joined by Justices Brennan, White, Marshall, and Stevens. Writing in dissent were Justices Powell (joined by Chief Justice Burger and by Justices Rehnquist and O'Connor), O'Connor (joined by Justices Powell and Rehnquist), and Rehnquist.

[60] 469 U.S. at 557.

merated powers is not to be limited by "*a priori* definitions of state sovereignty."[61] States retain a significant amount of sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[62] There are direct limitations in Art. I, § 10; and "Section 8 . . . works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation."[63] On the other hand, the principal restraints on congressional exercise of the commerce power are to be found not in the Tenth Amendment, in the Commerce Clause itself, or in "judicially created limitations on federal power," but in the structure of the Federal Government and in the political processes.[64] "[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."[65] While continuing to recognize that "Congress's authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits."[66] Thus, arguably, the Court has not totally abandoned the *National League of Cities* premise that there are limits on the extent to which federal regulation may burden states as states. Rather, it has stipulated that any such limits on exercise of federal power must be premised on a failure of the political processes to protect state interests, and "must be tailored to compensate for [such] failings . . . rather than to dictate a 'sacred province of state autonomy.'"[67]

Further indication of what must be alleged in order to establish affirmative limits to commerce power regulation was provided in *South Carolina v. Baker*.[68] The Court expansively interpreted *Garcia* as meaning that there must be an allegation of "some extraor-

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[61] 469 U.S. at 548.
[62] 469 U.S. at 549.
[63] 469 U.S. at 548.
[64] "Apart from the limitation on federal authority inherent in the delegated nature of Congress's Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." 469 U.S. at 550. The Court cited as prime examples the role of states in selecting the President, and the equal representation of states in the Senate. Id. at 551.
[65] 469 U.S. at 554.
[66] 469 U.S. at 556.
[67] 469 U.S. at 554.
[68] 485 U.S. 505 (1988).

dinary defects in the national political process" before the Court will intervene.[69] A claim that Congress acted on incomplete information will not suffice, the Court noting that South Carolina had "not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."[70] Thus, the general rule is that "limits on Congress's authority to regulate state activities . . . are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."[71]

Dissenting in *Garcia*, Justice Rehnquist predicted that the doctrine propounded by the dissenters and by those Justices in *National League of Cities* "will . . . in time again command the support of a majority of the Court."[72] As the membership of the Court changed, it appeared that the prediction was proving true.[73] Confronted with the opportunity in *New York v. United States*,[74] to reexamine *Garcia*, the Court instead distinguished it,[75] striking down a federal law on the basis that Congress could not "commandeer" the legislative and administrative processes of state government to compel the administration of federal programs.[76] The line of analysis pursued by the Court makes clear, however, what the result will be when a *Garcia* kind of federal law is reviewed.

That is, because the dispute involved the division of authority between federal and state governments, Justice O'Connor wrote for the Court in *New York*, one could inquire whether Congress acted under a delegated power or one could ask whether Congress had

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[69] 485 U.S. at 512.

[70] 485 U.S. at 513.

[71] 485 U.S. at 512.

[72] Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 579–80 (1985).

[73] The shift was pronounced in Gregory v. Ashcroft, 501 U.S. 452 (1991), in which the Court, cognizant of the constraints of *Garcia*, chose to apply a "plain statement" rule to construction of a statute seen to be intruding into the heart of state autonomy. Id. at 463. To do otherwise, said Justice O'Connor, was to confront "a potential constitutional problem" under the Tenth Amendment and the Guarantee Clause of Article IV, § 4. Id. at 463–64.

[74] 505 U.S. 144 (1992).

[75] The line of cases exemplified by *Garcia* was said to concern the authority of Congress to subject state governments to generally applicable laws, those covering private concerns as well as the states, necessitating no revisiting of those cases. 505 U.S. at 160.

[76] Struck down was a provision of law providing for the disposal of radioactive wastes generated in the United States by government and industry. Placing various responsibilities on the states, the provision sought to compel performance by requiring that any state that failed to provide for the permanent disposal of wastes generated within its borders must take title to, take possession of, and assume liability for the wastes, 505 U.S. at 161, obviously a considerable burden.

invaded a state province protected by the Tenth Amendment. But, the Justice wrote, "the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." [77]

Powers delegated to the Nation, therefore, are subject to limitations that reserve power to the states. This limitation is not found in the text of the Tenth Amendment, which is, the Court stated, "but a truism," [78] but is a direct constraint on Article I powers when an incident of state sovereignty is invaded.[79] The "take title" provision was such an invasion. Both the Federal Government and the states owe political accountability to the people. When Congress encourages states to adopt and administer a federally prescribed program, both governments maintain their accountability for their decisions. When Congress compels the states to act, state officials will bear the brunt of accountability that properly belongs at the national level.[80] The "take title" provision, because it presented the states with "an unavoidable command", transformed state governments into "regional offices" or "administrative agencies" of the Federal Government, impermissibly undermined the accountability owing the people and was void.[81] Whether viewed as lying outside Congress's enumerated powers or as infringing the core of state sovereignty reserved by the Tenth Amendment, "the provision is inconsistent with the federal structure of our Government established by the Constitution." [82]

Federal laws of general applicability, therefore, are surely subject to examination under the *New York* test rather than under the *Garcia* structural standard.

Expanding upon its anti-commandeering rule, the Court in *Printz v. United States* [83] established "categorically" the rule that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." [84] At issue in *Printz* was a provision of the Brady Handgun Violence Prevention Act that required, pending the development by the Attorney General of a national system

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[77] 505 U.S. at 156.
[78] 505 U.S. at 156 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).
[79] 505 U.S. at 156.
[80] 505 U.S. at 168–69.
[81] 505 U.S. at 175–77, 188.
[82] 505 U.S. at 177.
[83] 521 U.S. 898 (1997).
[84] 521 U.S. at 933 (internal quotation marks omitted) (quoting New York v. United States, 505 U.S. 144, 188 (1992)).

by which criminal background checks on prospective firearms purchasers could be conducted, the chief law enforcement officers of state and local governments to conduct background checks to ascertain whether applicants were ineligible to purchase handguns. Confronting the absence of any textual basis for a "categorical" rule, the Court looked to history, which in its view demonstrated a paucity of congressional efforts to impose affirmative duties upon the states.[85] More important, the Court relied on the "structural Constitution" to demonstrate that the Constitution of 1787 had not taken from the states "a residuary and inviolable sovereignty,"[86] that it had, in fact and theory, retained a system of "dual sovereignty"[87] reflected in many things but most notably in the constitutional conferral "upon Congress of not all governmental powers, but only discrete, enumerated ones," which was expressed in the Tenth Amendment. Thus, although it had earlier rejected the commandeering of legislative assistance, the Court now made clear that administrative officers and resources were also fenced off from federal power.

The scope of the rule thus expounded was unclear. Particularly, Justice O'Connor in concurrence observed that Congress retained the power to enlist the states through contractual arrangements and on a voluntary basis. More pointedly, she stated that "the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid."[88]

A partial answer was provided in *Reno v. Condon*,[89] in which the Court upheld the Driver's Privacy Protection Act of 1994 against a charge that it offended the anti-commandeering rule of *New York* and *Printz*. The Act in general limits disclosure and resale without a driver's consent of personal information contained in the records of state motor vehicle departments, and requires disclosure of that information for specified government record-keeping purposes. While conceding that the Act "will require time and effort on the part of state employees," the Court found this imposition permissible because the Act regulates state activities directly rather than requiring states to regulate private activities.[90]

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[85] 521 U.S. at 904–18. Notably, the Court expressly exempted from this rule the continuing role of the state courts in the enforcement of federal law. Id. at 905–08.

[86] 521 U.S. at 919 (quoting THE FEDERALIST, No. 39 (Madison)).

[87] 521 U.S. at 918.

[88] 521 U.S. at 936 (citing 42 U.S.C. § 5779(a)) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice).

[89] 528 U.S. 141 (2000).

[90] 528 U.S. at 150–51.

Federal Instrumentalities and Personnel and State Police Power

Federal instrumentalities and agencies have never enjoyed the same degree of immunity from state police regulation as from state taxation. The Court has looked to the nature of each regulation to determine whether it is compatible with the functions committed by Congress to the federal agency. This problem has arisen most often with reference to the applicability of state laws to the operation of national banks. Two correlative propositions have governed the decisions in these cases. The first was stated by Justice Miller in *National Bank v. Commonwealth*.[91] "[National banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."[92] In *Davis v. Elmira Savings Bank*,[93] the Court stated the second proposition thus: "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created."[94]

Similarly, a state law, insofar as it forbids national banks to use the word "saving" or "savings" in their business and advertising, is void because it conflicts with the Federal Reserve Act's authorizing such banks to receive savings deposits.[95] However, federal incorporation of a railroad company of itself does not operate to exempt it from control by a state as to business consummated wholly within the state.[96] Also, Treasury Department regulations, designed to implement the federal borrowing power (Art. I, § 8, cl. 2) by making United States Savings Bonds attractive to investors and conferring exclusive title thereto upon a surviving joint owner,

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[91] 76 U.S. (9 Wall.) 353 (1870).
[92] 76 U.S. at 362.
[93] 161 U.S. 275 (1896).
[94] 161 U.S. at 283.
[95] Franklin Nat'l Bank v. New York, 347 U.S. 273 (1954).
[96] Reagan v. Mercantile Trust Co., 154 U.S. 413 (1894).

override contrary state community property laws whereunder a one-half interest in such property remains part of the estate of a decedent co-owner.[97] Similarly, the Patent Office's having been granted by Congress an unqualified authorization to license and regulate the conduct throughout the United States of nonlawyers as patent agents, a state, under the guise of prohibiting unauthorized practice of law, is preempted from enjoining such activities of a licensed agent as entail the rendering of legal opinions as to patentability or infringement of patent rights and the preparation and prosecution of application for patents.[98]

The extent to which states may regulate contractors who furnish goods or services to the Federal Government is not as clearly established as is the states' right to tax such dealers. In 1943, a closely divided Court sustained the refusal of the Pennsylvania Milk Control Commission to renew the license of a milk dealer who, in violation of state law, had sold milk to the United States for consumption by troops at an army camp located on land belonging to the state, at prices below the minimum established by the Commission.[99] The majority was unable to find in congressional legislation, or in the Constitution, unaided by congressional enactment, any immunity from such price fixing regulations. On the same day, a different majority held that California could not penalize a milk dealer for selling milk to the War Department at less than the minimum price fixed by state law where the sales and deliveries were made in a territory which had been ceded to the Federal Government by the state and were subject to the exclusive jurisdiction of the former.[100] On the other hand, by virtue of its conflict with standards set forth in the Armed Services Procurement Act, 41 U.S.C. § 152, for determining the letting of contracts to responsible bidders, a state law licensing contractors cannot be enforced against one selected by federal authorities for work on an Air Force base.[101]

Most recently, the Court has done little to clarify the doctrinal difficulties.[102] The Court looked to a "functional" analysis of state regulations, much like the rule covering state taxation. "A state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom

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[97] Free v. Bland, 369 U.S. 663 (1962).

[98] Sperry v. Florida, 373 U.S. 379 (1963).

[99] Penn Dairies v. Milk Control Comm'n, 318 U.S. 261 (1943).

[100] Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285 (1943). *See also* Paul v. United States, 371 U.S. 245 (1963).

[101] Leslie Miller, Inc. v. Arkansas, 353 U.S. 187 (1956).

[102] North Dakota v. United States, 495 U.S. 423 (1990). The difficulty is that the case was five-to-four, with a single Justice concurring with a plurality of four to reach the result. Id. at 444. Presumably, the concurrence agreed with the rationale set forth here, disagreeing only in other respects.

it deals." [103] In determining whether a regulation discriminates against the Federal Government, "the entire regulatory system should be analyzed." [104]

The Doctrine of Federal Exemption From State Taxation

McCulloch v. Maryland.—Five years after the decision in *McCulloch v. Maryland* that a state may not tax an instrumentality of the Federal Government, the Court was asked to and did reexamine the entire question in *Osborn v. Bank of the United States*.[105] In that case counsel for the State of Ohio, whose attempt to tax the Bank was challenged, put forward two arguments of great importance. In the first place it was "contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and not being expressed, ought not to be implied by the Court." [106] To which Marshall replied: "It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance." [107] Secondly, the appellants relied "greatly on the distinction between the bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government. . . . Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors." [108] Marshall accepted this analogy but not to the advantage of the appellants. He simply indicated that all contractors who dealt with the government were entitled to immunity from taxation upon such transactions.[109] Thus, not only was the decision of *McCulloch v. Maryland* reaffirmed but the foundation was laid for the vast expansion of the principle of immunity that was to follow in the succeeding decades.

Applicability of Doctrine to Federal Securities.—The first significant extension of the doctrine of the immunity of federal instrumentalities from state taxation came in *Weston v. Charles-*

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[103] 495 U.S. at 435. Four dissenting Justices agreed with this principle, but they also would invalidate a state law that "actually and substantially interferes with specific federal programs." Id. at 448, 451–52.

[104] 495 U.S. at 435. That is, only when the overall effect, when balanced against other regulations applicable to similarly situated persons who do not deal with the government, imposes a discriminatory burden will they be invalidated. Justice Scalia, concurring, was doubtful of this standard. Id. at 444.

[105] 22 U.S. (9 Wheat.) 738 (1824).

[106] 22 U.S. at 865.

[107] 22 U.S. at 865.

[108] 22 U.S. at 866.

[109] 22 U.S. at 867.

ton,[110] where Chief Justice Marshall also found in the Supremacy Clause a bar to state taxation of obligations of the United States. During the Civil War, when Congress authorized the issuance of legal tender notes, it explicitly declared that such notes, as well as United States bonds and other securities, should be exempt from state taxation.[111] A modified version of this section remains on the statute books today.[112] The right of Congress to exempt legal tender notes to the same extent as bonds was sustained in *Bank v. Supervisors*,[113] over the objection that such notes circulate as money and should be taxable in the same way as coin. But a state tax on checks issued by the Treasurer of the United States for interest accrued upon government bonds was sustained since it did not in any way affect the credit of the National Government.[114] Similarly, the assessment for an *ad valorem* property tax of an open account for money due under a federal contract,[115] and the inclusion of the value of United States bonds owed by a decedent, in measuring an inheritance tax,[116] were held valid, since neither tax would substantially embarrass the power of the United States to secure credit.[117] A state property tax levied on mutual savings banks and federal savings and loan associations and measured by the amount of their capital, surplus, or reserve and undivided profits, but without deduction of the value of their United States securities, was voided as a tax on obligations of the Federal Government. Apart from the fact that the ownership interest of depositors in such institutions was different from that of corporate stockholders, the tax was imposed on the banks which were solely liable for payment thereof.[118]

Income from federal securities is also beyond the reach of the state taxing power as the cases now stand.[119] Nor can such a tax

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[110] 27 U.S. (2 Pet.) 449 (1829), followed in New York ex rel. Bank of Commerce v. New York City, 67 U.S. (2 Bl.) 620 (1863).

[111] Ch. 73, 37th Cong., 3d Sess., 12 Stat. 709, 710 (1863).

[112] 31 U.S.C. § 3124. The exemption under the statute is no broader than that which the Constitution requires. First Nat'l Bank v. Bartow County Bd. of Tax Assessors, 470 U.S. 583 (1985). The relationship of this statute to another, 12 U.S.C. § 548, governing taxation of shares of national banking associations, has occasioned no little difficulty. American Bank & Trust Co. v. Dallas County, 463 U.S. 855 (1983); Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983).

[113] 74 U.S. (7 Wall.) 26 (1868).

[114] Hibernia Savings Society v. San Francisco, 200 U.S. 310, 315 (1906).

[115] Smith v. Davis, 323 U.S. 111 (1944).

[116] Plummer v. Coler, 178 U.S. 115 (1900); Blodgett v. Silberman, 277 U.S. 1, 12 (1928).

[117] *Accord*, Rockford Life Ins. Co. v. Illinois Dep't of Revenue, 482 U.S. 182 (1987) (tax including in an investor's net assets the value of federally-backed securities ("Ginnie Maes") upheld, as it would have no adverse effect on Federal Government's borrowing ability).

[118] Society for Savings v. Bowers, 349 U.S. 143 (1955).

[119] Northwestern Mut. Life Ins. Co. v. Wisconsin, 275 U.S. 136, 140 (1927).

be imposed indirectly upon the stockholders on such part of the corporate dividends as corresponds to the part of the corporation's income which is not assessed, *i.e.*, income from tax exempt bonds.[120] A state may constitutionally levy an excise tax on corporations for the privilege of doing business, and measure the tax by the property of net income of the corporation, including tax exempt United States securities or the income derived therefrom.[121] The designation of a tax is not controlling.[122] Where a so-called "license tax" upon insurance companies, measured by gross income, including interest on government bonds, was, in effect, a commutation tax levied in lieu of other taxation upon the personal property of the taxpayer, it was still held to amount to an unconstitutional tax on the bonds themselves.[123]

Taxation of Government Contractors.—In the course of his opinion in *Osborn v. Bank of the United States*,[124] Chief Justice Marshall posed the question: "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative." [125]

Today, the question insofar as taxation is concerned is answered in the affirmative. Although the early cases looked toward immunity,[126] in *James v. Dravo Contracting Co.*,[127] by a 5-to-4 vote, the Court established the modern doctrine. Upholding a state tax on the gross receipts of a contractor providing services to the Federal Government, the Court said that "'[I]t is not necessary to cripple [the state's power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden

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[120] Miller v. Milwaukee, 272 U.S. 713 (1927).

[121] Provident Inst. v. Massachusetts, 73 U.S. (6 Wall.) 611 (1868); Society for Savings v. Coite, 73 U.S. (6 Wall.) 594 (1868); Hamilton Company v. Massachusetts, 73 U.S. (6 Wall.) 632 (1868); Home Ins. Co. v. New York, 134 U.S. 594 (1890); Werner Machine Co. v. Director of Taxation, 350 U.S. 492 (1956).

[122] Macallen Co. v. Massachusetts, 279 U.S. 620, 625 (1929).

[123] Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U.S. 136 (1927).

[124] 22 U.S. (9 Wheat.) 738 (1824).

[125] 22 U.S. at 867.

[126] The dissent in James v. Dravo Contracting Co., 302 U.S. 134, 161 (1937), observed that the Court was overruling "a century of precedents." *See*, *e.g.*, Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218 (1928) (voiding a state privilege tax on dealers in gasoline as applied to sales by a dealer to the Federal Government for use by Coast Guard). It was in *Panhandle* that Justice Holmes uttered his riposte to Chief Justice Marshall: "The power to tax is not the power to destroy while this Court sits." Id. at 223 (dissenting).

[127] 302 U.S. 134 (1937).

is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.'" [128] A state-imposed sales tax upon the purchase of goods by a private firm having a cost-plus contract with the Federal Government was sustained, it not being critical to the tax's validity that it would be passed on to the government.[129] Previously, it had sustained a gross receipts tax levied in lieu of a property tax upon the operator of an automobile stage line, who was engaged in carrying the mails as an independent contractor [130] and an excise tax on gasoline sold to a contractor with the government and used to operate machinery in the construction of levees on the Mississippi River.[131] Although the decisions have not set an unwavering line,[132] the Court has hewed to a very restrictive doctrine of immunity. "[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." [133] Thus, *New Mexico* sustained a state gross receipts tax and a use tax imposed upon contractors with the Federal Government which operated on "advanced funding," drawing on federal deposits so that only federal funds were expended by the contractors to meet their obligations.[134] Of course, Congress may

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[128] 302 U.S. at 150 (quoting Willcuts v. Bunn, 282 U.S. 216, 225 (1931)).

[129] Alabama v. King & Boozer, 314 U.S. 1 (1941), overruling Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218 (1928), and Graves v. Texas Co., 298 U.S. 393 (1936). *See also* Curry v. United States, 314 U.S. 14 (1941). "The Constitution . . . does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States." United States v. Boyd, 378 U.S. 39, 44 (1964) (sustaining sales and use taxes on contractors using tangible personal property to carry out government cost-plus contract).

[130] Alward v. Johnson, 282 U.S. 509 (1931).

[131] Trinityfarm Const. Co. v. Grosjean, 291 U.S. 466 (1934).

[132] United States v. Allegheny County, 322 U.S. 174 (1944) (voiding property tax that included in assessment the value of federal machinery held by private party); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954) (voiding gross receipts sales tax applied to contractor purchasing article under agreement whereby he was to act as agent for government and title to articles purchased passed directly from vendor to United States).

[133] United States v. New Mexico, 455 U.S. 720, 735 (1982). *See* South Carolina v. Baker, 485 U.S. 505, 523 (1988).

[134] "[I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." United States v. New Mexico, 455 U.S. 720, 734 (1982). Arizona Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999) (the same rule applies when the contractual services are rendered on an Indian reservation).

statutorily provide for immunity from taxation of federal contractors generally or in particular programs.[135]

Taxation of Salaries of Federal Employees.—Of a piece with *James v. Dravo Contracting Co.* was *Graves v. New York ex rel. O'Keefe*,[136] handed down two years later. Repudiating the theory "that a tax on income is legally or economically a tax on its source," the Court held that a state could levy a nondiscriminatory income tax upon the salary of an employee of a government corporation. In the opinion of the Court, Justice Stone intimated that Congress could not validly confer such an immunity upon federal employees. "The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes; and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments." [137] Chief Justice Hughes concurred in the result without opinion. Justices Butler and McReynolds dissented and Justice Frankfurter wrote a concurring opinion in which he reserved judgment as to "whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live." [138]

That question is academic, Congress's having consented to state taxation of its employees' compensation as long as the taxation "does not discriminate against the . . . employee, because of the source of the . . . compensation." [139] This principle, the Court has held, "is

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[135] James v. Dravo Contracting Co., 302 U.S. 134, 161 (1937); Carson v. Roane-Anderson Co., 342 U.S. 232, 234 (1952); United States v. New Mexico, 455 U.S. 720, 737 (1982). *Roane-Anderson* held that a section of the Atomic Energy Act barred the collection of state sales and use taxes in connection with sales to private companies of personal property used by them in fulfilling their contracts with the AEC. Thereafter, Congress repealed the section for the express purpose of placing AEC contractors on the same footing as other federal contractors, and the Court upheld imposition of the taxes. United States v. Boyd, 378 U.S. 39 (1964).

[136] 306 U.S. 466 (1939), followed in State Comm'n v. Van Cott, 306 U.S. 511 (1939). This case was overruled by implication in Dobbins v. Erie County, 41 U.S. (16 Pet.) 435 (1842), and New York ex rel. Rogers v. Graves, 299 U.S. 401 (1937), which held the income of federal employees to be immune from state taxation.

[137] 306 U.S. at 487.

[138] 306 U.S. at 492.

[139] 4 U.S.C. § 111. The statute, part of the Public Salary Tax Act of 1939, was considered and enacted contemporaneously with the alteration occurring in constitutional law, exemplified by *Graves*. That is, in Helvering v. Gerhardt, 304 U.S. 405 (1938), the Court had overruled precedents and held that Congress could impose

coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." [140]

Ad Valorem Taxes Under the Doctrine.—Property owned by a federally chartered corporation engaged in private business is subject to state and local *ad valorem* taxes. This was conceded in *McCulloch v. Maryland* [141] and confirmed a half century later with respect to railroads incorporated by Congress.[142] Similarly, a property tax may be levied against the lands under water that are owned by a person holding a license under the Federal Water Power Act.[143] However, when privately owned property erected by lessees on tax-exempt state lands is taxed by a county at less than full value, and houses erected by contractors on land leased from a federal Air Force base are taxed at full value, the latter tax, solely because it discriminates against the United States and its lessees, is void.[144] Likewise, when, under state laws, a school district does not tax private lessees of state and municipal realty, whose leases are subject to termination at the lessor's option in the event of sale, but does levy a tax, measured by the entire value of the realty, on lessees of United States property used for private purposes and whose leases are terminable at the option of the United States in an emergency or upon sale, the discrimination voided the tax collected from the latter. "A state tax may not discriminate against the government or those with whom it deals" in the absence of significant differences justifying levy of higher taxes on lessees of federal property.[145] Land con-

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nondiscriminatory taxes on the incomes of most state employees, and the 1939 Act had as its primary purpose the imposition of federal income taxes on the salaries of all state and local government employees. Feeling equity required it, Congress included a provision authorizing nondiscriminatory state taxation of federal employees. *Graves* came down while the provision was pending in Congress. *See* Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 810–14 (1989). For application of the Act to salaries of federal judges, *see* Jefferson County v. Acker, 527 U.S. 423 (1999) (upholding imposition of a local occupational tax).

[140] Davis v. Michigan Dept. of the Treasury, 489 U.S. at 813. This case struck down, as violative of the provision, a state tax imposed on federal retirement benefits but exempting state retirement benefits. *See also* Barker v. Kansas, 503 U.S. 594 (1992) (similarly voiding a state tax on federal military retirement benefits but not reaching state and local government retirees).

[141] 17 U.S. (4 Wheat.) 316, 426 (1819).

[142] Thomson v. Union Pac. R.R., 76 U.S. (9 Wall.) 579, 588 (1870); Union Pacific R.R. v. Peniston, 85 U.S. (18 Wall.) 5, 31 (1873).

[143] Susquehanna Power Co. v. Tax Comm'n (No. 1), 283 U.S. 291 (1931).

[144] Moses Lake Homes v. Grant County, 365 U.S. 744 (1961).

[145] Phillips Chemical Co. v. Dumas School Dist., 361 U.S. 376, 383, 387 (1960). In Offutt Housing Co. v. Sarpy County, 351 U.S. 253 (1956), a housing company was held liable for county personal property taxes on the ground that the government had consented to state taxation of the company's interest as lessee. Upon its completion of housing accommodations at an Air Force Base, the company had leased the houses and the furniture therein from the Federal Government.

veyed by the United States to a corporation for dry dock purposes was subject to a general property tax, despite a reservation in the conveyance of a right to free use of the dry dock and a provision for forfeiture in case of the continued unfitness of the dry dock for use or the use of land for other purposes.[146] Also, where equitable title has passed to the purchaser of land from the government, a state may tax the equitable owner on the full value thereof, despite retention of legal title;[147] but, in the case of reclamation entries, the tax may not be collected until the equitable title passes.[148] In the pioneer case of *Van Brocklin v. Tennessee*,[149] the state was denied the right to sell for taxes lands which the United States owned at the time the taxes were levied, but in which it had ceased to have any interest at the time of sale. Similarly, a state cannot assess land in the hands of private owners for benefits from a road improvement completed while it was owned by the United States.[150]

In 1944, with two dissents, the Court held that where the government purchased movable machinery and leased it to a private contractor the lessee could not be taxed on the full value of the equipment.[151] Twelve years later, and with a like number of Justices dissenting, the Court upheld the following taxes imposed on federal contractors: (1) a municipal tax levied pursuant to a state law which stipulated that when tax exempt real property is used by a private firm for profit, the latter is subject to taxation to the same extent as if it owned the property, and based upon the value of real property, a factory, owned by the United States and made available under a lease permitting the contracting corporation to deduct such taxes from rentals paid by it; the tax was collectible only by direct action against the contractor for a debt owed, and was not applicable to federal properties on which payments in lieu of taxes are made; (2) a municipal tax, levied under the authority of the same state law, based on the value of the realty owned by the United States, and collected from a cost-plus-fixed-fee contractor, who paid no rent but agreed not to include any part of the cost of the facilities furnished by the government in the price of goods supplied under the contract; (3) another municipal tax levied in the same state against a federal subcontractor, and computed on the value of materials and work in process in his possession, notwithstanding that

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[146] Baltimore Shipbuilding Co. v. Baltimore, 195 U.S. 375 (1904).

[147] Northern Pacific R.R. v. Myers, 172 U.S. 589 (1899); New Brunswick v. United States, 276 U.S. 547 (1928).

[148] Irwin v. Wright, 258 U.S. 219 (1922).

[149] 117 U.S. 151 (1886).

[150] Lee v. Osceola Imp. Dist., 268 U.S. 643 (1925).

[151] United States v. Allegheny County, 322 U.S. 174 (1944).

title thereto had passed to the United States following his receipt of installment payments.[152]

In sustaining the first tax, the Court held that it was imposed, not on the government or on its property, but upon a private lessee, that it was computed by the value of the use to the contractor of the federally leased property, and that it was nondiscriminatory; that is, it was designed to equalize the tax burden carried by private business using exempt property with that of similar businesses using taxed property. Distinguishing *Allegheny County*, the Court maintained that in that older decision, the tax invalidated was imposed directly on federal property and that the question of the legality of a privilege on use and possession of such property had been expressly reserved. Also, insofar as the economic incidents of such tax on private use curtails the net rental accruing to the government, such burden was viewed as insufficient to vitiate the tax.[153]

Deeming the second and third taxes similar to the first, the Court sustained them as taxes on the privilege of using federal property in the conduct of private business for profit. With reference to the second, the Court emphasized that the government had reserved no right of control over the contractor and, hence, the latter could not be viewed as an agent of the government entitled to the immunity derivable from that status.[154] As to the third tax, the Court asserted that there was no difference between taxing a private party for the privilege of using property he possesses, and taxing him for possessing property which he uses; for, in both instances, the use was private profit. Moreover, the economic burden thrust upon the government was viewed as even more remote than in the administration of the first two taxes.[155]

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[152] United States v. City of Detroit, 355 U.S. 466 (1958). The Court more recently has stated that *Allegheny County* "in large part was overruled" by *Detroit*. United States v. New Mexico, 455 U.S. 720, 732 (1982).

[153] United States v. City of Detroit, 355 U.S. 478, 482, 483 (1958). *See also* California Bd. of Equalization v. Sierra Summit, 490 U.S. 844 (1989).

[154] United States v. Township of Muskegon, 355 U.S. 484 (1958).

[155] City of Detroit v. Murray Corp., 355 U.S. 489 (1958). In United States v. County of Fresno, 429 U.S. 452 (1977), these cases were reaffirmed and applied to sustain a tax imposed on the possessory interests of United States Forest Service employees in housing located in national forests within the county and supplied to the employees by the Forest Service as part of their compensation. A state or local government may raise revenues on the basis of property owned by the United States as long as it is in possession or use by the private citizen that is being taxed.

Federal Property and Functions.—Property owned by the United States is, of course, wholly immune from state taxation.[156] No state can regulate, by the imposition of an inspection fee, any activity carried on by the United States directly through its own agents and employees.[157] An early case, the authority of which is now uncertain, held invalid a flat rate tax on telegraphic messages, as applied to messages sent by public officers on official business.[158]

Federally Chartered Finance Agencies: Statutory Exemptions.—Fiscal institutions chartered by Congress, their shares and their property, are taxable only with the consent of Congress and only in conformity with the restrictions it has attached to its consent.[159] Immediately after the Supreme Court construed the statute authorizing the states to tax national bank shares as allowing a tax on the preferred shares of such a bank held by the Reconstruction Finance Corporation,[160] Congress enacted a law exempting such shares from taxation. The Court upheld this measure, saying: "When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will."[161] In *Pittman v. Home Owners' Corp.*,[162] the Court sustained the power of Congress under the necessary and proper clause to immunize the activities of the Corporation from state taxation; and in *Federal Land Bank v. Bismarck Lumber Co.*,[163] the like result was reached with respect to an attempt by the state to impose a retail sales tax on a sale of lumber and other building materials to the bank for use in repairing and improving property that had been acquired by foreclosure or mortgages.

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[156] Clallam County v. United States, 263 U.S. 341 (1923). *See also* Cleveland v. United States, 323 U.S. 329, 333 (1945); United States v. Mississippi Tax Comm'n, 412 U.S. 363 (1973); United States v. Mississippi Tax Comm'n, 421 U.S. 599 (1975).

[157] Mayo v. United States, 319 U.S. 441 (1943). A municipal tax on the privilege of working within the city, levied at the rate of one percent of earnings, although not deemed to be an income tax under state law, was sustained as such when collected from employees of a naval ordinance plant by reason of federal assent to that type of tax expressed in the Buck Act. 4 U.S.C. §§ 105–110. Howard v. Commissioners, 344 U.S. 624 (1953).

[158] Telegraph Co. v. Texas, 105 U.S. 460, 464 (1882).

[159] Des Moines Bank v. Fairweather, 263 U.S. 103, 106 (1923); Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 669 (1899); First Nat'l Bank v. Adams, 258 U.S. 362 (1922); Michigan Nat'l Bank v. Michigan, 365 U.S. 467 (1961).

[160] Baltimore Nat'l Bank v. Tax Comm'n, 297 U.S. 209 (1936).

[161] Maricopa County v. Valley Bank, 318 U.S. 357, 362, (1943).

[162] 308 U.S. 21 (1939).

[163] 314 U.S. 95 (1941).

The state's principal argument proceeded thus: "Congress has authority to extend immunity only to the governmental functions of the federal land banks; the only governmental functions of the land banks are those performed by acting as depositories and fiscal agents for the Federal Government and providing a market for government bonds; all other functions of the land banks are private; petitioner here was engaged in an activity incidental to its business of lending money, an essentially private function; therefore § 26 cannot operate to strike down a sales tax upon purchases made in furtherance of petitioner's lending functions."[164] The Court rejected this argument and invalidated the tax, writing: "The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the Federal Government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental."[165]

Similarly, the lease by a federal land bank of oil and gas in a mineral estate, which it had reserved in land originally acquired through foreclosure and thereafter had conveyed to a third party, was held immune from a state personal property tax levied on the lease and on the royalties accruing thereunder. The fact that at the time of the conveyance and lease, the bank had recouped its entire loss resulting from the foreclosure did not operate to convert the mineral estate and lease into a non-governmental activity no longer entitled to exemption.[166] However, in the absence of federal legislation, a state law laying a percentage tax on the users of safety deposit services, measured by the bank's charges therefore, was held valid as applied to national banks. The tax, being on the user, did not, the Court held, impose an intrinsically unconstitutional burden on a federal instrumentality.[167]

Royalties.—In 1928, the Court went so far as to hold that a state could not tax as income royalties for the use of a patent issued by the United States.[168] This proposition was soon overruled in *Fox Film Corp. v. Doyal*,[169] where a privilege tax based on gross income and applicable to royalties from copyrights was upheld. Like-

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[164] 314 U.S. at 101.
[165] 314 U.S. at 102 (citations omitted).
[166] Federal Land Bank v. Kiowa County, 368 U.S. 146 (1961).
[167] Colorado Bank v. Bedford, 310 U.S. 41 (1940).
[168] Long v. Rockwood, 277 U.S. 142 (1928).
[169] 286 U.S. 123 (1932).

wise a state may lay a franchise tax on corporations, measured by the net income from all sources and applicable to income from copyright royalties.[170]

Immunity of Lessees of Indian Lands.—Another line of anomalous decisions conferring tax immunity upon lessees of restricted Indian lands was overruled in 1949. The first of these cases, *Choctaw & Gulf R.R. v. Harrison*,[171] held that a gross production tax on oil, gas, and other minerals was an occupational tax, and, as applied to a lessee of restricted Indian lands, was an unconstitutional burden on such lessee, who was deemed to be an instrumentality of the United States. Next, the Court held the lease itself a federal instrumentality immune from taxation.[172] A modified gross production tax imposed in lieu of all ad valorem taxes was invalidated in two *per curiam* decisions.[173] In *Gillespie v. Oklahoma*,[174] a tax upon net income of the lessee derived from sales of his share of oil produced from restricted lands also was condemned. Finally a petroleum excise tax upon every barrel of oil produced in the state was held inapplicable to oil produced on restricted Indian lands.[175] In harmony with the trend to restricting immunity implied from the Constitution to activities of the government itself, the Court overruled all these decisions in *Oklahoma Tax Comm'n v. Texas Co.* and held that a lessee of mineral rights in restricted Indian lands was subject to nondiscriminatory gross production and excise taxes, so long as Congress did not affirmatively grant him immunity.[176]

Summation and Evaluation

Although *McCulloch v. Maryland* and *Gibbons v. Ogden* were expressions of a single thesis, the supremacy of the national government, their development after Marshall's death has been sharply divergent. During the period when *Gibbons v. Ogden* was eclipsed by the theory of dual federalism, the doctrine of *McCulloch v. Mary-*

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[170] Educational Films Corp. v. Ward, 282 U.S. 379 (1931).

[171] 235 U.S. 292 (1914).

[172] Indian Oil Co. v. Oklahoma, 240 U.S. 522 (1916).

[173] Howard v. Gipsy Oil Co., 247 U.S. 503 (1918); Large Oil Co. v. Howard, 248 U.S. 549 (1919).

[174] 257 U.S. 501 (1922).

[175] Oklahoma v. Barnsdall Corp., 296 U.S. 521 (1936).

[176] 336 U.S. 342 (1949). Justice Rutledge, speaking for the Court, sketched the history of the immunity lessees of Indian lands from state taxation, which he found to stem from early rulings that tribal lands are themselves immune. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). One of the first steps taken to curtail the scope of the immunity was Shaw v. Oil Corp., 276 U.S. 575 (1928), which held that lands outside a reservation, though purchased with restricted Indian funds, were subject to state taxation. Congress soon upset the decision, however, and its act was sustained in Board of County Comm'rs v. Seber, 318 U.S. 705 (1943).

land was not merely followed but greatly extended as a restraint on state interference with federal instrumentalities. Conversely, the Court's recent return to Marshall's conception of the powers of Congress has coincided with a retreat from the more extreme positions taken in reliance upon *McCulloch v. Maryland*. Today, the application of the Supremacy Clause is becoming, to an ever increasing degree, a matter of statutory interpretation; a determination whether state regulations can be reconciled with the language and policy of federal enactments. In the field of taxation, the Court has all but wiped out the private immunities previously implied from the Constitution without explicit legislative command. Broadly speaking, the immunity which remains is limited to activities of the government itself, and to that which is explicitly created by statute, *e.g.*, that granted to federal securities and to fiscal institutions chartered by Congress. But the term "activities" will be broadly construed.

Clause 3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

OATH OF OFFICE

Power of Congress in Respect to Oaths

Congress may require no other oath of fidelity to the Constitution, but it may add to this oath such other oath of office as its wisdom may require.[177] It may not, however, prescribe a test oath as a qualification for holding office, such an act being in effect an *ex post facto* law,[178] and the same rule holds in the case of the states.[179]

National Duties of State Officers

Commenting in *The Federalist* on the requirement that state officers, as well as members of the state legislatures, shall be bound

[177] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819).

[178] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 337 (1867).

[179] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867). *See also* Bond v. Floyd, 385 U.S. 116 (1966), in which the Supreme Court held that antiwar statements made by a newly elected member of the Georgia House of Representatives were not inconsistent with the oath of office to support to the United States Constitution.

by oath or affirmation to support the Constitution, Hamilton wrote: "Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and it will be rendered auxiliary to the enforcement of its laws."[180] The younger Pinckney had expressed the same idea on the floor of the Philadelphia Convention: "They [the states] are the instruments upon which the Union must frequently depend for the support and execution of their powers. . . ."[181] Indeed, the Constitution itself lays many duties, both positive and negative, upon the different organs of state government,[182] and Congress may frequently add others, provided it does not require the state authorities to act outside their normal jurisdiction. Early congressional legislation contains many illustrations of such action by Congress.

The Judiciary Act of 1789[183] not only left the state courts in sole possession of a large part of the jurisdiction over controversies between citizens of different states and in concurrent possession of the rest, and by other sections state courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws, examples of the principle that federal law is law to be applied by the state courts, but also any justice of the peace or other magistrates of any of the states were authorized to cause any offender against the United States to be arrested and imprisoned or bailed under the usual mode of process. From the beginning, Congress enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.[184] Pursuant to the same idea of treating state governmental organs as available to the national government for administrative purposes, the act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part to state officials and the rendition of fugitives from justice from one state to another exclusively to the state executives.[185]

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[180] No. 27, (J. Cooke ed. 1961), 175 (emphasis in original). *See also*, id. at No. 45, 312–313 (Madison).

[181] 1 M. Farrand, The Records of the Federal Convention of 1787 404 (rev. ed. 1937).

[182] *See* Article I, § 3, cl. 1; § 4, cl. 1; 10; Article II, § 1, cl. 2; Article III, 2, cl. 2; Article IV, §§ 1, 2; Article V; Amendments 13, 14, 15, 17, 19, 25, and 26.

[183] 1 Stat. 73 (1789).

[184] *See* Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925); Holcomb, *The States as Agents of the Nation*, 3 Selected Essays on Constitutional Law 1187 (1938); Barnett, *Cooperation Between the Federal and State Governments*, 7 Ore. L. Rev. 267 (1928). *See also* J. Clark, The Rise of a New Federalism (1938); E. Corwin, Court Over Constitution 148–168 (1938).

[185] 1 Stat. 302 (1793).

With the rise of the doctrine of states' rights and of the equal sovereignty of the states with the National Government, the availability of the former as instruments of the latter in the execution of its power came to be questioned.[186] In *Prigg v. Pennsylvania*,[187] decided in 1842, the constitutionality of the provision of the act of 1793 making it the duty of state magistrates to act in the return of fugitive slaves was challenged; and in *Kentucky v. Dennison*,[188] decided on the eve of the Civil War, similar objection was leveled against the provision of the same act which made it "the duty" of the chief executive of a state to render up a fugitive from justice upon the demand of the chief executive of the state from which the fugitive had fled. The Court sustained both provisions, but upon the theory that the cooperation of the state authorities was purely voluntary. In *Prigg*, the Court, speaking by Justice Story, said that "while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this Court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation." [189] Subsequent cases confirmed the point that Congress could authorize willing state officers to perform such federal duties.[190] Indeed, when Congress in the Selective Service Act of 1917 authorized enforcement to a great extent through state employees, the Court rejected "as too wanting in merit to require further notice" the contention that the Act was invalid because of this delegation.[191] State officials were frequently employed in the enforcement of the National Prohibition Act, and suits to abate nuisances as defined by the statute were authorized to be brought, in the name of the United States, not only by federal officials, but also by "any prosecuting attorney of any State or any subdivision thereof." [192]

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[186] For the development of opinion, especially on the part of state courts, adverse to the validity of such legislation, *see* 1 J. KENT, COMMENTARIES ON AMERICAN LAW 396–404 (1826).

[187] 41 U.S. (16 Pet.) 539 (1842).

[188] 65 U.S. (24 How.) 66 (1861).

[189] 41 U.S. (16 Pet.) 539, 622 (1842). *See also* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108 (1861). The word "magistrates" in this passage does not refer solely to judicial officers but reflects the usage in that era in which officers generally were denominated magistrates; the power thus upheld is not the related but separate issue of the use of state courts to enforce federal law.

[190] United States v. Jones, 109 U.S. 513, 519 (1883); Robertson v. Baldwin, 165 U.S. 275, 280 (1897); Dallemagne v. Moisan, 197 U.S. 169, 174 (1905); Holmgren v. United States, 217 U.S. 509, 517 (1910); Parker v. Richard, 250 U.S. 235, 239 (1919).

[191] *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918). The Act was 40 Stat. 76 (1917).

[192] 41 Stat. 314, § 22. In at least two States, the practice was approved by state appellate courts. Carse v. Marsh, 189 Cal. 743, 210 Pac. 257 (1922); United States v. Richards, 201 Wis. 130, 229 N.W. 675 (1930). On this and other issues under the

In *Dennison*, however, the Court held that, although Congress could delegate, it could not require performance of an obligation. The "duty" of state executives in the rendition of fugitives from justice was construed to be declaratory of a "moral duty." Chief Justice Taney wrote for the Court: "The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. . . . It is true," the Chief Justice conceded, "that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, [but this, he explained, was] upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution." [193]

Eighteen years later, in *Ex parte Siebold*,[194] the Court sustained the right of Congress, under Article I, § 4, paragraph 1 of the Constitution, to impose duties upon state election officials in connection with a congressional election and to prescribe additional penalties for the violation by such officials of their duties under state law. Although the doctrine of the holding was expressly confined to cases in which the National Government and the states enjoy "a concurrent power over the same subject matter," no attempt was made to catalogue such cases. Moreover, the outlook of Justice Bradley's opinion for the Court was decidedly nationalistic rather than dualistic, as is shown by the answer made to the contention of counsel "that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned . . . ." [195] To this Justice Bradley replied: "As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal appli-

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Act, *see* Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement*, 13 VA. L. REV. 86 (1922).

[193] 65 U.S. (24 How.) 66, 107–08 (1861).

[194] 100 U.S. 371 (1880).

[195] 100 U.S. at 391.

cation. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." [196]

Conflict thus developed early between these two doctrinal lines. But it was the *Siebold* line that prevailed. Enforcement of obligations upon state officials through mandamus or through injunctions was readily available, even when the state itself was immune, through the fiction of *Ex parte Young*,[197] under which a state official could be sued in his official capacity but without the immunities attaching to his official capacity. Although the obligations were, for a long period, in their origin based on the United States Constitution, the capacity of Congress to enforce statutory obligations through judicial action was little doubted.[198] Nonetheless, it was only recently that the Court squarely overruled *Dennison*. "If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that 'the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,' . . . basic constitutional principles now point as clearly the other way." [199] That case is doubly important, because the Court spoke not only to the Extradition Clause and the federal statute directly enforcing it, but it also enforced a purely statutory right on behalf of a Territory that could not claim for itself rights under the clause.[200]

Even as the Court imposes new federalism limits upon Congress's powers to regulate the states as states, it has reaffirmed the principle that Congress may authorize the federal courts to compel state officials to comply with federal law, statutory as well as constitutional. "[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply." [201]

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[196] 100 U.S. at 392.

[197] 209 U.S. 123 (1908). *See also* Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876).

[198] Maine v. Thiboutot, 448 U.S. 1 (1980).

[199] Puerto Rico v. Branstad, 483 U.S. 219, 227 (1987) (*Dennison* "rests upon a foundation with which time and the currents of constitutional change have dealt much less favorably").

[200] In including territories in the statute, Congress acted under the Territorial Clause rather than under the Extradition Clause. New York ex rel. Kopel v. Bingham, 211 U.S. 468 (1909).

[201] New York v. United States, 505 U.S. 144, 179 (1992). *See also* FERC v. Mississippi, 456 U.S. 742, 761–765 (1982); Washington v. Washington State Commercial

No doubt, there is tension between the exercise of Congress's power to impose duties on state officials [202] and the developing doctrine under which the Court holds that Congress may not "commandeer" state legislative or administrative processes in the enforcement of federal programs.[203] However, the existence of the Supremacy Clause and the federal oath of office, as well as a body of precedent, indicates that coexistence of the two lines of principles will be maintained.

Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979); Illinois v. City of Milwaukee, 406 U.S. 91, 106–108 (1972).

[202] The practice continues. *See* Pub. L. 94–435, title III, 90 Stat. 1394, 15 U.S.C. § 15c (authorizing state attorneys general to bring *parens patriae* antitrust actions in the name of the state to secure monetary relief for damages to the citizens of the state); Medical Waste Tracking Act of 1988, Pub. L. 100–582, 102 Stat. 2955, 42 U.S.C. § 6992f (authorizing states to impose civil and possibly criminal penalties for violations of the Act); Brady Handgun Violence Prevention Act, Pub. L. 103–159, tit. I, 107 Stat. 1536, 18 U.S.C. § 922s (imposing on chief law enforcement officer of each jurisdiction to ascertain whether prospective firearms purchaser his disqualifying record).

[203] New York v. United States, 505 U.S. 144 (1992).

RATIFICATION

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

IN GENERAL

In *Owings v. Speed* [1] the question at issue was whether the Constitution operated upon an act of Virginia passed in 1788. The Court held it did not, stating in part:

"The Conventions of nine States having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the Convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, 'for commencing proceedings under the Constitution.'"

"Both Governments could not be understood to exist at the same time. The New Government did not commence until the old Government expired. It is apparent that the government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new Government into operation. In fact, Congress did continue to act as a Government until it dissolved on the 1st of November, by the successive disappearance of its Members. It existed potentially until the 2d of March, the day proceeding that on which the Members of the new Congress were directed to assemble."

"The resolution of the Convention might originally have suggested a doubt, whether the government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March 1789 . . . ."

[1] 18 U.S. (5 Wheat.) 420, 422–23 (1820).

AMENDMENTS TO THE CONSTITUTION

FIRST THROUGH TENTH AMENDMENTS

BILL OF RIGHTS

CONTENTS

AMENDMENTS TO THE CONSTITUTION

BILL OF RIGHTS

First Through Tenth Amendments

On September 12, five days before the Convention adjourned, Mason and Gerry raised the question of adding a bill of rights to the Constitution. Mason said: "It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours." But the motion of Gerry and Mason to appoint a committee for the purpose of drafting a bill of rights was rejected.[1] Again, on September 14, Pinckney and Gerry sought to add a provision "that the liberty of the Press should be inviolably observed—." But after Sherman observed that such a declaration was unnecessary, because "[t]he power of Congress does not extend to the Press," this suggestion too was rejected.[2] It cannot be known accurately why the Convention opposed these suggestions. Perhaps the lateness of the Convention, perhaps the desire not to present more opportunity for controversy when the document was forwarded to the states, perhaps the belief, asserted by the defenders of the Constitution when the absence of a bill of rights became critical, that no bill was needed because Congress was delegated none of the powers which such a declaration would deny, perhaps all these contributed to the rejection.[3]

In any event, the opponents of ratification soon made the absence of a bill of rights a major argument,[4] and some friends of the document, such as Jefferson,[5] strongly urged amendment to in-

[1] 2 M. Farrand, The Records of the Federal Convention of 1787 587–88 (rev. ed. 1937).

[2] Id. at 617–618.

[3] The argument most used by proponents of the Constitution was that inasmuch as Congress was delegated no power to do those things which a bill of rights would proscribe no bill of rights was necessary and that it might be dangerous because it would contain exceptions to powers not granted and might therefore afford a basis for claiming more than was granted. The Federalist No. 84 at 555–67 (Alexander Hamilton) (Modern Library ed. 1937).

[4] Substantial excerpts from the debate in the country and in the ratifying conventions are set out in 1 The Bill of Rights: A Documentary History 435–620 (B. Schwartz ed., 1971); 2 id. at 627–980. The earlier portions of volume 1 trace the origins of the various guarantees back to the Magna Carta.

[5] In a letter to Madison, Jefferson indicated what he did not like about the proposed Constitution. "First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of the fact triable by the laws of the land and not by the law of Nations. . . . Let me add that a bill of rights

clude a declaration of rights.[6] Several state conventions ratified while urging that the new Congress to be convened propose such amendments, 124 amendments in all being put forward by these states.[7] Although some dispute has occurred with regard to the obligation of the first Congress to propose amendments, Madison at least had no doubts[8] and introduced a series of proposals,[9] which he had difficulty claiming the interest of the rest of Congress in considering. At length, the House of Representatives adopted 17 proposals; the

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is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference." 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (J. Boyd ed., 1958). He suggested that nine States should ratify and four withhold ratification until amendments adding a bill of rights were adopted. Id. at 557, 570, 583. Jefferson still later endorsed the plan put forward by Massachusetts to ratify and propose amendments. 14 id. at 649.

[6] Thus, George Washington observed in letters that a ratified Constitution could be amended but that making such amendments conditions for ratification was ill-advised. 11 THE WRITINGS OF GEORGE WASHINGTON 249 (W. Ford ed., 1891).

[7] 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 627–980 (B. Schwartz ed., 1971). *See also* H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION 19 (1896).

[8] Madison began as a doubter, writing Jefferson that while "[m]y own opinion has always been in favor of a bill of rights," still "I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment. . . ." 5 THE WRITINGS OF JAMES MADISON 269 (G. Hunt ed., 1904). His reasons were four. (1) The Federal Government was not granted the powers to do what a bill of rights would proscribe. (2) There was reason "to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." (3) A greater security was afforded by the jealousy of the States of the national government. (4) "[E]xperience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the government is the mere instrument of the major number of the Constituents. . . . Wherever there is a interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful and interested prince." Id. at 272–73. Jefferson's response acknowledged the potency of Madison's reservations and attempted to answer them, in the course of which he called Madison's attention to an argument in favor not considered by Madison "which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity." 14 THE PAPERS OF THOMAS JEFFERSON 659 (J. Boyd ed., 1958). Madison was to assert this point when he introduced his proposals for a bill of rights in the House of Representatives. 1 ANNALS OF CONGRESS 439 (June 8, 1789).

In any event, following ratification, Madison in his successful campaign for a seat in the House firmly endorsed the proposal of a bill of rights. "[I]t is my sincere opinion that the Constitution ought to be revised, and that the first Congress meeting under it ought to prepare and recommend to the States for ratification, the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude, the freedom of the press, trials by jury, security against general warrants & c." 5 THE WRITINGS OF JAMES MADISON 319 (G. Hunt ed., 1904).

Senate rejected two and reduced the remainder to twelve, which were accepted by the House and sent on to the states [10] where ten were ratified and the other two did not receive the requisite number of concurring states.[11]

Bill of Rights and the States.—One of the amendments that the Senate refused to accept—declared by Madison to be "the most valuable of the whole list" [12]—read: "The equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases shall not be infringed by any State." [13] In spite of this rejection, the contention that the Bill of Rights—or at least the first eight amendments—was applicable to the states was repeatedly pressed upon the Supreme Court. By a long series of decisions, beginning with the opinion of Chief Justice Marshall in *Barron v. Baltimore*,[14] the argument was consistently rejected. Nevertheless, the enduring vitality of natural law concepts encouraged renewed appeals for judicial protection through application of the Bill of Rights.[15]

The Fourteenth Amendment and Incorporation.—Following the ratification of the Fourteenth Amendment, litigants disadvantaged by state laws and policies first resorted unsuccessfully to the Privileges or Immunities Clause of § 1 for judicial protection.[16] Then, claimants seized upon the Due Process Clause of the Fourteenth Amendment as guaranteeing certain fundamental

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[9] 1 ANNALS OF CONGRESS 424–50 (June 8, 1789). The proposals as introduced are at pp. 433–36. The Members of the House were indisposed to moving on the proposals.

[10] Debate in the House began on July 21, 1789, and final passage was had on August 24, 1789. 1 ANNALS OF CONGRESS 660–779. The Senate considered the proposals from September 2 to September 9, but no journal was kept. The final version compromised between the House and Senate was adopted September 24 and 25. *See* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 983–1167 (B. Schwartz ed., 1971).

[11] The two not ratified dealt with the ratio of population to representatives and with compensation of Members of Congress. H. AMES, THE PROPOSED AMENDMENTS TO THE CONSTITUTION 184, 185 (1896). The latter proposal was deemed ratified in 1992 as the 27th Amendment.

[12] 1 ANNALS OF CONGRESS 755 (August 17, 1789).

[13] Id.

[14] 32 U.S. (7 Pet.) 243 (1833). *See also* Livingston's Lessee v. Moore, 32 U.S. (7 Pet.) 469 (1833); Permoli v. Municipality No. 1, 44 U.S. (3 How.) 589, 609 (1845); Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); Smith v. Maryland, 59 U.S. (18 How.) 71 (1855); Withers v. Buckley, 61 U.S. (20 How.) 84 (1858); Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475 (1867); Twitchell v. Commonwealth, 74 U.S. (7 Wall.) 321 (1869).

[15] Thus, Justice Miller for the Court in Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662, 663 (1875): "It must be conceded that there are . . . rights in every free government beyond the control of the State . . . There are limitations on [governmental] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

[16] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

and essential safeguards, without pressing the point of the applicability of the Bill of Rights.[17] It was not until 1887 that a litigant contended that, although the Bill of Rights had not limited the states, nonetheless, to the extent that they secured and recognized the fundamental rights of man, they were privileges and immunities of citizens of the United States and were now protected against state abridgment by the Fourteenth Amendment.[18] This case the Court decided on other grounds, but in a series of subsequent cases it confronted the argument and rejected it,[19] though over the dissent of the elder Justice Harlan, who argued that the Fourteenth Amendment in effect incorporated the Bill of Rights and made them effective restraints on the states.[20] Until 1947, this dissent made no headway,[21]

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[17] Walker v. Sauvinet, 92 U.S. 90 (1876); United States v. Cruikshank, 92 U.S. 542 (1876); Hurtado v. California, 110 U.S. 516 (1884); Presser v. Illinois, 116 U.S. 252 (1886). In *Hurtado*, in which the Court held that indictment by information rather than by grand jury did not offend due process, the elder Justice Harlan entered a long dissent arguing that due process preserved the fundamental rules of procedural justice as they had existed in the past, but he made no reference to the possibility that the Fourteenth Amendment due process clause embodied the grand jury indictment guarantee of the Fifth Amendment.

[18] Spies v. Illinois, 123 U.S. 131 (1887).

[19] *In re* Kemmler, 136 U.S. 436 (1890); McElvaine v. Brush, 142 U.S. 155 (1891); O'Neil v. Vermont, 144 U.S. 323 (1892).

[20] In O'Neil v. Vermont, 144 U.S. 323, 370 (1892), Justice Harlan, with Justice Brewer concurring, argued "that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier Amendments of the Constitution." Justice Field took the same position. Id. at 337. Thus, he said: "While therefore, the ten Amendments, as limitations on power, and so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no State shall make or enforce any law which shall abridge them." Id. at 363. Justice Harlan reasserted this view in Maxwell v. Dow, 176 U.S. 581, 605 (1900) (dissenting opinion), and in Twining v. New Jersey, 211 U.S. 78, 114 (1908) (dissenting opinion). Justice Field was no longer on the Court and Justice Brewer did not in either case join Justice Harlan as he had done in *O'Neil*.

[21] Cf. Palko v. Connecticut, 302 U.S. 319, 323 (1937), in which Justice Cardozo for the Court, including Justice Black, said: "We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the Federal Government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule." *See* Frankfurter, *Memorandum on 'Incorporation,' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965). According to Justice Douglas' calculations, ten Justices had believed that the Fourteenth Amendment incorporated the Bill of Rights, but a majority of the Court at any one particular time had never been of that view. Gideon v. Wainwright, 372 U.S. 335, 345–47 (1963) (concurring opinion). *See also* Malloy v. Hogan, 378 U.S. 1, 4 n.2 (1964). It must be said, however, that many of these Justices were not consis-

but in *Adamson v. California* [22] a minority of four Justices adopted it. Justice Black, joined by three others, contended that his researches into the history of the Fourteenth Amendment left him in no doubt "that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights." [23] Scholarly research stimulated by Justice Black's view tended to discount the validity of much of the history recited by him and to find in the debates in Congress and in the ratifying conventions no support for his contention.[24] Other scholars, going beyond the immediate debates, found in the pre- and post-Civil War period a substantial body of abolitionist constitutional thought which could be shown to have greatly influenced the principal architects, and observed that all three formulations of § 1, privileges and immunities, due process, and equal protection, had long been in use as shorthand descriptions for the principal provisions of the Bill of Rights.[25]

Unresolved perhaps in theory, the controversy in fact has been mostly mooted through the "selective incorporation" of a majority of the provisions of the Bill of Rights.[26] This process seems to have

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tent in asserting this view. Justice Goldberg probably should be added to the list. Pointer v. Texas, 380 U.S. 400, 410–14 (1965) (concurring opinion).

[22] 332 U.S. 46 (1947).

[23] Id. at 74, Justice Black's contentions, id. at 68–123, were concurred in by Justice Douglas. Justices Murphy and Rutledge also joined this view but went further. "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." Id. at 124. Justice Black rejected this extension as an invocation of "natural law due process." For examples in which he and Justice Douglas split over the application of nonspecified due process limitations, *see*, *e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); *In re* Winship, 397 U.S. 358 (1970).

[24] The leading piece is Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5 (1949).

[25] Graham, *Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WISC. L. REV. 479, 610; Graham, *Our 'Declaratory' Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954); J. TENBROEK, EQUAL UNDER LAW (1965 enlarged ed.). The argument of these scholars tends to support either a "selective incorporation" theory or a fundamental rights theory, but it emphasized the abolitionist stress on speech and press as well as on jury trials as included in either construction.

[26] Williams v. Florida, 399 U.S. 78, 130–32 (1970) (Justice Harlan concurring in part and dissenting in part). The language of this process is somewhat abstruse. Justice Frankfurter objected strongly to "incorporation" but accepted other terms. "The cases say the First [Amendment] is 'made applicable' by the Fourteenth or that it is taken up into the Fourteenth by 'absorption,' but not that the Fourteenth 'incor-

had its beginnings in an 1897 case in which the Court, without mentioning the Just Compensation Clause of the Fifth Amendment, held that the Fourteenth Amendment's Due Process Clause forbade the taking of private property without just compensation.[27] Then, in *Twining v. New Jersey*[28] the Court observed that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such nature that they are included in the conception of due process of law." And, in *Gitlow v. New York*,[29] the Court in dictum said: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." After quoting the language set out above from *Twining v. New Jersey*, the Court in 1932 said that "a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character."[30] The doctrine of this period was best formulated by Justice Cardozo, who observed that the Due Process Clause of the Fourteenth Amendment might proscribe a certain state procedure, not because the proscription was spelled out in one of the first eight amendments, but because the procedure "offends some principle of justice so rooted in the traditions and conscience of our people as

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porates' the First. This is not a quibble. The phrase 'made applicable' is a neutral one. The concept of 'absorption' is a progressive one, i.e., over the course of time something gets absorbed into something else. The sense of the word 'incorporate' implies simultaneity. One writes a document incorporating another by reference at the time of the writing. The Court has used the first two forms of language, but never the third." Frankfurter, *Memorandum on 'Incorporation' of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 747–48 (1965). It remains true that no opinion of the Court has used "incorporation" to describe what it is doing, cf. Washington v. Texas, 388 U.S. 14, 18 (1967); Benton v. Maryland, 395 U.S. 784, 794 (1969), though it has regularly been used by dissenters. *E.g.*, Pointer v. Texas, 380 U.S. 400, 408 (1965) (Justice Harlan); Williams v. Florida, 399 U.S. 78, 130 (1970) (Justice Harlan); Williams v. Florida, 399 U.S. at 143 (Justice Stewart).

[27] Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

[28] 211 U.S. 78, 99 (1908).

[29] 268 U.S. 652, 666 (1925).

[30] Powell v. Alabama, 287 U.S. 45, 68 (1932).

to be ranked as fundamental,"[31] because certain proscriptions were "implicit in the concept of ordered 'liberty.'"[32]

As late as 1958, Justice Harlan asserted in an opinion of the Court that a certain state practice fell afoul of the Fourteenth Amendment because "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . ."[33]

But this process of "absorption" into due process, of rights that happened also to be specifically named in the Bill of Rights, came to be supplanted by a doctrine that had for a time co-existed with it: the doctrine of "selective incorporation." This doctrine holds that the Due Process Clause incorporates the text of certain of the provisions of the Bill of Rights. Thus, in *Malloy v. Hogan*,[34] Justice Brennan wrote: "We have held that the guarantees of the First Amendment, the prohibition of unreasonable searches and seizures of the Fourth Amendment, and the right to counsel guaranteed by the Sixth Amendment, are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." And Justice

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[31] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[32] Palko v. Connecticut, 302 U.S. 319, 325 (1937). Justice Frankfurter was a strong advocate of this approach to the Fourteenth Amendment's due process clause. *E.g.*, Rochin v. California, 342 U.S. 165 (1952); Adamson v. California, 332 U.S. 46, 59 (1947) (concurring opinion). Justice Harlan followed him in this regard. *E.g.*, Benton v. Maryland, 395 U.S. 784, 801 (1969) (dissenting opinion); Williams v. Florida, 399 U.S. 78, 117 (1970) (concurring in part and dissenting in part). For early applications of the principles to void state practices, *see* Moore v. Dempsey, 261 U.S. 86 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923); Tumey v. Ohio, 273 U.S. 510 (1927); Powell v. Alabama, 287 U.S. 45 (1932); Mooney v. Holohan, 294 U.S. 103 (1935); Brown v. Mississippi, 297 U.S. 278 (1936); Rochin v. California, supra.

[33] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

[34] 378 U.S. 1, 10 (1964) (citations omitted). In Washington v. Texas, 388 U.S. 14, 18 (1967), Chief Justice Warren for the Court said that the Court has "increasingly looked to the specific guarantees of the [Bill of Rights] to determine whether a state criminal trial was conducted with due process of law." And, in Benton v. Maryland, 395 U.S. 784, 794 (1969), Justice Marshall for the Court wrote: "[W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." In this process, the Court has substantially increased the burden carried by those who would defend a departure from the requirement of the Bill of Rights of showing that a procedure is fundamentally fair. That is, previously the Court had asked whether a civilized system of criminal justice could be imagined that did not accord the particular procedural safeguard. *E.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937). The present approach is to ascertain whether a particular guarantee is fundamental in the light of the system existent in the United States; the use of this approach can make a substantial difference. Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968). *See also* Williams v. Florida, 399 U.S. 78 (1970); Apodaca v. Oregon, 406 U.S. 404 (1972); McDonald v. Chicago, 561 U.S. ___, No. 08–1521, slip op. (2010) (plurality opinion).

Clark wrote: "First, this Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth Amendment."[35] Similar language asserting that particular provisions of the Bill of Rights have been applied to the states through the Fourteenth Amendment's Due Process Clause may be found in numerous cases.[36] Most of the provisions have now been so applied.[37]

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[35] Abington School Dist. v. Schempp, 374 U.S. 203, 215 (1963). Similar formulations for the speech and press clauses appeared early. *E.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Schneider v. Irvington, 308 U.S. 147, 160 (1939). In Griffin v. California, 380 U.S. 609, 615 (1965), Justice Douglas stated "that the Fifth Amendment, in its direct application to the Federal Government, and, in its bearing on the States by reason of the Fourteenth Amendment, forbids" the state practice at issue.

[36] *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Klopfer v. North Carolina, 386 U.S. 213 (1967); Duncan v. Louisiana, 391 U.S. 145 (1968); Ashe v. Swenson, 397 U.S. 436 (1970); Baldwin v. New York, 399 U.S. 66 (1970).

[37] The following list does not attempt to distinguish between those Bill of Rights provisions that have been held to have themselves been incorporated or absorbed by the Fourteenth Amendment and those provisions that the Court indicated at the time were applicable against the states because they were fundamental and not merely because they were named in the Bill of Rights. Whichever formulation was originally used, the former is now the one used by the Court. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

First Amendment—

Religion—

Free exercise: Hamilton v. Regents, 293 U.S. 245, 262 (1934); Cantwell v. Connecticut, 310 U.S. 296, 300, 303 (1940).

Establishment: Everson v. Board of Education, 330 U.S. 1, 3, 7, 8 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).

Speech—Gitlow v. New York, 268 U.S. 652, 666 (1925); Fiske v. Kansas, 274 U.S. 380 (1927); Stromberg v. California, 283 U.S. 359 (1931).

Press—Near v. Minnesota ex rel. Olson, 283 U.S. 697, 701 (1931).

Assembly—DeJonge v. Oregon, 299 U.S. 353 (1937).

Petition—DeJonge v. Oregon, 299 U.S. at 364, 365; Hague v. CIO, 307 U.S. 496 (1939); Bridges v. California, 314 U.S. 252 (1941).

Second Amendment

Right to keep and bear arms—McDonald v. Chicago, 561 U.S. ___, No. 08–1521, slip op. (2010).

Fourth Amendment—

Search and seizure—Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1961).

Fifth Amendment—

Double jeopardy—Benton v. Maryland, 395 U.S. 784 (1969); Ashe v. Swenson, 397 U.S. 436 (1970) (collateral estoppel).

Self-incrimination—Malloy v. Hogan, 378 U.S. 1 (1964); Griffin v. California, 380 U.S. 609 (1965).

Just compensation—Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

Sixth Amendment—

Speedy trial—Klopfer v. North Carolina, 386 U.S. 213 (1967).

Aside from the theoretical and philosophical considerations raised by the question whether the Bill of Rights is incorporated into the Fourteenth Amendment or whether due process subsumes certain fundamental rights that are named in the Bill of Rights, the principal relevant controversy is whether, once a guarantee or a right set out in the Bill of Rights is held to be a limitation on the states, the same standards that restrict the Federal Government restrict the states. The majority of the Court has consistently held that the standards are identical, whether the Federal Government or a state is involved,[38] and "has rejected the notion that the Fourteenth Amendment applies to the State only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'"[39] Those who have argued for the application of a dual-standard test of due process for the Federal Government and the states, most notably Jus-

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Public trial—*In re* Oliver, 333 U.S. 257 (1948).

Jury trial—Duncan v. Louisiana, 391 U.S. 145 (1968).

Impartial Jury—Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. Louisiana, 379 U.S. 466 (1965).

Notice of charges—*In re* Oliver, 333 U.S. 257 (1948).

Confrontation—Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

Compulsory process—Washington v. Texas, 388 U.S. 14 (1967).

Counsel—Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963).

Eighth Amendment—

Cruel and unusual punishment—Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); Robinson v. California, 370 U.S. 660 (1962).

Provisions not applied are:

Third Amendment—

Quartering troops in homes—No cases.

Fifth Amendment—

Grand Jury indictment—Hurtado v. California, 110 U.S. 516 (1884).

Seventh Amendment—

Jury trial in civil cases in which value of controversy exceeds $20—*Cf.* Adamson v. California, 332 U.S. 46, 64–65 (1947) (Justice Frankfurter concurring). *See* Minneapolis & St. L. R.R. v. Bombolis, 241 U.S. 211 (1916).

Eighth Amendment—

Bail—*But see* Schilb v. Kuebel, 404 U.S. 357, 365 (1971).

Excessive Fines—*But see* Tate v. Short, 401 U.S. 395 (1971) (using equal protection to prevent automatic jailing of indigents when others can pay a fine and avoid jail).

[38] Malloy v. Hogan, 378 U.S. 1, 10–11 (1964); Ker v. California, 374 U.S. 23 (1963); Griffin v. California, 380 U.S. 609 (1965); Baldwin v. New York, 399 U.S. 66 (1970); Williams v. Florida, 399 U.S. 78 (1970); Ballew v. Georgia, 435 U.S. 223 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (specifically the First Amendment speech and press clauses); Crist v. Bretz, 437 U.S. 28 (1978); Burch v. Louisiana, 441 U S. 130 (1979).

[39] Williams v. Florida, 399 U.S. 78, 106–107 (1970) (Justice Black concurring in part and dissenting in part), quoting Malloy v. Hogan, 378 U.S. 1, 10–11 (1964).

tice Harlan,[40] but including Justice Stewart,[41] Justice Fortas,[42] Justice Powell,[43] and Justice Rehnquist,[44] have not only rejected incorporation, but have also argued that, if the same standards are to apply, the standards previously developed for the Federal Government would have to be diluted in order to give the states more leeway in the operation of their criminal justice systems.[45] The latter result seems to have been reached for application of the jury trial guarantee of the Sixth Amendment.[46]

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[40] Justice Harlan first took this position in Roth v. United States, 354 U.S. 476, 496 (1957) (concurring in part and dissenting in part). *See also* Ker v. California, 374 U.S. 23, 45–46 (1963) (concurring). His various opinions are collected in Williams v. Florida, 399 U.S. 78, 129–33 (1970) (concurring in part and dissenting in part).

[41] Williams v. Florida, 399 U.S. 78, 143–45 (1970) (concurring in part and dissenting in part); Duncan v. Louisiana, 391 U.S. 145, 173–83 (1968) (Justices Harlan and Stewart dissenting). *But see* Apodaca v. Oregon, 406 U.S. 404, 414 (1972) (dissenting). *See also* Crist v. Bretz, 437 U.S. 28 (1978) (Justice Stewart writing opinion of the Court).

[42] Bloom v. Illinois, 391 U.S. 194, 211 (1968) (concurring).

[43] Johnson v. Louisiana, 406 U.S. 356, 366 (1972) (concurring); Crist v. Bretz, 437 U.S. 28, 52–53 (1978) (dissenting, joined by Chief Justice Burger and Justice Rehnquist). *But see* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 780 n.16 (1978) (rejecting theory in First Amendment context in opinion for the Court, joined by Chief Justice Burger).

[44] Buckley v. Valeo, 424 U.S. 1, 290 (1976) (concurring in part and dissenting in part); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 822 (1978) (dissenting). *See also* Crist v. Bretz, 437 U.S. 28, 52–53 (1978) (joining Justice Powell's dissent). Justice Jackson also apparently held this view. Beauharnais v. Illinois, 343 U.S. 250, 288 (1952) (dissenting).

[45] *E.g.*, Williams v. Florida, 399 U.S. 78, 129–38 (1970) (Justice Harlan concurring in part and dissenting in part); Bloom v. Illinois, 391 U.S. 194, 213–215 (1968) (Justice Fortas concurring). *But see* Williams v. Florida, 399 U.S. at 106–08 (Justice Black concurring in part and dissenting in part).

[46] Williams v. Florida, 399 U.S. 78 (1970); Apodaca v. Oregon, 406 U.S. 404 (1972). *But cf.* Ballew v. Georgia, 435 U.S. 223 (1978).

FIRST AMENDMENT

RELIGION AND FREE EXPRESSION

CONTENTS

RELIGION AND FREE EXPRESSION

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

RELIGION

An Overview

Madison's original proposal for a bill of rights provision concerning religion read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed."[1] The language was altered in the House to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[2] In the Senate, the section adopted read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion. . . ."[3] It was in the conference committee of the two bodies, chaired by Madison, that the present language was written with

[1] 1 ANNALS OF CONGRESS 434 (June 8, 1789).

[2] The committee appointed to consider Madison's proposals, and on which Madison served, with Vining as chairman, had rewritten the religion section to read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." After some debate during which Madison suggested that the word "national" might be inserted before the word "religion" as "point[ing] the amendment directly to the object it was intended to prevent," the House adopted a substitute reading: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ANNALS OF CONGRESS 729–31 (August 15, 1789). On August 20, on motion of Fisher Ames, the language of the clause as quoted in the text was adopted. Id. at 766. According to Madison's biographer, "[t]here can be little doubt that this was written by Madison." I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787–1800 at 271 (1950).

[3] This text, taken from the Senate Journal of September 9, 1789, appears in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1153 (B. Schwartz ed., 1971). It was at this point that the religion clauses were joined with the freedom of expression clauses.

its somewhat more indefinite "respecting" phraseology.[4] Debate in Congress lends little assistance in interpreting the religion clauses; Madison's position, as well as that of Jefferson, who influenced him, is fairly clear,[5] but the intent, insofar as there was one, of the others in Congress who voted for the language and those in the states who voted to ratify is subject to speculation.

Scholarly Commentary.—The explication of the religion clauses by scholars in the nineteenth century gave a restrained sense of their meaning. Story, who thought that "the right of a society or government to interfere in matters of religion will hardly be contested by any persons, who believe that piety, religion, and morality are intimately connected with the well being of the state, and indispensable to the administration of civil justice,"[6] looked upon the prohibition simply as an exclusion from the Federal Government of all power to act upon the subject. "The situation . . . of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, episcopalians constituted the predominant sect; in others presbyterians; in others, congregationalists; in others, quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a

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[4] 1 ANNALS OF CONGRESS 913 (September 24, 1789). The Senate concurred the same day. *See* I. BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787–1800 at 271–72 (1950).

[5] During House debate, Madison told his fellow Members that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any Manner contrary to their conscience." 1 ANNALS OF CONGRESS 730 (August 15, 1789). That his conception of "establishment" was quite broad is revealed in his veto as President in 1811 of a bill which in granting land reserved a parcel for a Baptist Church in Salem, Mississippi; the action, explained President Madison, "comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" 8 THE WRITINGS OF JAMES MADISON (G. Hunt, ed.) 132–33 (1904). Madison's views were no doubt influenced by the fight in the Virginia legislature in 1784–1785 in which he successfully led the opposition to a tax to support teachers of religion in Virginia and in the course of which he drafted his "Memorial and Remonstrance against Religious Assessments" setting forth his thoughts. Id. at 183–91; I. BRANT, JAMES MADISON: THE NATIONALIST 1780–1787 at 343–55 (1948). Acting on the momentum of this effort, Madison secured passage of Jefferson's "Bill for Religious Liberty". Id. at 354; D. MALONE, JEFFERSON THE VIRGINIAN 274–280 (1948). The theme of the writings of both was that it was wrong to offer public support of any religion in particular or of religion in general.

[6] 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1865 (1833).

declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship." [7]

"Probably," Story also wrote, "at the time of the adoption of the constitution and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." [8] The object, then, of the religion clauses in this view was not to prevent general governmental encouragement of religion, of Christianity, but to prevent religious persecution and to prevent a national establishment.[9]

Not until the Supreme Court held the religion clauses applicable to the states in the 1940s [10] did it have much opportunity to interpret them. But it quickly gave them a broad construction. In *Everson v. Board of Education*,[11] the Court, without dissent on this point, declared that the Establishment Clause forbids not only practices that "aid one religion" or "prefer one religion over another," but also those that "aid all religions." With respect to the Free Exercise Clause, it asserted in *Wisconsin v. Yoder* [12] that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."

More recent decisions, however, evidence a narrower interpretation of the religion clauses. Indeed, in *Employment Division, Oregon Department of Human Resources v. Smith* [13] the Court abandoned its earlier view and held that the Free Exercise Clause *never* "relieve[s] an individual of the obligation to comply with a 'valid

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[7] Id. at 1873.

[8] Id. at 1868.

[9] For a late expounding of this view, *see* T. Cooley, General Principles of Constitutional Law in the United States 224–25 (3d ed. 1898).

[10] Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause); Everson v. Board of Education, 330 U.S. 1 (1947) (Establishment Clause).

[11] 330 U.S. 1, 15 (1947). Establishment Clause jurisprudence since, whatever its twists and turns, maintains this view.

[12] 406 U.S. 205, 215 (1972).

[13] 494 U.S. 872, 879 (1990).

and neutral law of general applicability.'" On the Establishment Clause the Court has not wholly repudiated its previous holdings, but recent decisions have evidenced a greater sympathy for the view that the clause bars "preferential" governmental promotion of some religions but allows governmental promotion of all religion in general.[14] Nonetheless, the Court remains sharply split on how to interpret both clauses.

Court Tests Applied to Legislation Affecting Religion.—Before considering in detail the development of the two religion clauses by the Supreme Court, one should notice briefly the tests the Court has articulated to adjudicate the religion cases. At the same time it should be emphasized that the Court has noted that the language of earlier cases "may have [contained] too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."[15] While later cases have relied on a series of well-defined, if difficult-to-apply, tests, the Court has cautioned that "the purpose [of the religion clauses] was to state an objective, not to write a statute."[16]

In 1802, President Jefferson wrote a letter to a group of Baptists in Danbury, Connecticut, in which he declared that it was the purpose of the First Amendment to build "a wall of separation between Church and State."[17] In *Reynolds v. United States*,[18] Chief Justice Waite for the Court characterized the phrase as "almost an authoritative declaration of the scope and effect of the amendment." In its first encounters with religion-based challenges to state programs, the Court looked to Jefferson's metaphor for substantial guidance.[19] But a metaphor may obscure as well as illuminate, and the Court soon began to emphasize neutrality and voluntarism as

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[14] *See* Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); and Zelman v. Simmons-Harris, 536 U.S. 639 (2002). The fullest critique of the Court's broad interpretation of the Establishment Clause was given by then-Justice Rehnquist in dissent in Wallace v. Jaffree, 472 U.S. 38, 91 (1985).

[15] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

[16] 397 U.S. at 668.

[17] 16 THE WRITINGS OF THOMAS JEFFERSON 281 (A. Libscomb ed., 1904).

[18] 98 U.S. 145, 164 (1879).

[19] Everson v. Board of Education, 330 U.S. 1, 16 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 211, 212 (1948); *cf.* Zorach v. Clauson, 343 U.S. 306, 317 (1952) (Justice Black dissenting). In Lemon v. Kurtzman, 403 U.S. 602, 614 (1971), Chief Justice Burger remarked that "the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." In his opinion for the Court, the Chief Justice repeated similar observations in Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (the metaphor is not "wholly accurate"; the Constitution does not "require complete separation of church and state [but] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

the standard of restraint on governmental action.[20] The concept of neutrality itself is "a coat of many colors,"[21] and three standards that seemingly could be stated in objective fashion emerged as tests of Establishment Clause validity. The first two standards emerged together. "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[22] The third test emerged several years later and asks whether the governmental program results in "an excessive government entanglement with religion. The test is inescapably one of degree . . . [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[23] In 1971, these three tests were combined and restated in Chief Justice Burger's opinion for the Court in *Lemon v. Kurtzman*,[24] and are frequently referred to by reference to that case name.

Although at one time accepted in principle by all the Justices,[25] the tests have sometimes been difficult to apply,[26] have re-

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[20] Zorach v. Clauson, 343 U.S. 306, 314 (1952); Engel v. Vitale, 370 U.S. 421 (1962); Sherbert v. Verner, 374 U.S. 398 (1963); Abington School District v. Schempp, 374 U.S. 203, 305 (1963) (Justice Goldberg concurring); Walz v. Tax Comm'n, 397 U.S. 664, 694–97 (1970) (Justice Harlan concurring). In the opinion of the Court in *Walz*, Chief Justice Burger wrote: "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Id. at 669.

[21] Board of Education v. Allen, 392 U.S. 236, 249 (1968) (Justice Harlan concurring).

[22] Abington School District v. Schempp, 374 U.S. 203, 222 (1963).

[23] Walz v. Tax Comm'n, 397 U.S. 664, 674–75 (1970).

[24] 403 U.S. 602, 612–13 (1971).

[25] *E.g.*, Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 653 (1980), and id. at 665 (dissenting opinion); Stone v. Graham, 449 U.S. 39, 40 (1980), and id. at 43 (dissenting opinion).

[26] The tests provide "helpful signposts," Hunt v. McNair, 413 U.S. 734, 741 (1973), and are at best "guidelines" rather than a "constitutional caliper"; they must be used to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action." Inevitably, "no 'bright line' guidance is afforded." Tilton v. Richardson, 403 U.S. 672, 677–78 (1971). *See also* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 761 & n.5, 773 n.31 (1973);

cently come under direct attack by some Justices,[27] and in several instances the Court has not applied them at all.[28] Nonetheless, the Court employed the *Lemon* tests in several recent Establishment Clause decisions,[29] and those tests remain the primary standard of Establishment Clause validity. Other tests, however, have also been formulated and used. Justice Kennedy has proffered "coercion" as an alternative test for violations of the Establishment Clause,[30] and the Court has used that test as the basis for decision from time to time.[31] But that test has been criticized on the grounds that it would eliminate a principal distinction between the Establishment Clause

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Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980), and id. at 663 (Justice Blackmun dissenting).

[27] *See*, *e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636–40 (1987) (Justice Scalia, joined by Chief Justice Rehnquist, dissenting) (advocating abandonment of the "purpose" test); Wallace v. Jaffree, 472 U.S. 38, 108–12 (1985) (Justice Rehnquist dissenting); Aguilar v. Felton, 473 U.S. 402, 426–30 (1985) (Justice O'Connor, dissenting) (addressing difficulties in applying the entanglement prong); Roemer v. Maryland Bd. of Public Works, 426 U.S. 736, 768–69 (Justice White concurring in judgment) (objecting to entanglement test). Justice Kennedy has also acknowledged criticisms of the *Lemon* tests, while at the same time finding no need to reexamine them. *See*, *e.g.*, Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 655–56 (1989). At least with respect to public aid to religious schools, Justice Stevens would abandon the tests and simply adopt a "no-aid" position. Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980).

[28] *See* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding legislative prayers on the basis of historical practice); Lee v. Weisman, 505 U.S. 577, 587 (1992) (rejecting a request to reconsider *Lemon* because the practice of invocations at public high school graduations was invalid under established school prayer precedents). The Court has also held that the tripartite test is not applicable when law grants a denominational preference, distinguishing between religions; rather, the distinction is to be subjected to the strict scrutiny of a suspect classification. Larson v. Valente, 456 U.S. 228, 244–46 (1982). *See also* Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993) (upholding provision of sign-language interpreter to deaf student attending parochial school); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687 (1994) (invalidating law creating special school district for village composed exclusively of members of one religious sect); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (upholding the extension of a university subsidy of student publications to a student religious publication).

[29] Agostini v. Felton, 521 U.S. 203 (1997) (upholding under the *Lemon* tests the provision of remedial educational services by public school teachers to sectarian elementary and secondary schoolchildren on the premises of the sectarian schools); Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) (holding unconstitutional under the *Lemon* tests as well as under the coercion and endorsement tests a school district policy permitting high school students to decide by majority vote whether to have a student offer a prayer over the public address system prior to home football games); and Mitchell v. Helms, 530 U.S. 793 (2000) (upholding under the *Lemon* tests a federally funded program providing instructional materials and equipment to public and private elementary and secondary schools, including sectarian schools).

[30] County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989) (Justice Kennedy concurring in part and dissenting in part); and Lee v. Weisman, 505 U.S. 577 (1992).

[31] Lee v. Weisman, 505 U.S. 577 (1992), and Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

and the Free Exercise Clause and make the former a "virtual nullity."[32] Justice O'Connor has suggested "endorsement" as a clarification of the *Lemon* test; *i.e.*, that the Establishment Clause is violated if the government intends its action to endorse or disapprove of religion or if a "reasonable observer" would perceive the government's action as such an endorsement or disapproval.[33] But others have criticized that test as too amorphous to provide adequate guidance.[34] Justice O'Connor has also suggested that it may be inappropriate to try to shoehorn all Establishment Clause cases into one test, and has called instead for recognition that different contexts may call for different approaches.[35] In two Establishment Clause decisions, the Court employed all three tests in one decision[36] and relied primarily on a modified version of the *Lemon* tests in the other.[37]

In interpreting and applying the Free Exercise Clause, the Court has consistently held religious beliefs to be absolutely immune from governmental interference.[38] But it has used a number of standards to review government action restrictive of religiously motivated conduct, ranging from formal neutrality[39] to clear and present danger[40] to strict scrutiny.[41] For cases of intentional governmental discrimination against religion, the Court still employs strict scrutiny[42] But for most other free exercise cases it has now reverted to a standard of formal neutrality. "[T]he right of free exercise," it has stated, "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground

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[32] Lee v. Weisman, 505 U.S. 577, 621 (Souter, J., concurring). *See also* County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

[33] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (concurring); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 625 (1989) (concurring); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 712 (1994) (concurring).

[34] County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 655 (1989) (Justice Kennedy, concurring in the judgment in part and dissenting in part); and Capitol Square Review Bd. v. Pinette, 515 U.S. 753, 768 n.3 (1995) (Justice Scalia).

[35] Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 718–723 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

[36] Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

[37] Mitchell v. Helms, 530 U.S. 793 (2000).

[38] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1878); Cantwell v. Connecticut, 310 U.S. 296 (1940); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

[39] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879); Braunfeld v. Brown, 366 U.S. 599 (1961).

[40] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[41] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[42] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[43]

Government Neutrality in Religious Disputes.—One value that both religion clauses serve is to enforce governmental neutrality in deciding controversies arising out of religious disputes. Schisms sometimes develop within churches or between a local church and the general church, resulting in secession or expulsion of one faction or of the local church. A dispute over which body is to control the property of the church will then often be taken into the courts. It is now established that both religion clauses prevent governmental inquiry into religious doctrine in settling such disputes, and instead require courts simply to look to the decision-making body or process in the church and to give effect to whatever decision is officially and properly made.

The first such case was *Watson v. Jones*,[44] which was decided on common-law grounds in a diversity action without explicit reliance on the First Amendment. A constitutionalization of the rule was made in *Kedroff v. St. Nicholas Cathedral*,[45] in which the Court held unconstitutional a state statute that recognized the autonomy and authority of those North American branches of the Russian Orthodox Church that had declared their independence from the general church. Recognizing that *Watson v. Jones* had been decided on nonconstitutional grounds, the Court thought nonetheless that the opinion "radiates . . . a spirit of freedom for religious organizations, and independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[46] The power of civil courts to resolve church property disputes was severely circumscribed, the Court held, because to permit resolution of doctrinal disputes in court was to jeopardize First Amendment values. What a court must do, it held, is to look at the church rules: if the church is a hierarchical one that reposes determination of ecclesiastical issues in a certain body, the resolution by that body is determinative, whereas if the church is a congregational one that prescribes action by a majority vote, that determina-

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[43] Employment Div. v. Smith, 494 U.S. 872, 879 (1990), quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Justice Stevens concurring in the judgment).

[44] 80 U.S. (13 Wall.) 679 (1872).

[45] 344 U.S. 94 (1952). *Kedroff* was grounded on the Free Exercise Clause. Id. at 116. But the subsequent cases used a collective "First Amendment" designation.

[46] 344 U.S. at 116. On remand, the state court adopted the same ruling on the merits but relied on a common-law rule rather than the statute. This too was struck down. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960).

tion will prevail.[47] On the other hand, a court confronted with a church property dispute could apply "neutral principles of law, developed for use in all property disputes," when to do so would not require resolution of doctrinal issues.[48] In a 1976 case, the Court elaborated on the limits of proper inquiry, holding that an argument over a matter of internal church government—the power to reorganize the dioceses of a hierarchical church in this country—was "at the core of ecclesiastical affairs" and a court could not interpret the church constitution to make an independent determination of the power but must defer to the interpretation of the church body authorized to decide.[49]

In *Jones v. Wolf*,[50] however, a divided Court, while formally adhering to these principles, appeared to depart in substance from their application. A schism had developed in a local church that was a member of a hierarchical church, and the majority voted to withdraw from the general church. The proper authority of the general church determined that the minority constituted the "true congregation" of the local church and awarded them authority over it. But rather than requiring deference to the decision of the church body, the Court approved the approach of the state court in applying neutral principles by examining the deeds to the church property, state statutes, and provisions of the general church's constitution concerning ownership and control of church property in order to determine that no language of trust in favor of the general church was contained in any of them and that the property thus belonged to the local congregational majority.[51] Further, the Court held, the First Amendment did not prevent the state court from applying a pre-

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[47] Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 447, 450–51 (1969); Maryland and Virginia Eldership of the Churches of God v. Church of God at Sharpsburg, 396 U.S. 367 (1970). For a similar rule of neutrality in another context, *see* United States v. Ballard, 322 U.S. 78 (1944) (denying defendant charged with mail fraud through dissemination of purported religious literature the right to present to the jury evidence of the truthfulness of the religious views he urged).

[48] Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969); Maryland and Virginia Eldership of the Churches of God v. Church of God of Sharpsburg, 396 U.S. 367, 368 (1970). *See also* id. at 368–70 (Justice Brennan concurring).

[49] The Serbian Eastern Orthodox Diocese v. Dionisije Milivojevich, 426 U.S. 697, 720–25 (1976). In Gonzalez v. Archbishop, 280 U.S. 1 (1929), the Court had permitted limited inquiry into the legality of the actions taken under church rules. In *Serbian Eastern* the Court disapproved of this inquiry with respect to concepts of "arbitrariness," although it reserved decision on the "fraud" and "collusion" exceptions. 426 U.S. at 708–20.

[50] 443 U.S. 595 (1979). In the majority were Justices Blackmun, Brennan, Marshall, Rehnquist, and Stevens. Dissenting were Justices Powell, Stewart, White, and Chief Justice Burger.

[51] 443 U.S. at 602–06.

sumption of majority rule to award control to the majority of the local congregation, provided that it permitted defeasance of the presumption upon a showing that the identity of the local church is to be determined by some other means as expressed perhaps in the general church charter.[52] The dissent argued that to permit a court narrowly to view only the church documents relating to property ownership permitted it to ignore the fact that the dispute was over ecclesiastical matters and that the general church had decided which faction of the congregation was the local church.[53]

Thus, it is unclear where the Court is on this issue. *Jones v. Wolf* restated the rule that it is improper to review an ecclesiastical dispute and that deference is required in those cases, but, by approving a neutral principles inquiry which in effect can filter out the doctrinal issues underlying a church dispute, the Court seems to have approved at least an indirect limitation of the authority of hierarchical churches.[54]

Establishment of Religion

"[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[55] "[The] Court has long held that the First Amendment reaches more than classic, 18th-century establishments."[56] However, the Court's reading of the clause has never resulted in the barring of all assistance that aids, however incidentally, a religious institution. Outside this area, the decisions generally have more rigorously prohibited what may be deemed governmental promotion of religious doctrine.[57]

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[52] 443 U.S. at 606–10. Because it was unclear whether the state court had applied such a rule and applied it properly, the Court remanded.

[53] 443 U.S. at 610.

[54] The Court indicated that the general church could always expressly provide in its charter or in deeds to property the proper disposition of disputed property. But here the general church had decided which faction was the "true congregation," and this would appear to constitute as definitive a ruling as the Court's suggested alternatives. 443 U.S. at 606.

[55] Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). "Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools . . . . In my opinion both avenues were closed by the Constitution." Everson v. Board of Education, 330 U.S. 1, 63 (1947) (Justice Rutledge dissenting).

[56] Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 709 (1994) (citing Torcaso v. Watkins, 367 U.S. 488, 492–95 (1961)).

[57] For a discussion of standing to sue in Establishment Clause cases, see Article III, Taxpayer Suits, *supra*.

Financial Assistance to Church-Related Institutions.—The Court's first opportunity to rule on the validity of governmental financial assistance to a religiously affiliated institution occurred in 1899, the assistance being a federal grant for the construction of a wing of a hospital owned and operated by a Roman Catholic order that was to be devoted to the care of the poor. The Court viewed the hospital primarily as a secular institution so chartered by Congress and not as a religious or sectarian body, and thus avoided the constitutional issue.[58] But, when the right of local authorities to provide free transportation for children attending parochial schools reached the Court, it adopted a very broad view of the restrictions imposed by the Establishment Clause. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[59]

But, despite this interpretation, the majority sustained the provision of transportation. Although recognizing that "it approaches the verge" of the state's constitutional power, Justice Black found that the transportation was a form of "public welfare legislation" that was being extended "to all its citizens without regard to their religious belief."[60] "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own

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[58] Bradfield v. Roberts, 175 U.S. 291 (1899). *Cf.* Abington School District v. Schempp, 374 U.S. 203, 246 (1963) (Justice Brennan concurring). In Cochran v. Louisiana Board of Education, 281 U.S. 370 (1930), a state program furnishing textbooks to parochial schools was sustained under a due process attack without reference to the First Amendment. *See also* Quick Bear v. Leupp, 210 U.S. 50 (1908) (statutory limitation on expenditures of public funds for sectarian education does not apply to treaty and trust funds administered by the government for Indians).

[59] Everson v. Board of Education, 330 U.S. 1, 15–16 (1947).

[60] 330 U.S. at 16.

pockets when transportation to a public school would have been paid for by the State."[61] Transportation benefited the child, just as did police protection at crossings, fire protection, connections for sewage disposal, public highways and sidewalks. Thus was born the "child benefit" theory.[62]

The Court in 1968 relied on the "child benefit" theory to sustain state loans of textbooks to parochial school students.[63] Using the secular purpose and effect tests,[64] the Court determined that the purpose of the loans was the "furtherance of the educational opportunities available to the young," while the effect was hardly less secular. "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution."[65]

From these beginnings, the case law on the discretion of state and federal governmental assistance to sectarian elementary and secondary schools as well as other religious entities has multiplied. Through the 1970s, at least, the law became as restrictive in fact as the dicta in the early cases suggested, except for the provision of some assistance to children under the "child benefit" theory. Since that time, the Court has gradually adopted a more accommodating approach. It has upheld direct aid programs that have been of only marginal benefit to the religious mission of the recipient elementary and secondary schools, tax benefit and scholarship aid programs where the schools have received the assistance as the result of the independent decisions of the parents or students who initially receive the aid, and in its most recent decisions direct aid programs which substantially benefit the educational function of such

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[61] 330 U.S. at 17. It was in *Everson* that the Court, without much discussion of the matter, held that the Establishment Clause applied to the states through the Fourteenth Amendment and limited both national and state governments equally. Id. at 8, 13, 14–16. The issue is discussed at some length by Justice Brennan in Abington School Dist. v. Schempp, 374 U.S. 203, 253–58 (1963).

[62] *See also* Zorach v. Clauson, 343 U.S. 306, 312–13 (1952) (upholding program allowing public schools to excuse students to attend religious instruction or exercises).

[63] Board of Education v. Allen, 392 U.S. 236 (1968).

[64] *See* discussion under "Court Tests Applied to Legislation Affecting Religion," *supra*.

[65] 392 U.S. at 243–44 (1968).

schools. Indeed, in its most recent decisions the Court has overturned several of the most restrictive school aid precedents from its earlier jurisprudence. Throughout, the Court has allowed greater discretion with respect to aid programs benefiting religiously affiliated colleges and social services agencies.

A secular purpose is the first requirement of the *Lemon* tripartite test to sustain the validity of legislation touching upon religion, and upon this standard the Justices display little disagreement. There are adequate legitimate, non-sectarian bases for legislation to assist nonpublic, religious schools: preservation of a healthy and safe educational environment for all school children, promotion of pluralism and diversity among public and nonpublic schools, and prevention of overburdening of the public school system that would accompany the financial failure of private schools.[66]

The primary secular effect and no excessive entanglement aspects of the *Lemon* test, however, have proven much more divisive. As a consequence, the Court's applications of these tests have not always been consistent, and the rules guiding their application have not always been easy to decipher. Moreover, in its most recent decisions the Court has substantially modified the strictures these tests have previously imposed on public aid to pervasively sectarian entities.

In applying the primary effect and excessive entanglement tests, the Court has drawn a distinction between public aid programs that directly aid sectarian entities and those that do so only indirectly. Aid provided directly, the Court has said, must be limited to secular use lest it have a primary effect of advancing religion. The Establishment Clause "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[67] The government may provide direct support to the secular services and programs sponsored by religious entities, but it cannot directly subsidize such organizations' religious activities or proselytizing.[68] Thus, the Court struck down as unconstitutional a program providing grants for the maintenance and repair of sectarian elementary and secondary school facilities, because the grants had no restrictions to prevent their use for such purposes as defraying the costs of building or maintaining chapels

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[66] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973). *See also* id. at 805 (Chief Justice Burger dissenting), 812–13 (Justice Rehnquist dissenting), 813 (Justice White dissenting). *See also* Wolman v. Walter, 433 U.S. 229, 240 (1977) (plurality opinion); Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 653–54 (1980), and id. at 665 (Justice Blackmun dissenting).

[67] Grand Rapids School District v. Ball, 473 U.S. 373, 385 (1985).

[68] Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Mitchell v. Helms, 530 U.S. 793 (2000).

or classrooms in which religion is taught.[69] It also struck down a program subsidizing field trip transportation for children attending sectarian elementary and secondary schools, because field trips are inevitably interwoven with the schools' educational functions.[70]

But the Court has not imposed a secular use limitation on aid programs that benefit sectarian entities only indirectly, *i.e.*, as the result of decisions by someone other than the government itself. The initial beneficiaries of the public aid must be determined on the basis of religiously neutral criteria, and they must have a genuine choice about whether to use the aid at sectarian or nonsectarian entities. But, where those standards have been met, the Court has upheld indirect aid programs even though the sectarian institutions that ultimately benefit may use the aid for religious purposes. Moreover, the Court has gradually broadened its understanding of what constitutes a genuine choice so that now most voucher or tax benefit programs benefiting the parents of children attending sectarian schools seem able to pass constitutional muster.

Thus, the Court initially struck down tax benefit and educational voucher programs where the initial beneficiaries were limited to the universe of parents of children attending sectarian schools and where the aid, as a consequence, was virtually certain to go to sectarian schools.[71] Subsequently, however, it upheld a state program that allowed taxpayers to take a deduction from their gross income for educational expenses, including tuition, incurred in sending their children to public or private schools, because the deduction was "available for educational expenses incurred by all parents" and the aid became available to sectarian schools "only as a result of numerous, private choices of individual parents of school-age children."[72] It upheld for the same reasons a vocational rehabilitation program that made a grant to a blind person for training at a Bible college for a religious vocation[73] and another program that provided a sign-language interpreter for a deaf student attending a sectarian secondary school.[74] Most recently, it upheld as constitutional a tuition voucher program made available to the parents of children attending failing public schools, notwithstanding that most of the private schools at which the vouchers could be used

[69] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
[70] Wolman v. Walter, 433 U.S. 229 (1977).
[71] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), and Sloan v. Lemon, 413 U.S. 825 (1973).
[72] Mueller v. Allen, 463 U.S. 388, 397–399 (1983).
[73] Witters v. Washington Dep't of Social Services, 474 U.S. 481 (1986). In this decision the Court also cited as important the factor that the program was not likely to provide "any significant portion of the aid expended under the . . . program" for religious education. Id. at 488.
[74] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

were sectarian in nature.[75] Whether the parents had a genuine choice among religious and secular options in using the vouchers, the Court said, had to be evaluated on the basis not only of the private schools where the vouchers could be redeemed but also by examining the full range of educational options open to them, including various public school options.

In applying the primary effect and excessive entanglement tests, the Court has also, until recently, drawn a distinction between religious institutions that are pervasively sectarian and those that are not. Organizations that are permeated by a religious purpose and character in all that they do have often been held by the Court to be constitutionally ineligible for direct public aid. Direct aid to religion-dominated institutions inevitably violates the primary effect test, the Court has said, because such aid generally cannot be limited to secular use in such entities and, as a consequence, it has a primary effect of advancing religion.[76] Moreover, any effort to limit the use of public aid by such entities to secular use inevitably falls afoul of the excessive entanglement test, according to the Court, because the risk of diversion of the aid to religious use is so great that it necessitates an intrusive government monitoring.[77] But, direct aid to religious entities that are not pervasively sectarian, the Court held, is constitutionally permissible, because the secular functions of such entities can be distinguished from their religious ones for purposes of public aid and because the risk of diversion of the aid to religious use is attenuated and does not require an intrusive government monitoring. As a practical matter, this distinction has had its most serious consequences for programs providing aid directly to sectarian elementary and secondary schools, because the Court has, until recently, presumed such schools to be pervasively sectarian and direct aid, as a consequence, to be severely limited.[78] The Court has presumed to the contrary with respect to religiously affiliated colleges, hospitals, and social services providers; and as a

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[75] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[76] *See*, *e.g.*, Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (grants for the maintenance and repair of sectarian school facilities); Meek v. Pittenger, 421 U.S. 349 (1975) (loan of secular instructional materials and equipment); Grand Rapids School Dist. v. Bal, 473 U.S. 373 (1985) (hiring of parochial school teachers to provide after-school instruction to the students attending such schools).

[77] *See*, *e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (subsidies for teachers of secular subjects) and Aguilar v. Felton, 473 U.S. 402 (1985) (provision of remedial and enrichment services by public school teachers to eligible children attending sectarian elementary and secondary schools on the premises of those schools).

[78] See cases cited in the preceding two footnotes.

consequence it has found direct aid programs to such entities to be permissible.[79]

In its most recent decisions the Court has modified both the primary effect and excessive entanglement prongs of the *Lemon* test as they apply to aid programs directly benefiting sectarian elementary and secondary schools; and in so doing it has overturned several prior decisions imposing tight constraints on aid to pervasively sectarian institutions. In *Agostini v. Felton*[80] the Court, in a 5–4 decision, abandoned the presumptions that public school teachers giving instruction on the premises of sectarian elementary and secondary schools will be so affected by the religiosity of the environment that they will inculcate religion and that, consequently, an excessively entangling monitoring of their services is constitutionally necessary. In *Mitchell v. Helms*,[81] in turn, the Court abandoned the presumptions that such schools are so pervasively sectarian that their secular educational functions cannot be differentiated from their religious educational functions and that direct aid to their educational functions, consequently, violates the Establishment Clause. In reaching these conclusions and upholding the aid programs in question, the Court overturned its prior decision in *Aguilar v. Felton*[82] and parts of its decisions in *Meek v. Pittenger*,[83] *Wolman v. Walter*,[84] and *Grand Rapids School District v. Ball*.[85]

Thus, the Court's jurisprudence concerning public aid to sectarian organizations has evolved, particularly as it concerns public aid to sectarian elementary and secondary schools. That evolution has given some uncertainty to the rules that apply to any given form of aid; and in both *Agostini v. Felton*[86] and *Mitchell v. Helms*[87] the Court left open the possibility of a further evolution in its thinking. Nonetheless, the cases give substantial guidance.

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[79] Bradfield v. Roberts, 175 U.S. 291 (1899) (public subsidy of the construction of a wing of a Catholic hospital on condition that it be used to provide care for the poor upheld); Tilton v. Richardson, 403 U.S. 672 (1971) (program of grants to colleges, including religiously affiliated ones, for the construction of academic buildings upheld); Roemer v. Maryland Bd. of Pub. Works, 426 U.S. 736 (1976) (program of general purpose grants to colleges in the state, including religiously affiliated ones, upheld); and Bowen v. Kendrick, 487 U.S. 589 (1988) (program of grants to public and private nonprofit organizations, including religious ones, for the prevention of adolescent pregnancies upheld).

[80] 521 U.S. 203 (1997).

[81] 530 U.S. 793 (2000).

[82] 473 U.S. 402 (1985).

[83] 421 U.S. 349 (1975).

[84] 433 U.S. 229 (1977).

[85] 473 U.S. 373 (1985).

[86] 521 U.S. 203 (1994).

[87] 530 U.S. 793 (2000).

State aid to church-connected schools was first found to have gone over the "verge" [88] in *Lemon v. Kurtzman*.[89] The Court struck down two state statutes, one of which authorized the "purchase" of secular educational services from nonpublic elementary and secondary schools, a form of reimbursement for the cost to religious schools of the teaching of such things as mathematics, modern foreign languages, and physical sciences, and the other of which provided salary supplements to nonpublic school teachers who taught courses similar to those found in public schools, used textbooks approved for use in public schools, and agreed not to teach any classes in religion. Accepting the secular purpose attached to both statutes by the legislature, the Court did not pass on the secular effect test, but found excessive entanglement. This entanglement arose because the legislature "has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . ." [90] Because the schools concerned were religious schools, because they were under the control of the church hierarchy, and because the primary purpose of the schools was the propagation of the faith, a "comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions [on religious use of aid] are obeyed and the First Amendment otherwise respected." [91] Moreover, the provision of public aid inevitably will draw religious conflict into the public arena as the contest for adequate funding goes on. Thus, the Court held, both programs were unconstitutional because the state supervision necessary to ensure a secular purpose and a secular effect inevitably involved the state authorities too deeply in the religious affairs of the aided institutions.[92]

Two programs of assistance through the provision of equipment and services to private, including sectarian, schools were invalidated in *Meek v. Pittenger*.[93] First, the loan of instructional material and equipment directly to nonpublic elementary and secondary schools was voided as constituting impermissible assistance to reli-

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[88] Everson v. Board of Education, 330 U.S. 1, 16 (1947).

[89] 403 U.S. 602 (1971).

[90] 403 U.S. at 619.

[91] 403 U.S. at 619.

[92] Only Justice White dissented. 403 U.S. at 661. In Lemon v. Kurtzman, 411 U.S. 192 (1973), the Court held that a state could reimburse schools for expenses incurred in reliance on the voided program up to the date the Supreme Court held the statute unconstitutional. *But see* New York v. Cathedral Academy, 434 U.S. 125 (1977).

[93] 421 U.S. 349 (1975). Chief Justice Burger and Justices Rehnquist and White dissented. Id. at 385, 387.

gion. This holding was based on the fact that 75 percent of the qualifying schools were church-related or religiously affiliated educational institutions, and that the assistance was available without regard to the degree of religious activity of the schools. The materials and equipment loaned were religiously neutral, but the substantial assistance necessarily constituted aid to the sectarian school enterprise as a whole and thus had a primary effect of advancing religion.[94] Second, the provision of auxiliary services—remedial and accelerated instruction, guidance counseling and testing, speech and hearing services—by public employees on nonpublic school premises was invalidated because the Court found that, even though the teachers under this program—unlike those under one of the programs struck down in *Lemon v. Kurtzman*—were public employees rather than employees of the religious schools, the continuing surveillance necessary to ensure that the teachers remained religiously neutral gave rise to a constitutionally intolerable degree of entanglement between church and state.[95]

In two 1985 cases, the Court again struck down programs of public subsidy of instructional services provided on the premises of sectarian schools, and relied on the effects test as well as the entanglement test. In *Grand Rapids School District v. Ball*,[96] the Court invalidated two programs conducted in leased private school classrooms, one taught during the regular school day by public school teachers,[97] and the other taught after regular school hours by part-time "public" teachers otherwise employed as full-time teachers by the sectarian school.[98] Both programs, the Court held, had the effect of promoting religion in three distinct ways. The teachers might be influenced by the "pervasively sectarian nature" of the environment and might "subtly or overtly indoctrinate the students in particular religious tenets at public expense"; use of the parochial school classrooms "threatens to convey a message of state support for religion" through "the symbolic union of government and religion in

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[94] 421 U.S. at 362–66. *See also* Wolman v. Walter, 433 U.S. 229, 248–51 (1977). The Court in Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646, 661–62 (1980), held that *Meek* did not forbid all aid that benefited religiously pervasive schools to some extent, so long as it was conferred in such a way as to prevent any appreciable risk of being used to transmit or teach religious views. *See also* Wolman v. Walter, 433 U.S. at 262 (Justice Powell concurring in part and dissenting in part).

[95] Meek v. Pittenger, 421 U.S. 349, 367–72 (1975). *But see* Wolman v. Walter, 433 U.S. 229, 238–48 (1977).

[96] 473 U.S. 373 (1985).

[97] The vote on this "Shared Time" program was 5–4, the opinion of the Court by Justice Brennan being joined by Justices Marshall, Blackmun, Powell, and Stevens. The Chief Justice, and Justices White, Rehnquist, and O'Connor dissented.

[98] The vote on this "Community Education" program was 7–2, Chief Justice Burger and Justice O'Connor concurring with the "Shared Time" majority.

one sectarian enterprise"; and "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." [99] In *Aguilar v. Felton*,[100] the Court invalidated a program under which public school employees provided instructional services on parochial school premises to educationally deprived children. The program differed from those at issue in *Grand Rapids* because the classes were closely monitored for religious content. This "pervasive monitoring" did not save the program, however, because, by requiring close cooperation and day-to-day contact between public and secular authorities, the monitoring "infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." [101]

A state program to reimburse nonpublic schools for a variety of services mandated by state law was voided because the statute did not distinguish between secular and potentially religious services, the costs of which the state would reimburse.[102] Similarly, a program of direct monetary grants to nonpublic schools to be used for the maintenance of school facilities and equipment failed to survive the primary effect test because it did not restrict payment to those expenditures related to the upkeep of facilities used exclusively for secular purposes and because "within the context of these religion-oriented institutions" the Court could not see how such restrictions could effectively be imposed.[103] But a plan of direct monetary grants to nonpublic schools to reimburse them for the costs of state-mandated record-keeping and of administering and grading state-prepared tests and that contained safeguards against religious use of the tests was sustained even though the Court recognized the incidental benefit to the schools.[104]

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[99] 473 U.S. at 397.

[100] 473 U.S. 402 (1985). This was another 5–4 decision, with Justice Brennan's opinion of the Court being joined by Justices Marshall, Blackmun, Powell, and Stevens, and with Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissenting.

[101] 473 U.S. at 413.

[102] Levitt v. Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973). Justice White dissented, id. at 482. The most expensive service to be reimbursed for nonpublic schools was the "administration, grading and the compiling and reporting of the results of tests and examinations." Id. at 474–75. In New York v. Cathedral Academy, 434 U.S. 125 (1977), the Court struck down a new statutory program entitling private schools to obtain reimbursement for expenses incurred during the school year in which the prior program was voided in *Levitt*.

[103] Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774–80 (1973). Chief Justice Burger and Justice Rehnquist concurred, id. at 798, and Justice White dissented, id. at 820.

[104] Committee for Public Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980). Justices Blackmun, Brennan, Marshall, and Stevens dissented. Id. at 662, 671. The

The "child benefit" theory, under which it is permissible for government to render ideologically neutral assistance and services to pupils in sectarian schools without being deemed to be aiding the religious mission of the schools, has not proved easy to apply. Several different forms of assistance to students were at issue in *Wolman v. Walter*.[105] The Court approved the following: standardized tests and scoring services used in the public schools, with private school personnel not involved in the test drafting and scoring; speech, hearing, and psychological diagnostic services provided in the private schools by public employees; and therapeutic, guidance, and remedial services for students provided off the premises of the private schools. In all these, the Court thought the program contained adequate built-in protections against religious use. But, though the Court adhered to its ruling permitting the states to lend secular textbooks used in the public schools to pupils attending religious schools,[106] it declined to extend the precedent to permit the states to lend to pupils or their parents instructional materials and equipment, such as projectors, tape recorders, maps, globes and science kits, even though the materials and equipment were identical to those used in the public schools.[107] Nor was a state permitted to

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dissenters thought that the authorization of direct reimbursement grants was distinguishable from previously approved plans that had merely relieved the private schools of the costs of preparing and grading state-prepared tests. *See* Wolman v. Walter, 433 U.S. 229, 238–41 (1977).

[105] 433 U.S. 229 (1977). The Court deemed the situation in which these services were performed and the nature of the services to occasion little danger of aiding religious functions and thus requiring little supervision that would give rise to entanglement. All the services fell "within that class of general welfare services for children that may be provided by the States regardless of the incidental benefit that accrues to church-related schools." Id. at 243, quoting Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975). Justice Brennan would have voided all the programs because, considered as a whole, the amount of assistance was so large as to constitute assistance to the religious mission of the schools. 433 U.S. at 255. Justice Marshall would have approved only the diagnostic services, id. at 256, while Justice Stevens would generally approve closely administered public health services. Id. at 264.

[106] Meek v. Pittenger, 421 U.S. 349, 359–72 (1975); Wolman v. Walter, 433 U.S. 229, 236–38 (1977). *Allen* was explained as resting on "the unique presumption" that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." There was "a tension" between *Nyquist*, *Meek*, and *Wolman*, on the one hand, and *Allen* on the other; although *Allen* was to be followed "as a matter of stare decisis," the "presumption of neutrality" embodied in *Allen* would not be extended to other similar assistance. Id. at 251 n.18. A later Court majority revived the *Allen* presumption, however, applying it to uphold tax deductions for tuition and other school expenses in Mueller v. Allen, 463 U.S. 388 (1983). Justice Rehnquist wrote the Court's opinion, joined by Justices White, Powell, and O'Connor, and by Chief Justice Burger.

[107] 433 U.S. at 248–51. *See also* id. at 263–64 (Justice Powell concurring in part and dissenting in part).

pay the costs to religious schools of field trip transportation, such as it did to public school students.[108]

The Court's later decisions, however, rejected the reasoning and overturned the results of several of these decisions. In two rulings, the Court reversed course with respect to the constitutionality of public school personnel's providing educational services on the premises of pervasively sectarian schools. First, in *Zobrest v. Catalina Foothills School District*[109] the Court held that the public subsidy of a sign-language interpreter for a deaf student attending a parochial school created no primary effect or entanglement problems. The payment did not relieve the school of an expense that it would otherwise have borne, the Court stated, and the interpreter had no role in selecting or editing the content of any of the lessons. Reviving the child benefit theory of its earlier cases, the Court wrote: "The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends."[110]

Second, and more pointedly, the Court in *Agostini v. Felton*[111] overturned its decision in *Aguilar v. Felton*,[112] which had struck down the Title I program as administered in New York City, as well as the analogous parts of its decisions in *Meek v. Pittenger*[113] and *Grand Rapids School District v. Ball*.[114] The assumptions on which those decisions had rested, the Court stated, had been "undermined" by its more recent decisions. Decisions such as *Zobrest* and *Witters v. Washington Department of Social Services*,[115] it said, had repudiated the notions that the placement of a public employee in a sectarian school creates an "impermissible symbolic link" between government and religion, that "all government aid that directly aids the educational function of religious schools" is constitutionally forbidden, that public teachers in a sectarian school necessarily pose a serious risk of inculcating religion, and that "pervasive monitoring of [such] teachers is required." The proper criterion under the primary effect prong of the *Lemon* test, the Court asserted, is religious neutrality, *i.e.*, whether "aid is allocated on the basis of neu-

[108] 433 U.S. at 252–55. Justice Powell joined the other three dissenters who would have approved this expenditure. Id. at 264.
[109] 509 U.S. 1 (1993).
[110] 509 U.S. at 10.
[111] 521 U.S. 203 (1997).
[112] 473 U.S. 402 (1985).
[113] 421 U.S. 349 (1975).
[114] 473 U.S. 373 (1985).
[115] 474 U.S. 481 (1986).

tral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." [116] Finding the Title I program to meet that test, the Court concluded that "accordingly, we must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law." [117]

Later, in *Mitchell v. Helms* [118] the Court abandoned the presumptions that religious elementary and secondary schools are so pervasively sectarian that they are constitutionally ineligible to participate in public aid programs directly benefiting their educational functions and that direct aid to such institutions must be subject to an intrusive and constitutionally fatal monitoring. At issue in the case was a federal program that distributed funds to local educational agencies to provide instructional materials and equipment, such as computer hardware and software, library books, movie projectors, television sets, VCRs, laboratory equipment, maps, and cassette recordings, to public and private elementary and secondary schools. Virtually identical programs had previously been held unconstitutional by the Court in *Meek v. Pittenger* [119] and *Wolman v. Walter*.[120] But in this case the Court overturned those decisions and held the program to be constitutional.

Mitchell had no majority opinion. The opinions of Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, and of Justice O'Connor, joined by Justice Breyer, found the program constitutional. They agreed that to pass muster under the primary effect prong of the *Lemon* test direct public aid has to be secular in nature and distributed on the basis of religiously neutral criteria. They also agreed, in contrast to past rulings, that sectarian elementary and secondary schools should not be deemed constitutionally ineligible for direct aid on the grounds that their secular educational functions are "inextricably intertwined" with their religious educational functions, *i.e.*, that they are pervasively sectarian. But their rationales for the program's constitutionality then di-

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[116] In *Agostini*, the Court nominally eliminated entanglement as a separate prong of the *Lemon* test. "[T]he factors we use to assess whether an entanglement is 'excessive,'" the Court stated, "are similar to the factors we use to examine 'effect.'" "Thus," it concluded, "it is simplest to recognize why entanglement is significant and treat it—as we did in *Walz*—as an aspect of the inquiry into a statute's effect." 521 U.S. at 232, 233.

[117] Justice Souter, joined by Justices Stevens and Ginsburg, dissented from the Court's ruling, contending that the Establishment Clause mandates a "flat ban on [the] subsidization" of religion (521 U.S. at 243) and that the Court's contention that recent cases had undermined the reasoning of *Aguilar* was a "mistaken reading" of the cases. Id. at 248. Justice Breyer joined in the second dissenting argument.

[118] 530 U.S. 793 (2000).

[119] 421 U.S. 349 (1975).

[120] 433 U.S. 229 (1977).

verged. For Justice Thomas it was sufficient that the instructional materials were secular in nature and were distributed according to neutral criteria. It made no difference whether the schools used the aid for purposes of religious indoctrination or not. But that was not sufficient for Justice O'Connor. She adhered to the view that direct public aid has to be limited to secular use by the recipient institutions. She further asserted that a limitation to secular use could be honored by the teachers in the sectarian schools and that the risk that the aid would be used for religious purposes was not so great as to require an intrusive and entangling government monitoring.[121]

Justice Souter, joined by Justices Stevens and Ginsburg, dissented on the grounds that the Establishment Clause bars "aid supporting a sectarian school's religious exercise or the discharge of its religious mission." Adhering to the "substantive principle of no aid" first articulated in *Everson*, he contended that direct aid to pervasively sectarian institutions inevitably results in the diversion of the aid for purposes of religious indoctrination. He further argued that the aid in this case had been so diverted.

As the opinion upholding the program's constitutionality on the narrowest grounds, Justice O'Connor's provides the most current guidance on the standards governing the constitutionality of aid programs directly benefiting sectarian elementary and secondary schools.

The Court has similarly loosened the constitutional restrictions on public aid programs indirectly benefiting sectarian elementary and secondary schools. Initially, the Court in 1973 struck down substantially similar programs in New York and Pennsylvania providing for tuition reimbursement to parents of religious school children. New York's program provided reimbursements out of general tax revenues for tuition paid by low-income parents to send their children to nonpublic elementary and secondary schools; the reimbursements were of fixed amounts but could not exceed 50 percent of actual tuition paid. Pennsylvania provided fixed-sum reimbursement for parents who sent their children to nonpublic elementary and secondary schools, so long as the amount paid did not exceed actual tuition, the funds to be derived from cigarette tax revenues. Both programs, it was held, constituted public financial assistance

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[121] Justice O'Connor also cited several other factors as "sufficient" to ensure the program's constitutionality, without saying whether they were "constitutionally necessary"—that the aid supplemented rather than supplanted the school's educational functions, that no funds ever reached the coffers of the sectarian schools, and that there were various administrative regulations in place providing for some degree of monitoring of the schools' use of the aid.

to sectarian institutions with no attempt to segregate the benefits so that religion was not advanced.[122]

New York had also enacted a separate program providing tax relief for low-income parents who did not qualify for the tuition reimbursements; here relief was in the form of a deduction or credit bearing no relationship to the amounts of tuition paid, but keyed instead to adjusted gross income. This too was invalidated in *Nyquist*. "In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition [reimbursement] grant. . . . The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that '[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education.'"[123] Some difficulty, however, was experienced in distinguishing this program from the tax exemption approved in *Walz*.[124]

The Court rejected two subsidiary arguments in these cases. The first, in the New York case, was that the tuition reimbursement program promoted the free exercise of religion in that it permitted low-income parents desiring to send their children to school in accordance with their religious views to do so. The Court agreed that "tension inevitably exists between the Free Exercise and the Establishment Clauses," but explained that the tension is ordinarily resolved through application of the "neutrality" principle: government may neither advance nor inhibit religion. The tuition program inescapably advanced religion and thereby violated this prin-

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[122] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–798 (1973) (New York); Sloan v. Lemon, 413 U.S. 825 (1973) (Pennsylvania). The Court distinguished *Everson* and *Allen* on the grounds that in those cases the aid was given to all children and their parents and that the aid was in any event religiously neutral, so that any assistance to religion was purely incidental. 413 U.S. at 781–82. Chief Justice Burger thought that *Everson* and *Allen* were controlling. Id. at 798.

[123] Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 790–91 (1973).

[124] 413 U.S. at 791–94. Principally, *Walz* was said to be different because of the longstanding nature of the property tax exemption it dealt with, because the *Walz* exemption was granted in the spirit of neutrality whereas the tax credit under consideration was not, and the fact that the *Walz* exemption promoted less entanglement whereas the credit would promote more.

ciple.[125] The second subsidiary argument that the Court rejected was that, because the Pennsylvania program reimbursed parents who sent their children to nonsectarian schools as well as to sectarian ones, the portion respecting the former parents was valid and "parents of children who attended sectarian schools are entitled to the same aid as a matter of equal protection."[126] The Court found the argument "thoroughly spurious," adding, "The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution."[127]

In 1983, the Court clarified the limits of the *Nyquist* holding. In *Mueller v. Allen*,[128] the Court upheld a Minnesota deduction from state income tax available to parents of elementary and secondary school children for expenses incurred in providing tuition, transportation, textbooks, and various other school supplies. Because the Minnesota deduction was available to parents of public and private schoolchildren alike, the Court termed it "vitally different from the scheme struck down in *Nyquist*," and more similar to the benefits upheld in *Everson* and *Allen* as available to *all* schoolchildren.[129] The Court declined to look behind the "facial neutrality" of the law and consider empirical evidence of its actual impact, citing a need for "certainty" and the lack of "principled standards" by which to evaluate such evidence.[130] Also important to the Court's refusal to consider

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[125] 413 U.S. at 788–89. *But cf.* Lynch v. Donnelly, 465 U.S. 668, 673 (1984) (Free Exercise Clause "affirmatively mandates accommodation, not merely tolerance, of all religions").

[126] Sloan v. Lemon, 413 U.S. 825, 834 (1973).

[127] 413 U.S. at 834. In any event, the Court sustained the district court's refusal to sever the program and save that portion as to children attending nonsectarian schools on the basis that, because so large a portion of the children benefited attended religious schools, it could not be assumed the legislature would have itself enacted such a limited program.

In Wheeler v. Barrera, 417 U.S. 402 (1974), the Court held that states receiving federal educational funds were required by federal law to provide "comparable" but not equal services to both public and private school students within the restraints imposed by state constitutional restrictions on aid to religious schools. In the absence of specific plans, the Court declined to review First Amendment limitations on such services.

[128] 463 U.S. 388 (1983).

[129] 463 U.S. at 398. *Nyquist* had reserved the question of "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e.g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted." 413 U.S. at 783 n.38.

[130] 463 U.S. at 401. Justice Marshall's dissenting opinion, joined by Justices Brennan, Blackmun, and Stevens, argued that the tuition component of the deduction, unavailable to parents of most public schoolchildren, was by far the most significant, and that the deduction as a whole "was little more that a subsidy of tuition masquerading as a subsidy of general educational expenses." 463 U.S. at 408–09. *Cf.* Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985), where the Court emphasized that 40 of 41 nonpublic schools at which publicly funded programs operated

the alleged disproportionate benefits to parents of parochial school children was the assertion that, "whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits . . . provided to the State and all taxpayers by parents sending their children to parochial schools." [131]

A second factor important in *Mueller*, which had been present but not controlling in *Nyquist*, was that the financial aid was provided to the parents of schoolchildren rather than to the school. In the Court's view, therefore, the aid was "attenuated" rather than direct; because it was "available only as a result of decisions of individual parents," there was no "imprimatur of state approval." The Court noted that, with the exception of *Nyquist*, "all . . . of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the State to the schools themselves." [132] Thus, *Mueller* apparently stands for the proposition that state subsidies of tuition expenses at sectarian schools are permissible if contained in a facially neutral scheme providing benefits, at least nominally, to parents of public and private schoolchildren alike.

The Court confirmed this proposition three years later in *Witters v. Washington Department of Social Services for the Blind*.[133] At issue was the constitutionality of a grant made by a state vocational rehabilitation program to a blind person who wanted to use the grant to attend a religious school and train for a religious ministry. Again, the Court emphasized that, in the vocational rehabilitation program "any aid provided is 'made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited'" and "ultimately flows to religious institutions . . . only as a result of the genuinely independent and private choices of aid recipients." [134] The program, the Court stated, did not have the purpose of providing support for nonpublic, sectarian institutions; created no financial incentive for students to undertake religious education; and gave recipients "full opportunity to expend vocational rehabiiltation aid on wholly secular education." "In this case," the Court found, "the fact that the aid goes to individuals means that the decision to support religious education is made by

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were sectarian in nature; and Widmar v. Vincent, 454 U.S. 263, 275 (1981), holding that a college's open forum policy had no primary effect of advancing religion "[a]t least in the absence of evidence that religious groups will dominate [the] forum." *But cf.* Bowen v. Kendrick, 487 U.S. 589 (1988), permitting religious institutions to be recipients under a "facially neutral" direct grant program.

[131] 463 U.S. at 402.

[132] 463 U.S. at 399.

[133] 474 U.S. 481 (1986).

[134] 474 U.S. at 487.

the individual, not by the State." Finally, the Court concluded, there was no evidence that "any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education." [135]

In *Zobrest v. Catalina Foothills School District* [136] the Court reaffirmed this line of reasoning. The case involved the provision of a sign language interpreter pursuant to the Individuals with Disabilities Education Act (IDEA) [137] to a deaf high school student who wanted to attend a Catholic high school. In upholding the assistance as constitutional, the Court emphasized that "[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the IDEA, without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." Thus, it held that the presence of the interpreter in the sectarian school resulted not from a decision of the state but from the "private decision of individual parents." [138]

Finally, in *Zelman v. Simmons-Harris* [139] the Court reinterpreted the genuine private choice criterion in a manner that seems to render most voucher programs constitutional. At issue was an Ohio program that provided vouchers to the parents of children in failing public schools in Cleveland for use at private schools in the city. The Court upheld the program notwithstanding that, as in *Nyquist*, most of the schools at which the vouchers could be redeemed were religious and most of the voucher students attended such schools. But the Court found that the program nevertheless involved "true private choice." [140] "Cleveland schoolchildren," the Court said, "enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleve-

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[135] 474 U.S. at 488.
[136] 509 U.S. 1 (1993).
[137] 20 U.S.C. §§ 1400 *et seq*.
[138] 509 U.S. at 10.
[139] 536 U.S. at 639 (2002).
[140] 536 U.S. at 653.

land schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." [141]

In contrast to its rulings concerning direct aid to sectarian elementary and secondary schools, the Court, although closely divided at times, has from the start approved quite extensive public assistance to institutions of higher learning. On the same day that it first struck down an assistance program for elementary and secondary private schools, the Court sustained construction grants to church-related colleges and universities.[142] The specific grants in question were for the construction of two library buildings, a science building, a music, drama, and arts building, and a language laboratory. The law prohibited the financing of any facility for, or the use of any federally financed building for, religious purposes, although the restriction on use ran for only twenty years.[143] The Court found that the purpose and effect of the grants were secular and that, unlike elementary and secondary schools, religious colleges were not so devoted to inculcating religion.[144] The supervision required to ensure conformance with the non-religious-use requirement was found not to constitute "excessive entanglement," inasmuch as a building is nonideological in character, and the construction grants were one-time rather than continuing.

Also sustained was a South Carolina program under which a state authority would issue revenue bonds for construction projects on campuses of private colleges and universities. The Court did not decide whether this special form of assistance could be otherwise sustained, because it concluded that religion was neither advanced nor inhibited; nor was there any impermissible public entanglement. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." [145] The colleges involved, though affiliated with religious institutions, were

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[141] 536 U.S. at 655–56.

[142] Tilton v. Richardson, 403 U.S. 672 (1971). This was a 5–4 decision.

[143] Because such buildings would still have substantial value after twenty years, the Court found that a religious use then would be an unconstitutional aid to religion, and it struck down the period of limitation. 403 U.S. at 682–84.

[144] It was no doubt true, Chief Justice Burger conceded, that construction grants to religious-related colleges did in some measure benefit religion, because the grants freed money that the colleges would be required to spend on the facilities for which the grants were made. Bus transportation, textbooks, and tax exemptions similarly benefited religion and had been upheld. "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." 403 U.S. at 679.

[145] Hunt v. McNair, 413 U.S. 734, 743 (1973).

not shown to be too pervasively religious—no religious qualifications existed for faculty or student body, a substantial part of the student body was not of the religion of the affiliation, and state rules precluded the use of any state-financed project for religious activities.[146]

The kind of assistance permitted by *Tilton* and by *Hunt v. McNair* seems to have been broadened when the Court sustained a Maryland program of annual subsidies to qualifying private institutions of higher education; the grants were noncategorical but could not be used for sectarian purposes, a limitation to be policed by the administering agency.[147] The plurality opinion found a secular purpose; found that the limitation of funding to secular activities was meaningful,[148] since the religiously affiliated institutions were not so pervasively sectarian that secular activities could not be separated from sectarian ones; and determined that excessive entanglement was improbable, given the fact that aided institutions were not pervasively sectarian. The annual nature of the subsidy was recognized as posing the danger of political entanglement, but the plurality thought that the character of the aided institutions—"capable of separating secular and religious functions"—was more important.[149]

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[146] 413 U.S. at 743–44. Justices Brennan, Douglas, and Marshall, dissenting, rejected the distinction between elementary and secondary education and higher education and foresaw a greater danger of entanglement than did the Court. Id. at 749.

[147] Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976). Justice Blackmun's plurality opinion was joined only by Chief Justice Burger and Justice Powell. Justices White and Rehnquist concurred on the basis of secular purpose and no primary religious benefit, rejecting entanglement. Id. at 767. Four justices dissented.

[148] 426 U.S. at 755. In some of the schools mandatory religion courses were taught, the significant factor in Justice Stewart's view, id. at 773, but overweighed by other factors in the plurality's view.

[149] 426 U.S. at 755–66. The plurality also relied on the facts that the student body was not local but diverse, and that large numbers of non-religiously affiliated institutions received aid. A still further broadening of governmental power to extend aid affecting religious institutions of higher education occurred in several subsequent decisions. First, the Court summarily affirmed two lower-court decisions upholding programs of assistance—scholarships and tuitions grants—to students at college and university as well as vocational programs in both public and private—including religious—institutions; one of the programs contained no secular use restriction at all and in the other one the restriction seemed somewhat pro forma. Smith v. Board of Governors of Univ. of North Carolina, 434 U.S. 803 (1977), aff'g 429 F. Supp. 871 (W.D.N.C. 1977); Americans United v. Blanton, 434 U.S. 803 (1977), aff'g 433 F. Supp. 97 (M.D. Tenn. 1977). Second, in Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986), the Court upheld use of a vocational rehabilitation scholarship at a religious college, emphasizing that the religious institution received the public money as a result of the "genuinely independent and private choices of the aid recipients," and not as the result of any decision by the state to sponsor or subsidize religion. Third, in Rosenberger v. The Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), the Court held that a public university cannot exclude a student religious publication from a program subsidizing the printing costs

Finally, in the first case since *Bradfield v. Roberts* [150] to challenge the constitutionality of public aid to non-educational religious institutions, the Court in *Bowen v. Kendrick*,[151] by a 5–4 vote, upheld the Adolescent Family Life Act (AFLA) [152] against facial challenge. The Act permits direct grants to religious organizations for the provision of health care and for counseling of adolescents on matters of pregnancy prevention and abortion alternatives, and requires grantees to involve other community groups, including religious organizations, in the delivery of services. All the Justices agreed that AFLA had valid secular purposes; their disagreement related to application of the effects and entanglement tests. The Court relied on analogy to the higher education cases rather than to the cases involving aid to elementary and secondary schools.[153] The case presented conflicting factual considerations. On the one hand, the class of beneficiaries was broad, with religious groups not predominant among the wide range of eligible community organizations. On the other hand, there were analogies to the parochial school aid cases: secular and religious teachings might easily be mixed, and the age of the targeted group (adolescents) suggested susceptibility. The Court resolved these conflicts by holding that AFLA is facially valid, there being insufficient indication that a significant proportion of the AFLA funds would be disbursed to "pervasively sectarian" institutions, but by remanding to the district court to determine whether particular grants to pervasively sectarian institutions were invalid. The Court emphasized in both parts of its opinion that the fact that "views espoused [during counseling] on matters of premarital sex, abortion, and the like happen to coincide with the religious views of the AFLA grantee would not be sufficient to show [an Establishment Clause violation]." [154]

At the time it was rendered, *Bowen* differed from the Court's decisions concerning direct aid to sectarian elementary and secondary schools primarily in that it refused to presume that religiously affiliated social welfare entities are pervasively sectarian. That difference had the effect of giving greater constitutional latitude to public aid to such entities than was afforded direct aid to religious elementary and secondary schools. As noted above, the Court in its recent decisions eliminated the presumption that such religious schools

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of all other student publications. The Court said the fund was essentially a religiously neutral subsidy promoting private student speech without regard to content.

[150] 175 U.S. 291 (1899).

[151] 487 U.S. 589 (1988).

[152] Pub. L. 97–35, 95 Stat. 578 (1981), codified at 42 U.S.C. §§ 300z *et seq*.

[153] The Court also noted that the 1899 case of Bradfield v. Roberts had established that religious organizations may receive direct aid for support of secular social-welfare cases.

[154] 487 U.S. at 621.

are pervasively sectarian and has extended the same constitutional latitude to aid programs benefiting such schools as it gives to aid programs benefiting religiously affiliated social welfare programs.

Governmental Encouragement of Religion in Public Schools: Released Time.—Introduction of religious education into the public schools, one of Justice Rutledge's "great drives," [155] has also occasioned a substantial amount of litigation in the Court. In its first two encounters, the Court voided one program and upheld another, in which the similarities were at least as significant as the differences. Both cases involved "released time" programs, the establishing of a period during which pupils in public schools were to be allowed, upon parental request, to receive religious instruction. In the first, the religious classes were conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths, subject to the approval or supervision of the superintendent of schools. Attendance reports were kept and reported to the school authorities in the same way as for other classes, and pupils not attending the religious instruction classes were required to continue their regular studies. "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . . ." [156] The case was also noteworthy because of the Court's express rejection of the contention "that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." [157]

Four years later, the Court upheld a different released-time program.[158] In this one, schools released pupils during school hours, on written request of their parents, so that they might leave the school building and go to religious centers for religious instruction or devotional exercises. The churches reported to the schools the names of children released from the public schools who did not re-

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[155] Everson v. Board of Education, 330 U.S. 1, 63 (Justice Rutledge dissenting) (quoted under "Establishment of Religion," *supra*).

[156] Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 209–10 (1948).

[157] 333 U.S. at 211.

[158] Zorach v. Clauson, 343 U.S. 306 (1952). Justices Black, Frankfurter, and Jackson dissented. Id. at 315, 320, 323.

port for religious instruction; children not released remained in the classrooms for regular studies. The Court found the differences between this program and the program struck down in *McCollum* to be constitutionally significant. Unlike *McCollum*, where "the classrooms were used for religious instruction and force of the public school was used to promote that instruction," religious instruction was conducted off school premises and "the public schools do no more than accommodate their schedules." [159] "We are a religious people whose institutions presuppose a Supreme Being," Justice Douglas wrote for the Court. "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."

Governmental Encouragement of Religion in Public Schools: Prayers and Bible Reading.—Upon recommendation of the state governing board, a local New York school required each class to begin each school day by reading aloud the following prayer in the presence of the teacher: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers and our country." Students who wished to do so could remain silent or leave the room. The Court wrote: "We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. . . . [W]e think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." [160] "Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the

[159] 343 U.S. at 315. *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 261–63 (1963) (Justice Brennan concurring) (suggesting that the important distinction was that "the *McCollum* program placed the religious instruction in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not").

[160] Engel v. Vitale, 370 U.S. 421, 424, 425 (1962).

Establishment Clause, as it might from the Free Exercise Clause. . . . The Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." [161]

Following the prayer decision came two cases in which parents and their school age children challenged the validity under the Establishment Clause of requirements that each school day begin with readings of selections from the Bible. Scripture reading, like prayers, the Court found, was a religious exercise. "Given that finding the exercises and the law requiring them are in violation of the Establishment Clause." [162] Rejected were contentions by the state that the object of the programs was the promotion of secular purposes, such as the expounding of moral values, the contradiction of the materialistic trends of the times, the perpetuation of traditional institutions, and the teaching of literature [163] and that to forbid the particular exercises was to choose a "religion of secularism" in their place.[164] Though the "place of religion in our society is an exalted one," the Establishment Clause, the Court continued, prescribed that in "the relationship between man and religion," the state must be "firmly committed to a position of neutrality." [165]

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[161] 370 U.S. at 430. Justice Black for the Court rejected the idea that the prohibition of religious services in public schools evidenced "a hostility toward religion or toward prayer." Id. at 434. Rather, such an application of the First Amendment protected religion from the coercive hand of government and government from control by a religious sect. Dissenting alone, Justice Stewart could not "see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." Id. at 444, 445.

[162] Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963). "[T]he States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in Zorach v. Clausen." Id.

[163] 374 U.S. at 223–24. The Court thought the exercises were clearly religious.

[164] 374 U.S. at 225. "We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'" Zorach v. Clauson, 343 U.S. at 314. "We do not agree, however, that this decision in any sense has that effect."

[165] 374 U.S. at 226. Justice Brennan contributed a lengthy concurrence in which he attempted to rationalize the decisions of the Court on the religion clauses and to delineate the principles applicable. He concluded that what the Establishment Clause foreclosed "are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious

In *Wallace v. Jaffree*,[166] the Court held invalid an Alabama statute authorizing a 1-minute period of silence in all public schools "for meditation or prayer." Because the only evidence in the record indicated that the words "or prayer" had been added to the existing statute by amendment for the sole purpose of returning voluntary prayer to the public schools, the Court found that the first prong of the *Lemon* test had been violated, *i.e.*, that the statute was invalid as being entirely motivated by a purpose of advancing religion. The Court characterized the legislative intent to return prayer to the public schools as "quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday,"[167] and both Justices Powell and O'Connor in concurring opinions suggested that other state statutes authorizing moments of silence might pass constitutional muster.[168]

The school prayer decisions served as precedent for the Court's holding in *Lee v. Weisman*[169] that a school-sponsored invocation at a high school commencement violated the Establishment Clause. The Court rebuffed a request to reexamine the *Lemon* test, finding "[t]he government involvement with religious activity in this case [to be] pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school." State officials not only determined that an invocation and benediction should be given, but also selected the religious participant and provided him with guidelines for the content of nonsectarian prayers. The Court, in an opinion by Justice Kennedy, viewed this state participation as coercive

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means to serve governmental ends, where secular means would suffice." Id. at 230, 295. Justice Stewart again dissented alone, feeling that the claims presented were essentially free exercise contentions which were not supported by proof of coercion or of punitive official action for nonparticipation.

While numerous efforts were made over the years to overturn these cases, through constitutional amendment and through limitations on the Court's jurisdiction, the Supreme Court itself has had no occasion to review the area again. *But see* Stone v. Graham, 449 U.S. 39 (1980) (summarily reversing state court and invalidating statute requiring the posting of the Ten Commandments, purchased with private contributions, on the wall of each public classroom, on the grounds the Ten Commandments are "undeniably a sacred text" and the "pre-eminent purpose" of the posting requirement was "plainly religious in nature").

[166] 472 U.S. 38 (1985).

[167] 472 U.S. at 59.

[168] Justice O'Connor's concurring opinion is notable for its effort to synthesize and refine the Court's Establishment and Free Exercise tests (*see also* the Justice's concurring opinion in Lynch v. Donnelly), and Justice Rehnquist's dissent for its effort to redirect Establishment Clause analysis by abandoning the tripartite test, discarding any requirement that government be neutral between religion and "irreligion," and confining the scope to a prohibition on establishing a national church or otherwise favoring one religious group over another.

[169] 505 U.S. 577 (1992).

in the elementary and secondary school setting.[170] The state "in effect required participation in a religious exercise," since the option of not attending "one of life's most significant occasions" was no real choice. "At a minimum," the Court concluded, the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise."

In *Santa Fe Independent School District v. Doe* [171] the Court held a school district's policy permitting high school students to vote on whether to have an "invocation and/or prayer" delivered prior to home football games by a student elected for that purpose to violate the Establishment Clause. It found the policy to violate each of the tests it has formulated for Establishment Clause cases. The preference given for an "invocation" in the text of the school district's policy, the long history of pre-game prayer led by a student "chaplain" in the school district, and the widespread perception that "the policy is about prayer," the Court said, made clear that its purpose was not secular but was to preserve a popular state-sponsored religious practice in violation of the first prong of the *Lemon* test. Moreover, it said, the policy violated the coercion test by forcing unwilling students into participating in a religious exercise. Some students—the cheerleaders, the band, football players—had to attend, it noted, and others were compelled to do so by peer pressure. "The constitutional command will not permit the District 'to exact religious conformity from a student as the price' of joining her classmates at a varsity football game," the Court held.[172] Finally, it said, the speech sanctioned by the policy was not private speech but government-sponsored speech that would be perceived as a government endorsement of religion. The long history of pre-game prayer, the bias toward religion in the policy itself, the fact that the message would be "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school prop-

[170] The Court distinguished *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), holding that the opening of a state legislative session with a prayer by a state-paid chaplain does not offend the Establishment Clause. The *Marsh* Court had distinguished *Abington* on the basis that state legislators, as adults, are "presumably not readily susceptible to 'religious indoctrination' or 'peer pressure'" and the *Lee* Court reiterated this distinction. 505 U.S. at 596–97. This distinction was again relied on by a plurality of Justices in *Town of Greece v. Galloway*, *see* 572 U.S. ___, No. 12–696, slip op. at 18–24 (2014), in a decision upholding the use of legislative prayer at a town board meeting. Justice Kennedy, on behalf of himself and Chief Justice Roberts and Justice Alito, distinguished the situation in *Lee*, in that with legislative prayer, at least in the context of *Town of Greece*, those claiming offense at the prayer were "mature adults" who are not "susceptible to religious indoctrination or peer pressure" and were free to leave a town meeting during the prayer without any adverse implications. *Id.* at 22–23 (quoting *Marsh*, 463 U.S. at 792).

[171] 530 U.S. 290 (2000).

[172] 530 U.S. at 312.

erty" [173] and over the school's public address system, the Court asserted, all meant that the speech was not genuine private speech but would be perceived as "stamped with [the] school's seal of approval." [174] The Court concluded that "[t]he policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." [175]

Governmental Encouragement of Religion in Public Schools: Curriculum Restriction.—In *Epperson v. Arkansas*,[176] the Court struck down a state statute that made it unlawful for any teacher in any state-supported educational institution "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals," or "to adopt or use in any such institution a textbook that teaches" this theory. Agreeing that control of the curriculum of the public schools was largely in the control of local officials, the Court nonetheless held that the motivation of the statute was a fundamentalist belief in the literal reading of the Book of Genesis and that this motivation and result required the voiding of the law. "The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First . . . Amendment to the Constitution." [177]

Similarly invalidated as having the improper purpose of advancing religion was a Louisiana statute mandating balanced treatment of "creation-science" and "evolution-science" in the public schools. "The preeminent purpose of the Louisiana legislature," the Court found in *Edwards v. Aguillard*, "was clearly to advance the religious viewpoint that a supernatural being created humankind." [178] The Court viewed as a "sham" the stated purpose of protecting academic freedom, and concluded instead that the legislature's purpose was to narrow the science curriculum in order to discredit evolution "by counterbalancing its teaching at every turn with the teaching of creation science." [179]

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[173] 530 U.S. at 307.
[174] 530 U.S. at 308.
[175] 530 U.S. at 317.
[176] 393 U.S. 97 (1968).
[177] 393 U.S. at 109.
[178] 482 U.S. 578, 591 (1987).
[179] 482 U.S. at 589. The Court's conclusion was premised on its finding that "the term 'creation science,' as used by the legislature . . . embodies the religious belief that a supernatural creator was responsible for the creation of humankind." Id. at 592.

Access of Religious Groups to Public Property.—Although government may not promote religion through its educational facilities, it may not bar student religious groups from meeting on public school property if it makes its facilities available to nonreligious student groups. In *Widmar v. Vincent*,[180] the Court held that allowing student religious groups equal access to a public college's facilities would further a secular purpose, would not constitute an impermissible benefit to religion, and would pose little hazard of entanglement. Subsequently, the Court held that these principles apply to public secondary schools as well as to institutions of higher learning. In 1990, in *Westside Community Board of Education v. Mergens*,[181] the Court upheld application of the Equal Access Act [182] to prevent a secondary school from denying access to school premises to a student religious club while granting access to such other "noncurriculum" related student groups as a scuba diving club, a chess club, and a service club.[183] Justice O'Connor stated in a plurality opinion that "there is a crucial difference between *government* speech endorsing religion and *private* speech endorsing religion. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." [184]

Similarly, public schools may not rely on the Establishment Clause as grounds to discriminate against religious groups in after-hours use of school property otherwise available for non-religious social, civic, and recreational purposes. In *Lamb's Chapel v. Center Moriches School District*,[185] the Court held that a school district could not,

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[180] 454 U.S. 263, 270–75 (1981).

[181] 496 U.S. 226 (1990). The Court had noted in *Widmar* that university students "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion," 454 U.S. at 274 n.14. The *Mergens* plurality ignored this distinction, suggesting that secondary school students are also able to recognize that a school policy allowing student religious groups to meet in school facilities is one of neutrality toward religion. 496 U.S. at 252.

[182] Pub. L. 98–377, title VIII, 98 Stat. 1302 (1984); 20 U.S.C. §§ 4071–74. The Act requires secondary schools that receive federal financial assistance to allow student religious groups to meet in school facilities during noncurricular time to the same extent as other student groups and had been enacted by Congress in 1984 to apply the *Widmar* principles to the secondary school setting.

[183] There was no opinion of the Court on Establishment Clause issues, a plurality of four led by Justice O'Connor applying the three-part *Lemon* test, and concurring Justices Kennedy and Scalia proposing a less stringent test under which "neutral" accommodations of religion would be permissible as long as they do not in effect establish a state religion, and as long as there is no coercion of students to participate in a religious activity.

[184] 496 U.S. at 242.

[185] 508 U.S. 384 (1993).

consistent with the free speech clause, refuse to allow a religious group to use school facilities to show a film series on family life when the facilities were otherwise available for community use. "It discriminates on the basis of viewpoint," the Court ruled, "to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious viewpoint." In response to the school district's claim that the Establishment Clause required it to deny use of its facilities to a religious group, the Court said that there was "no realistic danger" in this instance that "the community would think that the District was endorsing religion or any particular creed" and that such permission would satisfy the requirements of the *Lemon* test.[186] Similarly, in *Good News Club v. Milford Central School*,[187] the Court held the free speech clause to be violated by a school policy that barred a religious children's club from meeting on school premises after school. Given that other groups teaching morals and character development to young children were allowed to use the school's facilities, the exclusion, the Court said, "constitutes unconstitutional viewpoint discrimination." Moreover, it said, the school had "no valid Establishment Clause interest" because permitting the religious club to meet would not show any favoritism toward religion but would simply "ensure neutrality."

Finally, the Court has made clear that public colleges may not exclude student religious organizations from benefits otherwise provided to a full spectrum of student "news, information, opinion, entertainment, or academic communications media groups." In *Rosenberger v. Board of Visitors of the University of Virginia*,[188] the Court struck down a university policy that afforded a school subsidy to all student publications except religious ones. Once again, the Court held the denial of the subsidy to constitute viewpoint discrimination in violation of the free speech clause of the First Amendment. In response to the University's argument that the Establishment Clause required it not to subsidize an enterprise that promotes religion, the Court emphasized that the forum created by the University's subsidy policy had neither the purpose nor the effect of

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[186] 508 U.S. at 395. Concurring opinions by Justice Scalia, joined by Justice Thomas, and by Justice Kennedy, criticized the Court's reference to *Lemon*. Justice Scalia lamented that "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." Id. at 398. Justice White pointedly noted, however, that "*Lemon* . . . has not been overruled." Id at 395 n.7.

[187] 533 U.S. 98 (2001).

[188] 515 U.S. 819 (1995).

advancing religion and, because it was open to a variety of viewpoints, was neutral toward religion.

These cases make clear that the Establishment Clause does not necessarily trump the First Amendment's protection of freedom of speech. In regulating private speech in a public forum, government may not justify discrimination against religious viewpoints as necessary to avoid creating an "establishment" of religion.

Tax Exemptions of Religious Property.—Every state and the District of Columbia provide for tax exemptions for religious institutions, and the history of such exemptions goes back to the time of our establishment as a polity. The only expression by a Supreme Court Justice prior to 1970 was by Justice Brennan, who deemed tax exemptions constitutional because the benefit conferred was incidental to the religious character of the institutions concerned.[189] Then, in 1970, a nearly unanimous Court sustained a state exemption from real or personal property taxation of "property used exclusively for religious, educational or charitable purposes" owned by a corporation or association which was conducted exclusively for one or more of these purposes and did not operate for profit.[190] The first prong of a two-prong argument saw the Court adopting Justice Brennan's rationale. Using the secular purpose and effect test, Chief Justice Burger noted that the purpose of the exemption was not to single out churches for special favor; instead, the exemption applied to a broad category of associations having many common features and all dedicated to social betterment. Thus, churches as well as museums, hospitals, libraries, charitable organizations, professional associations, and the like, all non-profit, and all having a beneficial and stabilizing influence in community life, were to be encouraged by being treated specially in the tax laws. The primary effect of the exemptions was not to aid religion; the primary effect was secular and any assistance to religion was merely incidental.[191]

For the second prong, the Court created a new test, the entanglement test,[192] by which to judge the program. There was some entanglement whether there were exemptions or not, Chief Justice Burger continued, but with exemptions there was minimal involvement. But termination of exemptions would deeply involve government in the internal affairs of religious bodies, because evaluation

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[189] "If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups." Abington School Dist. v. Schempp, 374 U.S. 203, 301 (1963) (concurring opinion).

[190] Walz v. Tax Comm'n, 397 U.S. 664 (1970). Justice Douglas dissented.

[191] 397 U.S. at 672–74.

[192] *See* discussion under "Court Tests Applied to Legislation Affecting Religion," *supra*.

of religious properties for tax purposes would be required and there would be tax liens and foreclosures and litigation concerning such matters.[193]

Although the general issue is now settled, it is to be expected that variations of the exemption upheld in *Walz* will present the Court with an opportunity to elaborate the field still further.[194] For example, the Court determined that a sales tax exemption applicable only to religious publications constituted a violation of the Establishment Clause,[195] and, on the other hand, that application of a general sales and use tax provision to religious publications violates neither the Establishment Clause nor the Free Exercise Clause.[196]

Exemption of Religious Organizations from Generally Applicable Laws.—The Civil Rights Act's exemption of religious organizations from the prohibition against religious discrimination in employment [197] does not violate the Establishment Clause when applied to a religious organization's secular, nonprofit activities. In *Corporation of the Presiding Bishop v. Amos*,[198] the Court held that a church-run gymnasium operated as a nonprofit facility open to the public could require that its employees be church members. Declaring that "there is ample room for accommodation of religion under the Establishment Clause," [199] the Court identified a legitimate purpose in freeing a religious organization from the burden of predicting which of its activities a court will consider to be secular and which religious. The rule applying across-the-board to nonprofit activities and thereby "avoid[ing] . . . intrusive inquiry into religious belief" also serves to lessen entanglement of church and state.[200]

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[193] 397 U.S. at 674–76.

[194] For example, the Court subsequently accepted for review a case concerning property tax exemption for church property used as a commercial parking lot, but state law was changed, denying exemption for purely commercial property and requiring a pro rata exemption for mixed use, and the Court remanded so that the change in the law could be considered. Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972).

[195] Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[196] Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378 (1990). Similarly, there is no constitutional impediment to straightforward application of 26 U.S.C. § 170 to disallow a charitable contribution for payments to a church found to represent a reciprocal exchange rather than a contribution or gift. Hernandez v. Commissioner, 490 U.S. 680 (1989).

[197] Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2, makes it unlawful for any employer to discriminate in employment practices on the basis of an employee's religion. Section 702, 42 U.S.C. § 2000e–1, exempts from the prohibition "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities."

[198] 483 U.S. 327 (1987).

[199] 483 U.S. at 338.

[200] 483 U.S. at 339.

The exemption itself does not have a principal effect of advancing religion, the Court concluded, but merely allows churches to advance religion.[201]

Sunday Closing Laws.—The history of Sunday Closing Laws goes back into United States colonial history and far back into English history.[202] Commonly, the laws require the observance of the Christian Sabbath as a day of rest, although in recent years they have tended to become honeycombed with exceptions. The Supreme Court rejected an Establishment Clause challenge to Sunday Closing Laws in *McGowan v. Maryland*.[203] The Court acknowledged that historically the laws had a religious motivation and were designed to effectuate concepts of Christian theology. However, "[i]n light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion. . . ."[204] "[T]he fact that this [prescribed day of rest] is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State."[205] The choice of Sunday as the day of rest, although originally religious, now reflected simple legislative inertia or recognition that Sunday was a traditional day for the choice.[206] Valid secular reasons existed for not simply requiring one day of rest and leaving to each individual to choose the day,

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[201] "For a law to have forbidden 'effects' . . . it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 483 U.S. at 337. Justice O'Connor's concurring opinion suggests that practically any benefit to religion can be "recharacterized as simply 'allowing' a religion to better advance itself," and that a "necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." Id. at 347, 348.

[202] The history is recited at length in the opinion of the Court in McGowan v. Maryland, 366 U.S. 420, 431–40 (1961), and in Justice Frankfurter's concurrence. Id. at 459, 470–551 and appendix.

[203] 366 U.S. 420 (1961). Decision on the establishment question in this case also controlled the similar decision on that question in Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961), Braunfeld v. Brown, 366 U.S. 599 (1961), and Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961). On free exercise in Sunday Closing cases, *see* "Free Exercise Exemption From General Governmental Requirements," *infra*.

[204] McGowan v. Maryland, 366 U.S. 420, 444 (1961).

[205] 366 U.S. at 445.

[206] 366 U.S. at 449–52.

reasons of ease of enforcement and of assuring a common day in the community for rest and leisure.[207] Later, a state statute mandating that employers honor the Sabbath day of the employee's choice was held invalid as having the primary effect of promoting religion by weighing the employee's Sabbath choice over all other interests.[208]

Conscientious Objection.—Historically, Congress has provided for alternative service for men who had religious scruples against participating in either combat activities or in all forms of military activities; the fact that Congress chose to draw the line of exemption on the basis of religious belief confronted the Court with a difficult constitutional question, which, however, the Court chose to avoid by a somewhat disingenuous interpretation of the statute.[209] In *Gillette v. United States*,[210] a further constitutional problem arose in which the Court did squarely confront and validate the congressional choice. Congress had restricted conscientious objection status to those who objected to "war in any form" and the Court conceded that there were religious or conscientious objectors who were not opposed to all wars but only to particular wars based upon evaluation of a number of factors by which the "justness" of any particular war could be judged; "properly construed," the Court said, the statute did draw a line relieving from military service some religious objectors while not relieving others.[211] Purporting to apply the secular purpose and effect test, the Court looked almost exclusively to purpose and hardly at all to effect. Although it is not clear, the Court seemed to require that a classification must be religiously based "on its face" [212] or lack any "neutral, secular basis for the lines gov-

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[207] 366 U.S. at 449–52. Justice Frankfurter, with whom Justice Harlan concurred, arrived at the same conclusions by a route that did not require approval of Everson v. Board of Education, from which he had dissented.

[208] Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

[209] In United States v. Seeger, 380 U.S. 163 (1965), a unanimous Court construed the language of the exemption limiting the status to those who by "religious training and belief" (that is, those who believed in a "Supreme Being"), to mean that a person must have some belief which occupies in his life the place or role which the traditional concept of God occupies in the orthodox believer. After the "Supreme Being" clause was deleted, a plurality in Welsh v. United States, 398 U.S. 333 (1970), construed the religion requirement as inclusive of moral, ethical, or religious grounds. Justice Harlan concurred on constitutional grounds, believing that the statute was clear that Congress had intended to restrict conscientious objection status to those persons who could demonstrate a traditional religious foundation for their beliefs and that this was impermissible under the Establishment Clause. Id. at 344. The dissent by Justices White and Stewart and Chief Justice Burger rejected both the constitutional and the statutory basis. 398 U.S. at 367.

[210] 401 U.S. 437 (1971).

[211] 401 U.S. at 449.

[212] 401 U.S. at 450.

ernment has drawn"[213] in order that it be held to violate the Establishment Clause. The classification here was not religiously based "on its face," and served "a number of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religions."[214] These purposes, related to the difficulty in separating sincere conscientious objectors to particular wars from others with fraudulent claims, included the maintenance of a fair and efficient selective service system and protection of the integrity of democratic decision-making.[215]

Regulation of Religious Solicitation.—Although the solicitation cases have generally been decided under the free exercise or free speech clauses,[216] in one instance the Court, intertwining establishment and free exercise principles, voided a provision in a state charitable solicitations law that required only those religious organizations that received less than half their total contributions from members or affiliated organizations to comply with the registration and reporting sections of the law.[217] Applying strict scrutiny equal protection principles, the Court held that, by distinguishing between older, well-established churches that had strong membership financial support and newer bodies lacking a contributing constituency or that may favor public solicitation over general reliance on financial support from the members, the statute granted denominational preference forbidden by the Establishment Clause.[218]

Religion in Governmental Observances.—The practice of opening legislative sessions with prayers by paid chaplains was upheld in *Marsh v. Chambers*,[219] a case involving prayers in the Nebraska legislature. The Court relied almost entirely on historical practice. Congress had paid a chaplain and opened sessions with prayers for almost 200 years; the fact that Congress had continued the practice after considering constitutional objections in the Court's view strengthened rather than weakened the historical argument. Similarly, the practice was well rooted in Nebraska and in most other

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[213] 401 U.S. at 452.

[214] 401 U.S. at 452.

[215] 401 U.S. at 452–60.

[216] *See* discussion under "Door-to-Door Solicitation and Charitable Solicitation," *infra*.

[217] Larson v. Valente, 456 U.S. 228 (1982). Two Justices dissented on the merits, id. at 258 (Justices White and Rehnquist), while two other Justices dissented on a standing issue. Id. at 264 (Chief Justice Burger and Justice O'Connor).

[218] 456 U.S. at 246–51. *Compare* Heffron v. ISKCON, 452 U.S. 640, 652–53 (1981), *and* id. at 659 n.3 (Justice Brennan, concurring in part and dissenting in part) (dealing with a facially neutral solicitation rule distinguishing between religious groups that have a religious tenet requiring peripatetic solicitation and those who do not).

[219] 463 U.S. 783 (1983). *Marsh* was a 6–3 decision, with Chief Justice Burger's opinion for the Court being joined by Justices White, Blackmun, Powell, Rehnquist, and O'Connor, and with Justices Brennan, Marshall, and Stevens dissenting.

states. Most importantly, the First Amendment had been drafted in the First Congress with an awareness of the chaplaincy practice, and this practice was not prohibited or discontinued. The Court did not address the lower court's findings,[220] amplified in Justice Brennan's dissent, that each aspect of the *Lemon v. Kurtzman* tripartite test had been violated. Instead of constituting an application of the tests, therefore, *Marsh* can be read as representing an exception to their application.[221]

The Court likewise upheld the use of legislative prayers in the context of a challenge to the use of sectarian prayers to open a town meeting. In *Town of Greece v. Galloway*,[222] the Court considered whether such legislative prayers needed to be "ecumenical" and "inclusive." The challenge arose when the upstate New York Town of Greece recruited local clergy, who were almost exclusively Christian, to deliver prayers at monthly town board meetings. Basing its holding largely on the nation's long history of using prayer to open legislative sessions as a means to lend gravity to the occasion and to reflect long-held values, the Court concluded that the prayer practice in the Town of Greece fit within this tradition.[223] The Court also voiced pragmatic concerns with government scrutiny respecting the content of legislative prayers.[224] As a result, after *Town of Greece*, absent a "pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose," First Amendment challenges based solely on the content of a legislative prayer appear unlikely to be successful.[225] Moreover, absent situations in which a legislative body discriminates against minority faiths, governmental entities that allow for sectarian legislative prayer do not appear to violate the Constitution.[226]

Religious Displays on Government Property.—A different form of governmentally sanctioned religious observance—inclusion of religious symbols in governmentally sponsored holiday displays—was

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[220] Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982).

[221] School prayer cases were distinguished on the basis that legislators, as adults, are presumably less susceptible than are schoolchildren to religious indoctrination and peer pressure, 463 U.S. at 792, but there was no discussion of the tests themselves.

[222] 572 U.S. ___, No. 12–696, slip op. (2014).

[223] *Id.* at 9–18. The Court did suggest that a pattern of prayers that over time "denigrate, proselytize, or betray an impermissible government purpose" could establish a constitutional violation. *Id.* at 17.

[224] *Id.* at 12 ("To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice . . . .").

[225] *Id.* at 17.

[226] *Id.*

twice before the Court, with varying results. In 1984, in *Lynch v. Donnelly*,[227] the Court found that the Establishment Clause was not violated by inclusion of a Nativity scene (creche) in a city's Christmas display; in 1989, in *Allegheny County v. Greater Pittsburgh ACLU*,[228] inclusion of a creche in a holiday display was found to constitute a violation. Also at issue in *Allegheny County* was inclusion of a menorah in a holiday display; here the Court found no violation. The setting of each display was crucial to the different results in these cases, the determinant being whether the Court majority believed that the overall effect of the display was to emphasize the religious nature of the symbols, or whether instead the emphasis was primarily secular. Perhaps equally important for future cases, however, was the fact that the four dissenters in *Allegheny County* would have upheld both the creche and menorah displays under a more relaxed, deferential standard.

Chief Justice Burger's opinion for the Court in *Lynch* began by expanding on the religious heritage theme exemplified by *Marsh*; other evidence that "'[w]e are a religious people whose institutions presuppose a Supreme Being'"[229] was supplied by reference to the national motto "In God We Trust," the affirmation "one nation under God" in the pledge of allegiance, and the recognition of both Thanksgiving and Christmas as national holidays. Against that background, the Court then determined that the city's inclusion of the creche in its Christmas display had a legitimate secular purpose in recognizing "the historical origins of this traditional event long recognized as a National Holiday,"[230] and that its primary effect was not to advance religion. The benefit to religion was called "indirect, remote, and incidental," and in any event no greater than the benefit resulting from other actions that had been found to be permissible, such as the provision of transportation and textbooks to parochial school students, various assistance to church-supported colleges, Sunday closing laws, and legislative prayers.[231] The Court also re-

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[227] 465 U.S. 668 (1984). *Lynch* was a 5–4 decision, with Justice Blackmun, who voted with the majority in *Marsh*, joining the *Marsh* dissenters in this case. Again, Chief Justice Burger wrote the opinion of the Court, joined by the other majority Justices, and again Justice Brennan wrote a dissent, joined by the other dissenters. A concurring opinion was added by Justice O'Connor, and a dissenting opinion was added by Justice Blackmun.

[228] 492 U.S. 573 (1989).

[229] 465 U.S. at 675, quoting Zorach v. Clausen, 343 U.S. 306, 313 (1952).

[230] 465 U.S. at 680.

[231] 465 U.S. at 681–82. Although the extent of benefit to religion was an important factor in earlier cases, it was usually balanced against the secular effect of the same practice rather than the religious effects of other practices.

versed the lower court's finding of entanglement based only on "political divisiveness." [232]

Allegheny County was also decided by a 5–4 vote, Justice Blackmun writing the opinion of the Court on the creche issue, and there being no opinion of the Court on the menorah issue.[233] To the majority, the setting of the creche was distinguishable from that in *Lynch*. The creche stood alone on the center staircase of the county courthouse, bore a sign identifying it as the donation of a Roman Catholic group, and also had an angel holding a banner proclaiming "Gloria in Exclesis Deo." Nothing in the display "detract[ed] from the creche's religious message," and the overall effect was to endorse that religious message.[234] The menorah, on the other hand, was placed outside a government building alongside a Christmas tree and a sign saluting liberty, and bore no religious messages. To Justice Blackmun, this grouping merely recognized "that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status"; [235] to concurring Justice O'Connor, the display's "message of pluralism" did not endorse religion over nonreligion even though Chanukah is primarily a religious holiday and even though the menorah is a religious symbol.[236] The dissenters, critical of the endorsement test proposed by Justice O'Connor and of the three-part *Lemon* test, would instead distill two principles from the Establishment Clause: "government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a state religion or religious faith, or tends to do so.'" [237]

In *Capitol Square Review Bd. v. Pinette*,[238] the Court distinguished privately sponsored from governmentally sponsored reli-

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[232] 465 U.S. at 683–84.

[233] Justice O'Connor, who had concurred in *Lynch*, was the pivotal vote, joining the *Lynch* dissenters to form the majority in *Allegheny County*. Justices Scalia and Kennedy, not on the Court in 1984, replaced Chief Justice Burger and Justice Powell in voting to uphold the creche display; Justice Kennedy authored the dissenting opinion, joined by the other three.

[234] 492 U.S. at 598, 600.

[235] 492 U.S. at 616.

[236] 492 U.S. at 635.

[237] 492 U.S. at 659.

[238] 515 U.S. 753 (1995). The Court was divided 7–2 on the merits of *Pinette*, a vote that obscured continuing disagreement over analytical approach. The portions of Justice Scalia's opinion that formed the opinion of the Court were joined by Chief Justice Rehnquist and by Justices O'Connor, Kennedy, Souter, Thomas, and Breyer. A separate part of Justice Scalia's opinion, joined only by the Chief Justice and by Justices Kennedy and Thomas, disputed the assertions of Justices O'Connor, Souter, and Breyer that the "endorsement" test should be applied. Dissenting Justice Stevens thought that allowing the display on the Capitol grounds did carry "a clear

gious displays on public property. There the Court ruled that Ohio violated free speech rights by refusing to allow the Ku Klux Klan to display an unattended cross in a publicly owned plaza outside the Ohio Statehouse. Because the plaza was a public forum in which the state had allowed a broad range of speakers and a variety of unattended displays, the state could regulate the expressive content of such speeches and displays only if the restriction was necessary, and narrowly drawn, to serve a compelling state interest. The Court recognized that compliance with the Establishment Clause can be a sufficiently compelling reason to justify content-based restrictions on speech, but saw no need to apply this principle when permission to display a religious symbol is granted through the same procedures, and on the same terms, required of other private groups seeking to convey non-religious messages.

Displays of the Ten Commandments on government property occasioned two decisions in 2005. As in *Allegheny County*, a closely divided Court determined that one display violated the Establishment Clause and one did not. And again, context and imputed purpose made the difference. The Court struck down display of the Ten Commandments in courthouses in two Kentucky counties,[239] but held that a display on the grounds of the Texas State Capitol was permissible.[240] The displays in the Kentucky courthouses originally "stood alone, not part of an arguably secular display."[241] Moreover, the history of the displays revealed "a predominantly religious purpose" that had not been eliminated by steps taken to give the appearance of secular objectives.[242]

There was no opinion of the Court in *Van Orden*. Justice Breyer, the swing vote in the two cases,[243] distinguished the Texas Capitol grounds display from the Kentucky courthouse displays. In some contexts, the Ten Commandments can convey a moral and histori-

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image of endorsement" (id. at 811), and Justice Ginsburg's brief opinion seemingly agreed with that conclusion.

[239] McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).

[240] Van Orden v. Perry, 545 U.S. 677 (2005).

[241] 545 U.S. at 868. The Court in its previous Ten Commandments case, Stone v. Graham, 449 U.S. 39, 41 (1980) (invalidating display in public school classrooms) had concluded that the Ten Commandments are "undeniably a sacred text," and the 2005 Court accepted that characterization. *McCreary*, 545 U.S. at 859.

[242] 545 U.S. at 881. An "indisputable" religious purpose was evident in the resolutions authorizing a second display, and the Court characterized statements of purpose accompanying authorization of the third displays as "only . . . a litigating position." 545 U.S. at 870, 871.

[243] Only Justice Breyer voted to invalidate the courthouse displays and uphold the capitol grounds display. The other eight Justices were split evenly, four (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) voting to uphold both displays, and four (Justices Stevens, O'Connor, Souter, and Ginsburg) voting to invalidate both.

cal message as well as a religious one, the Justice explained. Although it was "a borderline case" turning on "a practical matter of *degree*," the capitol display served "a primarily nonreligious purpose."[244] The monument displaying the Ten Commandments was one of 17 monuments and 21 historical markers on the Capitol grounds; it was paid for by a private, civic, and primarily secular organization; and it had been in place, unchallenged, for 40 years. Under the circumstances, Justice Breyer thought that few would be likely to understand the monument to represent an attempt by government to favor religion.[245]

The Court has also considered an Establishment Clause challenge to the display of a Latin Cross—erected to honor American soldiers who died in World War I—on federal land located in a remote section of the Mojave Desert.[246] The legal proceedings leading up to the decision, however, were complicated by congressional attempts to influence the final disposition of the case, including the attempted transfer of the federal land in question to private hands.[247] As a result, a splintered Court failed to reach the merits of the underlying challenge, and instead remanded the case for further consideration.[248]

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[244] 545 U.S. at 700, 704, 703.

[245] 545 U.S. at 702. In Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1140 (2009), Justice Scalia, in a concurring opinion joined by Justice Thomas, wrote that, "[e]ven accepting the narrowest reading of the narrowest opinion necessary to the judgment in *Van Orden*," he would find that a Ten Commandments monument displayed in a Utah public park for 38 years amidst 15 permanent displays would not violate the Establishment Clause, even though the monument constituted government speech. The majority opinion did not consider the question, but decided the case on free-speech grounds. *See* The Public Forum, *infra*.

[246] Salazar v. Buono, 559 U.S. ___, No. 08–472, slip op. (2010).

[247] During the course of the litigation, Congress variously passed an appropriations bill forbidding the use of governmental funds to remove the cross, designating the cross and its adjoining land as a "national memorial," prohibitng the spending of governmental funds to remove the cross, and directing the Secretary of the Interior to transfer the land to the Veterans of Foreign Wars (VFW) as long as the property was maintained as a memorial commemorating World War I veterans. A federal court of appeals ordered the removal of the cross, holding that a reasonable observer would perceive a cross on federal land as governmental endorsement of religion, Buono v. Norton, 371 F.3d 543 (9th Cir. 2004), and the government did not seek review of this decision. Subsequently, the court of appeals affirmed a lower court injunction against the transfer of land to the VFW, holding that the underlying statute was an invalid attempt to keep the cross in its existing location. Buono v. Kempthorne, 502 F.3d 1069 (9th Cir. 2007).

[248] Justice Kennedy, joined in full by Chief Justice Roberts and in part by Justice Alito, found that the plaintiff, based on the existing injunction, had standing to challenge the land transfer. The case, however, was remanded to the district court to consider the legitimate congressional interest in reconciling Establishment Clause concerns with respect for the commemoration of military veterans, id. at 10–13, and to evaluate whether the land transfer would lead a "reasonable observer" to perceive government endorsement of religion. Id. at 16–17. Justice Alito would have

Miscellaneous.—In *Larkin v. Grendel's Den*,[249] the Court held that the Establishment Clause is violated by a delegation of governmental decisionmaking to churches. At issue was a state statute permitting any church or school to block issuance of a liquor license to any establishment located within 500 feet of the church or school. Although the statute had a permissible secular purpose of protecting churches and schools from the disruptions often associated with liquor establishments, the Court indicated that these purposes could be accomplished by other means, *e.g.*, an outright ban on liquor outlets within a prescribed distance, or the vesting of discretionary authority in a governmental decisionmaker required to consider the views of affected parties. However, the conferral of a veto authority on churches had a primary effect of advancing religion both because the delegation was standardless (thereby permitting a church to exercise the power to promote parochial interests), and because "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some."[250] Moreover, the Court determined, because the veto "enmeshes churches in the exercise of substantial governmental powers," it represented an entanglement offensive to "the core rationale underlying the Establishment Clause [—] preventing 'a fusion of governmental and religious functions.'"[251]

Using somewhat similar reasoning, the Court in *Board of Education of Kiryas Joel Village v. Grumet*,[252] invalidated a New York law creating a special school district for an incorporated village composed exclusively of members of one small religious sect. The statute failed "the test of neutrality," the Court concluded, since it delegated power "to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism." It was the "anomalously case-specific nature of the legislature's exercise of authority" that left the Court "without any direct

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upheld the land transfer, suggesting that a reasonable observer deemed to be aware of the history and all other pertinent facts relating to a challenged display would not find the transfer to be an endorsement of religion. Id. at 6 (Alito, J., concurring in part and in judgement). Justice Scalia, joined by Justice Thomas, held that the plaintiff had no standing to seek the expansion of the existing injunction to the display of the cross on private lands. Id. at 3–6 (Scalia, J., concurring in judgement).

[249] 459 U.S. 116 (1982).

[250] 459 U.S. at 125–26. *But cf.* Marsh v. Chambers, 463 U.S. 783 (1983), involving no explicit consideration of the possible symbolic implication of opening legislative sessions with prayers by paid chaplains.

[251] 459 U.S. at 126, quoting *Abington*, 374 U.S. 203, 222 (1963).

[252] 512 U.S. 687 (1994). Only four Justices (Souter, Blackmun, Stevens, and Ginsburg) thought that the *Grendel's Den* principle applied; in their view the distinction that the delegation was to a village electorate rather than to a religious body "lack[ed] constitutional significance" under the peculiar circumstances of the case.

way to review such state action" for conformity with the neutrality principle. Because the village did not receive its governmental authority simply as one of many communities eligible under a general law, the Court explained, there was no way of knowing whether the legislature would grant similar benefits on an equal basis to other religious and nonreligious groups.

Free Exercise of Religion

"The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority."[253] It bars "governmental regulation of religious *beliefs* as such,"[254] prohibiting misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect."[255] Freedom of conscience is the basis of the Free Exercise Clause, and government may not penalize or discriminate against an individual or a group of individuals because of their religious views nor may it compel persons to affirm any particular beliefs.[256] Interpretation is complicated, however, by the fact that exercise of religion usually entails ritual or other practices that constitute "conduct" rather than pure "belief." When it comes to protecting conduct as free exercise, the Court has been inconsistent.[257] It has long been held that the Free Exercise Clause does not necessarily prevent the government from requiring the doing of some act or forbidding the doing of some act merely because religious beliefs underlie the conduct in question.[258] What has changed over the years is the Court's willingness to hold that some reli-

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[253] Abington School District v. Schempp, 374 U.S. 203, 222–23 (1963).

[254] Sherbert v. Verner, 374 U.S 398, 402 (1963) (emphasis in original).

[255] Braunfeld v. Brown, 366 U.S. 599, 607 (1961).

[256] Sherbert v. Verner, 374 U.S. 398, 402 (1963); Torcaso v. Watkins, 367 U.S. 488 (1961).

[257] Academics as well as the Justices grapple with the extent to which religious practices as well as beliefs are protected by the Free Exercise Clause. For contrasting academic views of the origins and purposes of the Free Exercise Clause, *compare* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990) (concluding that constitutionally compelled exemptions from generally applicable laws are consistent with the Clause's origins in religious pluralism) *with* Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1989–90) (arguing that such exemptions establish an invalid preference for religious beliefs over non-religious beliefs).

[258] *E.g.*, Reynolds v. United States, 98 U.S. 145 (1879); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Prince v. Massachusetts, 321 U.S. 158 (1944); Braunfeld v. Brown, 366 U.S. 599 (1961); United States v. Lee, 455 U.S. 252 (1982); Employment Division v. Smith, 494 U.S. 872 (1990).

giously motivated conduct is protected from generally applicable prohibitions.

The relationship between the Free Exercise and Establishment Clauses varies with the expansiveness of interpretation of the two clauses. In a general sense both clauses proscribe governmental involvement with and interference in religious matters, but there is possible tension between a requirement of governmental neutrality derived from the Establishment Clause and a Free-Exercise-derived requirement that government accommodate some religious practices.[259] So far, the Court has harmonized interpretation by denying that free-exercise-mandated accommodations create establishment violations, and also by upholding some legislative accommodations not mandated by free exercise requirements. "This Court has long recognized that government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[260] "There is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without [governmental] sponsorship and without interference."[261]

In holding that a state could not deny unemployment benefits to Sabbatarians who refused Saturday work, for example, the Court denied that it was "fostering an 'establishment' of the Seventh-Day Adventist religion, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[262] Legislation granting religious ex-

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[259] "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 668–69 (1970).

[260] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144–45 (1987).

[261] Walz v. Tax Comm'n, 397 U.S. at 669. *See also* Locke v. Davey, 540 U.S. 712, 718 (2004); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005).

[262] Sherbert v. Verner, 374 U.S. 398, 409 (1963). *Accord*, Thomas v. Review Bd., 450 U.S. 707, 719–20 (1981). Dissenting in *Thomas*, Justice Rehnquist argued that *Sherbert* and *Thomas* created unacceptable tensions between the Establishment and Free Exercise Clauses, and that requiring the states to accommodate persons like Sherbert and Thomas because of their religious beliefs ran the risk of "establishing" religion under the Court's existing tests. He argued further, however, that less expansive interpretations of both clauses would eliminate this artificial tension. Thus, Justice Rehnquist would have interpreted the Free Exercise Clause as not requiring government to grant exemptions from general requirements that may burden religious exercise but that do not prohibit religious practices outright, and would have interpreted the Establishment Clause as not preventing government from voluntarily granting religious exemptions. 450 U.S. at 720–27. By 1990 these views had apparently gained ascendancy, Justice Scalia's opinion for the Court in the "peyote"

emptions not held to have been required by the Free Exercise Clause has been upheld against Establishment Clause challenge,[263] although it is also possible for legislation to go too far in promoting free exercise.[264] Government need not, however, offer the same accommodations to secular entities that it extends to religious practitioners in order to facilitate their religious exercise; "[r]eligious accommodations . . . need not 'come packaged with benefits to secular entities.' "[265]

"Play in the joints" can work both ways, the Court ruled in upholding a state's exclusion of theology students from a college scholarship program.[266] Although the state could have included theology students in its scholarship program without offending the Establishment Clause, its choice "not to fund" religious training did not offend the Free Exercise Clause even though that choice singled out theology students for exclusion.[267] Refusal to fund religious training, the Court observed, was "far milder" than restrictions on religious practices that have been held to offend the Free Exercise Clause.[268]

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case suggesting that accommodation should be left to the political process, *i.e.*, that states could constitutionally provide exceptions in their drug laws for sacramental peyote use, even though such exceptions are not constitutionally required. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

[263] *See*, *e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (upholding property tax exemption for religious organizations); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding Civil Rights Act exemption allowing religious institutions to restrict hiring to members of religion); Gillette v. United States, 401 U.S. 437, 453–54 (1971) (interpreting conscientious objection exemption from military service); Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding a provision of the Religious Land Use and Institutionalized Persons Act of 2000 that prohibits governments from imposing a "substantial burden on the religious exercise" of an institutionalized person unless the burden furthers a "compelling governmental interest").

[264] *See*, *e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788–89 (1973) (tuition reimbursement grants to parents of parochial school children violate Establishment Clause in spite of New York State's argument that program was designed to promote free exercise by enabling low-income parents to send children to church schools); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (state sales tax exemption for religious publications violates the Establishment Clause) (plurality opinion); Board of Educ. of Kiryas Joel Village v. Grumet, 512 U.S. 687, 706–07 (1994) ("accommodation is not a principle without limits;" one limit is that "neutrality as among religions must be honored").

[265] Cutter v. Wilkinson, 544 U.S. 709, 724 (2005) (quoting Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987)).

[266] Locke v. Davey, 540 U.S. 712 (2004).

[267] 540 U.S. at 720–21. Excluding theology students but not students training for other professions was permissible, the Court explained, because "[t]raining someone to lead a congregation is an essentially religious endeavor," and the Constitution's special treatment of religion finds "no counterpart with respect to other callings or professions." Id. at 721.

[268] 540 U.S. at 720–21 (distinguishing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (law aimed at restricting ritual of a single religious

The Belief-Conduct Distinction.—Although the Court has consistently affirmed that the Free Exercise Clause protects religious beliefs, protection for religiously motivated conduct has waxed and waned over the years. The Free Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[269] In its first free exercise case, involving the power of government to prohibit polygamy, the Court invoked a hard distinction between the two, saying that although laws "cannot interfere with mere religious beliefs and opinions, they may with practices."[270] The rule thus propounded protected only belief, inasmuch as religiously motivated action was to be subjected to the police power of the state to the same extent as would similar action springing from other motives. The *Reynolds* no-protection rule was applied in a number of cases,[271] but later cases established that religiously grounded conduct is not always outside the protection of the Free Exercise Clause.[272] Instead, the Court began to balance the secular interest asserted by the government against the claim of religious liberty asserted by the person affected; only if the governmental interest was "compelling" and if no alternative forms of regulation would serve that interest was the claimant required to yield.[273] Thus, although free-

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group); McDaniel v. Paty, 435 U.S. 618 (1978) (law denying ministers the right to serve as delegates to a constitutional convention); and Sherbert v. Verner, 374 U.S. 398 (1963) (among the cases prohibiting denial of benefits to Sabbatarians)).

[269] Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

[270] Reynolds v. United States, 98 U.S. 145, 166 (1879). "Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" Davis v. Beason, 133 U.S. 333, 345 (1890). In another context, Justice Sutherland in United States v. Macintosh, 283 U.S. 605, 625 (1931), suggested a plenary governmental power to regulate action in denying that recognition of conscientious objection to military service was of a constitutional magnitude, saying that "unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."

[271] Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor); Cleveland v. United States, 329 U.S. 14 (1946) (polygamy). In Sherbert v. Verner, 374 U.S. 398, 403 (1963), Justice Brennan asserted that the "conduct or activities so regulated [in the cited cases] have invariably posed some substantial threat to public safety, peace or order."

[272] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); *cf.* Braunfeld v. Brown, 366 U.S. 599, 607 (1961): "[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."

[273] Sherbert v. Verner, 374 U.S. 398, 403, 406–09 (1963). In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court recognized compelling state interests in provision of public education, but found insufficient evidence that those interests (preparing children for citizenship and for self-reliance) would be furthered by requiring Amish children to attend public schools beyond the eighth grade. Instead, the evidence showed

dom to engage in religious practices was not absolute, it was entitled to considerable protection.

Later cases evidence a narrowing of application of the compelling interest test, and a corresponding constriction of the freedom to engage in religiously motivated conduct. First, the Court purported to apply strict scrutiny, but upheld the governmental action anyhow.[274] Next, the Court held that the test is inappropriate in the contexts of military and prison discipline.[275] Then, more importantly, the Court ruled in *Employment Division v. Smith* that "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[276] Therefore, the Court concluded, the Free Exercise Clause does not prohibit a state from applying generally applicable criminal penalties to the use of peyote in a religious ceremony, or from denying unemployment benefits to persons dismissed from their jobs because of religious ceremonial use of peyote. Accommodation of such religious practices must be found in "the political process," the Court noted; statutory religious-practice exceptions are permissible, but not "constitutionally required."[277] The result is tantamount to a return to the *Reynolds* belief-conduct distinction.[278]

The Mormon Cases.—The Court's first encounter with free exercise claims occurred in a series of cases in which the Federal Government and the territories moved against the Mormons because of their practice of polygamy. Actual prosecutions and convictions for bigamy presented little problem for the Court, as it could distinguish between beliefs and acts.[279] But the presence of large num-

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that the Amish system of vocational education prepared their children for life in their self-sufficient communities.

[274] United States v. Lee, 455 U.S. 252 (1982) (holding mandatory participation in the Social Security system by an Amish employer religiously opposed to such social welfare benefits to be "indispensable" to the fiscal vitality of the system); Bob Jones Univ. v. United States, 461 U.S. 754 (1983) (holding government's interest in eradicating racial discrimination in education to outweigh the religious interest of a private college whose racial discrimination was founded on religious beliefs); and Hernandez v. Commissioner, 490 U.S. 680 (1989) (holding that government has a compelling interest in maintaining a uniform tax system "free of 'myriad exceptions flowing from a wide variety of religious beliefs'")

[275] Goldman v. Weinberger, 475 U.S. 503 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

[276] 494 U.S. 872, 878 (1990).

[277] 494 U.S. at 890.

[278] Employment Division v. Smith is discussed under "Free Exercise Exemption From General Governmental Requirements," *infra*, as is the Religious Freedom Restoration Act, which was enacted in response to the case.

[279] Reynolds v. United States, 98 U.S. 145 (1879); *cf.* Cleveland v. United States, 329 U.S. 14 (1946) (no religious-belief defense to Mann Act prosecution for transporting a woman across state line for the "immoral purpose" of polygamy).

bers of Mormons in some of the territories made convictions for bigamy difficult to obtain, and in 1882 Congress enacted a statute that barred "bigamists," "polygamists," and "any person cohabiting with more than one woman" from voting or serving on juries. The Court sustained the law, even as applied to persons entering the state prior to enactment of the original law prohibiting bigamy and to persons as to whom the statute of limitations had run.[280] Subsequently, an act of a territorial legislature that required a prospective voter not only to swear that he was not a bigamist or polygamist but also that "I am not a member of any order, organization or association which teaches, advises, counsels or encourages its members, devotees or any other person to commit the crime of bigamy or polygamy . . . or which practices bigamy, polygamy or plural or celestial marriage as a doctrinal rite of such organization; that I do not and will not, publicly or privately, or in any manner whatever teach, advise, counsel or encourage any person to commit the crime of bigamy or polygamy . . . ," was upheld in an opinion that condemned plural marriage and its advocacy as equal evils.[281] And, finally, the Court sustained the revocation of the charter of the Mormon Church and confiscation of all church property not actually used for religious worship or for burial.[282]

The Jehovah's Witnesses Cases.—In contrast to the Mormons, the sect known as Jehovah's Witnesses, in many ways as unsettling to the conventional as the Mormons were,[283] provoked from the Court a lengthy series of decisions[284] expanding the rights of religious proselytizers and other advocates to use the streets and parks to broadcast their ideas, though the decisions may be based more squarely on the speech clause than on the Free Exercise Clause.

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[280] Murphy v. Ramsey, 114 U.S. 15 (1885).

[281] Davis v. Beason, 133 U.S. 333 (1890). "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. . . . To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases." Id. at 341–42.

[282] The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890). "[T]he property of the said corporation . . . [is to be used to promote] the practice of polygamy—a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. . . . The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." Id. at 48–49.

[283] For later cases dealing with other religious groups discomfiting to the mainstream, *see* Heffron v. ISKCON, 452 U.S. 640 (1981) (Hare Krishnas); Larson v. Valente, 456 U.S. 228 (1982) (Unification Church). Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (Santeria faith).

[284] Most of the cases are collected and categorized by Justice Frankfurter in Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (concurring opinion).

The leading case is *Cantwell v. Connecticut*.[285] Three Jehovah's Witnesses were convicted under a statute that forbade the unlicensed soliciting of funds for religious or charitable purposes, and also under a general charge of breach of the peace. The solicitation count was voided as an infringement on religion because the issuing officer was authorized to inquire whether the applicant's cause was "a religious one" and to decline to issue a license if he determined that it was not.[286] Such power amounted to a prior restraint upon the exercise of religion and was invalid, the Court held.[287] The breach of the peace count arose when the three accosted two Catholics in a strongly Catholic neighborhood and played them a phonograph record which grossly insulted the Christian religion in general and the Catholic Church in particular. The Court voided this count under the clear-and-present danger test, finding that the interest sought to be upheld by the state did not justify the suppression of religious views that simply annoyed listeners.[288]

A series of sometimes-conflicting decisions followed. At first, the Court sustained the application of a non-discriminatory license fee to vendors of religious books and pamphlets,[289] but eleven months later it vacated the decision and struck down such fees.[290] A city ordinance making it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the dwellers of a residence to the door to receive such literature was held to violate the First Amendment when applied to distributors of leaflets advertising a religious

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[285] 310 U.S. 296 (1940).

[286] 310 U.S. at 305.

[287] 310 U.S. at 307. "The freedom to act must have appropriate definition to preserve the enforcement of that protection [of society]. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. . . . [A] State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." Id. at 304.

[288] 310 U.S. at 307–11. "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probabilities of excesses and abuses, these liberties are in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." Id. at 310.

[289] Jones v. Opelika, 316 U.S. 584 (1942).

[290] Jones v. Opelika, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943). *See also* Follett v. Town of McCormick, 321 U.S. 573 (1944) (invalidating a flat licensing fee for booksellers). *Murdock* and *Follett* were distinguished in Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378, 389 (1990), as applying "only where a flat license fee operates as a prior restraint"; upheld in *Swaggart* was application of a general sales and use tax to sales of religious publications.

meeting.[291] A state child labor law, however, was held to be validly applied to punish the guardian of a nine-year old child who permitted her to engage in "preaching work" and the sale of religious publications after hours.[292] The Court decided a number of cases involving meetings and rallies in public parks and other public places by upholding licensing and permit requirements which were premised on nondiscriminatory "times, places, and manners" terms and which did not seek to regulate the content of the religious message to be communicated.[293] In 2002, the Court struck down on free speech grounds a town ordinance requiring door-to-door solicitors, including persons seeking to proselytize about their faith, to register with the town and obtain a solicitation permit.[294] The Court stated that the requirement was "offensive . . . to the very notion of a free society."

Free Exercise Exemption From General Governmental Requirements.—As described above, the Court gradually abandoned its strict belief-conduct distinction, and developed a balancing test to determine when a uniform, nondiscriminatory requirement by government mandating action or nonaction by citizens must allow exceptions for citizens whose religious scruples forbid compliance. Then, in 1990, the Court reversed direction in *Employment Division v. Smith*,[295] confining application of the "compelling interest" test to a narrow category of cases.

In early cases the Court sustained the power of a state to exclude from its schools children who because of their religious beliefs would not participate in the salute to the flag,[296] only within a short time to reverse itself and condemn such exclusions, but on speech grounds rather than religious grounds.[297] Also, the Court seemed to be clearly of the view that government could compel those

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[291] Martin v. City of Struthers, 319 U.S. 141 (1943). *But cf.* Breard v. City of Alexandria, 341 U.S. 622 (1951) (similar ordinance sustained in commercial solicitation context).

[292] Prince v. Massachusetts, 321 U.S. 158 (1944).

[293] *E.g.*, Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953); Poulos v. New Hampshire, 345 U.S. 395 (1953). *See also* Larson v. Valente, 456 U.S. 228 (1982) (solicitation on state fair ground by Unification Church members).

[294] Watchtower Bible & Tract Soc'y v. Village of Stratton, 536 U.S. 150 (2002).

[295] 494 U.S. 872 (1990).

[296] Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

[297] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). On the same day, the Court held that a state may not forbid the distribution of literature urging and advising on religious grounds that citizens refrain from saluting the flag. Taylor v. Mississippi, 319 U.S. 583 (1943). In 2004, the Court rejected for lack of standing an Establishment Clause challenge to recitation of the Pledge of Allegiance in public schools. Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).

persons religiously opposed to bearing arms to take an oath to do so or to receive training to do so,[298] only in later cases to cast doubt on this resolution by statutory interpretation,[299] and still more recently to leave the whole matter in some doubt.[300]

Braunfeld v. Brown[301] held that the Free Exercise Clause did not mandate an exemption from Sunday Closing Laws for an Orthodox Jewish merchant who observed Saturday as the Sabbath and was thereby required to be closed two days of the week rather than one. This requirement did not prohibit any religious practices, the Court's plurality pointed out, but merely regulated secular activity in a manner making religious exercise more expensive.[302] "If the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden."[303]

Within two years the Court in *Sherbert v. Verner*[304] reversed this line of analysis to require a religious exemption from a secular, regulatory piece of economic legislation. Sherbert was disqualified from receiving unemployment compensation because, as a Seventh Day Adventist, she would not accept Saturday work; according to state officials, this meant she was not complying with the statutory requirement to stand ready to accept suitable employment. If this denial of benefits is to be upheld, the Court said, "it must be

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[298] *See* United States v. Schwimmer, 279 U.S. 644 (1929); United States v. Macintosh, 283 U.S. 605 (1931); and United States v. Bland, 283 U.S. 636 (1931) (all interpreting the naturalization law as denying citizenship to a conscientious objector who would not swear to bear arms in defense of the country), all three of which were overruled by Girouard v. United States, 328 U.S. 61 (1946), on strictly statutory grounds. *See also* Hamilton v. Board of Regents, 293 U.S. 245 (1934) (upholding expulsion from state university for a religiously based refusal to take a required course in military training); *In re* Summers, 325 U.S. 561 (1945) (upholding refusal to admit applicant to bar because as conscientious objector he could not take required oath).

[299] United States v. Seeger, 380 U.S. 163 (1965); *see* id. at 188 (Justice Douglas concurring); Welsh v. United States, 398 U.S. 333 (1970); *see also* id. at 344 (Justice Harlan concurring).

[300] Gillette v. United States, 401 U.S. 437 (1971) (holding that secular considerations overbalanced free exercise infringement of religious beliefs of objectors to particular wars).

[301] 366 U.S. 599 (1961). *See* "Sunday Closing Laws," *supra*, for application of the Establishment Clause.

[302] 366 U.S. at 605–06.

[303] 366 U.S. at 607 (plurality opinion). The concurrence balanced the economic disadvantage suffered by the Sabbatarians against the important interest of the state in securing its day of rest regulation. McGowan v. Maryland, 366 U.S. at 512–22. Three Justices dissented. Id. at 561 (Justice Douglas); Braunfeld v. Brown, 366 U.S. at 610 (Justice Brennan), 616 (Justice Stewart).

[304] 374 U.S. 398 (1963).

either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religions may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . .'" [305] First, the disqualification was held to impose a burden on the free exercise of Sherbert's religion; it was an indirect burden and it did not impose a criminal sanction on a religious practice, but the disqualification derived solely from her practice of her religion and constituted a compulsion upon her to forgo that practice.[306] Second, there was no compelling interest demonstrated by the state. The only interest asserted was the prevention of the possibility of fraudulent claims, but that was merely a bare assertion. Even if there was a showing of demonstrable danger, "it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." [307]

Sherbert was reaffirmed and applied in subsequent cases involving denial of unemployment benefits. *Thomas v. Review Board* [308] involved a Jehovah's Witness who quit his job when his employer transferred him from a department making items for industrial use to a department making parts for military equipment. While his belief that his religion proscribed work on war materials was not shared by all other Jehovah's Witnesses, the Court held that it was inappropriate to inquire into the validity of beliefs asserted to be religious so long as the claims were made in good faith (and the beliefs were at least arguably religious). The same result was reached in a 1987 case, the fact that the employee's religious conversion rather than a job reassignment had created the conflict between work and Sabbath observance not being considered material to the determination that free exercise rights had been burdened by the denial of unemployment compensation.[309] Also, a state may not deny unemployment benefits solely because refusal to work on the Sabbath was

[305] 374 U.S. at 403, quoting NAACP v. Button, 371 U.S. 415, 438 (1963).

[306] 374 U.S. at 403–06.

[307] 374 U.S. at 407. *Braunfeld* was distinguished because of "a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers." That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. Id. at 408–09. Other Justices thought that *Sherbert* overruled *Braunfeld*. Id. at 413, 417 (Justice Stewart concurring), 418 (Justice Harlan and White dissenting).

[308] 450 U.S. 707 (1981).

[309] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

based on sincere religious beliefs held independently of membership in any established religious church or sect.[310]

The Court applied the *Sherbert* balancing test in several areas outside of unemployment compensation. The first two such cases involved the Amish, whose religion requires them to lead a simple life of labor and worship in a tight-knit and self-reliant community largely insulated from the materialism and other distractions of modern life. *Wisconsin v. Yoder*[311] held that a state compulsory attendance law, as applied to require Amish children to attend ninth and tenth grades of public schools in contravention of Amish religious beliefs, violated the Free Exercise Clause. The Court first determined that the beliefs of the Amish were indeed religiously based and of great antiquity.[312] Next, the Court rejected the state's arguments that the Free Exercise Clause extends no protection because the case involved "action" or "conduct" rather than belief, and because the regulation, neutral on its face, did not single out religion.[313] Instead, the Court analyzed whether a "compelling" governmental interest required such "grave interference" with Amish belief and practices.[314] The governmental interest was not the general provision of education, as the state and the Amish agreed as to education through the first eight grades and as the Amish provided their children with additional education of a primarily vocational nature. The state's interest was really that of providing two additional years of public schooling. Nothing in the record, the Court found, showed that this interest outweighed the great harm that it would do to traditional Amish religious beliefs to impose the compulsory ninth and tenth grade attendance.[315]

But a subsequent decision involving the Amish reached a contrary conclusion. In *United States v. Lee*,[316] the Court denied the Amish exemption from compulsory participation in the Social Security system. The objection was that payment of taxes by Amish employers and employees and the receipt of public financial assistance were forbidden by their religious beliefs. Accepting that this was true, the Court nonetheless held that the governmental inter-

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[310] Frazee v. Illinois Dep't of Employment Security, 489 U.S. 829 (1989). *Cf.* United States v. Seeger, 380 U.S. 163 (1965) (interpreting the religious objection exemption from military service as encompassing a broad range of formal and personal religious beliefs).

[311] 406 U.S. 205 (1972).

[312] 406 U.S. at 215–19. Why the Court felt impelled to make these points is unclear, as it is settled that it is improper for courts to inquire into the interpretation of religious belief. *E.g.*, United States v. Lee, 455 U.S. 252, 257 (1982).

[313] 406 U.S. at 219–21.

[314] 406 U.S. at 221.

[315] 406 U.S. at 221–29.

[316] 455 U.S. 252 (1982).

est was compelling and therefore sufficient to justify the burdening of religious beliefs.[317] Compulsory payment of taxes was necessary for the vitality of the system; either voluntary participation or a pattern of exceptions would undermine its soundness and make the program difficult to administer.

"A compelling governmental interest" was also found to outweigh free exercise interests in *Bob Jones University v. United States*,[318] in which the Court upheld the I.R.S.'s denial of tax exemptions to church-run colleges whose racially discriminatory admissions policies derived from religious beliefs. The Federal Government's "fundamental, overriding interest in eradicating racial discrimination in education"—found to be encompassed in common law standards of "charity" underlying conferral of the tax exemption on "charitable" institutions—"substantially outweighs" the burden on free exercise. Nor could the schools' free exercise interests be accommodated by less restrictive means.[319]

In other cases, the Court found reasons not to apply compelling interest analysis. Religiously motivated speech, like other speech, can be subjected to reasonable time, place, or manner regulation serving a "substantial" rather than "compelling" governmental interest.[320] *Sherbert's* threshold test, inquiring "whether government has placed a substantial burden on the observation of a central religious belief or practice,"[321] eliminates other issues. As long as a particular religion does not proscribe the payment of taxes (as was the case with the Amish in *Lee*), the Court has denied that there is any constitutionally significant burden resulting from "imposition of a generally applicable tax [that] merely decreases the amount of money [adherents] have to spend on [their] religious activities."[322]

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[317] The Court's formulation was whether the limitation on religious exercise was "essential to accomplish an overriding governmental interest." 455 U.S. at 257–58. *Accord*, Hernandez v. Commissioner, 490 U.S. 680, 699–700 (1989) (any burden on free exercise imposed by disallowance of a tax deduction was "justified by the 'broad public interest in maintaining a sound tax system' free of 'myriad exceptions flowing from a wide variety of religious beliefs' ").

[318] 461 U.S. 574 (1983).

[319] 461 U.S. at 604.

[320] Heffron v. ISKCON, 452 U.S. 640 (1981). Requiring Krishnas to solicit at fixed booth sites on county fair grounds is a valid time, place, and manner regulation, although, as the Court acknowledged, id. at 652, peripatetic solicitation was an element of Krishna religious rites.

[321] As restated in Hernandez v. Commissioner, 490 U.S. 680, 699 (1989).

[322] Jimmy Swaggart Ministries v. California Bd. of Equalization, 493 U.S. 378, 391 (1990). *See also* Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (the Court failing to perceive how application of minimum wage and overtime requirements would burden free exercise rights of employees of a religious foundation, there being no assertion that the *amount* of compensation was a matter of religious import); and Hernandez v. Commissioner, 490 U.S. 680 (1989) (questioning but not deciding whether any burden was imposed by administrative disallowal of a

The one caveat the Court left—that a generally applicable tax might be so onerous as to "effectively choke off an adherent's religious practices" [323]—may be a moot point in light of the Court's general ruling in *Employment Division v. Smith*, discussed below.

The Court also drew a distinction between governmental regulation of individual conduct, on the one hand, and restraint of governmental conduct as a result of individuals' religious beliefs, on the other. *Sherbert's* compelling interest test has been held inapplicable in cases viewed as involving attempts by individuals to alter governmental actions rather than attempts by government to restrict religious practices. Emphasizing the absence of coercion on religious adherents, the Court in *Lyng v. Northwest Indian Cemetery Protective Ass'n* [324] held that the Forest Service, even absent a compelling justification, could construct a road through a portion of a national forest held sacred and used by Indians in religious observances. The Court distinguished between governmental actions having the indirect effect of frustrating religious practices and those actually prohibiting religious belief or conduct: "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" [325] Similarly, even a sincerely held religious belief that assignment of a social security number would rob a child of her soul was held insufficient to bar the government from using the number for purposes of its own recordkeeping.[326] It mattered not how easily the government could accommodate the religious beliefs or practices (an exemption from the social security number requirement might have been granted with only slight impact on the government's recordkeeping capabilities), since the nature of the governmental actions did not implicate free exercise protections.[327]

Compelling interest analysis is also wholly inapplicable in the context of military rules and regulations, where First Amendment review "is far more deferential than . . . review of similar laws or regulations designed for civilian society." [328] Thus the Court did not question the decision of military authorities to apply uniform dress code standards to prohibit the wearing of a yarmulke by an officer

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deduction for payments deemed to be for commercial rather than religious or charitable purposes).

[323] *Jimmy Swaggart Ministries*, 493 U.S. at 392.

[324] 485 U.S. 439 (1988).

[325] 485 U.S. at 451, quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

[326] Bowen v. Roy, 476 U.S. 693 (1986).

[327] "In neither case . . . would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity." *Lyng*, 485 U.S. at 449.

[328] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

compelled by his Orthodox Jewish religious beliefs to wear the yarmulke.[329]

A high degree of deference is also due decisions of prison administrators having the effect of restricting religious exercise by inmates. The general rule is that prison regulations impinging on exercise of constitutional rights by inmates are "'valid if . . . reasonably related to legitimate penological interests.'"[330] Thus because general prison rules requiring a particular category of inmates to work outside of buildings where religious services were held, and prohibiting return to the buildings during the work day, could be viewed as reasonably related to legitimate penological concerns of security and order, no exemption was required to permit Muslim inmates to participate in Jumu'ah, the core ceremony of their religion.[331] The fact that the inmates were left with no alternative means of attending Jumu'ah was not dispositive, the Court being "unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end."[332]

Finally, in *Employment Division v. Smith*[333] the Court indicated that the compelling interest test may apply only in the field of unemployment compensation, and in any event does not apply to require exemptions from generally applicable criminal laws. Criminal laws are "generally applicable" when they apply across the board regardless of the religious motivation of the prohibited conduct, and are "not specifically directed at . . . religious practices."[334] The unemployment compensation statute at issue in *Sherbert* was peculiarly suited to application of a balancing test because denial of benefits required a finding that an applicant had refused work "without good cause." *Sherbert* and other unemployment compensation cases thus "stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling rea-

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[329] Congress reacted swiftly by enacting a provision allowing military personnel to wear religious apparel while in uniform, subject to exceptions to be made by the Secretary of the relevant military department for circumstances in which the apparel would interfere with performance of military duties or would not be "neat and conservative." Pub. L. 100–180, § 508(a)(2), 101 Stat. 1086 (1987); 10 U.S.C. § 774.

[330] O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

[331] O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

[332] 482 U.S. at 351–52 (also suggesting that the ability of the inmates to engage in other activities required by their faith, *e.g.*, individual prayer and observance of Ramadan, rendered the restriction reasonable).

[333] 494 U.S. 872 (1990) (holding that state may apply criminal penalties to use of peyote in a religious ceremony, and may deny unemployment benefits to persons dismissed from their jobs because of religiously inspired use of peyote).

[334] 494 U.S. at 878.

son."[335] *Wisconsin v. Yoder* and other decisions holding "that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" were distinguished as involving "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections" such as free speech or "parental rights."[336] Except in the relatively uncommon circumstance when a statute calls for individualized consideration, the Free Exercise Clause affords no basis for exemption from a "neutral, generally applicable law." As the Court concluded in *Smith*, accommodation for religious practices incompatible with general requirements must ordinarily be found in "the political process."[337]

Smith has potentially widespread ramifications. The Court has apparently returned to a belief-conduct dichotomy under which religiously motivated conduct is not entitled to special protection. Laws may not single out religiously motivated conduct for adverse treatment,[338] but formally neutral laws of general applicability may regulate religious conduct (along with other conduct) regardless of the adverse or prohibitory effects on religious exercise. That the Court views the principle as a general one, not limited to criminal laws, seems evident from its restatement in *Church of Lukumi Babalu Aye v. City of Hialeah*: "our cases establish the general proposition that a law that is neutral and of general application need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[339]

Similar rules govern taxation. Under the Court's rulings in *Smith* and *Swaggart*, religious exemptions from most taxes are a matter of legislative grace rather than constitutional command, since most important taxes (*e.g.*, income, property, sales and use) satisfy the criteria of formal neutrality and general applicability, and are not license fees that can be viewed as prior restraints on expression.[340] The result is equal protection, but not substantive protection, for

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[335] 494 U.S. at 884.

[336] 494 U.S. at 881.

[337] 494 U.S. at 890.

[338] This much was made clear by Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993), which struck down a city ordinance that prohibited ritual animal sacrifice but that allowed other forms of animal slaughter.

[339] 508 U.S. 520, 531 (1993).

[340] This latter condition derives from the fact that the Court in *Swaggart* distinguished earlier decisions by characterizing them as applying only to flat license fees. 493 U.S. at 386. *See also* Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 39–41.

religious exercise.[341] The Court's approach also accords less protection to religiously based conduct than is accorded expressive conduct that implicates speech but not religious values.[342] On the practical side, relegation of free exercise claims to the political process may, as concurring Justice O'Connor warned, result in less protection for small, unpopular religious sects.[343]

It does appear that, despite *Smith*, the Court is still inclined to void the application of generally applicable laws to religious conduct when the prohibited activity is engaged in, not by an individual adherant, but by a religious institution. For instance, in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*,[344] the Court established a "ministerial exception" that precludes the application of employment discrimination laws[345] to claims arising out of an employment relationship between a religious institution and its ministers.[346] The Court found that even where such law is a "valid and neutral law of general applicability," and even if the basis for the employment decision is not religious doctrine, the Free Exercise Clause prohibits the application of an employment discrimination law, since enforcement of such law would involve "government interference with an internal church decision that affects the faith and mission of the church itself."[347]

Because of the broad ramifications of *Smith*, the political processes were soon used in an attempt to provide additional legislative protection for religious exercise. In the Religious Freedom Restoration Act of 1993 (RFRA),[348] Congress sought to supersede *Smith* and substitute a statutory rule of decision for free exercise cases.

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[341] Justice O'Connor, concurring in *Smith*, argued that "the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause." 494 U.S. at 901.

[342] Although neutral laws affecting expressive conduct are not measured by a "compelling interest" test, they are "subject to a balancing, rather than categorical, approach." *Smith*, 494 U.S. at 902 (O'Connor, J., concurring).

[343] 494 U.S. at 902–03.

[344] 565 U.S. ___, No. 10–553, slip op. (2012).

[345] In this case, the employee, who suffered from narcolepsy, alleged that she had been fired in retaliation for threatening to bring a legal action against the church under the Americans with Disabilities Act, 104 Stat. 327, 42 U.S.C. § 12101 *et seq*.

[346] An important issue in the case was determining when an employee of a religious institution was a "minister." The Court declined to create a uniform standard, but suggested deference to the position of the religious institution in making such a determinination. In this case, a "called" elementary school teacher (as opposed to a "contract" teacher) was found to be a "minister" based on her title, the religious education qualifications required for the position, how the church and the employee represented her position to others, and the religious functions performed by the employee as part of her job responsibilities. 565 U.S. ___, No. 10–553, slip op. at 15–20.

[347] 565 U.S. ___, No. 10–553, slip op. at 15.

[348] Pub. L. 103–141, 107 Stat. 1488 (1993); 42 U.S.C. §§ 2000bb to 2000bb–4.

The Act provides that laws of general applicability—federal, state, and local—may substantially burden free exercise of religion only if they further a compelling governmental interest and constitute the least restrictive means of doing so. The purpose, Congress declared in the Act itself, was "to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[349] But this legislative effort was partially frustrated in 1997 when the Court in *City of Boerne v. Flores*[350] held the Act unconstitutional as applied to the states. In applying RFRA to the states, Congress had exercised its power under § 5 of the Fourteenth Amendment to enact "appropriate legislation" to enforce the substantive protections of the Amendment, including the religious liberty protections incorporated in the Due Process Clause. But the Court held that RFRA exceeded Congress's power under § 5, because the measure did not simply enforce a constitutional right but substantively altered that right. "Congress," the Court said, "does not enforce a constitutional right by changing what the right is."[351] Moreover, it said, RFRA "reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved . . . [and] is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[352] "RFRA," the Court concluded, "contradicts vital principles necessary to maintain separation of powers and the federal balance."[353]

Boerne did not close the books on *Smith*, however, or even on RFRA. Although *Boerne* held that RFRA was not a valid exercise of Fourteenth Amendment enforcement power as applied to restrict states, it remained an open issue whether RFRA may be applied to the Federal Government, and whether its requirements could be imposed pursuant to other powers. Several lower courts answered these questions affirmatively,[354] and the Supreme Court has applied RFRA

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[349] Pub. L. 103–141, § 2(b)(1) (citations omitted). Congress also avowed a purpose of providing "a claim or defense to persons whose religious exercise is substantially burdened by government." § 2(b)(2).

[350] 521 U.S. 507 (1997).

[351] 521 U.S. at 519.

[352] 521 U.S. at 533–34.

[353] 521 U.S. at 536.

[354] *See*, *e.g.*, *In re* Young, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998) (RFRA is a valid exercise of Congress's bankruptcy powers as applied to insulate a debtor's church tithes from recovery by the bankruptcy trustee); O'Bryan v. Bureau of Prisons, 349 F.3d 399 (7th Cir. 2003) (RFRA may be applied to require the Bureau of Prisons to accommodate religious exercise by prisoners); Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) (RFRA applies to Bureau of Prisons).

to the Federal Government without addressing any constitutional questions.[355]

Congress responded to *Boerne* by enacting a new law purporting to rest on its commerce and spending powers. The Religious Land Use and Institutionalized Persons Act (RLUIPA)[356] imposes the same strict scrutiny test struck down in *Boerne* but limits its application to certain land use regulations and to religious exercise by persons in state institutions.[357] In *Cutter v. Wilkinson*,[358] the Court upheld RLUIPA's prisoner provision against a facial challenge under the Establishment Clause, but it did not rule on congressional power to enact RLUIPA. The Court held that RLUIPA "does not, on its face, exceed the limits of permissible government accommodation of religious practices."[359] Rather, the provision "fits within the corridor" between the Free Exercise and Establishment Clauses, and is "compatible with the [latter] because it alleviates exceptional government-created burdens on private religious exercise."[360]

Religious Test Oaths.—Although the Court has been divided in dealing with religiously based conduct and governmental compulsion of action or nonaction, it was unanimous in voiding a state constitutional provision which required a notary public, as a condition of perfecting his appointment, to declare his belief in the existence of God. The First Amendment, considered with the religious oath provision of Article VI, makes it impossible "for government, state or federal, to restore the historically and constitutionally discredited policy of probing religious beliefs by test oaths or limiting public offices to persons who have, or perhaps more properly, pro-

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[355] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006) (affirming preliminary injunction issued under RFRA against enforcement of the Controlled Substances Act to prevent the drinking of a sacramental tea that contains a hallucinogen regulated under the Act). *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ___, No. 13–354, slip op. (2014) (holding that RFRA applied to for-profit corporations and that a mandate that certain employers provide their employees with "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity" violated RFRA's general provisions).

[356] Pub. L. 106–274, 114 Stat. 804 (2000); 42 U.S.C. §§ 2000cc *et seq*.

[357] The Act requires that state and local zoning and landmark laws and regulations which impose a substantial burden on an individual's or institution's exercise of religion be measured by a strict scrutiny test, and applies the same strict scrutiny test for any substantial burdens imposed on the exercise of religion by persons institutionalized in state or locally run prisons, mental hospitals, juvenile detention facilities, and nursing homes. Both provisions apply if the burden is imposed in a program that receives federal financial assistance, or if the burden or its removal would affect commerce.

[358] 544 U.S. 709 (2005).

[359] 544 U.S. at 714.

[360] 544 U.S. at 720.

fess to have, a belief in some particular kind of religious concept."[361]

Religious Disqualification.—Unanimously, but with great differences of approach, the Court declared invalid a Tennessee statute barring ministers and priests from service in a specially called state constitutional convention.[362] The Court's decision necessarily implied that the constitutional provision on which the statute was based, barring ministers and priests from service as state legislators, was also invalid.

FREEDOM OF EXPRESSION—SPEECH AND PRESS

Adoption and the Common Law Background

Madison's version of the speech and press clauses, introduced in the House of Representatives on June 8, 1789, provided: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[363] The special committee rewrote the language to some extent, adding other provisions from Madison's draft, to make it read: "The freedom of speech and of the press, and the right of the people peaceably to assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."[364] In this form it went to the Senate, which rewrote it to read: "That Congress shall make no law abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and consult for their common good, and to petition the government for a redress of grievances."[365] Subsequently, the religion clauses and these

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[361] Torcaso v. Watkins, 367 U.S. 488, 494 (1961).

[362] McDaniel v. Paty, 435 U.S. 618 (1978). The plurality opinion by Chief Justice Burger, joined by Justices Powell, Rehnquist, and Stevens, found the case governed by Sherbert v. Verner's strict scrutiny test. The state had failed to show that its view of the dangers of clergy participation in the political process had any validity; Torcaso v. Watkins was distinguished because the state was acting on the status of being a clergyman rather than on one's beliefs. Justice Brennan, joined by Justice Marshall, found *Torcaso* controlling because imposing a restriction upon one's status as a religious person did penalize his religious belief, his freedom to profess or practice that belief. Id. at 629. Justice Stewart also found *Torcaso* dispositive, id. at 642, and Justice White found an equal protection violation because of the restraint upon seeking political office. Id. at 643.

[363] 1 Annals of Congress 434 (1789). Madison had also proposed language limiting the power of the states in a number of respects, including a guarantee of freedom of the press. Id. at 435. Although passed by the House, the amendment was defeated by the Senate. *See* "Amendments to the Constitution, Bill of Rights and the States," *supra*.

[364] Id. at 731 (August 15, 1789).

[365] The Bill of Rights: A Documentary History 1148–49 (B. Schwartz ed. 1971).

clauses were combined by the Senate.[366] The final language was agreed upon in conference.

Debate in the House is unenlightening with regard to the meaning the Members ascribed to the speech and press clause, and there is no record of debate in the Senate.[367] In the course of debate, Madison warned against the dangers that would arise "from discussing and proposing abstract propositions, of which the judgment may not be convinced. I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty."[368] That the "simple, acknowledged principles" embodied in the First Amendment have occasioned controversy without end both in the courts and out should alert one to the difficulties latent in such spare language.

Insofar as there is likely to have been a consensus, it was no doubt the common law view as expressed by Blackstone. "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish as the law does at present any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus, the will of individuals is still left free: the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or inquiry; liberty of private sentiment is still left; the disseminating, or making public,

[366] Id. at 1153.

[367] The House debate insofar as it touched upon this amendment was concerned almost exclusively with a motion to strike the right to assemble and an amendment to add a right of the people to instruct their Representatives. 1 ANNALS OF CONGRESS 731–749 (August 15, 1789). There are no records of debates in the states on ratification.

[368] Id. at 738.

of bad sentiments, destructive to the ends of society, is the crime which society corrects." [369]

Whatever the general unanimity on this proposition at the time of the proposal of and ratification of the First Amendment,[370] it appears that there emerged in the course of the Jeffersonian counterattack on the Sedition Act [371] and the use by the Adams Administration of the Act to prosecute its political opponents,[372] something of a libertarian theory of freedom of speech and press,[373] which, however much the Jeffersonians may have departed from it upon assum-

[369] 4 W. Blackstone's Commentaries on the Laws of England 151–52 (T. Cooley, 2d rev. ed. 1872). *See* 3 J. Story, Commentaries on the Constitution of the United States 1874–86 (1833). The most comprehensive effort to assess theory and practice in the period prior to and immediately following adoption of the Amendment is L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960), which generally concluded that the Blackstonian view was the prevailing one at the time and probably the understanding of those who drafted, voted for, and ratified the Amendment.

[370] It would appear that Madison advanced libertarian views earlier than his Jeffersonian compatriots, as witness his leadership of a move to refuse officially to concur in Washington's condemnation of "[c]ertain self-created societies," by which the President meant political clubs supporting the French Revolution, and his success in deflecting the Federalist intention to censure such societies. I. Brant, James Madison: Father of the Constitution 1787–1800 at 416–20 (1950). "If we advert to the nature of republican government," Madison told the House, "we shall find that the censorial power is in the people over the government, and not in the government over the people." 4 Annals of Congress 934 (1794). On the other hand, the early Madison, while a member of his county's committee on public safety, had enthusiastically promoted prosecution of Loyalist speakers and the burning of their pamphlets during the Revolutionary period. 1 Papers of James Madison 147, 161–62, 190–92 (W. Hutchinson & W. Rachal, eds., 1962). There seems little doubt that Jefferson held to the Blackstonian view. Writing to Madison in 1788, he said: "A declaration that the Federal Government will never restrain the presses from printing anything they please, will not take away the liability of the printers for false facts printed." 13 Papers of Thomas Jefferson 442 (J. Boyd ed., 1955). Commenting a year later to Madison on his proposed amendment, Jefferson suggested that the free speech-free press clause might read something like: "The people shall not be deprived or abridged of their right to speak, to write or otherwise to publish anything but false facts affecting injuriously the life, liberty, property, or reputation of others or affecting the peace of the confederacy with foreign nations." 15 Papers, *supra*, at 367.

[371] The Act, 1 Stat. 596 (1798), punished anyone who would "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute." *See* J. Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties (1956).

[372] Id. at 159 et seq.

[373] L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History ch. 6 (1960); New York Times Co. v. Sullivan, 376 U.S. 254, 273–76 (1964). *But compare* L. Levy, Emergence of a Free Press (1985), a revised and enlarged edition of Legacy of Expression, in which Professor Levy modifies his earlier views, arguing that while the intention of the Framers to outlaw the crime of seditious libel, in pursuit of a free speech principle, cannot be established and may not have been the goal, there was a tradition of robust and rowdy expression during the period of

ing power,[374] was to blossom into the theory undergirding Supreme Court First Amendment jurisprudence in modern times. Full acceptance of the theory that the Amendment operates not only to bar most prior restraints of expression but subsequent punishment of all but a narrow range of expression, in political discourse and indeed in all fields of expression, dates from a quite recent period, although the Court's movement toward that position began in its consideration of limitations on speech and press in the period following World War I.[375] Thus, in 1907, Justice Holmes could observe that, even if the Fourteenth Amendment embodied prohibitions similar to the First Amendment, "still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart

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the framing that contradicts his prior view that a modern theory of free expression did not begin to emerge until the debate over the Alien and Sedition Acts.

[374] L. Levy, Jefferson and Civil Liberties: The Darker Side (1963). Thus President Jefferson wrote to Governor McKean of Pennsylvania in 1803: "The federalists having failed in destroying freedom of the press by their gag-law, seem to have attacked it in an opposite direction; that is, by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit. . . . This is a dangerous state of things, and the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses. Not a general prosecution, for that would look like persecution; but a selected one." 9 Works of Thomas Jefferson 449 (P. Ford ed., 1905).

[375] New York Times Co. v. Sullivan, 376 U.S. 254 (1964), provides the principal doctrinal justification for the development, although the results had long since been fully applied by the Court. In *Sullivan*, Justice Brennan discerned in the controversies over the Sedition Act a crystallization of "a national awareness of the central meaning of the First Amendment," id. at 273, which is that the "right of free public discussion of the stewardship of public officials . . . [is] a fundamental principle of the American form of government." Id. at 275. This "central meaning" proscribes either civil or criminal punishment for any but the most maliciously, knowingly false criticism of government. "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. . . . [The historical record] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." Id. at 276. Madison's Virginia Resolutions of 1798 and his *Report* in support of them brought together and expressed the theories being developed by the Jeffersonians and represent a solid doctrinal foundation for the point of view that the First Amendment superseded the common law on speech and press, that a free, popular government cannot be libeled, and that the First Amendment absolutely protects speech and press. 6 Writings of James Madison, 341–406 (G. Hunt ed., 1908).

from statute in most cases, if not in all."[376] But as Justice Holmes also observed, "[t]here is no constitutional right to have all general propositions of law once adopted remain unchanged."[377]

But, in *Schenck v. United States*,[378] the first of the post-World War I cases to reach the Court, Justice Holmes, in his opinion for the Court upholding convictions for violating the Espionage Act by attempting to cause insubordination in the military service by circulation of leaflets, suggested First Amendment restraints on subsequent punishment as well as on prior restraint. "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . . We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Justice Holmes, along with Justice Brandeis, soon went into dissent in their views that the majority of the Court was misapplying the legal standards thus expressed to uphold suppression of speech that offered no threat to organized institutions.[379] But it was with

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[376] Patterson v. Colorado, 205 U.S. 454, 462 (1907) (emphasis in original, citation omitted). Justice Frankfurter had similar views in 1951: "The historic antecedents of the First Amendment preclude the notion that its purpose was to give unqualified immunity to every expression that touched on matters within the range of political interest. . . . 'The law is perfectly well settled,' this Court said over fifty years ago, 'that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed.' Robertson v. Baldwin, 165 U.S. 275, 281. That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years." Dennis v. United States, 341 U.S. 494, 521–522, 524 (1951) (concurring opinion).

[377] Patterson v. Colorado, 205 U.S. 454, 461 (1907).

[378] 249 U.S. 47, 51–52 (1919) (citations omitted).

[379] Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Schaefer v. United States, 251 U.S. 466 (1920); Pierce v. United States, 252 U.S. 239 (1920); United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921). A state statute similar to the federal one was upheld in Gilbert v. Minnesota, 254 U.S. 325 (1920).

the Court's assumption that the Fourteenth Amendment restrained the power of the states to suppress speech and press that the doctrines developed.[380] At first, Holmes and Brandeis remained in dissent, but, in *Fiske v. Kansas*,[381] the Court sustained a First Amendment type of claim in a state case, and in *Stromberg v. California*,[382] voided a state statute on grounds of its interference with free speech.[383] State common law was also voided, with the Court in an opinion by Justice Black asserting that the First Amendment enlarged protections for speech, press, and religion beyond those enjoyed under English common law.[384]

Development over the years since has been uneven, but by 1964 the Court could say with unanimity: "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [385] And, in 1969, the Court said that the cases "have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [386] This development and its myriad applications are elaborated in the following sections.

The First Amendment by its terms applies only to laws enacted by Congress and not to the actions of private persons.[387] As such, the First Amendment is subject to a "state action" (or "governmental action") limitation similar to that applicable to the Fifth and

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[380] Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927). The Brandeis and Holmes dissents in both cases were important formulations of speech and press principles.

[381] 274 U.S. 380 (1927).

[382] 283 U.S. 359 (1931). By contrast, it was not until 1965 that a federal statute was held unconstitutional under the First Amendment. Lamont v. Postmaster General, 381 U.S. 301 (1965). *See also* United States v. Robel, 389 U.S. 258 (1967).

[383] *See also* Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931); Herndon v. Lowry, 301 U.S. 242 (1937); DeJonge v. Oregon, 299 U.S. 353 (1937); Lovell v. City of Griffin, 303 U.S. 444 (1938).

[384] Bridges v. California, 314 U.S. 252, 263–68 (1941) (overturning contempt convictions of newspaper editor and others for publishing commentary on pending cases).

[385] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[386] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[387] Through interpretation of the Fourteenth Amendment, the prohibition extends to the states as well. *See* Bill of Rights: The Fourteenth Amendment and Incorporation, *infra*. Of course, the First Amendment also applies to the nonlegislative branches of government—to every "government agency—local, state, or federal." Herbert v. Lando, 441 U.S. 153, 168 n.16 (1979).

Fourteenth Amendments.[388] The limitation has seldom been litigated in the First Amendment context, but there appears to be no obvious reason why the analysis should differ markedly from Fifth or Fourteenth Amendment governmental action analysis.[389] Both contexts require "cautious analysis of the quality and degree of Government relationship to the particular acts in question."[390] In holding that the National Railroad Passenger Corporation (Amtrak) is a governmental entity for purposes of the First Amendment, the Court declared that "[t]he Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken' . . . [a]nd under whatever congressional label."[391]

Freedom of Expression: The Philosophical Basis

Probably no other provision of the Constitution has given rise to so many different views with respect to its underlying philosophical foundations, and hence proper interpretive framework, as has the guanantee of freedom of expression.[392] The argument has been fought out among the commentators. "The outstanding fact about the First Amendment today is that the Supreme Court has never

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[388] *See* Fourteenth Amendment: Equal Protection of the Laws: Scope and Application: State Action, *infra*.

[389] *Compare* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 399 (1995) (holding that, with respect to Amtrak, because "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, [Amtrak] is part of the Government for purposes of the First Amendment") *with,* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. ___, No. 13–1080, slip op. at 11 (2015) (extending the holding of *Lebron*, such that Amtrak is considered a governmental entity "for purposes of" the Fifth Amendment Due Process and separation of powers claims presented by the case).

[390] CBS v. Democratic Nat'l Comm., 412 U.S. 94, 115 (1973).

[391] *See Lebron*, 513 U.S. at 392 (quoting *Ex parte* Virginia, 100 U.S. 339, 346–47 (1880)). The Court refused to be bound by the statement in Amtrak's authorizing statute that the corporation is "not . . . an agency or establishment of the United States Government." This assertion can be effective only "for purposes of matters that are within Congress's control," the Court explained. "[I]t is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions." *Id.* at 392.

[392] Although "expression" is not found in the text of the First Amendment, it is used herein, first, as a shorthand term for the freedoms of speech, press, assembly, petition, association, and the like, that are covered by the Amendment, and, second, as a recognition of the fact that judicial interpretation of the clauses of the First Amendment has greatly enlarged the definition commonly associated with "speech," as the following discussion will reveal. The term seems well settled, *see*, *e.g.*, T. Emerson, The System of Freedom of Expression (1970), although it has been criticized. F. Schauer, Free Speech: A Philosophical Inquiry 50–52 (1982). The term also, as used here, conflates the speech and press clauses, explicitly assuming they are governed by the same standards of interpretation and that, in fact, the press clause itself adds nothing significant to the speech clause as interpreted, an assumption briefly defended in the next topic.

developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases."[393] Some commentators argue on behalf of a complex of values, none of which by itself is sufficient to support a broad-based protection of freedom of expression.[394] Others would limit the basis of the First Amendment to only one among a constellation of possible values and would therefore limit the coverage or the degree of protection of the speech and press clauses.

For example, one school of thought believes that, because of the constitutional commitment to free self-government, only political speech is within the core protected area,[395] although some commentators tend to define more broadly the concept of "political" than one might suppose from the word alone. Others recur to the writings of Milton and Mill and argue that protecting speech, even speech in error, is necessary for the eventual ascertainment of the truth through the conflict of ideas in the marketplace—a view skeptical of our ability ever to know the truth.[396] A broader-grounded view is expounded by scholars who argue that freedom of expression is necessary to promote individual self-fulfillment—that, when speech is freely chosen by the speaker to persuade others, it defines and expresses the speaker's "self" and promotes his liberty[397] and "self-realization" by enabling him to develop his powers and abilities and

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[393] T. Emerson, The System of Freedom of Expression 15 (1970). The practice in the Court is largely to itemize all the possible values the First Amendment has been said to protect. *See*, *e.g.*, Consolidated Edison Co. v. PSC, 447 U.S. 530, 534–35 (1980); First Nati'l Bank of Boston v. Bellotti, 435 U.S. 765, 776–77 (1978).

[394] T. Emerson, The System of Freedom of Expression 6–7 (1970). For Emerson, the four values are (1) assuring individuals self-fulfillment, (2) promoting discovery of truth, (3) providing for participation in decisionmaking by all members of society, and (4) promoting social stability through discussion and compromise of differences. For a persuasive argument in favor of an "eclectic" approach, *see* Shriffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 Nw. U.L. Rev. 1212 (1983). A compressive discussion of all the theories may be found in F. Schauer, Free Speech: A Philosophical Inquiry (1982).

[395] *E.g.*, A. Meiklejohn, Political Freedom (1960); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971); BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299 (1978). This contention does not reflect the Supreme Court's view. "It is no doubt true that a central purpose of the First Amendment 'was to protect the free discussion of governmental affairs.' . . . But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexclusive list of labels—is not entitled to full First Amendment protection." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977).

[396] The "marketplace of ideas" metaphor is attributable to Justice Holmes' opinion in Abrams v. United States, 250 U.S. 616, 630 (1919). *See* Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519 (1979). The theory has been the dominant one in scholarly and judicial writings. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. Rev. 964, 967–74 (1978).

[397] *E.g.*, C. Edwin Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. Cal. L. Rev. 293 (1982); C. Edwin Baker, *Realizing Self-*

to make and influence decisions regarding his destiny.[398] The literature is enormous and no doubt the Justices as well as the larger society are influenced by it, and yet the decisions, probably in large part because they are the collective determination of nine individuals, seldom clearly reflect a principled and consistent acceptance of any philosophy.

Freedom of Expression: Is There a Difference Between Speech and Press?

Use of the single word "expression" to reach speech, press, petition, association, and the like, raises the question of whether the free speech clause and the free press clause are coextensive, or whether one reaches where the other does not. It has been much debated, for example, whether the "institutional press" is entitled to greater freedom from governmental regulations or restrictions than are nonpress individuals, groups, or associations. Justice Stewart has argued: "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively." [399] But, as Chief Justice Burger wrote: "The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." [400]

Several Court holdings do firmly point to the conclusion that the press clause does not confer on the press the power to compel government to furnish information or otherwise give the press access to information that the public generally does not have.[401] Nor, in many respects, is the press entitled to treatment different in kind from the treatment to which any other member of the public may

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Realization: Corporate Political Expenditures and Redish's The Value of Free Speech, 130 U. PA. L. REV. 646 (1982).

[398] Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

[399] Houchins v. KQED, 438 U.S. 1, 17 (1978) (concurring opinion). Justice Stewart initiated the debate in a speech, subsequently reprinted as Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975). Other articles are cited in First National Bank of Boston v. Bellotti, 435 U.S. 765, 798 (1978) (Chief Justice Burger concurring).

[400] 435 U.S. at 798. The Chief Justice's conclusion was that the institutional press had no special privilege as the press.

[401] Houchins v. KQED, 438 U.S. 1 (1978), and id. at 16 (Justice Stewart concurring); Saxbe v. Washington Post, 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Nixon v. Warner Communications, 435 U.S. 589 (1978). The trial access cases, whatever they may precisely turn out to mean, recognize a right of access of both public and press to trials. Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

be subjected.[402] "Generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects."[403] Yet, it does seem clear that, to some extent, the press, because of its role in disseminating news and information, is entitled to deference that others are not entitled to—that its role constitutionally entitles it to governmental "sensitivity," to use Justice Stewart's word.[404] What difference such "sensitivity" might make in deciding cases is difficult to say.

The most interesting possibility lies in the First Amendment protection of good-faith defamation.[405] Justice Stewart argued that the *Sullivan* privilege is exclusively a free press right, denying that the "constitutional theory of free speech gives an individual any immunity from liability for libel or slander."[406] To be sure, in all the cases to date that the Supreme Court has resolved, the defendant has been, in some manner, of the press,[407] but the Court's decision in *First National Bank of Boston v. Bellotti* that corporations are entitled to assert First Amendment speech guarantees against federal and, through the Fourteenth Amendment, state, regulations causes the evaporation of the supposed "conflict" between speech clause protection of individuals only and press clause protection of press corporations as well as of press individuals.[408] The issue, the Court

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[402] Branzburg v. Hayes, 408 U.S. 665 (1972) (grand jury testimony be newspaper reporter); Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (search of newspaper offices); Herbert v. Lando, 441 U.S. 153 (1979) (defamation by press); Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (newspaper's breach of promise of confidentiality).

[403] Cohen v. Cowles Media, 501 U.S. 663, 669 (1991).

[404] *E.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); Landmark Communications v. Virginia, 435 U.S. 829 (1978). *See also* Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978), and id. at 568 (Justice Powell concurring); Branzburg v. Hayes, 408 U.S. 665, 709 (1972) (Justice Powell concurring). Several concurring opinions in Richmond Newspapers v. Virginia, 448 U.S. (1980), imply recognition of some right of the press to gather information that apparently may not be wholly inhibited by nondiscriminatory constraints. Id. at 582–84 (Justice Stevens), 586 n.2 (Justice Brennan), 599 n.2 (Justice Stewart). Yet the Court has also suggested that the press is protected in order to promote and to protect the exercise of free speech in society at large, including peoples' interest in receiving information. *E.g.*, Mills v. Alabama, 384 U.S. 214, 218–19 (1966); CBS v. FCC, 453 U.S. 367, 394–95 (1981).

[405] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See* discussion of "Defamation," *infra*.

[406] Stewart, *Or of the Press*, 26 HASTINGS L. J. 631, 633–35 (1975).

[407] In Hutchinson v. Proxmire, 443 U.S. 111, 133 n.16 (1979), the Court noted that it has never decided whether the *Times* standard applies to an individual defendant. Some think they discern in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), intimations of such leanings by the Court.

[408] 435 U.S. 765 (1978). The decision, addressing a question not previously confronted, was 5-to-4. Justice Rehnquist would have recognized no protected First Amendment rights of corporations because, as entities entirely the creation of state law, they were not to be accorded rights enjoyed by natural persons. Id. at 822. Justices White, Brennan, and Marshall thought the First Amendment implicated but not dispositive because of the state interests asserted. Id. at 802. Previous decisions recogniz-

wrote in *Bellotti*, was not what constitutional rights corporations have but whether the speech that is being restricted is protected by the First Amendment because of its societal significance. Because the speech in *Bellotti* concerned the enunciation of views on the conduct of governmental affairs, it was protected regardless of its source; while the First Amendment protects and fosters individual self-expression as a worthy goal, it also and as importantly affords the public access to discussion, debate, and the dissemination of information and ideas. Despite *Bellotti's* emphasis upon the political nature of the contested speech, it is clear that the same principle—the right of the public to receive information—governs nonpolitical, corporate speech.[409]

With some qualifications, therefore, the speech and press clauses may be analyzed under an umbrella "expression" standard, with little, if any, hazard of missing significant doctrinal differences.

The Doctrine of Prior Restraint

"[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."[410] "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[411] Government "thus carries a heavy burden of showing justification for the imposition of such a restraint."[412] Under the English licensing system, which expired in 1695, all printing presses and printers were licensed and nothing could be published without prior approval of the state or church authorities. The great struggle for liberty of the press was for the right to publish without a license what for a long time could be published only with a license.[413]

The United States Supreme Court's first encounter with a law imposing a prior restraint came in *Near v. Minnesota ex rel. Ol-*

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ing corporate free speech had involved either press corporations, id. at 781–83; *see also* id. at 795 (Chief Justice Burger concurring), or corporations organized especially to promote the ideological and associational interests of their members. *E.g.*, NAACP v. Button, 371 U.S. 415 (1963).

[409] Commercial speech when engaged in by a corporation is subject to the same standards of protection as when natural persons engage in it. Consolidated Edison Co. v. PSC, 447 U.S. 530, 533–35 (1980). Nor does the status of a corporation as a government-regulated monopoly alter the treatment. Id. at 534 n.1; Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566–68 (1980).

[410] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).

[411] Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).

[412] Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

[413] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713–14 (1931); Lovell v. Griffin, 303 U.S. 444, 451 (1938).

son,[414] in which a five-to-four majority voided a law authorizing the permanent enjoining of future violations by any newspaper or periodical once found to have published or circulated an "obscene, lewd and lascivious" or a "malicious, scandalous and defamatory" issue. An injunction had been issued after the newspaper in question had printed a series of articles tying local officials to gangsters. Although the dissenters maintained that the injunction constituted no prior restraint, because that doctrine applied to prohibitions of publication without advance approval of an executive official,[415] the majority deemed it "the essence of censorship" that, in order to avoid a contempt citation, the newspaper would have to clear future publications in advance with the judge.[416] Liberty of the press to scrutinize closely the conduct of public affairs was essential, said Chief Justice Hughes for the Court. "[T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege."[417] The Court did not explore the kinds of restrictions to which the term "prior restraint" would apply, nor do more than assert that only in "exceptional cases" would prior restraint be permissible.[418]

Nor did subsequent cases substantially illuminate the murky interior of the doctrine. The doctrine of prior restraint was called upon by the Court as it struck down restrictions on First Amendment rights, including a series of loosely drawn statutes and ordinances requiring licenses to hold meetings and parades and to distribute literature, with uncontrolled discretion in the licensor whether or not to issue them.[419] The doctrine that generally emerged was that permit systems and prior licensing are constitutionally valid

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[414] 283 U.S. 697 (1931).

[415] 283 U.S. at 723, 733–36 (Justice Butler dissenting).

[416] 283 U.S. at 713.

[417] 283 U.S. at 719–20.

[418] 283 U.S. at 716.

[419] *E.g.*, Lovell v. Griffin, 303 U.S. 444 (1938); Cantwell v. Connecticut, 310 U.S. 296 (1940); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Staub v. City of Baxley, 355 U.S. 313 (1958). For other applications, *see* Grosjean v. American Press Co., 297 U.S. 233 (1936); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944).

so long as the discretion of the issuing official was limited to questions of time, place, and manner.[420] "[*O*]*nly* content-based injunctions are subject to prior restraint analysis."[421]

The most recent Court encounter with the doctrine in the national security area occurred when the government attempted to enjoin press publication of classified documents pertaining to the Vietnam War[422] and, although the Court rejected the effort, at least five and perhaps six Justices concurred on principle that, in some circumstances, prior restraint of publication would be constitutional.[423] But no cohesive doctrine relating to the subject, its applications, and its exceptions has emerged.

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[420] Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953). In Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968), the Court held invalid the issuance of an ex parte injunction to restrain the holding of a protest meeting, holding that usually notice must be given the parties to be restrained and an opportunity for them to rebut the contentions presented to justify the sought-for restraint. In Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the Court held invalid as a prior restraint an injunction preventing the petitioners from distributing 18,000 pamphlets attacking respondent's alleged "blockbusting" real estate activities; he was held not to have borne the "heavy burden" of justifying the restraint. "No prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court. Designating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." Id. at 419–20. *See also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property is facially invalid as prior restraint).

The necessity of immediate appellate review of orders restraining the exercise of First Amendment rights was strongly emphasized in National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977), and seems to explain the Court's action in Philadelphia Newspapers v. Jerome, 434 U.S. 241 (1978). *But see* Moreland v. Sprecher, 443 U.S. 709 (1979) (party can relinquish right to expedited review through failure to properly request it).

[421] DVD Copy Control Association, Inc. v. Bunner, 75 P.3d 1, 17 (Cal. 2003) ("[a] prior restraint is a *content-based* restriction on speech *prior to its occurrence*," id. at 17–18). Regarding the standard for content-neutral injunctions, *see* "Public Issue Picketing and Parading," *infra*.

[422] New York Times Co. v. United States, 403 U.S. 713 (1971). The vote was 6-to-3, with Justices Black, Douglas, Brennan, Stewart, White, and Marshall in the majority and Chief Justice Burger and Justices Harlan and Blackmun in the minority. Each Justice issued an opinion.

[423] The three dissenters thought such restraint appropriate in this case. Id. at 748, 752, 759. Justice Stewart thought restraint would be proper if disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people," id. at 730, while Justice White did not endorse any specific phrasing of a standard. Id. at 730–33. Justice Brennan would preclude even interim restraint except upon "governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea." Id. at 712–13.

The same issues were raised in United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), in which the United States obtained an injunction prohibiting

The Supreme Court has written that "[t]he special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment."[424] The prohibition on prior restraint, thus, is essentially a limitation on restraints until a final judicial determination that the restricted speech is not protected by the First Amendment. It is a limitation, for example, against temporary restraining orders and preliminary injunctions pending final judgment, not against permanent injunctions after a final judgment is made that the restricted speech is not protected by the First Amendment.[425]

The Supreme Court has also written "that traditional prior restraint doctrine may not apply to [commercial speech],"[426] and "[t]he vast majority of [federal] circuits . . . do not apply the doctrine of prior restraint to commercial speech."[427] "Some circuits [however] have explicitly indicated that the requirement of procedural safeguards in the context of a prior restraint indeed applies to commercial speech."[428] In addition, prior restraint is generally permitted, even in the form of preliminary injunctions, in intellectual property cases, such as those for infringements of copyright or trademark.[429]

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publication of an article it claimed would reveal information about nuclear weapons, thereby increasing the dangers of nuclear proliferation. The injunction was lifted when the same information was published elsewhere and thus there was no appellate review of the order.

With respect to the right of the Central Intelligence Agency to prepublication review of the writings of former agents and its enforcement through contractual relationships, *see* Snepp v. United States, 444 U.S. 507 (1980); Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975); United States v. Marchetti, 446 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

[424] Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 390 (1973); *see also* Vance v. Universal Amusement Co., 445 U.S. 308, 315–316 (1980) ("the burden of supporting an injunction against a future exhibition [of allegedly obscene motion pictures] is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication").

[425] *See* Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke Law Journal 147, 169–171 (1998).

[426] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557 (1980), citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976).

[427] Bosley v. WildWetT.com, 310 F. Supp. 2d 914, 930 (N.D. Ohio 2004).

[428] New York Magazine v. Metropolitan Transportation Authority, 136 F.3d 123, 131 (2d Cir. 1998), *cert. denied*, 525 U.S. 824 (1998), citing Desert Outdoor Adver. v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996); *In re* Search of Kitty's East, 905 F.2d 1367, 1371–72 & n.4 (10th Cir. 1990).

[429] *See* Bosley v. WildWetT.com, 310 F. Supp. 2d 914, 930 (N.D. Ohio 2004). *See also* Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke Law Journal 147 (1998) (arguing that intellectual property should have the same First Amendment protection from preliminary injunctions that other speech does).

Injunctions and the Press in Fair Trial Cases.—Confronting a claimed conflict between free press and fair trial guarantees, the Court unanimously set aside a state court injunction barring the publication of information that might prejudice the subsequent trial of a criminal defendant.[430] Though agreed as to the result, the Justices were divided as to whether "gag orders" were ever permissible and if so what the standards for imposing them were. The Court used the Learned Hand formulation of the "clear and present danger" test[431] and considered as factors in any decision on the imposition of a restraint upon press reporters "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[432] Though the Court found that one seeking a restraining order must meet "the heavy burden of demonstrating, in advance of trial, that without a prior restraint a fair trial would be denied," it refused to "rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint."[433] Justice Brennan's concurring opinion flatly took the position that such restraining orders were never permissible. Commentary and reporting on the criminal justice system is at the core of First Amendment values, he would have held, and secrecy can do so much harm "that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained."[434] The only circumstance in

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[430] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[431] 427 U.S. at 562, quoting Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494, 510 (1951).

[432] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (opinion of Chief Justice Burger, concurred in by Justices Blackmun and Rehnquist, and, also writing brief concurrences, Justices White and Powell). Applying the tests, the Chief Justice agreed that (a) there was intense and pervasive pretrial publicity and more could be expected, but that (b) the lower courts had made little effort to assess the prospects of other methods of preventing or mitigating the effects of such publicity and that (c) in any event the restraining order was unlikely to have the desired effect of protecting the defendant's rights. Id. at 562–67.

[433] 427 U.S. at 569–70. The Court distinguished between reporting on judicial proceedings held in public and reporting of information gained from other sources, but found that a heavy burden must be met to secure a prior restraint on either. Id. at 570. *See also* Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977) (setting aside injunction restraining news media from publishing name of juvenile involved in pending proceeding when name has been learned at open detention hearing that could have been closed but was not); Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979).

[434] 427 U.S. at 572, 588. Justices Stewart and Marshall joined this opinion and Justice Stevens noted his general agreement except that he reserved decision in particularly egregious situations, even though stating that he might well agree with

which prior restraint of protected speech might be permissible is when publication would cause "virtually certain, direct, and immediate" national harm, Justice Brennan continued, but "the harm to a fair trial that might otherwise eventuate from publications which are suppressed . . . must inherently remain speculative."[435] Although the result in the case does not foreclose the possibility of future "gag orders," it does lessen the number to be expected and shifts the focus to other alternatives for protecting trial rights.[436] On a different level, however, are orders that restrain the press as a party to litigation in the dissemination of information obtained through pretrial discovery. In *Seattle Times Co. v. Rhinehart*,[437] the Court determined that such orders protecting parties from abuses of discovery require "no heightened First Amendment scrutiny."[438]

Obscenity and Prior Restraint.—Only in the obscenity area has there emerged a substantial consideration of the doctrine of prior restraint, and the doctrine's use there may be based upon the fact that obscenity is not a protected form of expression.[439] In *Kingsley Books v. Brown*,[440] the Court upheld a state statute that, though it embodied some features of prior restraint, was seen as having little more restraining effect than an ordinary criminal statute; that is, the law's penalties applied only after publication. But, in *Times Film Corp. v. City of Chicago*,[441] a divided Court specifically affirmed that, at least in the case of motion pictures, the First Amendment did not proscribe a licensing system under which a board of censors could refuse to license for public exhibition films that it found obscene. Books and periodicals may also be subjected to some forms of prior restraint,[442] but the thrust of the Court's opinions in this area with

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Justice Brennan there also. Id. at 617. Justice White, while joining the opinion of the Court, noted that he had grave doubts that "gag orders" could ever be justified but he would refrain from so declaring in the Court's first case on the issue. Id. at 570.

[435] 427 U.S. at 599.

[436] One such alternative is the banning of communication with the press on trial issues by prosecution and defense attorneys, police officials, and court officers. This, of course, also raises First Amendment issues. *See*, *e.g.*, Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976).

[437] 467 U.S. 20 (1984).

[438] 467 U.S. at 36. The decision was unanimous, all other Justices joining Justice Powell's opinion for the Court, but Justices Brennan and Marshall noting additionally that under the facts of the case important interests in privacy and religious freedom were being protected. Id. at 37, 38.

[439] *See* discussion of "Obscenity," *infra*. *See also* Justice Brennan's concurrence in Nebraska Press Ass'n v. Stuart, 427 U.S. at 590.

[440] 354 U.S. 436 1957). *See also* Bantam Books v. Sullivan, 372 U.S. 58 (1963).

[441] 365 U.S. 43 (1961). *See also* Young v. American Mini Theatres, 427 U.S. 50 (1976) (zoning ordinance prescribing distances adult theaters may be located from residential areas and other theaters is not an impermissible prior restraint).

[442] *Cf.* Kingsley Books v. Brown, 354 U.S. 436 (1957).

regard to all forms of communication has been to establish strict standards of procedural protections to ensure that the censoring agency bears the burden of proof on obscenity, that only a judicial order can restrain exhibition, and that a prompt final judicial decision is assured.[443]

Subsequent Punishment: Clear and Present Danger and Other Tests

Granted that the controversy over freedom of expression at the time of the ratification of the First Amendment was limited almost exclusively to the problem of prior restraint, nevertheless the words speak of laws "abridging" the freedom of speech and press, and the modern cases have been largely fought over subsequent punishment. "[T]he mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications . . . ."

"[The purpose of the speech and press clause] has evidently been to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them. . . . The

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[443] Freedman v. Maryland, 380 U.S. 51 (1965); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968); Blount v. Rizzi, 400 U.S. 410 (1971); United States v. Thirty-seven Photographs, 402 U.S. 363, 367–375 (1971); Southeastern Promotions v. Conrad, 420 U.S. 546 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 229 (1990) (ordinance requiring licensing of "sexually oriented business" "does not provide for an effective limitation on the time within which the licensor's decision must be made [and] also fails to provide an avenue for prompt judicial review"); City of Littleton v. Z.J. Gifts D–4, L.L.C., 541 U.S. 774, 784 (2004) ("Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria . . . and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type"); Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) (seizure of books and films based on *ex parte* probable cause hearing under state RICO law's forfeiture procedures constitutes invalid prior restraint; instead, there must be a determination in an adversarial proceeding that the materials are obscene or that a RICO violation has occurred). *But cf.* Alexander v. United States, 509 U.S. 544 (1993) (RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses, based on the predicate acts of selling four magazines and three videotapes, does not constitute a prior restraint and is not invalid as "chilling" protected expression that is not obscene).

evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." [444] A rule of law permitting criminal or civil liability to be imposed upon those who speak or write on public issues would lead to self-censorship, which would not be relieved by permitting a defense of truth. "Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so . . . . The rule thus dampens the vigor and limits the variety of public debate." [445]

"Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution." [446] "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of

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[444] 2 T. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union 885–86 (8th ed. 1927).

[445] New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964). *See also* Speiser v. Randall, 357 U.S. 513, 526 (1958); Smith v. California, 361 U.S. 147, 153–54 (1959); Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

[446] Abrams v. United States, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).

noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."[447]

"But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral."[448] The fixing of a standard is necessary, by which to determine what degree of evil is "sufficiently substantial to justify resort to abridgment of speech and press and assembly as a means of protection" and how clear and imminent and likely the danger is.[449] That standard has fluctuated over the years, as the cases discussed below demonstrate.

Clear and Present Danger.—Certain expression, oral or written, may incite, urge, counsel, advocate, or importune the commission of criminal conduct; other expression, such as picketing, demonstrating, and engaging in certain forms of "symbolic" action, may either counsel the commission of criminal conduct or itself constitute criminal conduct. Leaving aside for the moment the problem of "speech-plus" communication, it becomes necessary to determine when expression that may be a nexus to criminal conduct is subject to punishment and restraint. At first, the Court seemed disposed in the few cases reaching it to rule that if the conduct could be made criminal, the advocacy of or promotion of the conduct could be made criminal.[450] Then, in *Schenck v. United States*,[451] in which the defendants had been convicted of seeking to disrupt recruitment of military personnel by disseminating leaflets, Justice Holmes

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[447] Whitney v. California, 274 U.S. 357, 375–76 (1927) (Justice Brandeis concurring).

[448] 274 U.S. at 373.

[449] 274 U.S. at 374.

[450] Davis v. Beason, 133 U.S. 333 (1890); Fox v. Washington, 236 U.S. 273 (1915).

[451] 249 U.S. 47 (1919).

formulated the "clear and present danger" test that has ever since been the starting point of argument. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."[452] The convictions were unanimously affirmed. One week later, the Court again unanimously affirmed convictions under the same act with Justice Holmes writing, "we think it necessary to add to what has been said in *Schenck v. United States* only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[453] And, in *Debs v. United States*,[454] Justice Holmes upheld a conviction because "the natural and intended effect" and the "reasonably probable effect" of the speech for which the defendant was prosecuted was to obstruct military recruiting.

In *Abrams v. United States*,[455] however, Justices Holmes and Brandeis dissented upon affirmance of the convictions of several alien anarchists who had printed leaflets seeking to encourage discontent with the United States' participation in World War I. The majority simply referred to *Schenck* and *Frohwerk* to rebut the First Amendment argument, but the dissenters urged that the government had made no showing of a clear and present danger. Another affirmance by the Court of a conviction, the majority simply saying that "[t]he tendency of the articles and their efficacy were enough for the offense," drew a similar dissent.[456] Moreover, in *Gitlow v. New York*,[457] a conviction for distributing a manifesto in violation of a law making it criminal to advocate, advise, or teach the duty, necessity, or propriety of overthrowing organized government by force or violence, the Court affirmed in the absence of any evidence regarding the effect of the distribution and in the absence of any contention that it created any immediate threat to the security of the state. In so doing, the Court discarded Holmes' test. "It is clear that the question in such cases [as this] is entirely different from that

[452] 249 U.S. at 52.
[453] Frohwerk v. United States, 249 U.S. 204, 206 (1919) (citations omitted).
[454] 249 U.S. 211, 215–16 (1919).
[455] 250 U.S. 616 (1919).
[456] Schaefer v. United States, 251 U.S. 466, 479 (1920). *See also* Pierce v. United States, 252 U.S. 239 (1920).
[457] 268 U.S. 652 (1925).

involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. . . . In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. . . . And the general statement in the *Schenck Case* . . . was manifestly intended . . . to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."[458] Thus, a state legislative determination "that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power" was almost conclusive to the Court.[459] It is not clear what test, if any, the majority would have used, although the "bad tendency" test has usually been associated with the case. In *Whitney v. California*,[460] the Court affirmed a conviction under a criminal syndicalism statute based on the defendant's association with and membership in an organization that advocated the commission of illegal acts, finding again that the determination of a legislature that such advocacy involves "danger to the public peace and the security of the State" was entitled to almost conclusive weight. In a technical concurrence, which was in fact a dissent from the opinion of the Court, Justice Brandeis restated the "clear and present danger" test. "[E]ven advocacy of violation [of the law] . . . is not a justification for denying free speech where the advocacy fails short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. . . .

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[458] 268 U.S. at 670–71.

[459] 268 U.S. at 668. Justice Holmes dissented. "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Id. at 673.

[460] 274 U.S. 357, 371 (1927).

In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." [461]

The Adoption of Clear and Present Danger.—The Court did not invariably affirm convictions during this period in cases like those under consideration. In *Fiske v. Kansas*,[462] it held that a criminal syndicalism law had been invalidly applied to convict one against whom the only evidence was the "class struggle" language of the constitution of the organization to which he belonged. A conviction for violating a "red flag" law was voided because the statute was found unconstitutionally vague.[463] Neither case mentioned clear and present danger. An "incitement" test seemed to underlie the opinion in *DeJonge v. Oregon*,[464] upsetting a conviction under a criminal syndicalism statute for attending a meeting held under the auspices of an organization that was said to advocate violence as a political method, although the meeting was orderly and no violence was advocated during it. In *Herndon v. Lowry*,[465] the Court narrowly rejected the contention that the standard of guilt could be made the "dangerous tendency" of one's words, and indicated that the power of a state to abridge speech "even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."

Finally, in *Thornhill v. Alabama*,[466] a state anti-picketing law was invalidated because "no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." During the same term, the Court reversed the breach of the peace conviction of a Jehovah's Witness who had played an inflammatory phonograph record to persons on the street, the Court discerning no clear and present danger of disorder.[467]

The stormiest fact situation the Court faced in applying the clear and present danger test occurred in *Terminiello v. City of Chi-*

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[461] 274 U.S. at 376.

[462] 274 U.S. 380 (1927).

[463] Stromberg v. California, 283 U.S. 359 (1931).

[464] 299 U.S. 353 (1937). *See* id. at 364–65.

[465] 301 U.S. 242, 258 (1937). At another point, clear and present danger was alluded to without any definite indication it was the standard. Id. at 261.

[466] 310 U.S. 88, 105 (1940). The Court admitted that the picketing did result in economic injury to the employer, but found such injury "neither so serious nor so imminent" as to justify restriction. The doctrine of clear and present danger was not to play a future role in the labor picketing cases.

[467] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

cago,[468] in which a five-to-four majority struck down a conviction obtained after the judge instructed the jury that a breach of the peace could be committed by speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." "A function of free speech under our system of government," wrote Justice Douglas for the majority, "is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." [469] The dissenters focused on the disorders that had actually occurred as a result of Terminiello's speech, Justice Jackson saying: "Rioting is a substantive evil, which I take it no one will deny that the State and the City have the right and the duty to prevent and punish . . . . In this case the evidence proves beyond dispute that danger of rioting and violence in response to the speech was clear, present and immediate." [470] The Jackson position was soon adopted in *Feiner v. New York*,[471] in which Chief Justice Vinson said that "[t]he findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech."

Contempt of Court and Clear and Present Danger.—The period during which clear and present danger was the standard by which to determine the constitutionality of governmental suppression of or punishment for expression was a brief one, extending roughly from *Thornhill* to *Dennis*.[472] But in one area it was vigorously, though not without dispute, applied to enlarge freedom of utterance and it is in this area that it remains viable. In early contempt-of-court cases in which criticism of courts had been punished as contempt, the Court generally took the position that, even if freedom of speech and press was protected against governmental abridgment, a publication tending to obstruct the administration of justice was punish-

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[468] 337 U.S. 1 (1949).
[469] 337 U.S. at 4–5.
[470] 337 U.S. at 25–26.
[471] 340 U.S. 315, 321 (1951).
[472] Thornhill v. Alabama, 310 U.S. 88 (1940); Dennis v. United States, 341 U.S. 494 (1951).

able, irrespective of its truth.[473] In *Bridges v. California*,[474] however, in which contempt citations had been brought against a newspaper and a labor leader for statements made about pending judicial proceedings, Justice Black, for a five-to-four majority, began by applying the clear and present danger test, which he interpreted to require that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[475] He noted that "[t]he substantive evil here sought to be averted . . . appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice." As for the first evil, Justice Black rejected "[t]he assumption that respect for the judiciary can be won by shielding judges from published criticism . . . ."[476] As for "[t]he other evil feared, disorderly and unfair administration of justice, [it] is more plausibly associated with restricting publications which touch upon pending litigation." But the "degree of likelihood" of the evil being accomplished was not "sufficient to justify summary punishment."[477] In dissent, Justice Frankfurter accepted the application of the clear and present danger, but he interpreted it as meaning no more than a "reasonable tendency" test. "Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. . . . A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. . . . It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed."[478]

A unanimous Court next struck down the contempt conviction arising out of newspaper criticism of judicial action already taken, although one case was pending after a second indictment. Specifically alluding to clear and present danger, while seeming to regard it as stringent a test as Justice Black had in the prior case, Justice Reed wrote that the danger sought to be averted, a "threat to the impartial and orderly administration of justice," "has not the clearness and immediacy necessary to close the door of permissible pub-

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[473] Patterson v. Colorado, 205 U.S. 454 (1907); Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).
[474] 314 U.S. 252 (1941).
[475] 314 U.S. at 263.
[476] 314 U.S. at 270.
[477] 314 U.S. at 271.
[478] 314 U.S. at 291.

lic comment."[479] Divided again, the Court a year later set aside contempt convictions based on publication, while a motion for a new trial was pending, of inaccurate and unfair accounts and an editorial concerning the trial of a civil case. "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, and not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[480]

In *Wood v. Georgia*,[481] the Court again divided, applying clear and present danger to upset the contempt conviction of a sheriff who had been cited for criticizing the recommendation of a county court that a grand jury look into African-American bloc voting, vote buying, and other alleged election irregularities. No showing had been made, said Chief Justice Warren, of "a substantive evil actually designed to impede the course of justice." The case presented no situation in which someone was on trial, there was no judicial proceeding pending that might be prejudiced, and the dispute was more political than judicial.[482] A unanimous Court in 1972 apparently applied the standard to set aside a contempt conviction of a defendant who, arguing his own case, alleged before the jury that the trial judge by his bias had prejudiced his trial and that he was a political prisoner. Though the defendant's remarks may have been disrespectful of the court, the Supreme Court noted that "[t]here is no indication . . . that petitioner's statements were uttered in a boisterous tone or in any wise actually disrupted the court proceeding" and quoted its previous language about the imminence of the threat necessary to constitute contempt.[483]

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[479] Pennekamp v. Florida, 328 U.S. 331, 336, 350 (1946). To Justice Frankfurter, the decisive consideration was whether the judge or jury is, or presently will be, pondering a decision that comment seeks to affect. Id. at 369.

[480] Craig v. Harney, 331 U.S. 367, 376 (1947). Dissenting with Chief Justice Vinson, Justice Frankfurter said: "We cannot say that the Texas Court could not properly find that these newspapers asked of the judge, and instigated powerful sections of the community to ask of the judge, that which no one has any business to ask of a judge, except the parties and their counsel in open court, namely, that he should decide one way rather than another." Id. at 390. Justice Jackson also dissented. Id. at 394. *See also* Landmark Communications v. Virginia, 435 U.S. 829, 844 (1978); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–63 (1976).

[481] 370 U.S. 375 (1962).

[482] 370 U.S. at 383–85, 386–90. Dissenting, Justices Harlan and Clark thought that the charges made by the defendant could well have influenced the grand jurors in their deliberations and that the fact that laymen rather than judicial officers were subject to influence should call forth a less stringent test than when the latter were the object of comment. Id. at 395.

[483] *In re* Little, 404 U.S. 553, 555 (1972). The language from Craig v. Harney, 331 U.S. 367, 376 (1947), is quoted in the previous paragraph of text, *supra*.

Clear and Present Danger Revised: Dennis.—In *Dennis v. United States*,[484] the Court sustained the constitutionality of the Smith Act,[485] which proscribed advocacy of the overthrow by force and violence of the government of the United States, and upheld convictions under it. *Dennis*' importance here is in the rewriting of the clear and present danger test. For a plurality of four, Chief Justice Vinson acknowledged that the Court had in recent years relied on the Holmes-Brandeis formulation of clear and present danger without actually overruling the older cases that had rejected the test; but while clear and present danger was the proper constitutional test, that "shorthand phrase should [not] be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case." It was a relative concept. Many of the cases in which it had been used to reverse convictions had turned "on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech."[486]

Here, by contrast, "[o]verthrow of the government by force and violence is certainly a substantial enough interest for the government to limit speech."[487] And in combating that threat, the government need not wait to act until the putsch is about to be executed and the plans are set for action. "If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required."[488] Therefore, what does the phrase "clear and present danger" import for judgment? "Chief Judge Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' 183 F.2d at 212. We adopt this statement of the rule. As articulated by Chief Judge Hand, it is as succinct and inclusive as any other we might devise at this time. It takes into consideration those factors which we deem relevant, and relates their significances. More we cannot expect from words."[489]

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[484] 341 U.S. 494 (1951).

[485] 54 Stat. 670 (1940), 18 U.S.C. § 2385.

[486] Dennis v. United States, 341 U.S. 494, 508 (1951).

[487] 341 U.S. at 509.

[488] 341 U.S. at 508, 509.

[489] 341 U.S. at 510. Justice Frankfurter, concurring, adopted a balancing test, id. at 517, discussed in the next topic. Justice Jackson appeared to proceed on a conspiracy approach rather than one depending on advocacy. Id. at 561. Justices Black and Douglas dissented, reasserting clear and present danger as the standard. Id. at 579, 581. Note the recurrence to the Learned Hand formulation in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976), although the Court appeared in fact to apply balancing.

The "gravity of the evil, discounted by its improbability" was found to justify the convictions.[490]

Balancing.—Clear and present danger as a test, it seems clear, was a pallid restriction on governmental power after *Dennis*, and it virtually disappeared from the Court's language over the next twenty years.[491] Its replacement for part of this period was the much disputed "balancing" test, which made its appearance the year before *Dennis* in *American Communications Ass'n v. Douds*.[492] There the Court sustained a law barring from access to the NLRB any labor union if any of its officers failed to file annually an oath disclaiming membership in the Communist Party and belief in the violent overthrow of the government.[493] Chief Justice Vinson, for the Court, rejected reliance on the clear and present danger test. "Government's interest here is not in preventing the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced. Its interest is in protecting the free flow of commerce from what Congress considers to be substantial evils of conduct that are not the products of speech at all. Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs. The Board does not contend that political strikes, the substantive evil at which § 9(h) is aimed, are the

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[490] In Yates v. United States, 354 U.S. 298 (1957), the Court substantially limited both the Smith Act and the *Dennis* case by interpreting the Act to require advocacy of unlawful action, to require the urging of doing something now or in the future, rather than merely advocacy of forcible overthrow as an abstract doctrine, and by finding the evidence lacking to prove the former. Of *Dennis*, Justice Harlan wrote: "The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement,' id. at 511–12, is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur." Id. at 321.

[491] *Cf.* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 8 (1965). *See* Garner v. Louisiana, 368 U.S. 157, 185–207 (1961) (Justice Harlan concurring).

[492] 339 U.S. 382 (1950). *See also* Osman v. Douds, 339 U.S. 846 (1950). Balancing language was used by Justice Black in his opinion for the Court in Martin v. City of Struthers, 319 U.S. 141, 143 (1943), but it seems not to have influenced the decision. Similarly, in Schneider v. Irvington, 308 U.S. 147, 161–62 (1939), Justice Roberts used balancing language that he apparently did not apply.

[493] The law, § 9(h) of the Taft-Hartley Act, 61 Stat. 146 (1947), was repealed, 73 Stat. 525 (1959), and replaced by a section making it a criminal offense for any person "who is or has been a member of the Communist Party" during the preceding five years to serve as an officer or employee of any union. § 504, 73 Stat. 536 (1959); 29 U.S.C. § 504. It was held unconstitutional in United States v. Brown, 381 U.S. 437 (1965).

present or impending products of advocacy of the doctrines of Communism or the expression of belief in overthrow of the Government by force. On the contrary, it points out that such strikes are called by persons who, so Congress has found, have the will and power to do so *without* advocacy or persuasion that seeks acceptance in the competition of the market." [494]

The test, rather, must be one of balancing of interests. "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented." [495] As the interest in the restriction, the government's right to prevent political strikes and the disruption of commerce, was much more substantial than the limited interest on the other side in view of the relative handful of persons affected in only a partial manner, the Court perceived no difficulty upholding the statute.[496]

Justice Frankfurter, in his concurring opinion in *Dennis v. United States*,[497] rejected the applicability of clear and present danger and adopted a balancing test. "The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interest, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved." [498] But the "careful weighing of conflicting interests" [499] not only placed in the scale the disparately weighed interest of government in self-preservation and the interest of defendants in advocating illegal action, which alone would have determined the balance, it also involved the Justice's philosophy of the "confines of the judicial process" within which the role of courts, in First Amendment litigation as in other, is severely limited. Thus, "[f]ull responsibility" may not be placed in the courts "to balance the relevant factors and ascertain which interest in the circumstances [is] to prevail." "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." Rather, "[p]rimary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress." [500] Therefore, after considering at some length the factors to be balanced, Justice Frankfurter concluded:

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[494] American Communications Ass'n v. Douds, 339 U.S. 382, 396 (1950).
[495] 339 U.S. at 399.
[496] 339 U.S. at 400–06.
[497] 341 U.S. 494, 517 (1951).
[498] 341 U.S. at 524–25.
[499] 341 U.S. at 542.
[500] 341 U.S. at 525.

"It is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours. Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends." [501] Only if the balance struck by the legislature is "outside the pale of fair judgment" [502] could the Court hold that Congress was deprived by the Constitution of the power it had exercised.[503]

Thereafter, during the 1950s and the early 1960s, the Court used the balancing test in a series of decisions in which the issues were not, as they were not in *Douds* and *Dennis*, matters of expression or advocacy as a threat but rather were governmental inquiries into associations and beliefs of persons or governmental regulation of associations of persons, based on the idea that beliefs and associations provided adequate standards for predicting future or intended conduct that was within the power of government to regulate or to prohibit. Thus, in the leading case on balancing, *Konigsberg v. State Bar of California*,[504] the Court upheld the refusal of the state to certify an applicant for admission to the bar. Required to satisfy the Committee of Bar Examiners that he was of "good moral character," Konigsberg testified that he did not believe in the violent overthrow of the government and that he had never knowingly been a member of any organization that advocated such action, but he declined to answer any question pertaining to membership in the Communist Party.

For the Court, Justice Harlan began by asserting that freedom of speech and association were not absolutes but were subject to various limitations. Among the limitations, "general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved." [505] The governmental interest involved was the assurance that those admitted to the practice of law were committed to lawful change in society and it was proper for the state to be-

[501] 341 U.S. at 550–51.
[502] 341 U.S. at 540.
[503] 341 U.S. at 551.
[504] 366 U.S. 36 (1961).
[505] 366 U.S. at 50–51.

lieve that one possessed of "a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form" of government did not meet the standard of fitness.[506] On the other hand, the First Amendment interest was limited because there was "minimal effect upon free association occasioned by compulsory disclosure" under the circumstances. "There is here no likelihood that deterrence of association may result from foreseeable private action . . . for bar committee interrogations such as this are conducted in private. . . . Nor is there the possibility that the State may be afforded the opportunity for imposing undetectable arbitrary consequences upon protected association . . . for a bar applicant's exclusion by reason of Communist Party membership is subject to judicial review, including ultimate review by this Court, should it appear that such exclusion has rested on substantive or procedural factors that do not comport with the Federal Constitution." [507]

Balancing was used to sustain congressional and state inquiries into the associations and activities of individuals in connection with allegations of subversion [508] and to sustain proceedings against the Communist Party and its members.[509] In certain other cases, involving state attempts to compel the production of membership lists of the National Association for the Advancement of Colored People and to investigate that organization, use of the balancing test resulted in a finding that speech and associational rights outweighed the governmental interest claimed.[510] The Court used a balancing test in the late 1960s to protect the speech rights of a public employee who had criticized his employers.[511] Balancing, however, was not used when the Court struck down restrictions on receipt of materials mailed from Communist countries,[512] and it was not used in cases involving picketing, pamphleteering, and demonstrating in pub-

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[506] 366 U.S. at 52.

[507] 366 U.S. at 52–53. *See also In re* Anastaplo, 366 U.S. 82 (1961). The status of these two cases is in doubt after Baird v. State Bar, 401 U.S. 1 (1971), and *In re* Stolar, 401 U.S. 23 (1971), in which neither the plurality nor the concurring Justice making up the majority used a balancing test.

[508] Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961).

[509] Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961); Scales v. United States, 367 U.S. 203 (1961).

[510] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963).

[511] Pickering v. Board of Education, 391 U.S. 563 (1968).

[512] Lamont v. Postmaster General, 381 U.S. 301 (1965).

lic places.[513] But the only case in which it was specifically rejected involved a statutory regulation like those that had given rise to the test in the first place. *United States v. Robel* [514] held invalid under the First Amendment a statute that made it unlawful for any member of an organization that the Subversive Activities Control Board had ordered to register to work in a defense establishment.[515] Although Chief Justice Warren for the Court asserted that the vice of the law was that its proscription operated *per se* "without any need to establish that an individual's association poses the threat feared by the Government in proscribing it," [516] the rationale of the decision was not clear and present danger but the existence of less restrictive means by which the governmental interest could be accomplished.[517] In a concluding footnote, the Court said: "It has been suggested that this case should be decided by 'balancing' the governmental interests . . . against the First Amendment rights asserted by the appellee. This we decline to do. We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other. Our inquiry is more circumscribed. Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal. In making this determination we have found it necessary to measure the validity of the means adopted by Congress against both the goal it has sought to achieve and the specific prohibitions of the First Amendment. But we have in no way 'balanced' those respective interests. We have ruled only that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict." [518]

The "Absolutist" View of the First Amendment, With a Note on "Preferred Position".—During much of this period, the opposition to the balancing test was led by Justices Black and Douglas, who espoused what may be called an "absolutist" position, denying

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[513] *E.g.*, Cox v. Louisiana, 379 U.S. 536 and 559 (1965) (2 cases); Edwards v. South Carolina, 372 U.S. 229 (1963); Adderley v. Florida, 385 U.S. 39 (1966); Brown v. Louisiana, 383 U.S. 131 (1966). *But see* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), where balancing reappears and in which other considerations overbalance the First Amendment claims.

[514] 389 U.S. 258 (1967).

[515] Subversive Activities Control Act of 1950, § 5(a)(1)(D), 64 Stat. 992, 50 U.S.C. § 784(a)(1)(D).

[516] United States v. Robel, 389 U.S. 258, 265 (1967).

[517] 389 U.S. at 265–68.

[518] 389 U.S. at 268 n.20.

the government any power to abridge speech. But the beginnings of such a philosophy may be gleaned in much earlier cases in which a rule of decision based on a preference for First Amendment liberties was prescribed. Thus, Chief Justice Stone in his famous *Carolene Products* "footnote 4" suggested that the ordinary presumption of constitutionality that prevailed when economic regulation was in issue might be reversed when legislation is challenged that restricts "those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or that reflects "prejudice against discreet and insular minorities . . . tend[ing] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[519] Then, in *Murdock v. Pennsylvania*,[520] in striking down a license tax on religious colporteurs, the Court remarked that "[f]reedom of press, freedom of speech, freedom of religion are in a preferred position." Two years later the Court indicated that its decision with regard to the constitutionality of legislation regulating individuals is "delicate . . . [especially] where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. . . . That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions."[521] The "preferred-position" language was sharply attacked by Justice Frankfurter in *Kovacs v. Cooper*,[522] and it dropped from the opinions, although its philosophy did not.

Justice Black expressed his position in many cases but his *Konigsberg* dissent contains one of the lengthiest and clearest expositions of it.[523] That a particular governmental regulation abridged speech or deterred it was to him "sufficient to render the action of

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[519] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). In other words, whereas economic regulation need have merely a rational basis to be constitutional, legislation of the sort to which Chief Justice Stone referred might be subject to "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . ." Id. Justice Powell later wrote that footnote 4 "is recognized as a primary source of 'strict scrutiny' judicial review." Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 Columbia L. Rev. 1087, 1088 (1982).

[520] 319 U.S. 105, 115 (1943). *See also* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

[521] Thomas v. Collins, 323 U.S. 516, 529–30 (1945).

[522] 336 U.S. 77, 89 (1949) (collecting cases with critical analysis).

[523] Konigsberg v. State Bar of California, 366 U.S. 36, 56 (1961) (dissenting opinion). *See also* Braden v. United States, 365 U.S. 431, 441 (1961) (dissenting); Wilkinson v. United States, 365 U.S. 399, 422 (1961) (dissenting); Uphaus v. Wyman, 364 U.S. 388, 392 (1960) (dissenting); Barenblatt v. United States, 360 U.S. 109, 140 (1959) (dissenting); American Communications Ass'n v. Douds, 339 U.S. 382, 445 (1950); Communist Party v. SACB, 367 U.S. 1, 137 (1961) (dissenting); Beauharnais v. Illinois, 343 U.S. 250, 267 (1952) (dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (concurring); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (concurring). For Justice Douglas' position, *see* New York Times Co.

the State unconstitutional" because he did not subscribe "to the doctrine that permits constitutionally protected rights to be 'balanced' away whenever a majority of this Court thinks that a State might have an interest sufficient to justify abridgment of those freedoms . . . I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." [524] As he wrote elsewhere: "First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation, or exposure by government." [525] But the "First and Fourteenth Amendments . . . take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes*. This does not mean, however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property." [526] Thus, in his last years on the Court, Justice Black, while maintaining an "absolutist" position, increasingly drew a line between "speech" and "conduct which involved communication." [527]

Modern Tests and Standards: Vagueness, Overbreadth, Strict Scrutiny, Intermediate Scrutiny, and Effectiveness of Speech Restrictions.—Vagueness is a due process vice that can be brought into play with regard to any criminal and many civil statutes,[528] but it has a special signficance when applied to governmental restrictions of speech: fear that a vague restriction may apply to one's speech may deter constitutionally protected speech as well as constitutionally unprotected speech. Vagueness has been the basis for voiding numerous such laws, especially in the fields of loyalty oaths,[529]

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v. United States, 403 U.S. at 720 (concurring); Roth v. United States, 354 U.S. 476, 508 (1957) (dissenting); Brandenburg v. Ohio, 395 U.S. 444, 450 (1969) (concurring).

[524] Konigsberg v. State Bar of California, 366 U.S. 36, 60–61 (1961).

[525] Bates v. City of Little Rock, 361 U.S. 516, 528 (1960) (concurring).

[526] Cox v. Louisiana, 379 U.S. 559, 578 (1965) (dissenting) (emphasis in original).

[527] These cases involving important First Amendment issues are dealt with *infra*, under "Speech Plus." *See* Brown v. Louisiana, 383 U.S. 131 (1966); Adderley v. Florida, 385 U.S. 39 (1966).

[528] The vagueness doctrine generally requires that a statute be precise enough to give fair warning to actors that contemplated conduct is criminal, and to provide adequate standards to enforcement agencies, factfinders, and reviewing courts. *See*, *e.g.*, Connally v. General Const. Co., 269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Colautti v. Franklin, 439 U.S. 379 (1979); Village of Hoffman Estates v. The Flipside, 455 U.S. 489 (1982).

[529] *E.g.*, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Baggett v. Bullitt, 377 U.S. 360 (1964); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

obscenity and indecency,[530] and restrictions on public demonstrations.[531] It is usually combined with the overbreadth doctrine, which focuses on the need for precision in drafting a statute that may affect First Amendment rights;[532] an overbroad statute that sweeps under its coverage both protected and unprotected speech and conduct will normally be struck down as facially invalid, although in a non-First Amendment situation the Court would simply void its application to protected conduct.[533]

But, even in a First Amendment situation, the Court has written, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do now swallow the social benefits of declaring a law 'overbroad,' we have insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation. . . . Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)."[534]

See also Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (attorney discipline, extrajudicial statements).

[530] *E.g.*, Winters v. New York, 333 U.S. 507 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Interstate Circuit v. City of Dallas, 390 U.S. 676 (1968); Reno v. ACLU, 521 U.S. 844, 870–874 (1997). In National Endowment for the Arts v. Finley, 524 U.S. 569 (1998), the Court held that a "decency" criterion for the awarding of grants, which "in a criminal statute or regulatory scheme . . . could raise substantial vagueness concerns," was not unconstitutionally vague in the context of a condition on public subsidy for speech.

[531] *E.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940); Gregory v. City of Chicago, 394 U.S. 111 (1969); Coates v. City of Cincinnati, 402 U.S. 611 (1971). *See also* Smith v. Goguen, 415 U.S. 566 (1974) (flag desecration law); Lewis v. City of New Orleans, 415 U.S. 130 (1974) (punishment of opprobrious words); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976) (door-to-door canvassing). For an evident narrowing of standing to assert vagueness, *see* Young v. American Mini Theatres, 427 U.S. 50, 60 (1976).

[532] NAACP v. Button, 371 U.S. 415, 432–33 (1963).

[533] *E.g.*, Kunz v. New York, 340 U.S. 290 (1951); Aptheker v. Secretary of State, 378 U.S. 500 (1964); United States v. Robel, 389 U.S. 258 (1967); Zwickler v. Koota, 389 U.S. 241 (1967); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Massachusetts v. Oakes, 491 U.S. 576, 581 (1989). *But see* Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1190 (2008) (facial challenge to burden on right of association rejected "where the statute has a 'plainly legitimate sweep'").

[534] Virginia v. Hicks, 539 U.S. 113, 119–20, 124 (2003) (italics in original; citations omitted) (upholding, as not addressed to speech, an ordinance banning from streets within a low-income housing development any person who is not a resident or employee and who "cannot demonstrate a legitimate business or social purpose for being on the premises"). Virginia v. Hicks cited Broadrick v. Oklahoma, 413 U.S.

Out of a concern that is closely related to that behind the overbreadth doctrine, the Court has insisted that when the government seeks to carry out a permissible goal and it has available a variety of effective means to do so, "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." [535] Thus, the Court applies "strict scrutiny" to content-based regulations of fully protected speech; this means that it requires that such regulations "promote a compelling interest" and use "the least restrictive means to further the articulated interest." [536]

With respect to most speech restrictions to which the Court does not apply strict scrutiny, the Court applies intermediate scrutiny; *i.e.*, scrutiny that is "midway between the 'strict scrutiny' demanded for content-based regulation of speech and the 'rational basis' standard that is applied—under the Equal Protection Clause—to government regulation of nonspeech activities." [537] Intermediate scrutiny requires that the governmental interest be "significant" or "substantial" or "important" (but not necessarily "compelling"), and it requires that the restriction be narrowly tailored (but not necessarily the least restrictive means to advance the governmental interest). Speech restrictions to which the Court does not apply strict scrutiny include those that are not content-based (time, place, or manner restrictions; incidental restrictions) and those that restrict categories of speech to which the Court accords less than full First

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601 (1973), which, in the majority opinion and in Justice Brennan's dissent, id. at 621, contains extensive discussion of the overbreadth doctrine. Other restrictive decisions include Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974); Parker v. Levy, 417 U.S. 733, 757–61 (1974); and New York v. Ferber, 458 U.S. 747, 766–74 (1982). Nonetheless, the doctrine continues to be used across a wide spectrum of First Amendment cases. Bigelow v. Virginia, 421 U.S. 809, 815–18 (1975); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Doran v. Salem Inn, 422 U.S. 922, 932–34 (1975); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 633–39 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984) (charitable solicitation statute placing 25 percent cap on fundraising expenditures); City of Houston v. Hill, 482 U.S. 451 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987) (resolution banning all "First Amendment activities" at airport); Reno v. ACLU, 521 U.S. 844, 874–879 (1997) (statute banning "indecent" material on the Internet).

[535] Thompson v. Western States Medical Center, 535 U.S. 357, 373 (2002).

[536] Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989).

[537] Madsen v. Women's Health Center, Inc., 512 U.S. 753, 790 (1994) (parentheses omitted). The Court, however, applied a rational basis standard to uphold a state statute that banned the sale of sexually explicit material to minors. Ginsberg v. New York, 390 U.S. 629, 641 (1968). Of course, governmental restrictions on some speech, such as obscenity and fighting words, receive no First Amendment scrutiny, except that particular instances of such speech may not be discriminated against on the basis of hostility "towards the underlying message expressed." R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

Amendment protection (campaign contributions; commercial speech).[538] Note that restrictions on expression may be content-based, but will not receive strict scrutiny if they "are *justified* without reference to the content of the regulated speech."[539] Examples are bans on nude dancing, and zoning restrictions on pornographic theaters or bookstores, both of which, although content-based, receive intermediate scrutiny on the ground that they are "aimed at combating crime and other negative secondary effects," and not at the content of speech.[540]

The Court uses tests closely related to one another in free speech cases in which it applies intermediate scrutiny. It has indicated that the test for determining the constitutionality of an incidental restriction on speech "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,"[541] and that "the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial speech context."[542]

In addition, the Supreme Court generally requires—even when applying less than strict scrutiny—that, "[w]hen the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct

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[538] *E.g.*, Frisby v. Schultz, 487 U.S. 474, 481 (1988) (time, place, and manner restriction upheld as "narrowly tailored to serve a significant government interest, and leav[ing] open ample alternative channels of communication"); Ward v. Rock Against Racism, 491 U.S. 781, 798–799 (1989) (incidental restriction upheld as "promot[ing] a substantial governmental interest that would be achieved less effectively absent the regulation"); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (campaign contribution ceiling "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedom"); Board of Trustees v. Fox, 492 U.S. 469, 480 (1989) (commercial speech restrictions need not be "absolutely the least severe that will achieve the desired end," but must exhibit a "'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable . . . " (internal quotation mark and citation omitted)). *But see* Thompson v. Western States Medical Center, 535 U.S. 357, 371 (2002) (commercial speech restriction struck down as "more extensive than necessary to serve" the government's interests).

[539] Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (emphasis in original).

[540] Erie v. Pap's A.M., 529 U.S. 277, 291 (2000) (upholding ban on nude dancing); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986) (upholding zoning of "adult motion picture theaters"). Zoning and nude dancing cases are discussed below under "Non-obscene But Sexually Explicit and Indecent Expression."

[541] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984).

[542] United States v. Edge Broadcasting Co., 509 U.S. 418, 430 (1993).

and material way."[543] The Court has held, however, that to sustain a denial of a statute denying minors access to sexually explicit material "requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."[544]

In certain other contexts, the Court has relied on "common sense" rather than requiring the government to demonstrate that a recited harm was real and not merely conjectural. For example, it held that a rule prohibiting high school coaches from recruiting middle school athletes did not violate the First Amendment, finding that it needed "no empirical data to credit [the] common-sense conclusion that hard-sell [speech] tactics directed at middle school students could lead to exploitation . . . ."[545] On the use of common sense in free speech cases, Justice Souter wrote: "It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established . . . . But we must be careful about substituting common assumptions for evidence when the evidence is as readily available

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[543] Turner Broadcasting System v. FCC, 512 U.S. 622, 664 (1994) (federal "must-carry" provisions, which require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations, upheld as a content-neutral, incidental restriction on speech, not subject to strict scrutiny). The Court has applied the same principle in weighing the constitutionality of two other types of speech restrictions to which it does not apply strict scrutiny: restrictions on commercial speech, Edenfield v. Fane, 507 U.S. 761, 770–771 (1993) ("a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real"), and restrictions on campaign contributions, Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden").

[544] Ginsberg v. New York, 390 U.S. 629, 641 (1968) (upholding a ban on sale to minors of "girlie" magazines, and noting that, although "studies all agree that a causal link [between 'minors' reading and seeing 'sexual material' and an impairment in their 'ethical and moral development'] has not been demonstrated, they are equally agreed that a causal link has not been disproved either," id. at 641–42). In a case involving a federal statute that restricted "signal bleed" of sexually explicit programming on cable television, a federal district court wrote, "We recognize that the Supreme Court's jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required when sexually explicit programming and children are involved." Playboy Entertainment Group, Inc. v. U.S., 30 F. Supp. 2d 702, 716 (D. Del. 1998), *aff'd*, 529 U.S. 803 (2000). In a case upholding a statute that, to shield minors from "indecent" material, limited the hours that such material may be broadcast on radio and television, a federal court of appeals wrote, "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material. . . ." Action for Children's Television v. FCC, 58 F.3d 654, 662 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996). A dissenting opinion complained, "[t]here is not one iota of evidence in the record . . . to support the claim that exposure to indecency is harmful—indeed, the nature of the alleged 'harm' is never explained." Id. at 671 (Edwards, C.J., dissenting).

[545] Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 300 (2007).

as public statistics and municipal property evaluations, lest we find out when the evidence is gathered that the assumptions are highly debatable." [546]

Is There a Present Test?.—Complexities inherent in the myriad varieties of expression encompassed by the First Amendment guarantees of speech, press, and assembly probably preclude any single standard for determining the presence of First Amendment protection. For certain forms of expression for which protection is claimed, the Court engages in "definitional balancing" to determine that those forms are outside the range of protection.[547] Balancing is in evidence to enable the Court to determine whether certain covered speech is entitled to protection in the particular context in which the question arises.[548] Use of vagueness, overbreadth, and less intrusive means may very well operate to reduce the number of occasions when questions of protection must be answered squarely on the merits. What is observable, however, is the re-emergence, at least in a tentative fashion, of something like the clear and present danger standard in advocacy cases, which is the context in which it was first developed. Thus, in *Brandenburg v. Ohio*,[549] a conviction under a criminal syndicalism statute of advocating the necessity or propriety of criminal or terrorist means to achieve political change was reversed. The prevailing doctrine developed in the Communist Party cases was that "mere" advocacy was protected but that a call for concrete, forcible action even far in the future was not protected speech and knowing membership in an organization calling for such action was not protected association, regardless of the probability of success.[550] In *Brandenburg*, however, the Court reformulated these

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[546] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 459 (2002) (Souter, J., dissenting).

[547] Thus, obscenity, by definition, is outside the coverage of the First Amendment, Roth v. United States, 354 U.S. 476 (1957); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), as are malicious defamation, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and "fighting words," Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). The Court must, of course, decide in each instance whether the questioned expression, as a matter of definition, falls within one of these or another category. *See*, *e.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974); Gooding v. Wilson, 405 U.S. 518 (1972).

[548] *E.g.*, the multifaceted test for determining when commercial speech is protected, Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 566 (1980); the standard for determining when expressive conduct is protected, United States v. O'Brien, 391 U.S. 367, 377 (1968); the elements going into decision with respect to access at trials, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–10 (1982); and the test for reviewing press "gag orders" in criminal trials, Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562–67 (1976), are but a few examples.

[549] 395 U.S. 444 (1969).

[550] Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961); Noto v. United States, 367 U.S. 290 (1961). *See also* Bond v. Floyd, 385 U.S. 116 (1966); Watts v. United States, 394 U.S. 705 (1969).

and other rulings to mean "that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." [551] The Court has not revisited these issues since *Brandenburg*, so the long-term significance of the decision is yet to be determined.[552]

Freedom of Belief

The First Amendment does not expressly speak in terms of liberty to hold such beliefs as one chooses, but in both the religion and the expression clauses, it is clear, liberty of belief is the foundation of the liberty to practice what religion one chooses and to express oneself as one chooses.[553] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [554] Speaking in the context of religious freedom, the Court said that, although the freedom to act on one's beliefs could be limited, the freedom to believe what one will "is absolute." [555] But matters are not so simple.

Flag Salutes and Other Compelled Speech.—One question that has arisen is whether the government may compel a person to publicly declare or affirm a personal belief. In *Minersville School District v. Gobitis*,[556] the Court had upheld the power of Pennsylva-

[551] 395 U.S. at 447. Subsequent cases relying on *Brandenburg* indicate the standard has considerable bite, but do not elaborate sufficiently enough to begin filling in the outlines of the test. Hess v. Indiana, 414 U.S. 105 (1973); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982). *But see* Haig v. Agee, 453 U.S. 280, 308–09 (1981).

[552] In Stewart v. McCoy, 537 U.S. 993 (2002), Justice Stevens, in a statement accompanying a denial of certiorari, wrote that, while *Brandenburg's* "requirement that the consequence be 'imminent' is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function. . . . Long range planning of criminal enterprises—which may include oral advice, training exercises, and perhaps the preparation of written materials—involve speech that should not be glibly characterized as mere 'advocacy' and certainly may create significant public danger. Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech." Id. at 995.

[553] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); United States v. Ballard, 322 U.S. 78 (1944); Torcaso v. Watkins, 367 U.S. 488 (1961); American Communications Ass'n v. Douds, 339 U.S. 382, 408 (1950); Bond v. Floyd, 385 U.S. 116, 132 (1966); Speiser v. Randall, 357 U.S. 513 (1958); Baird v. State Bar of Arizona, 401 U.S. 1, 5–6 (1971), and id. at 9–10 (Justice Stewart concurring).

[554] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[555] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[556] 310 U.S. 586 (1940).

nia to expel from its schools certain children—Jehovah's Witnesses—who refused upon religious grounds to join in a flag salute ceremony and recite the pledge of allegiance. "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." [557] But three years later, in *West Virginia State Bd. of Educ. v. Barnette*,[558] a six-to-three majority of the Court overturned *Gobitis*.[559] Justice Jackson, writing for the Court, chose to ignore the religious argument and to ground the decision upon freedom of speech. The state policy, he said, constituted "a compulsion of students to declare a belief. . . . It requires the individual to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks." [560] The power of a state to follow a policy that "requires affirmation of a belief and an attitude of mind," however, is limited by the First Amendment, which, under the standard then prevailing, required the state to prove that for the students to remain passive during the ritual "creates a clear and present danger that would justify an effort even to muffle expression." [561]

The rationale of *Barnette* became the basis for the Court's decision in *Wooley v. Maynard*,[562] which voided a requirement by the state of New Hampshire that motorists display passenger vehicle license plates bearing the motto "Live Free or Die." [563] Acting on the complaint of a Jehovah's Witness, the Court held that the plaintiff could not be compelled by the state to display a message making an ideological statement on his private property. In a subsequent case, however, the Court found that compelling property owners to facilitate the speech of others by providing access to their property did not violate the First Amendment.[564] Nor was there a con-

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[557] 310 U.S. at 594. Justice Stone alone dissented, arguing that the First Amendment religion and speech clauses forbade coercion of "these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions." Id. at 601.

[558] 319 U.S. 624 (1943).

[559] Justice Frankfurter dissented at some length, denying that the First Amendment authorized the Court "to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen." 319 U.S. at 646, 647. Justices Roberts and Reed simply noted their continued adherence to *Gobitis*. Id. at 642.

[560] 319 U.S. at 631, 633.

[561] 319 U.S. at 633, 634.

[562] 430 U.S. 705 (1977).

[563] The state had prosecuted vehicle owners who covered the motto on their vehicle's license plate.

[564] As to the question of whether one can be required to allow others to speak on his property, compare the Court's opinion in PruneYard Shopping Center v. Rob-

stitutional violation where compulsory fees were used to subsidize the speech of others.[565]

Other governmental efforts to compel speech have also been held by the Supreme Court to violate the First Amendment; these include a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations,[566] a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers' criticism and attacks on their records,[567] an Ohio statute that prohibited the distribution of anonymous campaign literature,[568] and a Massachusetts statute that required private citizens who organized a parade to include among the marchers a group imparting a message—in this case support for gay rights—that the organizers did not wish to convey.[569]

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ins, 447 U.S. 74, 85–88 (1980) (upholding a state requirement that privately owned shopping centers permit others to engage in speech or petitioning on their property) *with* Justice Powell's concurring opinion in the same case, id. at 96 (would limit the holding to situations where a property owner did not feel compelled to disassociate themselves from the permitted speech).

[565] The First Amendment does not preclude a public university from charging its students an activity fee that is used to support student organizations that engage in extracurricular speech, provided that the money is allocated to those groups by use of viewpoint-neutral criteria. Board of Regents of the Univ. of Wisconsin System v. Southworth, 529 U.S. 217 (2000) (upholding fee except to the extent a student referendum substituted majority determinations for viewpoint neutrality in allocating funds). Nor does the First Amendment preclude the government from "compel[ling] financial contributions that are used to fund advertising," provided that such contributions do not finance "political or ideological" views. Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 471, 472 (1997) (upholding Secretary of Agriculture's marketing orders that assessed fruit producers to cover the expenses of generic advertising of California fruit). But, for compelled financial contributions to be constitutional, the advertising they fund must be, as in *Glickman*, "ancillary to a more comprehensive program restricting marketing autonomy" and not "the principal object of the regulatory scheme." United States v. United Foods, Inc., 533 U.S. 405, 411, 412 (2001) (striking down Secretary of Agriculture's mandatory assessments, used for advertising, upon handlers of fresh mushrooms). The First Amendment is, however, not violated when the government compels financial contributions to fund *government* speech, even if the contributions are raised through a targeted assessment rather than through general taxes. Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005).

[566] Riley v. National Fed'n of the Blind of North Carolina, 487 U.S. 781 (1988). In Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 605 (2003), the Supreme Court held that a fundraiser who has retained 85 percent of gross receipts from donors, but falsely represented that "a significant amount of each dollar donated would be paid over to" a charitable organization, could be sued for fraud.

[567] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986), a Court plurality held that a state could not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees.

[568] McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995).

[569] Hurley v. Irish-American Gay Group, 514 U.S. 334 (1995).

The principle of *Barnette*, however, does not extend so far as to bar a government from requiring of its employees or of persons seeking professional licensing or other benefits an oath generally but not precisely based on the oath required of federal officers, which is set out in the Constitution, that the taker of the oath will uphold and defend the Constitution.[570] It is not at all clear, however, to what degree the government is limited in probing the sincerity of the person taking the oath.[571]

By contrast, the Supreme Court has found no First Amendment violation when government compels disclosures in commercial speech, or when it compels the labeling of foreign political propaganda. Regarding compelled disclosures in commercial speech, the Court held that an advertiser's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal. . . . [A]n advertiser's rights are reasonably protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers. . . . The right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right."[572] Regarding compelled labeling of foreign political propaganda, the Court upheld a provision of the Foreign Agents Registration Act of 1938 that required that, when an agent of a foreign principal seeks to disseminate foreign "political propaganda," he must label such material with certain information, including his identity, the principal's identity, and the fact that he has registered with the Department of Justice. The Court found that "Congress did not prohibit, edit, or restrain the distribution of advocacy materials. . . . To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda."[573]

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[570] Cole v. Richardson, 405 U.S. 676 (1972); Connell v. Higginbotham, 403 U.S. 207 (1971); Bond v. Floyd, 385 U.S. 116 (1966); Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967) (three-judge court), *aff'd*, 390 U.S. 36 (1968); Hosack v. Smiley, 276 F. Supp. 876 (C.D. Colo. 1967) (three-judge court), *aff'd*, 390 U.S. 744 (1968); Ohlson v. Phillips, 304 F. Supp. 1152 (C.D. Colo. 1969) (three-judge court), *aff'd*, 397 U.S. 317 (1970); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 161 (1971); Fields v. Askew, 279 So. 2d 822 (Fla. 1973), *aff'd per curiam*, 414 U.S. 1148 (1974).

[571] *Compare* Bond v. Floyd, 385 U.S. 116 (1966), *with* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

[572] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651, 652 n.14 (1985). *See* Milavetz, Gallop, & Milavetz v. United States, 559 U.S. ___, No. 08–1119 (2010), slip op. at 19–23 (requiring advertisement for certain "debt relief" businesses to disclose that the services offered include bankruptcy assistance).

[573] Meese v. Keene, 481 U.S. 465, 480 (1987).

Imposition of Consequences for Holding Certain Beliefs.—Despite the *Cantwell* dictum that freedom of belief is absolute,[574] government has been permitted to inquire into the holding of certain beliefs and to impose consequences on the believers, primarily with regard to its own employees and to licensing certain professions.[575] It is not clear what precise limitations the Court has placed on these practices.

In its disposition of one of the first cases concerning the federal loyalty-security program, the Court of Appeals for the District of Columbia asserted broadly that "so far as the Constitution is concerned there is no prohibition against dismissal of Government employees because of their political beliefs, activities or affiliations."[576] On appeal, this decision was affirmed by an equally divided Court, its being impossible to determine whether this issue was one treated by the Justices.[577] Thereafter, the Court dealt with the loyalty-security program in several narrow decisions not confronting the issue of denial or termination of employment because of beliefs or "beliefs plus." But the same issue was also before the Court in related fields. In *American Communications Ass'n v. Douds*,[578] the Court was again evenly divided over a requirement that, in order for a union to have access to the NLRB, each of its officers must file an affidavit that he neither believed in, nor belonged to an organization that believed in, the overthrow of government by force or by illegal means. Chief Justice Vinson thought the requirement reasonable because it did not prevent anyone from believing what he chose

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[574] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[575] The issue has also arisen in the context of criminal sentencing. Evidence that racial hatred was a motivation for a crime may be taken into account, Barclay v. Florida, 463 U.S. 939, 949 (1983); Wisconsin v. Mitchell, 508 U.S. 476 (1993) (criminal sentence may be enhanced because the defendant intentionally selected his victim on account of the victim's race), but evidence of the defendant's membership in a racist group is inadmissible where race was not a factor and no connection had been established between the defendant's crime and the group's objectives. Dawson v. Delaware, 503 U.S. 159 (1992). *See also* United States v. Abel, 469 U.S. 45 (1984) (defense witness could be impeached by evidence that both witness and defendant belonged to group whose members were sworn to lie on each other's behalf).

[576] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950). The premise of the decision was that government employment is a privilege rather than a right and that access thereto may be conditioned as the government pleases. But this basis, as the Court has said, "has been thoroughly undermined in the ensuing years." Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). For the vitiation of the right-privilege distinction, *see* "Government as Employer: Free Speech Generally," *infra*.

[577] Bailey v. Richardson, 341 U.S. 918 (1951). *See also* Washington v. McGrath, 341 U.S. 923 (1951), aff'g by an equally divided Court, 182 F.2d 375 (D.C. Cir. 1950). Although no opinions were written in these cases, several Justices expressed themselves on the issues in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), decided the same day.

[578] 339 U.S. 382 (1950). In a later case raising the same point, the Court was again equally divided. Osman v. Douds, 339 U.S. 846 (1950).

but only prevented certain people from being officers of unions, and because Congress could reasonably conclude that a person with such beliefs was likely to engage in political strikes and other conduct that Congress could prevent.[579] Dissenting, Justice Frankfurter thought the provision too vague,[580] Justice Jackson thought that Congress could impose no disqualification upon anyone for an opinion or belief that had not manifested itself in any overt act,[581] and Justice Black thought that government had no power to penalize beliefs in any way.[582] Finally, in *Konigsberg v. State Bar of California*,[583] a majority of the Court supported dictum in Justice Harlan's opinion in which he justified some inquiry into beliefs, saying that "[i]t would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions."

When the same issue returned to the Court years later, three five-to-four decisions left the principles involved unclear.[584] Four Justices endorsed the view that beliefs could not be inquired into as a basis for determining qualifications for admission to the bar;[585] four Justices endorsed the view that while mere beliefs might not be sufficient grounds to debar one from admission, the states were not precluded from inquiring into them for purposes of determining whether one was prepared to advocate violent overthrow of the government and to act on his beliefs.[586] The decisive vote in each case was cast by a single Justice who would not permit denial of admission based on beliefs alone but would permit inquiry into those beliefs to an unspecified extent for purposes of determining that the required oath to uphold and defend the Constitution could be taken

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[579] 339 U.S. at 408–09, 412.

[580] 339 U.S. at 415.

[581] 339 U.S. at 422.

[582] 339 U.S. at 445.

[583] 336 U.S. 36, 51–52 (1961). *See also In re* Anastaplo, 336 U.S. 82, 89 (1961). Justice Black, joined by Justice Douglas and Chief Justice Warren, dissented on the ground that the refusal to admit the two to the state bars was impermissibly based upon their beliefs. Id. at 56, 97.

[584] Baird v. State Bar of Arizona, 401 U.S. 1 (1971); *In re* Stolar, 401 U.S. 23 (1971); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971).

[585] 401 U.S. at 5–8; 401 U.S. at 28–29 (plurality opinions of Justices Black, Douglas, Brennan, and Marshall in *Baird* and *Stolar*, respectively); 401 U.S. at 174–76, 178–80 (Justices Black and Douglas dissenting in *Wadmond*), 186–90 (Justices Marshall and Brennan dissenting in *Wadmond*).

[586] 401 U.S. at 17–19, 21–22 (Justices Blackmun, Harlan, and White, and Chief Justice Burger dissenting in *Baird*).

in good faith.[587] Changes in Court personnel following this decision would seem to leave the questions presented open to further litigation.

Right of Association

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."[588] It appears from the Court's opinions that the right of association is derivative from the First Amendment guarantees of speech, assembly, and petition,[589] although it has at times been referred to as an independent freedom protected by the First Amendment.[590] The doctrine is a fairly recent construction, the problems associated with it having previously arisen primarily in the context of loyalty-security investigations of Communist Party membership, and these cases having been resolved without giving rise to any separate theory of association.[591]

Freedom of association as a concept thus grew out of a series of cases in the 1950s and 1960s in which certain states were attempting to curb the activities of the National Association for the Advancement of Colored People. In the first case, the Court unanimously set aside a contempt citation imposed after the organization refused to comply with a court order to produce a list of its members within the state. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."[592] "[T]hese indispensable liberties, whether of speech, press,

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[587] 401 U.S. at 9–10; 401 U.S. at 31 (Justice Stewart concurring in *Baird* and *Stolar*, respectively). How far Justice Stewart would permit government to go is not made clear by his majority opinion in *Wadmond*. 401 U.S. at 161–66.

[588] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460–61 (1958).

[589] 357 U.S. at 460; Bates v. City of Little Rock, 361 U.S. 516, 522–23 (1960); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 578–79 (1971); Healy v. James, 408 U.S. 169, 181 (1972).

[590] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 461, 463 (1958); NAACP v. Button, 371 U.S. 415, 429–30 (1963); Cousins v. Wigoda, 419 U.S. 477, 487 (1975); *In re* Primus, 436 U.S. 412, 426 (1978); Democratic Party v. Wisconsin, 450 U.S. 107, 121 (1981).

[591] *See* "Maintenance of National Security and the First Amendment," *infra*.

[592] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958).

or association,"[593] may be abridged by governmental action either directly or indirectly, wrote Justice Harlan, and the state had failed to demonstrate a need for the lists which would outweigh the harm to associational rights which disclosure would produce.

Applying the concept in subsequent cases, the Court, in *Bates v. City of Little Rock*,[594] again held that the disclosure of membership lists, because of the harm to "the right of association," could be compelled only upon a showing of a subordinating interest; ruled in *Shelton v. Tucker*[595] that, though a state had a broad interest to inquire into the fitness of its school teachers, that interest did not justify a regulation requiring all teachers to list all organizations to which they had belonged within the previous five years; again struck down an effort to compel membership lists from the NAACP;[596] and overturned a state court order barring the NAACP from doing any business within the state because of alleged improprieties.[597] Certain of the activities condemned in the latter case, the Court said, were protected by the First Amendment and, though other actions might not have been, the state could not infringe on the "right of association" by ousting the organization altogether.[598]

A state order prohibiting the NAACP from urging persons to seek legal redress for alleged wrongs and from assisting and representing such persons in litigation opened up new avenues when the Court struck the order down as violating the First Amendment.[599] "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. . . . In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. . . ."

"We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect

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[593] 357 U.S. at 461.
[594] 361 U.S. 516 (1960).
[595] 364 U.S. 479 (1960).
[596] Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961).
[597] NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964).
[598] 377 U.S. at 308, 309.
[599] NAACP v. Button, 371 U.S. 415 (1963).

certain forms of orderly group activity."[600] This decision was followed in three cases in which the Court held that labor unions enjoyed First Amendment protection in assisting their members in pursuing their legal remedies to recover for injuries and other actions. In the first case, the union advised members to seek legal advice before settling injury claims and recommended particular attorneys;[601] in the second the union retained attorneys on a salaried basis to represent members;[602] in the third, the union recommended certain attorneys whose fee would not exceed a specified percentage of the recovery.[603] Justice Black wrote: "[T]he First Amendment guarantees of free speech, petition, and assembly give railroad workers the rights to cooperate in helping and advising one another in asserting their rights. . . ."[604]

Thus, a right to associate to further political and social views is protected against unreasonable burdening,[605] but the evolution of this right in recent years has passed far beyond the relatively narrow contexts in which it was born.

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[600] 371 U.S. at 429–30. *Button* was applied in *In re* Primus, 436 U.S. 412 (1978), in which the Court found foreclosed by the First and Fourteenth Amendments the discipline visited upon a volunteer lawyer for the American Civil Liberties Union who had solicited someone to use the ACLU to bring suit to contest the sterilization of Medicaid recipients. Both the NAACP and the ACLU were organizations that engaged in extensive litigation as well as lobbying and educational activities, all of which were means of political expression. "[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." Id. at 431. "[C]ollective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." Id. at 426. However, ordinary law practice for commercial ends is not given special protection. "A lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns." Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459 (1978). *See also* Bates v. State Bar of Arizona, 433 U.S. 350, 376 n.32 (1977), and see the comparison of *Ohralik* and *Bates* in Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 296–98 (2007) ("solicitation ban was more akin to a conduct regulation than a speech restriction").

[601] Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964).

[602] United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[603] United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971).

[604] 401 U.S. at 578–79. These cases do not, however, stand for the proposition that individuals are always entitled to representation of counsel in administrative proceedings. *See* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (upholding limitation to $10 of fee that may be paid attorney in representing veterans' death or disability claims before VA).

[605] *E.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–15 (1982) (concerted activities of group protesting racial bias); Healy v. James, 408 U.S. 169 (1972) (denial of official recognition to student organization by public college without justification abridged right of association). The right does not, however, protect the decision of entities not truly private to exclude minorities. Runyon v. McCrary, 427 U.S. 160, 175–76 (1976); Norwood v. Harrison, 413 U.S. 455, 469–70 (1973); Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945); Roberts v. United States Jaycees, 468 U.S. 609 (1984).

Social contacts that do not occur in the context of an "organized association" may be unprotected, however. In holding that a state may restrict admission to certain licensed dance halls to persons between the ages of 14 and 18, the Court declared that there is no "generalized right of 'social association' that includes chance encounters in dance halls." [606]

In a series of three decisions, the Court explored the extent to which associational rights may be burdened by nondiscrimination requirements. First, *Roberts v. United States Jaycees* [607] upheld application of the Minnesota Human Rights Act to prohibit the United States Jaycees from excluding women from full membership. Three years later in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*,[608] the Court applied *Roberts* in upholding application of a similar California law to prevent Rotary International from excluding women from membership. Then, in *New York State Club Ass'n v. New York City*,[609] the Court upheld against facial challenge New York City's Human Rights Law, which prohibits race, creed, sex, and other discrimination in places "of public accommodation, resort, or amusement," and applies to clubs of more than 400 members providing regular meal service and supported by nonmembers for trade or business purposes. In *Roberts*, both the Jaycees' nearly indiscriminate membership requirements and the state's compelling interest in prohibiting discrimination against women were important to the Court's analysis. The Court found that "the local chapters of the Jaycees are large and basically unselective groups," age and sex being the only established membership criteria in organizations otherwise entirely open to public participation. The Jaycees, therefore, "lack the distinctive characteristics [*e.g.*, small size, identifiable purpose, selectivity in membership, perhaps seclusion from the public eye] that might afford constitutional protection to the decision of its members to exclude women." [610] Similarly, the Court determined in *Rotary International* that Rotary Clubs, designed as community service organizations representing a cross section of business and professional occupations, also do not represent "the kind of intimate or private relation that warrants constitutional protection." [611] And, in *New York City*, the fact "that the antidiscrimina-

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[606] City of Dallas v. Stanglin, 490 U.S. 19, 24, 25 (1989). The narrow factual setting—a restriction on adults dancing with teenagers in public—may be contrasted with the Court's broad assertion that "coming together to engage in recreational dancing . . . is not protected by the First Amendment." Id. at 25.

[607] 468 U.S. 609 (1984).

[608] 481 U.S. 537 (1987).

[609] 487 U.S. 1 (1988).

[610] 468 U.S. at 621.

[611] 481 U.S. at 546.

tion provisions of the Human Rights Law certainly could be constitutionally applied at least to some of the large clubs, under the Court's decisions in *Rotary* and *Roberts*," and the fact that the clubs were "'commercial' in nature," helped to defeat the facial challenge.[612]

Some amount of First Amendment protection is still due such organizations; the Jaycees had taken public positions on a number of issues, and, the Court in *Roberts* noted, "regularly engage[d] in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment. There is, however, no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views."[613] Moreover, the state had a "compelling interest to prevent . . . acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages. . . ."[614]

Because of the near-public nature of the Jaycees and Rotary Clubs—the Court in *Roberts* likening the situation to a large business attempting to discriminate in hiring or in selection of customers—the cases may be limited in application, and should not be read as governing membership discrimination by private social clubs.[615] In *New York City*, the Court noted that "opportunities for individual associations to contest the constitutionality of the Law as it may be applied against them are adequate to assure that any overbreadth . . . will be curable through case-by-case analysis of specific facts."[616]

When application of a public accommodations law was viewed as impinging on an organization's ability to present its message, the Court found a First Amendment violation. Massachusetts could not require the private organizers of Boston's St. Patrick's Day parade to allow a group of gays and lesbians to march as a unit proclaiming its members' gay and lesbian identity, the Court held in *Hurley v. Irish-American Gay Group*.[617] To do so would require parade organizers to promote a message they did not wish to promote. *Roberts* and *New York City* were distinguished as not involving "a trespass on the organization's message itself."[618] Those cases

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[612] 487 U.S. at 11–12.
[613] 468 U.S. at 626–27 (citations omitted).
[614] 468 U.S. at 628.
[615] The Court in *Rotary* rejected an assertion that *Roberts* had recognized that Kiwanis Clubs are constitutionally distinguishable, and suggested that a case-by-case approach is necessary to determine whether "the 'zone of privacy' extends to a particular club or entity." 481 U.S. at 547 n.6.
[616] 487 U.S. at 15.
[617] 514 U.S. 334 (1995).
[618] 515 U.S. at 580.

stood for the proposition that the state could require equal access for individuals to what was considered the public benefit of organization membership. But even if individual access to the parade might similarly be mandated, the Court reasoned, the gay group "could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." [619]

In *Boy Scouts of America v. Dale*,[620] the Court held that application of New Jersey's public accommodations law to require the Boy Scouts of America to admit an avowed homosexual as an adult member violated the organization's "First Amendment right of expressive association." [621] Citing *Hurley*, the Court held that "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." [622] The Boy Scouts, the Court found, engages in expressive activity in seeking to transmit a system of values, which include being "morally straight" and "clean." [623] The Court "accept[ed] the Boy Scouts' assertion" that the organization teaches that homosexual conduct is not morally straight.[624] The Court also gave "deference to [the] association's view of what would impair its expression." [625] Allowing a gay rights activist to serve in the Scouts would "force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." [626]

Political Association.—The major expansion of the right of association has occurred in the area of political rights. "There can no longer be any doubt that freedom to associate with others for the

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[619] 515 U.S. at 580–81.
[620] 530 U.S. 640 (2000).
[621] 530 U.S. at 644.
[622] 530 U.S. at 648.
[623] 530 U.S. at 650.
[624] 530 U.S. at 651.
[625] 530 U.S. at 653.
[626] 530 U.S. at 653. In Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 69 (2006), the Court held that the Solomon Amendment's forcing law schools to allow military recruiters on campus does not violate the schools' freedom of expressive association because "[r]ecruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school 'to accept members it does not desire.'" *Rumsfeld* is discussed below under "Government and the Power of the Purse." *See also* ANDREW KOPPELMAN AND TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE?: HOW THE CASE OF BOY SCOUTS OF AMERICAN V. JAMES DALE WARPED THE LAW OF FREE ASSOCIATION (Yale University Press, 2009).

common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." [627] Usually in combination with an equal protection analysis, the Court since *Williams v. Rhodes* [628] has passed on numerous state restrictions that limit the ability of individuals or groups to join one or the other of the major parties or to form and join an independent political party to further political, social, and economic goals.[629] Of course, the right is not absolute. The Court has recognized that there must be substantial state regulation of the election process, which will necessarily burden the individual's right to vote and to join with others for political purposes. The validity of governmental regulation must be determined by assessing the degree of infringement of the right of association against the legitimacy, strength, and necessity of the governmental interests and the means of implementing those interests.[630] Many restrictions upon political association have survived this sometimes-exacting standard of review, in large measure upon the basis of some of the governmental interests having been found compelling.[631]

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[627] Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973) (citation omitted).

[628] 393 U.S. 23 (1968).

[629] *E.g.*, Rosario v. Rockefeller, 410 U.S. 752 (1973) (time deadline for enrollment in party in order to vote in next primary); Kusper v. Pontikes, 414 U.S. 51 (1973) (barring voter from party primary if he voted in another party's primary within preceding 23 months); American Party of Texas v. White, 415 U.S. 767 (1974) (ballot access restriction); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (number of signatures to get party on ballot); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (limit on contributions to associations formed to support or oppose referendum measure); Clements v. Fashing, 457 U.S. 957 (1982) (resign-to-run law).

[630] Williams v. Rhodes, 393 U.S. 23, 30–31 (1968); Bullock v. Carter, 405 U.S. 134, 142–143 (1972); Storer v. Brown, 415 U.S. 724, 730 (1974); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 183 (1979).

[631] Thus, in Storer v. Brown, 415 U.S. 724, 736 (1974), the Court found "compelling" the state interest in achieving stability through promotion of the two-party system, and upheld a bar on any independent candidate who had been affiliated with any other party within one year. *Compare* Williams v. Rhodes, 393 U.S. 23, 31–32 (1968) (casting doubt on state interest in promoting Republican and Democratic voters). The state interest in protecting the integrity of political parties was held to justify requiring enrollment of a person in the party up to eleven months before a primary election, Rosario v. Rockefeller, 410 U.S. 752 (1973), but not to justify requiring one to forgo one election before changing parties. Kusper v. Pontikes, 414 U.S. 51 (1973). *See also* Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973) (efficient operation of government justifies limits on employee political activity); Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982) (permitting political party to designate replacement in office vacated by elected incumbent of that party serves valid governmental interests). Storer v. Brown was distinguished in Anderson v. Celebrezze, 460 U.S. 780 (1983), holding invalid a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot; state interests in assuring

If people have a First Amendment right to associate with others to form a political party, then it follows that "[a] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform. These rights are circumscribed, however, when the State gives a party a role in the election process—as . . . by giving certain parties the right to have their candidates appear on the general-election ballot. Then, for example, the party's racially discriminatory action may become state action that violates the Fifteenth Amendment. And then also the State acquires a legitimate governmental interest in assuring the fairness of the party's nominating process, enabling it to prescribe what that process must be." [632]

A political party's First Amendment right to limit its membership as it wishes does not render invalid a state statute that allows a candidate to designate his party preference on a ballot, even when the candidate "is unaffiliated with, or even repugnant to, the party" he designates.[633] This is because the statute in question "never

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voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters. *See also* Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) (state interests are insubstantial in imposing "closed primary" under which a political party is prohibited from allowing independents to vote in its primaries); California Democratic Party v. Jones, 530 U.S. 567, 577 (2000) (requirement of a "blanket" primary, in which all registered voters, regardless of political affiliation, may participate, unconstitutionally "forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."); Clingman v. Beaver, 544 U.S. 581 (2005) (Oklahoma statute that allowed only registered members of a political party, and registered independents, to vote in the party's primary does not violate freedom of association; Oklahoma's "semiclosed primary system" distinguished from Connecticut's closed primary that the Court struck down in *Tashjian*).

[632] New York State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 797–98 (2008) (citations omitted). In *Lopez Torres*, the Court upheld a state statute that required political parties to select judicial candidates at a convention of delegates chosen by party members in a primary election, rather than to select candidates in direct primary elections. The statute was challenged by party members who had not been selected and who claimed "that the convention process that follows the delegate election does not give them a realistic chance to secure the party's nomination." Id. at 799. The Court rejected their challenge, holding that, although a state may require "party-candidate selection through processes more favorable to insurgents, such as primaries," id. at 799, the Constitution does not demand that a state do so. "Party conventions, with their attendant 'smoke-filled rooms' and domination by party leaders, have long been an accepted manner of selecting party candidates." Id. at 799. The plaintiffs had an associational right to join the party but not to have a certain degree of influence in the party. Id. at 798.

[633] Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1189 (2008). This was a 7-to-2 decision written by Justice Thomas, with Justices Scalia and Kennedy dissenting.

refers to the candidates as nominees of any party, nor does it treat them as such"; it merely allows them to indicate their party preference.[634] The Court acknowledged that "it is *possible* that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties," but "whether voters will be confused by the party-preference designations will depend in significant part on the form of the ballot."[635] If the form of the ballot used in a particular election is such as to confuse voters, then an as-applied challenge to the statute may be appropriate, but a facial challenge, the Court held, is not.[636]

A significant extension of First Amendment association rights in the political context occurred when the Court curtailed the already limited political patronage system. At first holding that a nonpolicymaking, nonconfidential government employee cannot be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs or affiliations,[637] the Court subsequently held that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved."[638] The Court thus abandoned the concept of policymaking, confidential positions, noting that some such positions would nonetheless be protected, whereas some people filling positions not reached by the description would not be.[639] The Court's opinion makes it difficult to evaluate the ramifications of the decision, but it seems clear that a majority of the Justices adhere to a doctrine of broad associational political

[634] 128 S. Ct. at 1192.

[635] 128 S. Ct. at 1193. The Court saw "simply no basis to presume that a well-informed electorate will interpret a candidate's party preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." Id.

[636] A ballot could avoid confusion by, for example, "includ[ing] prominent disclaimers explaining that party preference reflects only the self-designation of the candidate and not an official endorsement by the party." 128 S. Ct. at 1194. Justice Scalia, joined by Justice Kennedy in dissent, wrote that "[a]n individual's endorsement of a party shapes the voter's view of what the party stands for," and that it is "quite impossible for the ballot to satisfy a reasonable voter that the candidate is 'not associated' with the party for which he has expressed a preference." Id. at 1200.

[637] Elrod v. Burns, 427 U.S. 347 (1976). The limited concurrence of Justices Stewart and Blackmun provided the qualification for an otherwise expansive plurality opinion. Id. at 374.

[638] Branti v. Finkel, 445 U.S. 507, 518 (1980). On the same page, the Court refers to a position in which "party membership was *essential* to the discharge of the employee's governmental responsibilities." (Emphasis added.) A great gulf separates "appropriate" from "essential," so that much depends on whether the Court was using the two words interchangeably or whether the stronger word was meant to characterize the position noted and not to particularize the standard.

[639] Justice Powell's dissents in both cases contain lengthy treatments of and defenses of the patronage system as a glue strengthening necessary political parties. 445 U.S. at 520.

freedom that will have substantial implications for governmental employment. Refusing to confine *Elrod* and *Branti* to their facts, the court in *Rutan v. Republican Party of Illinois* [640] held that restrictions on patronage apply not only to dismissal or its substantial equivalent, but also to promotion, transfer, recall after layoffs, and hiring of low-level public employees. In 1996, the Court extended *Elrod* and *Branti* to protect independent government contractors.[641]

The protected right of association enables a political party to assert against some state regulation an overriding interest sufficient to overcome the legitimate interests of the governing body. Thus, a Wisconsin law that mandated an open primary election, with party delegates bound to support at the national convention the wishes of the voters expressed in that primary election, although legitimate and valid in and of itself, had to yield to a national party rule providing for the acceptance of delegates chosen only in an election limited to those voters who affiliated with the party.[642]

Provisions of the Federal Election Campaign Act requiring the reporting and disclosure of contributions and expenditures to and by political organizations, including the maintenance by such organizations of records of everyone contributing more than $10 and the reporting by individuals and groups that are not candidates or political committees who contribute or expend more than $100 a year for the purpose of advocating the election or defeat of an identified candidate, were sustained.[643] "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. . . . We long have recognized the significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. . . . We have required that the subordinating interests of the State must survive exacting scru-

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[640] 497 U.S. 62 (1990). *Rutan* was a 5–4 decision, with Justice Brennan writing the Court's opinion. The four dissenters indicated, in an opinion by Justice Scalia, that they would not only rule differently in *Rutan*, but that they would also overrule *Elrod* and *Branti*.

[641] O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) (allegation that city removed petitioner's company from list of those offered towing business on a rotating basis, in retaliation for petitioner's refusal to contribute to mayor's campaign, and for his support of mayor's opponent, states a cause of action under the First Amendment); Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996) (termination or non-renewal of a public contract in retaliation for the contractor's speech on a matter of public concern can violate the First Amendment).

[642] Democratic Party v. Wisconsin ex rel. LaFollette, 450 U.S. 107 (1981). *See also* Cousins v. Wigoda, 419 U.S. 477 (1975) (party rules, not state law, governed which delegation from state would be seated at national convention; national party had protected associational right to sit delegates it chose).

[643] Buckley v. Valeo, 424 U.S. 1, 60–84 (1976).

tiny. We have also insisted that there be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." [644] The governmental interests effectuated by these requirements—providing the electorate with information, deterring corruption and the appearance of corruption, and gathering data necessary to detect violations—were found to be of sufficient magnitude to be validated even though they might incidentally deter some persons from contributing.[645] A claim that contributions to minor parties and independents should have a blanket exemption from disclosure was rejected inasmuch as an injury was highly speculative; but any such party making a showing of a reasonable probability that compelled disclosure of contributors' names would subject them to threats or reprisals could obtain an exemption from the courts.[646] The *Buckley* Court also narrowly construed the requirement of reporting independent contributions and expenditures in order to avoid constitutional problems.[647]

Conflict Between Organization and Members.—It is to be expected that disputes will arise between an organization and some of its members, and that First Amendment principles may be implicated. Of course, unless there is some governmental connection, there will be no federal constitutional application to any such controversy.[648] But, in at least some instances, when government compels membership in an organization or in some manner lends its authority to such compulsion, there may be constitutional limitations. For example, such limitations can arise in connection with union shop labor agreements permissible under the National Labor Relations Act and the Railway Labor Act.[649]

Union shop agreements generally require, as a condition of employment, membership in the union on or after the thirtieth day

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[644] 424 U.S. at 64 (footnote citations omitted).

[645] 424 U.S. at 66–68.

[646] 424 U.S. at 68–74. Such a showing, based on past governmental and private hostility and harassment, was made in Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).

[647] 424 U.S. at 74–84.

[648] The Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 537, 29 U.S.C. §§ 411–413, enacted a bill of rights for union members, designed to protect, among other things, freedom of speech and assembly and the right to participate in union meetings on political and economic subjects.

[649] Section 8(a)(3) of the Labor-Management Relations Act of 1947, 61 Stat. 140, 29 U.S.C. § 158(a)(3), permits the negotiation of union shop agreements. Such agreements, however, may be outlawed by state "right to work" laws. Section 14(b), 61 Stat. 151, 29 U.S.C. § 164(b). *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949). In industries covered by the Railway Labor Act, union shop agreements may be negotiated regardless of contrary state laws. 64 Stat. 1238, 45 U.S.C. § 152, Eleventh; *see* Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956).

following the beginning of employment. In *Railway Employes' Dep't v. Hanson*, the Supreme Court upheld the constitutionality of such agreements, noting that the record in the case did not indicate that union dues were being "used as a cover for forcing ideological conformity or other action in contravention of the First Amendment," such as by being spent to support political candidates.[650] In *International Ass'n of Machinists v. Street*, where union dues had been collected pursuant to a union shop agreement and had been spent to support political candidates, the Court avoided the First Amendment issue by construing the Railway Labor Act to prohibit the use of compulsory union dues for political causes.[651]

In *Abood v. Detroit Bd. of Education*,[652] the Court found *Hanson* and *Street* applicable to the public employment context.[653] Recognizing that any system of compelled support restricted employees' right not to associate and not to support, the Court nonetheless found the governmental interests served by an "agency shop" agreement[654]—the promotion of labor peace and stability of employer-employee relations—to be of overriding importance and to justify the impact upon employee freedom.[655] But the Court drew a different balance when it considered whether employees compelled to support the union were constitutionally entitled to object to the use of those exacted funds to support political candidates or to advance ideological causes not germane to the union's duties as collective-bargaining representative. To compel one to expend funds in such a way is to violate his freedom of belief and the right to act on those beliefs just as

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[650] 351 U.S. 225, 238 (1956).

[651] 367 U.S. 740, 749–50 (1961). Justices Douglas, Black, Frankfurter, and Harlan would have reached the constitutional issue, with differing results. On the same day that it decided *Street*, the Court, in Lathrop v. Donohue, 367 U.S. 820 (1961), declined to reach the constitutional issues presented by roughly the same fact situation in a suit by lawyers compelled to join an "integrated bar." These issues, however, were faced squarely in Keller v. State Bar of California, 496 U.S. 1, 14 (1990), which held that an integrated state bar may not, against a members' wishes, devote compulsory dues to ideological or other political activities not "necessarily or reasonably related to the purpose of regulating the legal profession or improving the quality of legal service available to the people of the State."

[652] 431 U.S. 209 (1977).

[653] That a public entity was the employer and the employees consequently were public employees was deemed constitutionally immaterial for the application of the principles of *Hanson* and *Street*, id. at 226–32, but, in a concurring opinion joined by Chief Justice Burger and Justice Blackmun, Justice Powell found the distinction between public and private employment crucial. Id. at 244.

[654] An agency shop agreement requires all employees, regardless of union membership, to pay a fee to the union that reflects the union's efforts in obtaining employment benefits through collective bargaining. The Court in *Abood* noted that it is the "practical equivalent" of a union shop agreement. 431 U.S. at 217 n.10.

[655] 431 U.S. at 217–23. For a similar argument over the issue of corporate political contributions and shareholder rights, *see* First National Bank v. Bellotti, 435 U.S. 765, 792–95 (1978), and id. at 802, 812–21 (Justice White dissenting).

much as if government prohibited him from acting to further his own beliefs.[656] The remedy, however, was not to restrain the union from making non-collective-bargaining-related expenditures, but was to require that those funds come only from employees who do not object. Therefore, the lower courts were directed to oversee development of a system under which employees could object generally to such use of union funds and could obtain either a proportionate refund or a reduction of future exactions.[657] Later, the Court further tightened the requirements. A proportionate refund is inadequate because "even then the union obtains an involuntary loan for purposes to which the employee objects";[658] an advance reduction of dues corrects the problem only if accompanied by sufficient information by which employees may gauge the propriety of the union's fee.[659] Therefore, the union procedure must also "provide for a reasonably prompt decision by an impartial decisionmaker."[660]

In *Davenport v. Washington Education Ass'n*,[661] the Court noted that, although *Chicago Teachers Union v. Hudson* had "set forth various procedural requirements that public-sector unions collecting agency fees must observe in order to ensure that an objecting nonmember can prevent the use of his fees for impermissible purposes,"[662] it "never suggested that the First Amendment is implicated whenever governments place limitations on a union's entitlement to agency fees above and beyond what *Abood* and *Hudson* require. To the contrary, we have described *Hudson* as 'outlin[ing] a *minimum* set of procedures by which a [public-sector] union in an agency-shop relationship could meet its requirements under *Abood*.'"[663] Thus, the Court held in *Davenport* that the State of Washington could prohibit "expenditure of a nonmember's agency fees for election-related purposes unless the nonmember affirmatively consents."[664]

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[656] 431 U.S. at 232–37.

[657] 431 U.S. at 237–42. On the other hand, nonmembers may be charged for such general union expenses as contributions to state and national affiliates, expenses of sending delegates to state and national union conventions, and costs of a union newsletter. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991). A local union may also charge nonmembers a fee that goes to the national union to pay for litigation expenses incurred on behalf of other local units, but only if (1) the litigation is related to collective bargaining rather than political activity, and (2) the litigation charge is reciprocal in nature, *i.e.*, other locals contribute similarly. Locke v. Karass, 129 S. Ct. 798, 802 (2009).

[658] Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435, 444 (1984).

[659] Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986).

[660] 475 U.S. at 309.

[661] 551 U.S. 177 (2007).

[662] 551 U.S. at 181, citing 475 U.S. 292, 302, 304–310.

[663] 551 U.S. at 185, quoting Keller v. State Bar of Cal., 496 U.S. 1, 17 (1990), and adding emphasis.

[664] 551 U.S. at 184.

The Court added that "Washington could have gone much further, restricting public-sector agency fees to the portion of union dues devoted to collective bargaining. Indeed, it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely." [665]

And then, in *Knox v. Service Employees International Union*,[666] the Court did suggest constitutional limits on a public union assessing political fees in an agency shop other than through a voluntary opt in system. The union in *Knox* had proposed and implemented a special fee to fund political advocacy before providing formal notice with an opportunity for non-union employees to opt out. Five Justices characterized agency shop arrangements in the public sector as constitutionally problematic in the first place, and, then, charged that requiring non-union members to affirmatively opt out of contributing to political activities was "a remarkable boon for unions." Continuing to call opt-out arrangements impingements on the First Amendment rights of non-union members, the majority more specifically held that the Constitution required that separate notices be sent out for special political assessments that allowed non-union employees to opt in rather than requiring them to opt out.[667] Two concurring Justices, echoed by the dissenters, heavily criticized the majority for reaching "significant constitutional issues not contained in the questions presented, briefed, or argued." Rather, the concurrence more narrowly found that unions may not collect special political assesments from non-union members who earlier objected to nonchargeable (*i.e.*, political) expenses, and could only collect from nonobjecting nonmembers after giving notice and an opportunity to opt out.[668]

Doubts on the constitutionality of mandatory union dues in the public sector intensified in *Harris v. Quinn*.[669] The Court openly expressed reservations on *Abood*'s central holding that the collection of an agency fee from public employees withstood First Amendment scrutiny because of the desirability of "labor peace" and the problem of "free ridership." Specifically, the Court questioned (1) the scope of the precedents (like *Hanson* and *Street*) that the *Abood* Court relied on; (2) *Abood*'s failure to appreciate the distinctly political context of public sector unions; and (3) *Abood*'s dismissal of the administrative difficulties in distinguishing between public union ex-

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[665] 551 U.S. at 184 (citations omitted).

[666] 567 U.S. ___, No. 10–1121, slip op. (2012).

[667] Id. at 17 (Alito, J., joined by Roberts, C.J., and by Scalia, Kennedy, and Thomas, JJ.).

[668] 567 U.S. ___, No. 10–1121, slip op. (2012) (Sotomayor, J., joined by Ginsburg, J., concurring).

[669] 573 U.S. ___, No. 11–681, slip op. (2014).

penditures for collective bargaining and expenditures for political purposes.[670] Notwithstanding these concerns about *Abood*'s core holding, the Court in *Harris* declined to overturn *Abood* outright. Instead, the Court focused on the peculiar status of the employees at issue in the case before it: home health care assistants subsidized by Medicaid. These "partial-public employees" were under the direction and control of their individual clients and not the state, had little direct interaction with state agencies or employees, and derived only limited benefits from the union.[671] As a consequence, the Court concluded that *Abood*'s rationale—the labor peace and free rider concerns—did not justify compelling dissenting home health care assistants to subsidize union speech.[672] The question that remains after *Harris* is whether the Court will, given its open criticism of *Abood*, overturn the 1977 ruling in the future, or whether the Court will continue to limit *Abood* to its facts.[673]

In *Ysursa v. Pocatello Education Ass'n*,[674] the Court upheld an Idaho statute that prohibited payroll deductions for union political activities. Because the statute did not restrict political speech, but merely declined to subsidize it by providing for payroll deductions, the state did not abridge the union's First Amendment right and therefore could justify the ban merely by demonstrating a rational basis for it. The Court found that it was "justified by the State's interest in avoiding the reality or appearance of government favoritism or entanglement with partisan politics."[675]

The Court has held that a labor relations body may not prevent a union member or employee represented exclusively by a union from speaking out at a public meeting on an issue of public concern, simply because the issue was a subject of collective bargaining between the union and the employer.[676]

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[670] *Id.* at 8–20.
[671] *Id.* at 24–27.
[672] *Id.* at 27.
[673] In *Friedrichs v. California Teachers Association*, the Court was equally divided on the question of whether to overrule *Abood*, signaling that *Abood*'s continued viability may be a subject of future debate at the Supreme Court. 578 U.S. ___, No. 14–915, slip op. at 1 (2016).
[674] 129 S. Ct. 1093 (2009).
[675] 129 S. Ct. at 1098. The unions had argued that, even if the limitation was valid as applied at the state level, it violated their First Amendment rights when applied to local public employers. The Court held that a political subdivision, "created by the state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." Id. at 1101, quoting Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933).
[676] Madison School Dist. v. WERC, 429 U.S. 167 (1976).

Maintenance of National Security and the First Amendment

Preservation of the security of the Nation from its enemies, foreign and domestic, is the obligation of government and one of the foremost reasons for government to exist. Pursuit of this goal may lead government officials at times to trespass in areas protected by the guarantees of speech and press and may require the balancing away of rights that might be preserved inviolate at other times. The drawing of the line is committed, not exclusively but finally, to the Supreme Court. In this section, we consider a number of areas in which the necessity to draw lines has arisen.

Punishment of Advocacy.—Criminal punishment for the advocacy of illegal or of merely unpopular goals and ideas did not originate in the United States with the post-World War II concern with Communism. Enactment of and prosecutions under the Sedition Act of 1798[677] and prosecutions under the federal espionage laws[678] and state sedition and criminal syndicalism laws[679] in the 1920s and early 1930s have been alluded to earlier.[680] But it was in the 1950s and the 1960s that the Supreme Court confronted First Amendment concepts fully in determining the degree to which government could proceed against persons and organizations that it believed were plotting and conspiring both to advocate the overthrow of government and to accomplish that goal.

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[677] Ch. 74, 1 Stat. 596 (1798).

[678] The cases included Schenck v. United States, 249 U.S. 47 (1919) (affirming conviction for attempting to disrupt conscription by circulation of leaflets bitterly condemning the draft); Debs v. United States, 249 U.S. 211 (1919) (affirming conviction for attempting to create insubordination in armed forces based on one speech advocating socialism and opposition to war, and praising resistance to the draft); Abrams v. United States, 250 U.S. 616 (1919) (affirming convictions based on two leaflets, one of which attacked President Wilson as a coward and hypocrite for sending troops into Russia and the other of which urged workers not to produce materials to be used against their brothers).

[679] The cases included Gitlow v. New York, 268 U.S. 652 (1925) (affirming conviction based on publication of "manifesto" calling for the furthering of the "class struggle" through mass strikes and other mass action); Whitney v. California, 274 U.S. 357 (1927) (affirming conviction based upon adherence to party which had platform rejecting parliamentary methods and urging a "revolutionary class struggle," the adoption of which defendant had opposed).

[680] *See* discussion under "Adoption and the Common Law Background," and "Clear and Present Danger," *supra*. *See also* Taylor v. Mississippi, 319 U.S. 583 (1943), setting aside convictions of three Jehovah's Witnesses under a statute that prohibited teaching or advocacy intended to encourage violence, sabotage, or disloyalty to the government after the defendants had said that it was wrong for the President "to send our boys across in uniform to fight our enemies" and that boys were being killed "for no purpose at all." The Court found no evil or sinister purpose, no advocacy of or incitement to subversive action, and no threat of clear and present danger to government.

The Smith Act of 1940[681] made it a criminal offense to knowingly or willfully to advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing the government of the United States or of any state by force or violence, or to organize any association that teaches, advises, or encourages such an overthrow, or to become a member of or to affiliate with any such association. No case involving prosecution under this law was reviewed by the Supreme Court until, in *Dennis v. United States*,[682] it considered the convictions of eleven Communist Party leaders on charges of conspiracy to violate the advocacy and organizing sections of the statute. Chief Justice Vinson's plurality opinion applied a revised clear and present danger test[683] and concluded that the evil sought to be prevented was serious enough to justify suppression of speech. "If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish. Obviously, the words cannot mean that before the government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required."[684] "The mere fact that from the period 1945 to 1948 petitioners' activities did not result in an attempt to overthrow the Government by force and violence is of course no answer to the fact that there was a group that was ready to make the attempt. The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."[685]

Justice Frankfurter in concurrence developed a balancing test, which, however, he deferred to the congressional judgment in applying, concluding that "there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat

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[681] 54 Stat. 670, 18 U.S.C. § 2385.
[682] 341 U.S. 494 (1951).
[683] 341 U.S. at 510.
[684] 341 U.S. at 509.
[685] 341 U.S. at 510–11.

to national order and security."[686] Justice Jackson's concurrence was based on his reading of the case as involving "a conviction of conspiracy, after a trial for conspiracy, on an indictment charging conspiracy, brought under a statute outlawing conspiracy." Here the government was dealing with "permanently organized, well-financed, semi-secret, and highly disciplined organizations" plotting to overthrow the Government; under the First Amendment "it is not forbidden to put down force and violence, it is not forbidden to punish its teaching or advocacy, and the end being punishable, there is no doubt of the power to punish conspiracy for the purpose."[687] Justices Black and Douglas dissented separately, the former viewing the Smith Act as an invalid prior restraint and calling for reversal of the convictions for lack of a clear and present danger, the latter applying the Holmes-Brandeis formula of clear and present danger to conclude that "[t]o believe that petitioners and their following are placed in such critical positions as to endanger the Nation is to believe the incredible."[688]

In *Yates v. United States*,[689] the convictions of several second-string Communist Party leaders were set aside, a number ordered acquitted, and others remanded for retrial. The decision was based upon construction of the statute and appraisal of the evidence rather than on First Amendment claims, although each prong of the ruling seems to have been informed with First Amendment considerations. Thus, Justice Harlan for the Court wrote that the trial judge had given faulty instructions to the jury in advising that all advocacy and teaching of forcible overthrow was punishable, whether it was language of incitement or not, so long as it was done with an intent to accomplish that purpose. But the statute, the Justice continued, prohibited "advocacy of action," not merely "advocacy in the realm of ideas." "The essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now or in the future, rather than merely to *believe* in something."[690] Second, the Court found the evidence insufficient to establish that the Communist Party had engaged in the required advocacy of action, requiring the Government to prove such advocacy in each instance rather than presenting evidence generally about the Party. Additionally, the Court found the evidence insufficient to link five of the de-

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[686] 341 U.S. at 517, 542.
[687] 341 U.S. at 561, 572, 575.
[688] 341 U.S. at 579 (Justice Black dissenting), 581, 589 (Justice Douglas dissenting).
[689] 354 U.S. 298 (1957).
[690] 354 U.S. at 314, 315–16, 320, 324–25.

fendants to advocacy of action, but sufficient with regard to the other nine.[691]

Compelled Registration of Communist Party.—The Internal Security Act of 1950 provided for a comprehensive regulatory scheme by which "Communist-action organizations" and "Communist-front organizations" could be curbed.[692] Organizations found to fall within one or the other of these designations were required to register and to provide for public inspection membership lists, accountings of all money received and expended, and listings of all printing presses and duplicating machines; members of organizations which failed to register were required to register and members were subject to comprehensive restrictions and criminal sanctions. After a lengthy series of proceedings, a challenge to the registration provisions reached the Supreme Court, which sustained the constitutionality of the section under the First Amendment, only Justice Black dissenting on this ground.[693] Employing the balancing test, Justice Frankfurter for himself and four other Justices concluded that the threat to national security posed by the Communist conspiracy outweighed considerations of individual liberty, the impact of the registration provision in this area in any event being limited to whatever "public opprobrium and obloquy" might attach.[694] Three Justices based their conclusion on findings that the Communist Party was an anti-democratic, secret organization that was subservient to a foreign power and that used more than speech in attempting to achieve its ends, and was therefore subject to extensive governmental regulation.[695]

Punishment for Membership in an Organization That Engages in Proscribed Advocacy.—The Smith Act provision making it a crime to organize or become a member of an organization

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[691] 354 U.S. at 330–31, 332. Justices Black and Douglas would have held the Smith Act unconstitutional. Id. at 339. Justice Harlan's formulation of the standard by which certain advocacy could be punished was noticeably stiffened in Brandenburg v. Ohio, 395 U.S. 444 (1969).

[692] Ch. 1024, 64 Stat. 987. Sections of the Act requiring registration of Communist-action and Communist-front organizations and their members were repealed in 1968. Pub. L. 90–237, § 5, 81 Stat. 766.

[693] Communist Party v. SACB, 367 U.S. 1 (1961). The Court reserved decision on the self-incrimination claims raised by the Party. The registration provisions ultimately floundered on this claim. Albertson v. SACB, 382 U.S. 70 (1965).

[694] 367 U.S. at 102.

[695] 367 U.S. at 170–75 (Justice Douglas dissenting on other grounds), 191 (Justice Brennan and Chief Justice Warren dissenting on other grounds). Justice Black's dissent on First Amendment grounds argued that "Congress has [no] power to outlaw an association, group or party either on the ground that it advocates a policy of violent overthrow of the existing Government at some time in the distant future or on the ground that it is ideologically subservient to some foreign country." Id. at 147.

that teaches, advocates, or encourages the overthrow of government by force or violence was used by the government against Communist Party members. In *Scales v. United States*,[696] the Court affirmed a conviction under this section and held it constitutional against First Amendment attack. Advocacy such as the Communist Party engaged in, Justice Harlan wrote for the Court, was unprotected under *Dennis*, and he could see no reason why membership that constituted a purposeful form of complicity in a group engaging in such advocacy should be a protected form of association. Of course, "[i]f there were a similar blanket prohibition of association with a group having both legal and illegal aims, there would indeed be a real danger that legitimate political expression or association would be impaired, but the membership clause . . . does not make criminal all association with an organization which has been shown to engage in illegal advocacy."[697] Only an "active" member of the Party—one who with knowledge of the proscribed advocacy intends to accomplish the aims of the organization—was to be punished, the Court said, not a "nominal, passive, inactive or purely technical" member.[698]

Disabilities Attaching to Membership in Proscribed Organizations.—The consequences of being or becoming a member of a proscribed organization can be severe. Aliens are subject to deportation for such membership.[699] Congress made it unlawful for any member of an organization required to register as a "Communist-action" or a "Communist-front" organization to apply for a passport

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[696] 367 U.S. 203 (1961). Justices Black and Douglas dissented on First Amendment grounds, id. at 259, 262, while Justice Brennan and Chief Justice Warren dissented on statutory grounds. Id. at 278

[697] 367 U.S. at 229.

[698] 367 U.S. at 220. In Noto v. United States, 367 U.S. 290 (1961), the Court reversed a conviction under the membership clause because the evidence was insufficient to prove that the Party had engaged in unlawful advocacy. "[T]he mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it." Id. at 297–98.

[699] *See* 66 Stat. 205 (1952), 8 U.S.C. § 1251(a)(6). "Innocent" membership in an organization that advocates violent overthrow of the government is apparently insufficient to save an alien from deportation. Galvan v. Press, 347 U.S. 522 (1954). Later cases, however, seem to impose a high standard of proof on the government to show a "meaningful association," as a matter of statutory interpretation. Rowoldt v. Perfetto, 355 U.S. 115 (1957); Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963).

or to use a passport.[700] A now-repealed statute required as a condition of access to NLRB processes by any union that each of its officers must file affidavits that he was not a member of the Communist Party or affiliated with it.[701] The Court has sustained state bar associations in their efforts to probe into applicants' membership in the Communist Party in order to determine whether there was knowing membership on the part of one sharing a specific intent to further the illegal goals of the organization.[702] A section of the Communist Control Act of 1954 was designed to keep the Communist Party off the ballot in all elections.[703] The most recent interpretation of this type of disability is *United States v. Robel*,[704] in which the Court held unconstitutional under the First Amendment a section of the Internal Security Act that made it unlawful for any member of an organization compelled to register as a "Communist-action" or "Communist-front" organization to work in any defense facility. For the Court, Chief Justice Warren wrote that a statute that so infringed upon freedom of association must be much more narrowly drawn to take precise account of the evils at which it permissibly could be aimed. One could be disqualified from holding sensitive positions on the basis of active, knowing membership with a specific intent to further the unlawful goals of an organization, but that membership that was passive or inactive, or by a person unaware of the organization's unlawful aims, or by one who disagreed with

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[700] Subversive Activities Control Act of 1950, § 6, 64 Stat. 993, 50 U.S.C. § 785. The section was declared unconstitutional in Aptheker v. Secretary of State, 378 U.S. 500 (1964), as an infringement of the right to travel, a liberty protected by the Due Process Clause of the Fifth Amendment. But the Court considered the case as well in terms of its restrictions on "freedom of association," emphasizing that the statute reached membership whether it was with knowledge of the organization's illegal aims or not, whether it was active or not, and whether the member intended to further the organization's illegal aims. Id. at 507–14. *But see* Zemel v. Rusk, 381 U.S. 1, 16–17 (1965), in which the Court denied that State Department area restrictions in its passport policies violated the First Amendment, because the policy inhibited action rather than expression, a distinction the Court continued in Haig v. Agee, 453 U.S. 280, 304–10 (1981).

[701] This part of the oath was sustained in American Communications Ass'n v. Douds, 339 U.S. 382 (1950), and Osman v. Douds, 339 U.S. 846 (1950).

[702] Konigsberg v. State Bar of California, 366 U.S. 36 (1961); *In re* Anastaplo, 366 U.S. 82 (1961); Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971). Membership alone, however, appears to be an inadequate basis on which to deny admission. Id. at 165–66; Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

[703] Ch. 886, § 3, 68 Stat. 775, 50 U.S.C. § 842. The section was at issue without a ruling on the merits in Mitchell v. Donovan, 290 F. Supp. 642 (D. Minn. 1968) (ordering names of Communist Party candidates put on ballot); 300 F. Supp. 1145 (D. Minn. 1969) (dismissing action as moot); 398 U.S. 427 (1970) (dismissing appeal for lack of jurisdiction).

[704] 389 U.S. 258 (1967).

those aims, could not be grounds for disqualification, certainly not for a non-sensitive position.[705]

A somewhat different matter is disqualifying a person for public benefits of some sort because of membership in a proscribed organization or because of some other basis ascribable to doubts about his loyalty. The First Amendment was raised only in dissent when in *Flemming v. Nestor*[706] the Court sustained a statute that required the termination of Social Security old-age benefits to an alien who was deported on grounds of membership in the Communist Party. Proceeding on the basis that no one was "entitled" to Social Security benefits, Justice Harlan for the Court concluded that a rational justification for the law might be the deportee's inability to aid the domestic economy by spending the benefits locally, although a passage in the opinion could be read to suggest that termination was permissible because alien Communists are undeserving of benefits.[707] Of considerable significance in First Amendment jurisprudence is *Speiser v. Randall*,[708] in which the Court struck down a state scheme for denying veterans' property tax exemptions to "disloyal" persons. The system, as interpreted by the state courts, denied the exemption only to persons who engaged in speech that could be criminally punished consistently with the First Amendment, but the Court found the vice of the provision to be that, after each claimant had executed an oath disclaiming his engagement in unlawful speech, the tax assessor could disbelieve the oath taker and deny the exemption, thereby placing on the claimant the burden of proving that he was loyal. "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens . . . . In practical operation, therefore, this procedural device must necessarily produce a result which

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[705] 389 U.S. at 265–66. *See also* Schneider v. Smith, 390 U.S. 17 (1968).

[706] 363 U.S. 603 (1960).

[707] 363 U.S. at 612. The passage reads: "Nor . . . can it be deemed irrational for Congress to have concluded that the public purse should not be utilized to contribute to the support of those deported on the grounds specified in the statute." Id. *But see* Sherbert v. Verner, 374 U.S. 398, 404–05, 409 n.9 (1963). Although the right-privilege distinction is all but moribund, *Flemming* was strongly reaffirmed in later cases by emphasis on the noncontractual nature of such benefits. Richardson v. Belcher, 404 U.S. 78, 80–81 (1971); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980).

[708] 357 U.S. 513 (1958).

the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free." [709]

Employment Restrictions and Loyalty Oaths.—An area in which significant First Amendment issues are often raised is the establishment of loyalty-security standards for government employees. Such programs generally take one of two forms or may combine the two. First, government may establish a system investigating employees or prospective employees under standards relating to presumed loyalty. Second, government may require its employees or prospective employees to subscribe to a loyalty oath disclaiming belief in or advocacy of, or membership in an organization that stands for or advocates, unlawful or disloyal action. The Federal Government's security investigation program has been tested numerous times and First Amendment issues raised, but the Supreme Court has never squarely confronted the substantive constitutional issues, and it has not dealt with the loyalty oath features of the federal program.[710] The Court has, however, had a long running encounter with state loyalty oath programs.[711]

First encountered [712] was a loyalty oath for candidates for public office rather than one for public employees. Accepting the state court construction that the law required each candidate to "make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt," the Court unanimously sustained the provi-

[709] 357 U.S. at 526. For a possible limiting application of the principle, *see* Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154, 162–64 (1971), and id. at 176–78 (Justices Black and Douglas dissenting), id. at 189 n.5 (Justices Marshall and Brennan dissenting).

[710] The federal program is primarily grounded in two Executive Orders by President Truman and President Eisenhower, E.O. 9835, 12 Fed. Reg. 1935 (1947), and E.O. 10450, 18 Fed. Reg. 2489 (1953), and a significant amendatory Order issued by President Nixon, E.O. 11605, 36 Fed. Reg. 12831 (1971). Statutory bases include 5 U.S.C. §§ 7311, 7531–32. Cases involving the program were decided either on lack of authority for the action being reviewed, *e.g.*, Cole v. Young, 351 U.S. 536 (1956); and Peters v. Hobby, 349 U.S. 331 (1955), or on procedural due process grounds, Greene v. McElroy, 360 U.S. 474 (1959); Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). *But cf.* United States v. Robel, 389 U.S. 258 (1967); Schneider v. Smith, 390 U.S. 17 (1968). A series of three-judge district court decisions, however, invalidated federal loyalty oaths and inquiries. Soltar v. Postmaster General, 277 F. Supp. 579 (N.D. Calif. 1967); Haskett v. Washington, 294 F. Supp. 912 (D.D.C. 1968); Stewart v. Washington, 301 F. Supp. 610 (D.D.C. 1969); National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969) (no-strike oath).

[711] So-called negative oaths or test oaths are dealt with in this section; for the positive oaths, *see* "Imposition of Consequences for Holding Certain Beliefs," *supra*.

[712] Test oaths had first reached the Court in the period following the Civil War, at which time they were voided as *ex post facto* laws and bills of attainder. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867).

sion in a one-paragraph *per curiam* opinion.[713] Less than two months later, the Court upheld a requirement that employees take an oath that they had not within a prescribed period advised, advocated, or taught the overthrow of government by unlawful means, nor been a member of an organization with similar objectives; every employee was also required to swear that he was not and had not been a member of the Communist Party.[714] For the Court, Justice Clark perceived no problem with the inquiry into Communist Party membership but cautioned that no issue had been raised whether an employee who was or had been a member could be discharged merely for that reason.[715] With regard to the oath, the Court did not discuss First Amendment considerations but stressed that it believed the appropriate authorities would not construe the oath adversely against persons who were innocent of an organization's purpose during their affiliation, or persons who had severed their associations upon knowledge of an organization's purposes, or persons who had been members of an organization at a time when it was not unlawfully engaged.[716] Otherwise, the oath requirement was valid as "a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty" and as being "reasonably designed to protect the integrity and competency of the service."[717]

In the following Term, the Court sustained a state statute disqualifying for government employment persons who advocated the overthrow of government by force or violence or persons who were members of organizations that so advocated; the statute had been supplemented by a provision applicable to teachers calling for the drawing up of a list of organizations that advocated violent overthrow and making membership in any listed organization *prima fa-*

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[713] Gerende v. Board of Supervisors of Elections, 341 U.S. 56 (1951) (emphasis original). In Indiana Communist Party v. Whitcomb, 414 U.S. 411 (1974), a requirement that parties and candidates seeking ballot space subscribe to a similar oath was voided because the oath's language did not comport with the advocacy standards of Brandenburg v. Ohio, 395 U.S. 444 (1969). Four Justices concurred more narrowly. 414 U.S. at 452 n.3. *See also* Whitcomb v. Communist Party of Indiana, 410 U.S. 976 (1973).

[714] Garner v. Board of Pub. Works, 341 U.S. 716 (1951)). Justice Frankfurter dissented in part on First Amendment grounds, id. at 724, Justice Burton dissented in part, id. at 729, and Justices Black and Douglas dissented completely, on bill of attainder grounds, id. at 731.

[715] 341 U.S. at 720. Justices Frankfurter and Burton agreed with this ruling. Id. at 725–26, 729–30.

[716] 341 U.S. at 723–24.

[717] 341 U.S. at 720–21. Justice Frankfurter objected that the oath placed upon the takers the burden of assuring themselves that every organization to which they belonged or had been affiliated with for a substantial period of time had not engaged in forbidden advocacy.

cie evidence of disqualification.[718] Justice Minton observed that everyone had a right to assemble, speak, think, and believe as he pleased, but had no right to work for the state in its public school system except upon compliance with the state's reasonable terms. "If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."[719] A state could deny employment based on a person's advocacy of overthrow of the government by force or violence or based on unexplained membership in an organization so advocating with knowledge of the advocacy.[720] With regard to the required list, the Justice observed that the state courts had interpreted the law to provide that a person could rebut the presumption attached to his mere membership.[721]

Invalidated the same year was an oath requirement, addressed to membership in the Communist Party and other proscribed organizations, which the state courts had interpreted to disqualify from employment "solely on the basis of organizational membership." Stressing that membership might be innocent, that one might be unaware of an organization's aims, or that he might have severed a relationship upon learning of its aims, the Court struck the law down; one must be or have been a member with knowledge of illegal aims.[722] But subsequent cases firmly reiterated the power of governmental agencies to inquire into the associational relationships of their employees for purposes of determining fitness and upheld dismissals for refusal to answer relevant questions.[723] In *Shelton v. Tucker*,[724] however, a five-to-four majority held that, although a state could inquire into the fitness and competence of its teachers, a requirement that every teacher annually list every organization to which he belonged or had belonged in the previous five years was invalid

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[718] Adler v. Board of Educ., 342 U.S. 485 (1952). Justice Frankfurter dissented because he thought no party had standing. Id. at 497. Justices Black and Douglas dissented on First Amendment grounds. Id. at 508.

[719] 342 U.S. at 492.

[720] 342 U.S. at 492.

[721] 342 U.S. at 494–96.

[722] Wieman v. Updegraff, 344 U.S. 183 (1952).

[723] Beilan v. Board of Education, 357 U.S. 399 (1958); Lerner v. Casey, 357 U.S. 468 (1958); Nelson v. County of Los Angeles, 362 U.S. 1 (1960). *Compare* Slochower v. Board of Higher Education, 350 U.S. 551 (1956). For the self-incrimination aspects of these cases, see Fifth Amendment, "Self-Incrimination: Development and Scope," *infra*.

[724] 364 U.S. 479 (1960). "It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Id. at 485–86. Justices Frankfurter, Clark, Harlan, and Whittaker dissented. Id. at 490, 496.

because it was too broad, bore no rational relationship to the state's interests, and had a considerable potential for abuse.

The Court relied on vagueness when loyalty oaths aimed at "subversives" next came before it. In *Cramp v. Board of Public Instruction*,[725] it unanimously held an oath too vague that required one to swear, *inter alia*, that "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party." Similarly, in *Baggett v. Bullitt*,[726] the Court struck down two oaths, one requiring teachers to swear that they "will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government," and the other requiring all state employees to swear, *inter alia*, that they would not "aid in the commission of any act intended to overthrow, destroy, or alter or assist in the overthrow, destruction, or alteration" of government. Although couched in vagueness terms, the Court's opinion stressed that the vagueness was compounded by its effect on First Amendment rights and seemed to emphasize that the state could not deny employment to one simply because he unintentionally lent indirect aid to the cause of violent overthrow by engaging in lawful activities that he knew might add to the power of persons supporting illegal overthrow.[727]

More precisely drawn oaths survived vagueness attacks but fell before First Amendment objections in the next three cases. *Elfbrandt v. Russell* [728] involved an oath that as supplemented would have been violated by one who "knowingly and willfully becomes or remains a member of the communist party . . . or any other organization having for its purposes the overthrow by force or violence of the government" with "knowledge of said unlawful purpose of said organization." The law's blanketing in of "knowing but guiltless" membership was invalid, wrote Justice Douglas for the Court, because one could be a knowing member but not subscribe to the illegal goals of the organization; moreover, it appeared that one must also have participated in the unlawful activities of the organization before public employment could be denied.[729] Next, in *Keyishian v. Board of Re-*

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[725] 368 U.S. 278 (1961). For further proceedings on this oath, *see* Connell v. Higginbotham, 305 F. Supp. 445 (M.D. Fla. 1970), *aff'd in part and rev'd in part*, 403 U.S. 207 (1971).

[726] 377 U.S. 360 (1964). Justices Clark and Harlan dissented. Id. at 380

[727] 377 U.S. at 369–70.

[728] 384 U.S. 11 (1966). Justices White, Clark, Harlan, and Stewart dissented. Id. at 20.

[729] 384 U.S. at 16, 17, 19. "Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities pose no threat, either as citizens or public employees." Id. at 17.

gents,[730] the oath provisions sustained in *Adler*[731] were declared unconstitutional. A number of provisions were voided as vague,[732] but the Court held invalid a new provision making Communist Party membership *prima facie* evidence of disqualification for employment because the opportunity to rebut the presumption was too limited. It could be rebutted only by denying membership, denying knowledge of advocacy of illegal overthrow, or denying that the organization advocates illegal overthrow. But "legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations."[733] Similarly, in *Whitehill v. Elkins*,[734] an oath was voided because the Court thought it might include within its proscription innocent membership in an organization that advocated illegal overthrow of government.

More recent cases do not illuminate whether membership changes in the Court presage a change in view with regard to the loyalty-oath question. In *Connell v. Higginbotham*[735] an oath provision reading "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" was invalidated because the statute provided for summary dismissal of an employee refusing to take the oath, with no opportunity to explain that refusal. *Cole v. Richardson*[736] upheld a clause in an oath "that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence, or by any illegal or unconstitutional method" upon the construction that this clause was mere "repetition, whether for emphasis or cadence," of the first part of the oath, which was a valid "uphold and defend" positive oath.

Legislative Investigations and the First Amendment.—The power of inquiry by congressional and state legislative committees in order to develop information as a basis for legislation[737] is subject to some uncertain limitation when the power as exercised results in deterrence or penalization of protected beliefs, associations, and conduct. Although the Court initially indicated that it

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[730] 385 U.S. 589 (1967). Justices Clark, Harlan, Stewart, and White dissented. Id. at 620.

[731] Adler v. Board of Education, 342 U.S. 485 (1952).

[732] Keyishian v. Board of Regents, 385 U.S. 589, 597–604 (1967).

[733] 385 U.S. at 608. The statement here makes specific intent or active membership alternatives in addition to knowledge, whereas Elfbrandt v. Russell, 384 U.S. 11, 19 (1966), requires both in addition to knowledge.

[734] 389 U.S. 54 (1967). Justices Harlan, Stewart, and White dissented. Id. at 62.

[735] 403 U.S. 207 (1971).

[736] 405 U.S. 676, 683–84 (1972).

[737] *See* subtopics under "Investigations in Aid of Legislation," *supra*.

would scrutinize closely such inquiries in order to curb First Amendment infringement,[738] later cases balanced the interests of the legislative bodies in inquiring about both protected and unprotected associations and conduct against what were perceived to be limited restraints upon the speech and association rights of witnesses, and upheld wide-ranging committee investigations.[739] Later, the Court placed the balance somewhat differently and required that the investigating agency show "a subordinating interest which is compelling" to justify the restraint on First Amendment rights that the Court found would result from the inquiry.[740] The issues in this field, thus, remain unsettled.

Interference With Vietnam War Effort.—Possibly the most celebrated governmental action in response to dissent to the Vietnam War—the prosecution of Dr. Benjamin Spock and four others for conspiring to counsel, aid, and abet persons to evade the draft—failed to reach the Supreme Court.[741] Aside from a comparatively minor case,[742] the Court's sole encounter with a Vietnam War protest allegedly involving protected "symbolic conduct" was *United States v. O'Brien*.[743] That case affirmed a conviction and upheld a congressional prohibition against destruction of draft registration certificates; O'Brien had publicly burned his draft card. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a

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[738] *See* United States v. Rumely, 345 U.S. 41 (1953); Watkins v. United States, 354 U.S. 178, 197–98 (1957); Sweezy v. New Hampshire, 354 U.S. 234, 249–51 (1957). Concurring in the last case, Justices Frankfurter and Harlan would have ruled that the inquiry there was precluded by the First Amendment. Id. at 255.

[739] Barenblatt v. United States, 360 U.S. 109 (1959); Uphaus v. Wyman, 360 U.S. 72 (1959); Wilkinson v. United States, 365 U.S. 399 (1961); Braden v. United States, 365 U.S. 431 (1961). Chief Justice Warren and Justices Black, Douglas, and Brennan dissented in each case.

[740] Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963). Justices Harlan, Clark, Stewart, and White dissented. Id. at 576, 583. *See also* DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966).

[741] United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

[742] In Schacht v. United States, 398 U.S. 58 (1970), the Court reversed a conviction under 18 U.S.C. § 702 for wearing a military uniform without authority. The defendant had worn the uniform in a skit in an on-the-street anti-war demonstration, and 10 U.S.C. § 772(f) authorized the wearing of a military uniform in a "theatrical production" so long as the performance did not "tend to discredit" the military. This last clause the Court held an unconstitutional limitation of speech.

[743] 391 U.S. 367 (1968).

sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[744] Finding that the government's interest in having registrants retain their cards at all times was an important one and that the prohibition of destruction of the cards worked no restriction of First Amendment freedoms broader than necessary to serve the interest, the Court upheld the statute. Subsequently, the Court upheld a "passive enforcement" policy singling out for prosecution for failure to register for the draft those young men who notified authorities of an intention not to register for the draft and those reported by others.[745]

Suppression of Communist Propaganda in the Mails.—A 1962 statute authorizing the Post Office Department to retain all mail from abroad that was determined to be "communist political propaganda" and to forward it to an addressee only upon his request was held unconstitutional in *Lamont v. Postmaster General*.[746] The Court held that to require anyone to request receipt of mail determined to be undesirable by the government was certain to deter and inhibit the exercise of First Amendment rights to receive information.[747] Distinguishing *Lamont*, the Court in 1987 upheld statutory classification as "political propaganda" of communications or expressions by or on behalf of foreign governments, foreign "principals," or their agents, and reasonably adapted or intended to influence United States foreign policy.[748] "The physical detention of materials, not their mere designation as 'communist political propaganda,' was the offending element of the statutory scheme [in *Lamont*]."[749]

Exclusion of Certain Aliens as a First Amendment Problem.—Although a nonresident alien might be able to present no claim, based on the First Amendment or on any other constitutional pro-

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[744] 391 U.S. at 376–77. The Court applied the *O'Brien* test less deferentially in Turner Broadcasting System v. FCC, 512 U.S. 622 (1994).

[745] Wayte v. United States, 470 U.S. 598 (1985). The incidental restriction on First Amendment rights to speak out against the draft was no greater than necessary to further the government's interests in "prosecutorial efficiency," obtaining sufficient proof prior to prosecution, and promoting general deterrence (or not appearing to condone open defiance of the law). *See also* United States v. Albertini, 472 U.S. 675 (1985) (order banning a civilian from entering military base upheld as applied to attendance at base open house by individual previously convicted of destroying military property).

[746] 381 U.S. 301 (1965). The statute, 76 Stat. 840, was the first federal law the Court ever struck down as an abridgment of the First Amendment speech and press clauses.

[747] 381 U.S. at 307. Justices Brennan, Harlan, and Goldberg concurred, spelling out in some detail the rationale of the protected right to receive information as the basis for the decision.

[748] Meese v. Keene, 481 U.S. 465 (1987).

[749] 481 U.S. at 480.

vision, to overcome a governmental decision to exclude him from the country, it was arguable that United States citizens who could assert a First Amendment interest in hearing the alien and receiving information from him, such as the right recognized in *Lamont*, could be able to contest such exclusion.[750] But the Court declined to reach the First Amendment issue and to place it in balance when it found that a governmental refusal to waive a statutory exclusion [751] was on facially legitimate and neutral grounds; the Court's emphasis, however, upon the "plenary" power of Congress over admission or exclusion of aliens seemed to indicate where such a balance might be drawn.[752]

Material Support of Terrorist Organizations

Congress may bar supporting the legitimate activities of certain foreign terrorist organizations through speech made to, under the direction of, or in coordination with those groups. So held the Court in *Holder v. Humanitarian Law Project*,[753] a case challenging an effective prohibition on giving training in peaceful dispute resolution, teaching how to petition the United Nations for relief, providing legal expertise in negotiating peace agreements, and the like.[754] Without express reliance on wartime precedents, and yet also without extended discussion of plaintiffs' free speech interests, the Court emphasized findings by the political branches that support meant to promote peaceful conduct can nevertheless further terrorism by designated groups in multiple ways. The Court also cited the narrowness of the proscription imposed. Only carefully defined activities done in concert with previously designated organizations were barred. Independent advocacy and mere membership were not restricted. Given the national security and foreign affairs concerns at stake, Congress had adequately balanced the competing inter-

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[750] The right to receive information has been prominent in the rationale of several cases, *e.g.*, Martin v. City of Struthers, 319 U.S. 141 (1943); Thomas v. Collins, 323 U.S. 516 (1945); Stanley v. Georgia, 394 U.S. 557 (1969).

[751] By §§ 212(a)(28)(D) and (G) of the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1182(a)(28)(D) and (G), aliens who advocate or write and publish "the economic, international, and governmental doctrines of world communism" are made ineligible to receive visas and are thus excluded from the United States. Upon the recommendation of the Secretary of State, however, the Attorney General is authorized to waive these provisions and to admit such an alien temporarily into the country. INA § 212(d)(3)(A), 8 U.S.C. § 1182(d)(3)(A).

[752] Kleindienst v. Mandel, 408 U.S. 753 (1972).

[753] 561 U.S. ___, No. 08–1498, slip op. (2010).

[754] The six-Justice majority also held that the statute at issue gave adequate notice of what conduct was prohibited, a conclusion with which the dissenting Justices agreed, and basic First Amendment rights of association and assembly were not implicated, a conclusion about which the dissent was less sanguine. 561 U.S. ___, No. 08–1498, slip op. at 13–20, 34–35 (2010). *See also* 561 U.S. ___, No. 08–1498, slip op. 1, 3–5 (2010) (Breyer, J., dissenting).

ests of individual speech and government regulation, deference to the informed judgment of the political branches being due even absent an extensive record of concrete evidence.[755]

Particular Governmental Regulations That Restrict Expression

Government adopts and enforces many measures that are designed to further a valid interest but that may restrict freedom of expression. As an employer, government is interested in attaining and maintaining full production from its employees in a harmonious environment. As enforcer of the democratic method of carrying out the selection of public officials, it is interested in outlawing "corrupt practices" and promoting a fair and smoothly functioning electoral process. As regulator of economic affairs, its interests are extensive. As educator, it desires to impart knowledge and training to the young with as little distraction as possible. All these interests may be achieved with some restriction upon expression, but, if the regulation goes too far, then it will violate the First Amendment.[756]

Government as Employer: Political and Other Outside Activities.—Abolition of the "spoils system" in federal employment brought with it restrictions on political activities by federal employees. In 1876, federal employees were prohibited from requesting from, giving to, or receiving from any other federal employee money for political purposes, and the Civil Service Act of 1883 more broadly forbade civil service employees to use their official authority or influence to coerce political action of any person or to interfere with

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[755] The majority purported to apply a level of scrutiny more rigorous than the intermediate scrutiny test applied in cases in which conduct, rather than the content of speech, is the primary target of regulation. 561 U.S. ___, No. 08–1498, slip op. at 22–23 (2010). The dissent found the majority's analysis to be too deferential and insufficiently exacting, and also thought the case might be susceptible to resolution on statutory grounds if remanded. 561 U.S. ___, No. 08–1498, slip op. 7–22 (2010) (Breyer, J., dissenting).

[756] Highly relevant in this and subsequent sections dealing with governmental incidental restraints upon expression is the distinction the Court has drawn between content-based and content-neutral regulations—a distinction between regulations that serve legitimate governmental interests and those that are imposed because of disapproval of the content of particular expression. *Compare* Police Dep't of Chicago v. Mosle, 408 U.S. 92 (1972); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); *and* Schacht v. United States, 398 U.S. 58 (1970), *with* Greer v. Spock, 424 U.S. 828 (1976); Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973); and United States v. O'Brien, 391 U.S. 367 (1968). Content-based regulations are subject to strict scrutiny, but content-neutral regulations are subject to lesser scrutiny. See "Modern Tests and Standards: Vagueness, Overbreadth, Strict Scrutiny, Intermediate Scrutiny, and Effectiveness of Speech Restrictions," *supra*.

elections.[757] By the Hatch Act, federal employees, and many state employees as well, are forbidden to "take any active part in political management or in political campaigns."[758] As applied through the regulations and rulings of the Office of Personnel Management, formerly the Civil Service Commission, the Act prevents employees from running for public office, distributing campaign literature, playing an active role at political meetings, circulating nomination petitions, attending a political convention except as a spectator, publishing a letter soliciting votes for a candidate, and all similar activity.[759] The question is whether government, which may not prohibit citizens in general from engaging in these activities, may nonetheless so control the off-duty activities of its own employees.

In *United Public Workers v. Mitchell*,[760] the Court answered in the affirmative. While the Court refused to consider the claims of persons who had not yet engaged in forbidden political activities, it ruled against a mechanical employee of the Mint who had done so. The Court's opinion, by Justice Reed, recognized that the restrictions of political activities imposed by the Act did in some measure impair First Amendment and other constitutional rights,[761] but it based its decision upon the established principle that no right is absolute. The standard by which the Court judged the validity of the permissible impairment of First Amendment rights was a due process standard of reasonableness.[762] Thus, changes in the standards of judging incidental restrictions on expression suggested the possibility of a reconsideration of *Mitchell*.[763] In *Civil Service Commission v. National Association of Letter Carriers*, however, a divided Court, reaffirming *Mitchell*, sustained the Act's limitations upon

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[757] 19 Stat. 143, § 6, 18 U.S.C. §§ 602–03, sustained in *Ex parte* Curtis, 106 U.S. 371 (1882); 22 Stat. 403, as amended, 5 U.S.C. § 7323.

[758] 53 Stat. 1147 § 9(a), (1939), as amended, 5 U.S.C. § 7324(a)(2). By 54 Stat. 767 (1940), as amended, 5 U.S.C. §§ 1501–08, the restrictions on political activity were extended to state and local governmental employees working in programs financed in whole or in part with federal funds. This provision was sustained against federalism challenges in Oklahoma v. Civil Service Comm'n, 330 U.S. 127 (1947). All the states have adopted laws patterned on the Hatch Act. *See* Broadrick v. Oklahoma, 413 U.S. 601, 604 (1973).

[759] The Commission on Political Activity of Government Personnel, Findings and Recommendations 11, 19–24 (Washington: 1968).

[760] 330 U.S. 75, 94–104 (1947). The decision was 4-to-3, with Justice Frankfurter joining the Court on the merits only after arguing that the Court lacked jurisdiction.

[761] 330 U.S. at 94–95.

[762] 330 U.S. at 101–02.

[763] The Act was held unconstitutional by a divided three-judge district court. National Ass'n of Letter Carriers v. Civil Service Comm'n, 346 F. Supp. 578 (D.D.C. 1972).

political activity against a range of First Amendment challenges.[764] The Court emphasized that the interest of the government in forbidding partisan political activities by its employees was so substantial that it overrode the rights of those employees to engage in political activities and association;[765] therefore, a statute that barred in plain language a long list of activities would clearly be valid.[766] The issue in *Letter Carriers*, however, was whether the language that Congress had enacted, forbidding employees to take "an active part in political management or in political campaigns,"[767] was unconstitutional on its face, either because the statute was too imprecise to allow government employees to determine what was forbidden and what was permitted, or because the statute swept in under its coverage conduct that Congress could not forbid as well as conduct subject to prohibition or regulation. With respect to vagueness, plaintiffs contended and the lower court had held that the quoted proscription was inadequate to provide sufficient guidance and that the only further elucidation Congress had provided was in a section stating that the forbidden activities were the same activities that the Commission had as of 1940, and reaching back to 1883, "determined are at the time of the passage of this act prohibited on the part of employees . . . by the provisions of the civil-service rules. . . ."[768] This language had been included, it was contended, to deprive the Commission of power to alter thousands of rulings it had made that were not available to employees and that were in any event mutually inconsistent and too broad.

The Court held, on the contrary, that Congress had intended to confine the Commission to the boundaries of its rulings as of 1940 but had further intended the Commission by a process of case-by-case adjudication to flesh out the prohibition and to give content to it. The Commission had done that. It had regularly summarized in understandable terms the rules that it applied, and it was authorized as well to issue advisory opinions to employees uncertain of the propriety of contemplated conduct. "[T]here are limitations in the English language with respect to being both specific and man-

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[764] 413 U.S. 548 (1973). In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court refused to consider overbreadth attacks on a state statute of much greater coverage because the plaintiffs had engaged in conduct that the statute clearly could constitutionally proscribe.

[765] The interests the Court recognized as served by the proscription on partisan activities were (1) the interest in the efficient and fair operation of governmental activities and the appearance of such operation, (2) the interest in fair elections, and (3) the interest in protecting employees from improper political influences. 413 U.S. at 557–67.

[766] 413 U.S. at 556.

[767] 413 U.S. at 554, 570 n.17.

[768] 413 U.S. at 570 n.17.

ageably brief," said the Court, but it thought the prohibitions as elaborated in Commission regulations and rulings were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interests."[769] There were conflicts, the Court conceded, between some of the things forbidden and some of the protected expressive activities, but these were at most marginal. Thus, some conduct arguably protected did under some circumstances so partake of partisan activities as to be properly proscribable. But the Court would not invalidate the entire statute for this degree of overbreadth.[770] Subsequently, in *Bush v. Lucas*[771] the Court held that the civil service laws and regulations constitute a sufficiently "elaborate, comprehensive scheme" to afford federal employees an adequate remedy for deprivation of First Amendment rights as a result of disciplinary actions by supervisors, and that therefore there is no need to create an additional judicial remedy for the constitutional violation.

The Hatch Act cases were distinguished in *United States v. National Treasury Employees Union (NTEU)*,[772] in which the Court struck down an honoraria ban as applied to lower-level employees of the Federal Government. The honoraria ban suppressed employees' right to free expression while the Hatch Act sought to protect that right, and also there was no evidence of improprieties in acceptance of honoraria by members of the plaintiff class of federal employees.[773] The Court emphasized further difficulties with the "crudely crafted" honoraria ban: it was limited to expressive activities and had no application to other sources of outside income, it applied when neither the subjects of speeches and articles nor the persons or groups paying for them bore any connection to the employee's job responsibilities, and it exempted a "series" of speeches or articles without also exempting individual articles and speeches. These "anomalies" led the Court to conclude that the "speculative benefits" of the ban were insufficient to justify the burdens it imposed on expressive activities.[774]

Government as Employer: Free Expression Generally.—In recent decades, the Court has eliminated the "right-privilege" dis-

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[769] 413 U.S. at 578–79.
[770] 413 U.S. at 580–81.
[771] 462 U.S. 367, 385 (1983).
[772] 513 U.S. 454 (1995).
[773] See 513 U.S. at 471. The plaintiff class consisted of all Executive Branch employees below grade GS–16. Also covered by the ban were senior executives, Members of Congress, and other federal officers, but the possibility of improprieties by these groups did not justify application of the ban to "the vast rank and file of federal employees below grade GS–16."Id. at 472.
[774] 513 U.S. at 477.

tinction with respect to public employees' free speech rights. Application of that distinction to the public employment context was epitomized in the famous sentence of Justice Holmes': "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [775] The Supreme Court embraced this application in the early 1950s, first affirming a lower court decision by an evenly divided vote,[776] and soon after applying the distinction itself. Upholding a prohibition on employment as teachers of persons who advocated the desirability of overthrowing the government, the Court declared that "[i]t is clear that such persons have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the state in the school system on their own terms. They may work for the school system under reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not." [777]

The same year, however, the Court expressly rejected the right-privilege doctrine in another loyalty case. Voiding a loyalty oath requirement conditioned on mere membership in suspect organizations, the Court reasoned that the interest of public employees in being free of such an imposition was substantial. "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. . . . [W]e need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclu-

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[775] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 2d 517 (1892).

[776] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an evenly divided Court*, 341 U.S. 918 (1951). The appeals court majority, upholding the dismissal of a government employee against due process and First Amendment claims, asserted that "the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations. . . . The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ." Id. at 59. Although the Supreme Court issued no opinion in *Bailey*, several Justices touched on the issues in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). Justices Douglas and Jackson in separate opinions rejected the privilege doctrine as applied by the lower court in *Bailey*. Id. at 180, 185. Justice Black had previously rejected the doctrine in United Public Workers v. Mitchell, 330 U.S. 75, 105 (1947) (dissenting opinion).

[777] Adler v. Board of Education, 342 U.S. 458, 492–93 (1952). Justices Douglas and Black dissented, again rejecting the privilege doctrine. Id. at 508. Justice Frankfurter, who dissented on other grounds, had previously rejected the doctrine in another case, Garner v. Board of Public Works, 341 U.S. 716, 725 (1951) (concurring in part and dissenting in part).

sion pursuant to a statute is patently arbitrary or discriminatory." [778] The premise here—that there is a constitutional claim against dismissal or rejection—has faded in subsequent cases; the rationale now is that, although government may deny employment, or any benefit for that matter, for any number of reasons, it may not deny employment or other benefits on a basis that infringes a person's constitutionally protected interests. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." [779]

However, the fact that government does not have carte blanche in dealing with the constitutional rights of its employees does not mean that it has no power at all. "[I]t cannot be gainsaid," the Court said in *Pickering v. Board of Education*, "that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." [780] *Pickering* concerned the dismissal of a high school teacher who had written a critical letter to a local newspaper reflecting on the administration of the school system. The letter also contained several factual errors. "The problem in any case," Justice Marshall wrote for the Court, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [781] The Court laid down no general standard, but undertook a suggestive analy-

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[778] Wieman v. Updegraff, 344 U.S. 183, 190–91, 192 (1952). Some earlier cases had used a somewhat qualified statement of the privilege. United Public Workers v. Mitchell, 330 U.S. 75, 100 (1947); Garner v. Board of Public Works, 341 U.S. 716, 722 (1951).

[779] Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citation omitted). In a companion case, the Court noted that the privilege basis for the appeals court's due process holding in *Bailey* "has been thoroughly undermined in the ensuing years." Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). The test now in due process and other such cases is whether government has conferred a property right in employment which it must respect, but the inquiry when it is alleged that an employee has been penalized for the assertion of a constitutional right is that stated in the text. A finding, however, that protected expression or conduct played a substantial part in the decision to dismiss or punish does not conclude the case; the employer may show by a preponderance of the evidence that the same decision would have been reached in the absence of the protected expression or conduct. Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 416 (1979). *See* Amendment 14, "The Property Interest," *infra*.

[780] 391 U.S. 563, 568 (1968).

[781] 391 U.S. at 568.

sis. Dismissal of a public employee for criticism of his superiors was improper, the Court indicated, where the relationship of employee to superior was not so close, such as day-to-day personal contact, that problems of discipline or of harmony among coworkers, or problems of personal loyalty and confidence, would arise.[782] The school board had not shown that any harm had resulted from the false statements in the letter, and it could not proceed on the assumption that the false statements were per se harmful, inasmuch as the statements primarily reflected a difference of opinion between the teacher and the board about the allocation of funds. Moreover, the allocation of funds is a matter of important public concern about which teachers have informed and definite opinions that the community should be aware of. "In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." [783]

Combining a balancing test of governmental interest and employee rights with a purportedly limiting statutory construction, the Court, in *Arnett v. Kennedy*,[784] sustained the constitutionality of a federal law that authorized the removal or suspension without pay of an employee "for such cause as will promote the efficiency of the service" when the "cause" cited concerned speech by the employee. He had charged that his superiors had made an offer of a bribe to a private person. The quoted statutory phrase, the Court held, "is without doubt intended to authorize dismissal for speech as well as other conduct." But, recurring to its *Letter Carriers* analysis,[785] it noted that the authority conferred was not impermissibly vague, in-

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[782] 391 U.S. at 568–70. *Contrast* Connick v. Myers, 461 U.S. 138 (1983), where *Pickering* was distinguished on the basis that the employee, an assistant district attorney, worked in an environment where a close personal relationship involving loyalty and harmony was important. "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Id. at 151–52.

[783] 391 U.S. at 573. *Pickering* was extended to private communications of an employee's views to the employer in Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979), although the Court recognized that different considerations might arise in different contexts. That is, with respect to public speech, content may be determinative in weighing impairment of the government's interests, whereas, with private speech, as "[w]hen a government employee personally confronts his immediate superior, . . . the manner, time, and place in which it is delivered" may also be relevant. Id. at 415 n.4. As discussed below, however, in Garcetti v. Ceballos, 547 U.S. 410 (2006), the Court held that there is no First Amendment protection at all for government employees when they make statements pursuant to their official duties.

[784] 416 U.S. 134 (1974). The quoted language is from 5 U.S.C. § 7501(a).

[785] Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 578–79 (1973).

asmuch as it is not possible to encompass within a statutory enactment all the myriad situations that arise in the course of employment, and inasmuch as the language used was informed by developed principles of agency adjudication coupled with a procedure for obtaining legal counsel from the agency on the interpretation of the law.[786] Nor was the language overbroad, continued the Court, because it "proscribes only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees than are necessary for the protection of the government as an employer. . . . We hold that the language 'such cause as will promote the efficiency of the service' in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad." [787]

Pickering was distinguished in *Connick v. Myers*,[788] involving what the Court characterized in the main as an employee grievance rather than an effort to inform the public on a matter of public concern. The employee, an assistant district attorney involved in a dispute with her supervisor over transfer to a different section, was fired for insubordination after she circulated a questionnaire among her peers soliciting views on matters relating to employee morale. The Court found this firing permissible. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." [789] Whether an employee's speech addresses a matter of public concern, the Court indicated, must be determined not only by its content, but also by its form and context.[790] Because one aspect of the employee's speech did raise matters of public concern, *Connick* also applied *Pickering's* balancing test, holding that "a wide degree of deference is appropriate" when "close work-

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[786] Arnett v. Kennedy, 416 U.S. 134, 158–64 (1974).

[787] 416 U.S. at 162. In dissent, Justice Marshall argued: "The Court's answer is no answer at all. To accept this response is functionally to eliminate overbreadth from the First Amendment lexicon. No statute can reach and punish constitutionally protected speech. The majority has not given the statute a limiting construction but merely repeated the obvious." Id. at 229.

[788] 461 U.S. 138 (1983).

[789] 461 U.S. at 146. *Connick* was a 5–4 decision. Justice Brennan wrote the dissent, arguing that information concerning morale at an important government office is a matter of public concern, and that the Court extended too much deference to the employer's judgment as to disruptive effect. Id. at 163–65.

[790] 461 U.S. at 147–48. Justice Brennan objected to this introduction of context, admittedly relevant in balancing interests, into the threshold issue of public concern.

ing relationships" between employer and employee are involved.[791] The issue of public concern is not only a threshold inquiry, but, under *Connick*, still figures in the balancing of interests: "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression" and its importance to the public.[792]

On the other hand, the Court has indicated that an employee's speech may be protected as relating to matters of public concern even in the absence of any effort or intent to inform the public.[793] In *Rankin v. McPherson* [794] the Court held protected an employee's comment, made to a co-worker upon hearing of an unsuccessful attempt to assassinate the President, and in a context critical of the President's policies, "If they go for him again, I hope they get him." Indeed, the Court in *McPherson* emphasized the clerical employee's lack of contact with the public in concluding that the employer's interest in maintaining the efficient operation of the office (including public confidence and good will) was insufficient to outweigh the employee's First Amendment rights.[795]

In *City of San Diego v. Roe*,[796] the Court held that a police department could fire a police officer who sold a video on the adults-only section of eBay that showed him stripping off a police uniform and masturbating. The Court found that the officer's "expression does not qualify as a matter of public concern . . . and *Pickering* balancing does not come into play." [797] The Court also noted that the officer's speech, unlike federal employees' speech in *United States v. National Treasury Employees Union (NTEU)*,[798] "was linked to his official status as a police officer, and designed to exploit his employer's image," and therefore "was detrimental to the mission and func-

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[791] 461 U.S. at 151–52.

[792] 461 U.S. at 150. The Court explained that "a stronger showing [of interference with governmental interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." Id. at 152.

[793] This conclusion was implicit in *Givhan*, 439 U.S. 410 (1979), characterized by the Court in *Connick* as involving "an employee speak[ing] out as a citizen on a matter of general concern, not tied to a personal employment dispute, but . . . [speaking] privately." 461 U.S. at 148, n.8.

[794] 483 U.S. 378 (1987). This was a 5–4 decision, with Justice Marshall's opinion of the Court being joined by Justices Brennan, Blackmun, Powell, and Stevens, and with Justice Scalia's dissent being joined by Chief Justice Rehnquist and by Justices White and O'Connor. Justice Powell added a separate concurring opinion.

[795] "Where . . . an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal." 483 U.S. at 390–91.

[796] 543 U.S. 77 (2004) (per curiam).

[797] 543 U.S. at 84.

[798] 513 U.S. 454 (1995) (discussed under "Government as Employer: Political and Other Outside Activities," *supra*).

tions of his employer."[799] The Court, therefore, had "little difficulty in concluding that the City was not barred from terminating Roe under either line of cases [*i.e.*, *Pickering* or *NTEU*]."[800] This leaves uncertain whether, had the officer's expression not been linked to his official status, the Court would have overruled his firing under *NTEU* or would have upheld it under *Pickering* on the ground that his expression was not a matter of public concern.

In *Garcetti v. Ceballos*, the Court cut back on First Amendment protection for government employees by holding that there is no protection—*Pickering* balancing is not to be applied—"when public employees make statements pursuant to their official duties," even if those statements are about matters of public concern.[801] In this case, a deputy district attorney had presented his supervisor with a memo expressing his concern that an affidavit that the office had used to obtain a search warrant contained serious misrepresentations. The deputy district attorney claimed that he was subjected to retaliatory employment actions, and he sued. The Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[802] The fact that the employee's speech occurred inside his office, and the fact that the speech concerned the subject matter of his employment, were not sufficient to foreclose First Amendment protection.[803] Rather, the "controlling factor" was "that his expressions were made pursuant to his duties."[804] Therefore, another employee in the office, with different duties, might have had a First Amendment right to utter the speech in question, and the deputy district attorney himself might have had a First Amendment right to communicate the information that

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[799] 543 U.S. at 84.

[800] 543 U.S. at 80.

[801] 547 U.S. 410, 421 (2006).

[802] 547 U.S. at 421. However, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." Id. at 419. Such necessity, however, may be based on a "common-sense conclusion" rather than on "empirical data." Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 300 (2007) (citing *Garcetti*).

[803] The Court cited Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979), for these points. In *Givhan*, the Court had upheld the First Amendment right of a public school teacher to complain to the school principal about "employment policies and practices at [the] school which [she] conceived to be racially discriminatory in purpose or effect." Id. at 413. The difference between *Givhan* and *Ceballos* was apparently that Givhan's complaints were not made pursuant to her job duties, whereas Ceballos' were. Therefore, Givhan spoke as a citizen whereas Ceballos spoke as a government employee. See *Ceballos*, 547 U.S. at 420–21.

[804] 547 U.S. at 421.

he had in a letter to the editor of a newspaper. In these two instances, a court would apply *Pickering* balancing.

In distinguishing between wholly unprotected "employee speech" and quasi-protected "citizen speech," sworn testimony outside of the scope of a public employee's ordinary job duties appears to be "citizen speech." In *Lane v. Franks*,[805] the director of a state government program for underprivileged youth was terminated from his job following his testimony regarding the alleged fraudulent activities of a state legislator that occurred during the legislator's employment in the government program. The employee challenged the termination on First Amendment grounds. The Court held generally that testimony by a subpoenaed public employee made outside the scope of his ordinary job duties is to be treated as speech by a citizen, subject to the *Pickering-Connick* balancing test.[806] The Court noted that "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation to the court and society at large, to tell the truth."[807] In so holding, the Court confirmed that *Garcetti*'s holding is limited to speech made in accordance with an employee's official job duties and does not extend to speech that merely concerns information learned during that employment.

The Court in *Lane* ultimately found that the plaintiff's speech deserved protection under the *Pickering-Connick* balancing test because the speech was both a matter of public concern (the speech was testimony about misuse of public funds) and the testimony did not raise concerns for the government employer.[808] After *Lane*, some question remains about the scope of protection for public employees, such as police officers or official representatives of an agency of government, who testify pursuant to their official job duties, and whether such speech falls within the scope of *Garcetti*.

The protections applicable to government employees have been extended to independent government contractors, the Court announcing that "the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection."[809]

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[805] 573 U.S. ___, No. 13–483, slip op. (2014).

[806] *Id.* at 9.

[807] *Id.*

[808] *Id.* at 12–13.The Court, however, held that because no relevant precedent in the lower court or in the Supreme Court clearly established that the government employer could not fire an employee because of testimony the employee gave, the defendant was entitled to qualified immunity. *Id.* at 13–17.

[809] Board of County Comm'rs v. Umbehr, 518 U.S. 668, 673 (1996). *See also* O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 715 (1996) (government may

In sum, although a public employer may not muzzle its employees or penalize them for their expressions and associations to the same extent that a private employer can,[810] the public employer nonetheless has broad leeway in restricting employee speech. If the employee speech does not relate to a matter of "public concern," then *Connick* applies and the employer is largely free of constitutional restraint.[811] If the speech does relate to a matter of public concern, then, unless the speech was made by an employee pursuant to his duties, *Pickering's* balancing test is applied, with the governmental interests in efficiency, workplace harmony, and the satisfactory performance of the employee's duties [812] balanced against the employee's First Amendment rights. Although the general approach is easy to describe, it has proven difficult to apply.[813] The First Amend-

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not "retaliate[ ] against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance").

[810] *See*, *e.g.*, Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980) (political patronage systems impermissibly infringe protected belief and associational rights of employees); Madison School Dist. v. WERC, 429 U.S. 167 (1977) (school teacher may not be prevented from speaking at a public meeting in opposition to position advanced by union with exclusive representation rights). The public employer may, as may private employers, permit collective bargaining and confer on representatives of its employees the right of exclusive representation, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 223–32 (1977), but the fact that its employees may speak does not compel government to listen to them. *See* Smith v. Arkansas State Highway Employees, 441 U.S. 463 (1979) (employees have right to associate to present their positions to their employer but employer not constitutionally required to engage in collective bargaining). *See also* Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984) (public employees not members of union have no First Amendment right to meet separately with public employers compelled by state law to "meet and confer" with exclusive bargaining representative). Government may also inquire into the fitness of its employees and potential employees, but it must do so in a manner that does not needlessly endanger the expression and associational rights of those persons. *See*, *e.g.*, Shelton v. Tucker, 364 U.S. 479 (1969).

[811] In *Connick*, the Court noted that it did not suggest "that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment." Rather, it was beyond First Amendment protection "absent the most unusual of circumstances." 461 U.S. at 147. In *Ceballos*, however, the Court, citing *Connick* at 147, wrote that, if an employee did not speak as a citizen on a matter of public concern, then "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." 547 U.S. at 418.

[812] In some contexts, the governmental interest is more far-reaching. *See* Snepp v. United States, 444 U.S. 507, 509 n.3 (1980) (interest in protecting secrecy of foreign intelligence sources).

[813] For analysis of efforts of lower courts to apply *Pickering* and *Connick*, *see* Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1 (1987); and Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43 (1988). In *Waters v. Churchill*, 511 U.S. 661 (1994), a plurality of a divided Court concluded that a public employer does not violate the First Amendment if the employer (1) had reasonably believed that the employee's conversation involved personal matters and (2) dismissed the employee because of that reasonable belief, even if the belief was mistaken. *Id.* at 679–80 (plurality opinion) (O'Connor, J., joined by Rehnquist, C.J., Souter & Ginsburg, JJ.). More than two decades later, a six-Justice majority approvingly cited to the

ment, however, does not stand alone in protecting the speech of public employees; statutory protections for "whistleblowers" add to the mix.[814]

Government as Educator.—Although the Court had previously made clear that students in public schools are entitled to some constitutional protection,[815] as are minors generally,[816] its first attempt to establish standards of First Amendment expression guarantees against curtailment by school authorities came in *Tinker v. Des Moines Independent Community School District*.[817] There, high school principals had banned the wearing of black armbands by students in school as a symbol of protest against United States' actions in Vietnam. Reversing the refusal of lower courts to reinstate students who had been suspended for violating the ban, the Court set out the balance to be drawn. "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. . . . On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to pre-

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plurality opinion from *Waters*, concluding that the employer's motive is dispositive in determining whether a public employee's First Amendment rights had been violated as a result of the employer's conduct. *See* Heffernan v. City of Paterson, 578 U.S. ___, No. 14–1280, slip op. at 5 (2016). In so doing, the Court held that the converse of the situation in *Waters*—a public employer's firing of an employee based on the mistaken belief that the employee *had* engaged in activity *protected* by the First Amendment—was actionable as a violation of the Constitution. *See id.* at 6 ("After all, in the law, what is sauce for the goose is normally sauce for the gander."). Put another way, when an employer demotes an employee to prevent the employee from engaging in protected political activity, the employee is entitled to challenge that unlawful action under the First Amendment, "even if . . . the employer makes a factual mistake about the employee's behavior." *Id.* The Court concluded that the employer's motivation is central with respect to public employee speech issues because of (1) the text of the First Amendment—which "focus[es] upon the activity of the Government"; and (2) the underlying purposes of the public employee speech doctrine, which is to prevent the chilling effect that results when an employee is discharged for having engaged in protected activity. *Id.* at 6–7.

[814] The principal federal law is the Whistleblower Protection Act of 1989, Pub. L. 101–12, 103 Stat. 16, 5 U.S.C. § 1201 note.

[815] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (flag salute); Meyer v. Nebraska, 262 U.S. 390 (1923) (limitation of language curriculum to English); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (compulsory school attendance in public rather than choice of public or private schools).

[816] *In re* Gault, 387 U.S. 1 (1967). Of course, children are in some respects subject to restrictions that could not constitutionally be applied to adults. *E.g.*, Ginsberg v. New York, 390 U.S. 629 (1968) (access to material deemed "harmful to minors," although not obscene as to adults).

[817] 393 U.S. 503 (1969).

scribe and control conduct in the schools."[818] Restriction on expression by school authorities is only permissible to prevent disruption of educational discipline. "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained."[819]

The Court reaffimed *Tinker* in *Healy v. James*,[820] in which it held that the withholding of recognition by a public college administration from a student organization violated the students' right of association, which is implicit in the First Amendment. Denial of recognition, the Court held, was impermissible if it had been based on the local organization's affiliation with the national SDS, or on disagreement with the organization's philosophy, or on a fear of disruption with no evidentiary support. Furthermore, the Court wrote, "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' . . . The college classroom with its surrounding environs is peculiarly the 'market place of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[821] A college administration may, however, impose a requirement "that a group seeking offical recognition affirm in advance its willingness to adhere to reasonable campus law."[822]

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[818] 393 U.S. at 506, 507.

[819] 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). *See also* Papish v. Board of Curators, 410 U.S. 667 (1973) (state university could not expel a student for using "indecent speech" in campus newspaper). However, offensive "indecent" speech in the context of a high school assembly is punishable by school authorities. *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (upholding 2-day suspension, and withdrawal of privilege of speaking at graduation, for student who used sophomoric sexual metaphor in speech given to school assembly).

[820] 408 U.S. 169 (1972).

[821] 408 U.S. at 180–81 (internal quotation marks omitted).

[822] Healy v. James, 408 U.S. at 193. Because a First Amendment right was in issue, the burden was on the college to justify its rejection of a request for recognition rather than upon the requesters to justify affirmatively their right to be recognized. Id. at 184. Justice Rehnquist concurred in the result, because in his view a school administration could impose upon students reasonable regulations that would be impermissible if imposed by the government upon all citizens; consequently, he

Although a public college may not be required to open its facilities generally for use by student groups, once it has done so it must justify any discrimination and exclusions under applicable constitutional norms, such as those developed under the public forum doctrine. Thus, it was constitutionally impermissible for a college to close off its facilities, otherwise open, to students wishing to engage in religious speech.[823]

While it is unclear whether this holding would extend beyond the college level to students in high school or below who are more "impressionable" and perhaps less able to appreciate that equal access does not compromise a school's neutrality toward religion,[824] Congress has done so by statute.[825] On the other hand, a public university that imposed an "accept-all-comers" policy on student groups as a condition of receiving the financial and other benefits of official school recognition did not impair a student religious group's right to expressive association, because the school's policy was reasonable and viewpoint neutral.[826]

When faced with another conflict between a school system's obligation to inculcate community values in students and the free-speech rights of those students, the Court splintered badly, remanding for full trial a case challenging the authority of a school board

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did not think that cases the Court cited that had arisen in the latter situation were controlling. Id. at 201. *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972), in which the Court upheld an anti-noise ordinance that forbade persons on grounds adjacent to a school to willfully make noise or to create any other diversion during school hours that "disturbs or tends to disturb" normal school activities.

[823] Widmar v. Vincent, 454 U.S. 263 (1981). To permit access by religious groups does not violate the Establishment Clause, and, even if the Missouri Constitution "has gone further than the Federal Constitution in proscribing indirect state support for religion, . . . the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." Id. at 275–276.

[824] 454 U.S. at 274 n.14; *see* Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

[825] By enactment of the Equal Access Act in 1984, Pub. L. 98–377, title VIII, 98 Stat. 1302, 20 U.S.C. §§ 4071–74, Congress applied the same "limited open [public] forum" principles to public high schools, and the Court upheld the Act against First Amendment challenge. Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

[826] Christian Legal Society v. Martinez, 561 U.S. ___, No. 08–1371, slip op. (2010). The Court did not address the more difficult question raised by the school's written policy, which forbade discrimination, among other things, based on religion or sexual orientation, because the parties stipulated that in practice student groups were required to accept all students who complied with neutral membership requirements (e.g., payment of dues). Id. at 11–12. Thus, the Court did not address whether the application of the narrower written anti-discrimination policies constituted viewpoint discrimination against a student group that required its members to adhere to its religious tenets, including the belief that sexual activity should only occur in the context of marriage between a man and a woman. Id. at 21–23 (Alito, J., dissenting).

to remove certain books from high school and junior high school libraries.[827] In dispute were the school board's reasons for removing the books—whether, as the board alleged, because of vulgarity and other content-neutral reasons, or whether also because of political disagreement with contents. The plurality conceded that school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values," and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." At the same time, the plurality thought that students retained substantial free-speech protections and that among these was the right to receive information and ideas. Carefully limiting its discussion to the removal of books from a school library, and excluding the question of the acquisition of books as well as questions of school curricula, the plurality held a school board constitutionally disabled from removing library books in order to deny access to ideas with which it disagrees for political reasons.[828] The four dissenters rejected the contention that school children have a right to receive information and ideas and thought that the proper role of education was to inculcate the community's values, a function into which the federal courts could rarely intrude.[829] The decision provides little guidance to school officials and to the lower courts and may necessitate a revisiting of the controversy by the Supreme Court.

The Court distinguished *Tinker* in *Hazelwood School District v. Kuhlmeier*,[830] in which it relied on public forum analysis to hold that editorial control and censorship of a student newspaper sponsored by a public high school need be only "reasonably related to legitimate pedagogical concerns."[831] "The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[832] The student newspaper had been created by school officials as a part of the school curriculum, and served "as a supervised learning experience for journalism students."[833] Because no public forum had been created, school officials could maintain editorial control subject only to a reasonable-

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[827] Board of Education v. Pico, 457 U.S. 853 (1982).

[828] 457 U.S. at 862, 864–69, 870–72. Only Justices Marshall and Stevens joined fully Justice Brennan's opinion.

[829] The principal dissent was by Justice Rehnquist. 457 U.S. at 904. *See also* id. at 885 (Chief Justice Burger), 893 (Justice Powell), 921 (Justice O'Connor).

[830] 484 U.S. 260 (1988).

[831] 484 U.S. at 273.

[832] 484 U.S. at 270–71.

[833] 484 U.S. at 270.

ness standard. Thus, a principal's decision to excise from the publication an article describing student pregnancy in a manner believed inappropriate for younger students, and another article on divorce critical of a named parent, were upheld.

The category of school-sponsored speech subject to *Kuhlmeier* analysis appears to be far broader than the category of student expression still governed by *Tinker*. School-sponsored activities, the Court indicated, can include "publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences."[834] Because most primary, intermediate, and secondary school environments are tightly structured, with few opportunities for unsupervised student expression,[835] *Tinker* apparently has limited applicability. It may be, for example, that students are protected for off-premises production of "underground" newspapers (but not necessarily for attempted distribution on school grounds) as well as for non-disruptive symbolic speech. For most student speech at public schools, however, *Tinker's* tilt in favor of student expression, requiring school administrators to premise censorship on likely disruptive effects, has been replaced by *Kuhlmeier's* tilt in favor of school administrators' pedagogical discretion.[836]

In *Morse v. Frederick*,[837] the Court held that a school could punish a pupil for displaying a banner that said, "BONG HiTS 4 JESUS," because these words could reasonably be interpreted as "promoting illegal drug use."[838] The Court indicated that it might have reached a different result if the banner had addressed the issue of

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[834] 484 U.S. at 271. Selection of materials for school libraries may fall within this broad category, depending upon what is meant by "designed to impart *particular* knowledge or skills." *See generally* Stewart, *The First Amendment, the Public Schools, and the Inculcation of Community Values*, 18 J. LAW & EDUC. 23 (1989).

[835] The Court in *Kuhlmeier* declined to decide "whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." 484 U.S. at 274, n.7.

[836] One exception may exist for student religious groups covered by the Equal Access Act; in this context the Court seemed to step back from *Kuhlmeier's* broad concept of curriculum-relatedness, seeing no constitutionally significant danger of perceived school sponsorship of religion arising from application of the Act's requirement that high schools provide meeting space for student religious groups on the same basis that they provide such space for student clubs. Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990).

[837] 127 S. Ct. 2618 (2007).

[838] 127 S. Ct. at 2624.

"the criminalization of drug use or possession."[839] Justice Alito, joined by Justice Kennedy, wrote a concurring opinion stating that they had joined the majority opinion "on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction on speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"[840] As *Morse v. Frederick* was a 5-to-4 decision, Justices Alito and Kennedy's votes were necessary for a majority and therefore should be read as limiting the majority opinion with respect to future cases.

Governmental regulation of school and college administration can also implicate the First Amendment. But the Court dismissed as too attenuated a claim to a First Amendment-based academic freedom privilege to withhold peer review materials from EEOC subpoena in an investigation of a charge of sex discrimination in a faculty tenure decision.[841]

Government as Regulator of the Electoral Process: Elections and Referendums.—Government has increasingly regulated the electoral system by which candidates are nominated and elected, requiring disclosure of contributions and certain expenditures, limiting contributions and expenditures, and imposing other regulations.[842] These regulations can restrict freedom of expression and association, which include the rights to join together for political purposes, to promote candidates and issues, and to participate in the political process.[843] The Court is divided with respect to the constitutionality of many of these federal and state restrictions, but it has been consistent in not permitting the government to bar or penalize political speech directly. Thus, it held that the Minnesota Supreme Court could not prohibit candidates for judicial election from announcing their views on disputed legal and political is-

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[839] 127 S. Ct. at 2625.

[840] 127 S. Ct. at 2636.

[841] University of Pennsylvania v. EEOC, 493 U.S. 182 (1990).

[842] The basic federal legislation regulating campaign finances is spread over several titles of the United States Code. The relevant, principal modern laws are the Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, the Federal Election Campaign Act Amendments of 1979, 93 Stat. 1339, and the Bipartisan Campaign Reform Act of 2002, 116 Stat. 81, found at 2 U.S.C. 431 et seq., and sections of Titles 18 and 26. The Federal Corrupt Practices Act of 1925, 43 Stat. 1074, was upheld in Burroughs v. United States, 290 U.S. 534 (1934), but there was no First Amendment challenge. All states, of course, extensively regulate elections.

[843] *See*, *e.g.*, Mills v. Alabama, 384 U.S. 214, 218–19 (1966); Buckley v. Valeo, 424 U.S. 1, 14, 19 (1976); First National Bank of Boston v. Bellotti, 435 U.S. 765, 776–78 (1978); Brown v. Hartlage, 456 U.S. 45, 52–54 (1982).

sues.[844] And, when Kentucky attempted to void an election on the ground that the winner's campaign promise to serve at a lower salary than that affixed to the office violated a law prohibiting candidates from offering material benefits to voters in consideration for their votes, the Court ruled unanimously that the state's action violated the First Amendment.[845]

Similarly, California could not prohibit official governing bodies of political parties from endorsing or opposing candidates in primary elections.[846] Minnesota, however, could prohibit a candidate from appearing on the ballot as the candidate of more than one party.[847] The Court wrote that election "[r]egulations imposing severe burdens on plaintiffs' [associational] rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable nondiscriminatory restrictions."[848] Minnesota's ban on "fusion" candidates was not severe, as a party that could not place another party's candidate on the ballot was free to communicate its preference for that candidate by other means, and the ban served "valid state interests in ballot integrity and political stability."[849]

In the Federal Election Campaign Act of 1971, as amended in 1974, Congress imposed new and stringent regulation of and limitations on contributions to and expenditures by political campaigns, as well as disclosure of most contributions and expenditures, setting the stage for the landmark case of *Buckley v. Valeo*.[850]

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[844] *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002). In the only case post-*White* concerning speech restrictions on candidates for judicial office, however, the Court in *Williams-Yulee v. Florida Bar*, upheld a more narrow restriction on candidate speech. *See* 575 U.S. ___, No. 13–1499, slip op. (2015). The *Williams-Yulee* Court held that a provision within Florida's Code of Judicial Conduct that prohibited judicial candidates from personally soliciting campaign funds served a compelling interest in preserving public confidence in the judiciary through a means that was "narrowly tailored to avoid unnecessarily abridging speech." *Id.* at 8–9.

[845] Brown v. Hartlage, 456 U.S. 45 (1982). *See also* Mills v. Alabama, 384 U.S. 214 (1966) (setting aside a conviction and voiding a statute that punished electioneering or solicitation of votes for or against any proposition on the day of the election, applied to publication of a newspaper editorial on election day supporting an issue on the ballot); Vanasco v. Schwartz, 401 F. Supp. 87 (E.D.N.Y. 1975) (three-judge court), *aff'd*, 423 U.S. 1041 (1976) (statute barring malicious, scurrilous, and false and misleading campaign literature is unconstitutionally overbroad).

[846] Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989). *Cf.* Burson v. Freeman, 504 U.S. 191 (1992) (upholding Tennessee law prohibiting solicitation of votes and distribution of campaign literature within 100 feet of the entrance to a polling place; plurality found a "compelling" interest in preventing voter intimidation and election fraud).

[847] Timmons v. Twin City Area New Party, 520 U.S. 351 (1997).

[848] 520 U.S. at 538 (internal quotation marks omitted).

[849] 520 U.S. at 369–70.

[850] 424 U.S. 1 (1976).

Acting in basic unanimity, the Court sustained the contribution and disclosure sections of the statute (although several Justices felt that the sustained provisions trenched on protected expression), but voided the limitations on expenditures.[851] Although "contribution and expenditure limitations both implicate fundamental First Amendment interests," the Court found, "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions."[852]

As to contribution limitations, the Court in *Buckley* recognized that political contributions "serve[ ] to affiliate a person with a candidate" and "enable[ ] like-minded persons to pool their resources in furtherance of common political goals." Contribution ceilings, therefore, "limit one important means of associating with a candidate or committee. . . ."[853] Yet "[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[854]

As to expenditure limitations, the Court wrote, "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[855] The expenditure of money in political campaigns may involve speech alone, conduct alone, or mixed speech-conduct, the Court noted, but all forms of it involve communication, and when governmental regulation is aimed directly at suppressing communication it does not matter how that communication is defined. As such, the regulation must be subjected to close scrutiny and justified by compelling governmental interests.

Applying this strict scrutiny standard, the contribution limitations, with some construed exceptions, survived, but the expenditure limitation did not. The contribution limitation was seen as imposing only a marginal restriction upon the contributor's ability to engage in free communication, inasmuch as the contribution shows merely a generalized expression of support for a candidate without communicating reasons for the support; "the size of the contribu-

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[851] The Court's lengthy opinion was denominated *per curiam*, but five Justices filed separate opinions.

[852] 424 U.S. at 23.

[853] 424 U.S. at 22.

[854] 424 U.S. at 25 (internal quotation marks omitted).

[855] 424 U.S. at 19.

tion provides a very rough index of the intensity of the contributors' support for the candidate."[856] The political expression really occurs when the funds are spent by a candidate; only if the restrictions were set so low as to impede this communication would there arise a constitutional infringement. This incidental restraint upon expression may therefore be justified by Congress's purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions.[857]

Of considerable importance to the contributions analysis, the Court voided a section restricting the aggregate expenditure anyone could make to advocate the election or defeat of a "clearly identified candidate" to $1,000 a year. Though the Court treated the restricted spending as purely an expenditure, the activity seems to partake equally of the nature of a contribution spent on behalf of a candidate (although not given to him or her directly). However, "[a]dvocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation."[858] The Court found that none of the justifications offered in support of a restriction on such expression was adequate; independent expenditures did not appear to pose the dangers of corruption that contributions did, and it was an impermissible purpose to attempt to equalize the ability of some individuals and groups to express themselves by restricting the speech of other individuals and groups.[859]

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[856] 424 U.S. at 21.

[857] 424 U.S. at 14–38. Chief Justice Burger and Justice Blackmun would have struck down the contribution limitations. Id. at 235, 241–46, 290. *See also* California Medical Ass'n v. FEC, 453 U.S. 182 (1981), sustaining a provision barring individuals and unincorporated associations from contributing more than $5,000 per year to any multicandidate political action committee, on the basis of the standards applied to contributions in *Buckley*; and FEC v. National Right to Work Comm., 459 U.S. 197 (1982), sustaining a provision barring nonstock corporations from soliciting contributions from persons other than their members when the corporation uses the funds for designated federal election purposes.

[858] 424 U.S. at 48.

[859] 424 U.S. at 39–51. Justice White dissented. Id. at 257. In an oblique return to the right-privilege distinction, the Court agreed that Congress could condition receipt of public financing funds upon acceptance of expenditure limitations. Id. at 108–09. In Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd by an equally divided Court*, 455 U.S. 129 (1982), a provision was invalidated that limited independent political committees to expenditures of no more than $1,000 to further the election of any presidential candidate who received public funding. An equally divided affirmance is of limited precedential value. When the validity of this provision, 26 U.S.C. § 9012(f), was again before the Court in 1985, the Court invalidated it. FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985). In an opinion by Justice Rehnquist, the Court determined that the governmental interest in preventing corruption or the appearance of corruption was insufficient justification for restricting the First Amendment rights of committees interested in making indepen-

Similarly, limitations upon the amount of funds a candidate could spend out of his own resources or those of his immediate family were voided. A candidate, no less than any other person, has a First Amendment right to advocate.[860] The limitations upon total expenditures by candidates seeking nomination or election to federal office could not be justified: the evil associated with dependence on large contributions was met by limitations on contributions, the purpose of equalizing candidate financial resources was impermissible, and the First Amendment did not permit government to determine that expenditures for advocacy were excessive or wasteful.[861]

The government not only may not limit the amount that a candidate may spend out of his own resources, but, if a candidate spends more than a particular amount, the government may not penalize the candidate by authorizing the candidate's opponent to receive individual contributions at higher than the normal limit. In *Davis v. Federal Election Commission*, the Court struck down, as lacking a compelling governmental interest, a federal statute that provided that, if a "self-financing" candidate for the House of Representatives spends more than a specified amount, then his opponent may accept more individual contributions than otherwise permitted. The statute, the Court wrote, imposed "a special and potentially significant burden" on a candidate "who robustly exercises [his] First Amendment right."[862] Citing *Buckley*, the Court stated that a burden "on the expenditure of personal funds is not justified by any governmental interest in eliminating corruption or the perception of corruption." This is because "reliance on personal funds *reduces* the threat of corruption, and therefore . . . discouraging use of personal funds[ ] disserves the anticorruption interest."[863] Citing *Buckley* again, the

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dent expenditures on behalf of a candidate, since "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." Id. at 498. *See also* Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996) (the First Amendment bars application of the Party Expenditure Provision of the Federal Election Campaign Act, 2 U.S.C. § 441a(d)(3), to expenditures that the political party makes independently, without coordination with the candidate).

[860] 424 U.S. at 51–54. Justices Marshall and White disagreed with this part of the decision. Id. at 286.

[861] 424 U.S. at 54–59.

[862] 128 S. Ct. 2759, 2771, 2772 (2008). The statute was § 319(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. 107–155, 116 Stat. 109, 2 U.S.C. § 441a–1(a), which was part of the so-called "Millionaire's Amendment."

[863] 128 S. Ct. at 2773 (emphasis in original). Justice Stevens, in the part of his dissenting opinion joined by Justices Souter, Ginsburg, and Breyer, found that the Millionaire's Amendment does not cause self-funding candidates "any First Amendment injury whatsoever. The Millionaire's Amendment quiets no speech at all. On the contrary, it does no more than assist the opponent of a self-funding candidate in his attempts to make his voice heard. . . . Enhancing the speech of the millionaire's

Court added that the governmental interest in equalizing the financial resources of candidates does not provide a justification for restricting expenditures, and, in fact, to restrict expenditures "has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office. . . . Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to the outcome of an election." [864]

A related question is whether the government violates the First Amendment rights of a candidate running a privately funded campaign when it provides public "equalization" funds to opposition candidates. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[865] the Court considered an Arizona voluntary public financing system which granted an initial allotment to the campaigns of candidates for state office who agreed to certain requirements and limitations.[866] In addition, matching funds were made available to the campaign if the expenditures of a privately financed opposing candidate, combined with the expenditures of any independent groups supporting that opposing candidacy, exceeded the campaign's initial allotment. Citing *Davis*, the Court found the scheme unconstitutional because it forced the privately financed candidate to "shoulder a special and potentially significant burden" in choosing to exercise his First Amendment right to spend funds on behalf of his candidacy.[867] Although the dissent argued that the provision of benefits to one speaker had not previously been considered by the Court as a significant burden to another,[868] the majority distinguished those cases as not having involved the provision of subsidies to directly counter the triggering speech.[869]

It was mentioned above that the Court in *Buckley* upheld the disclosure requirements of the Federal Election Campaign Act. The

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opponent, far from contravening the First Amendment, actually advances its core principles." Id. at 2780.

[864] 128 S. Ct. at 2773–74. The Court also struck down the disclosure requirements in § 319(b) of BCRA because they "were designed to implement the asymmetrical contribution limits provided for in § 319(a), and . . . § 319(a) violates the First Amendment." Id. at 2775.

[865] 564 U.S. ___, No. 10–238, slip op. (2011).

[866] These included limiting the expenditure of personal funds to $500, participating in at least one public debate, adhering to an over all expenditure cap, and returning all unspent public moneys to the State.

[867] *Bennett*, 564 U.S. ___, No. 10–238, slip op. at 11 quoting *Davis,* 554 U.S. at 739.

[868] Slip op. 10–11 (Kagan, J., dissenting).

[869] Slip op. at 17.

Court found that, although compelled disclosure "cannot be justified by a mere showing of some legitimate governmental interest," the governmental interests in the disclosure that the statute in *Buckley* mandated were "sufficiently important to outweigh the possibility of infringement" of the First Amendment.[870] Disclosure, the Court found, "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' "; it deters "actual corruption and the appearance of corruption"; and it is "an essential means of gathering the data necessary to detect violations of the contribution limitations" that the statute imposed.[871]

The Court indicated, however that, under some circumstances, the First Amendment might require exemption for minor parties that were able to show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." [872] This standard was applied both to disclosure of contributors' names and to disclosure of recipients of campaign expenditures in *Brown v. Socialist Workers '74 Campaign Committee*,[873] in which the Court held that the minor party had established the requisite showing of likely reprisals through proof of past governmental and private hostility and harassment. Disclosure of recipients of campaign expenditures, the Court reasoned, could not only dissuade supporters and workers who might receive reimbursement for expenses, but could also dissuade various entities from performing routine commercial services for the party and thereby "cripple a minor party's ability to operate effectively." [874]

The Court has apparently extended the reasoning of these cases to include not just disclosure related to political contributions, but also to disclosure related to legally "qualifying" a measure for the ballot. In *Doe v. Reed*,[875] the Court found that signing a petition to initiate a referendum was a protected form of political expression,[876] and that a state requirement to disclose the names and addresses on those petitions to the public would be subjected to "ex-

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[870] 424 U.S. at 64, 66. *See also* Amendment I, "Political Association," *supra*.
[871] 424 U.S. at 66, 67, 68.
[872] 424 U.S. at 74.
[873] 459 U.S. 87 (1982).
[874] 459 U.S. at 97–98.
[875] 561 U.S. ___, No. 09–559, slip op. (2010).
[876] Note, however, that the Court subsequently declined to extend the reasoning of this case to find that a legislator's vote was a form of expression protected by the First Amendment. Nevada Comm'n on Ethics v. Carrigan, 564 U.S. ___, No. 10–568, slip op. (2011) (upholding law prohibiting legislator with a conflict of interest from voting on a proposal or advocating its passage or failure).

acting scrutiny."[877] The Court upheld the disclosure requirement on its face, finding that it furthered the state's interest in detecting fraud and mistake in the petitioning process, while also providing for transparency and accountability. The case was remanded, however, to ascertain whether in this particular instance (a referendum to overturn a law conferring rights to gay couples) there was a "reasonable probability" that the compelled disclosures would subject the signatories to threats, harassment, or reprisals from either Government officials or private parties.[878]

In *Nixon v. Shrink Missouri Government PAC*,[879] the Court held that *Buckley v. Valeo* "is authority for state limits on contributions to state political candidates," but state limits "need not be pegged to *Buckley's* dollars."[880] The Court in *Nixon* justified the limits on contributions on the same grounds that it had in *Buckley*: "preventing corruption and the appearance of it that flows from munificent campaign contributions."[881] Further, *Nixon* did "not present a close call requiring further definition of whatever the State's evidentiary obligation may be" to justify the contribution limits, as "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters."[882] As for the amount of the contribution limits, Missouri's fluctuated in accordance with the consumer price index, and, when suit was filed, ranged from $275 to $1,075, depending on the state office or size of constituency. The Court upheld these limits, writing that, in *Buckley*, it had "rejected the contention that $1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate."[883] The relevant inquiry, rather, was "whether the contribution limitation was so radical in effect as to render political associa-

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[877] *Reed*, No. 09–559, slip op. at 7. Five Justices joined the majority opinion written by Chief Justice Roberts—Justices Kennedy, Ginsburg, Breyer, Alito and Sotomayor. One might question, however, what level of scrutiny Justice Breyer would support, since he also joined a concurrence by Justice Stevens, which suggested that the disclosure of the name and addresses on the petitions is not "a regulation of pure speech," and consequently should be subjected to a lesser standard of review. Slip op. at 1 (Stevens, J., concurring in part and in judgment). Justice Breyer, in his own concurrence, suggests that "in practice [the standard articulated in both the majority and Justice Steven's concurrence] has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others." Slip op. at 1 (Breyer, J., concurring). Justice Scalia, on the other hand, questioned whether "signing a petition that has the effect of suspending a law fits within 'freedom of speech' at all." Slip op. at 1 (Scalia, J., concurring in judgement).

[878] Slip op. at 12–13 (citation omitted).

[879] 528 U.S. 377 (2000).

[880] 528 U.S. at 381–82.

[881] 528 U.S. at 390.

[882] 528 U.S. at 393, 395.

[883] 528 U.S. at 397.

tion ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."[884]

In *McCutcheon v. FEC*,[885] however, a plurality of the Court[886] appeared to signal an intent to scrutinize limits on contributions more closely to ensure a "fit" between governmental objective and the means utilized.[887] Considering aggregate limits on individual contributions—that is, the limits on the amount an individual can give in one campaign cycle[888]—the plurality opinion distinguished between the government interest in avoiding even the appearance of quid pro quo corruption and the government interest in avoiding potential "'influence over or access to' elected officials of political parties" as the result of large contributions; only the interest in preventing actual or apparent quid pro quo corruption constituted a legitimate objective sufficient to satisfy the First Amendment.[889] Given the more narrow interest of the government, the *McCutcheon* Court struck down the limits on aggregate contributions by an individual donor. The plurality opinion viewed the provision in question as impermissibly restricting an individual's participation in the political process by limiting the number of candidates and organizations to which the individual could contribute (once that individual had reached the aggregate limit).[890] Moreover, the plurality opinion held that the aggregate limits on individual contributions were not narrowly tailored to prevent quid pro quo corruption, as the limits prevent any contributions (regardless of size) to any individual or organization once the limits are reached.[891] The plurality likewise rejected the argument that the restriction prevented circumvention of a separate restriction on base contributions to individual candidates, as such circumvention was either illegal (because of various anti-circumvention rules) or simply improbable.[892] Collectively, the Court

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[884] 528 U.S. at 397.

[885] 572 U.S. ___, No. 12–536, slip op. (2014).

[886] Chief Justice Roberts wrote the plurality opinion, joined by Justices Scalia, Kennedy and Alito. Justice Thomas, concurring in the judgment, declined to join the reasoning of the plurality, arguing that, to the extent that *Buckley* afforded a lesser standard of review to restrictions on contributions than to expenditures, it should be overruled.

[887] The Court declined to revisit the differing standards between contributions and expenditures established in *Buckley*, holding that the issue in question, aggregate spending limits, did not meet the demands of either test. 572 U.S. ___, slip op. at 10.

[888] In 2014, these aggregate limits capped total contributions per election cycle to $48,600 to all federal candidates and $74,600 to all other political committees, of which only $48,600 could be contributed to state or local party committees and PACs. 2 U.S.C. § 441a(a)(3) (2012); 78 Fed. Reg. 8,532 (Feb. 6, 2013).

[889] 572 U.S. ___, No. 12–536, slip op. at 19.

[890] *Id.* at 15.

[891] *Id.* at 21–22.

[892] *Id.* at 21–30.

concluded that the aggregate limits violate the First Amendment because of the poor "fit" between the interests proffered by the government and the means by which the limits attempt to serve those interests.[893]

Outside the context of contributions to candidates, however, the Court has not been convinced of the justifications for limiting such uses of money for political purposes. Thus, a municipal ordinance regulating the maximum amount that could be contributed to or accepted by an association formed to take part in a city referendum was invalidated.[894] Although *Buckley* had sustained limits on contributions as a prophylactic measure to prevent corruption or its appearance, no risk of corruption was found in giving or receiving funds in connection with a referendum. Similarly, the Court invalidated a criminal prohibition on payment of persons to circulate petitions for a ballot initiative.[895]

Venturing into the area of the constitutional validity of governmental limits upon political activities by corporations, a closely divided Court struck down a state law that prohibited corporations from expending funds to influence referendum votes on any measure save proposals that materially affected corporate business, property, or assets. In *First National Bank of Boston v. Bellotti*, the Court held that the free discussion of governmental affairs "is the type of speech indispensable to decisionmaking in a democracy," and that "this is no less true because the speech comes from a corporation rather than an individual."[896] The Court held that it is the nature

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[893] *Id.* at 30.

[894] Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1980). It is not clear from the opinion whether the Court was applying a contribution or an expenditure analysis to the ordinance, *see* id. at 301 (Justice Marshall concurring), or whether it makes any difference in this context.

[895] Meyer v. Grant, 486 U.S. 414 (1988). The Court subsequently struck down a Colorado statute that required ballot-initiative proponents, if they pay circulators, to file reports disclosing circulators' names and addresses and the total amount paid to each circulator. Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999). Although the Court upheld a requirement that *proponents'* names and the total amount they have spent to collect signatures be disclosed, as this served "as a control or check on domination of the initiative process by affluent special interest groups" (id. at 202), it found that "[t]he added benefit of revealing the names of paid circulators and the amounts paid to each circulator . . . is hardly apparent and has not been demonstrated." Id. at 203. The Court also struck down a requirement that circulators be registered voters, as the state's interest in ensuring that circulators would be amenable to subpoenas was served by the requirement that they be residents a requirement on which the Court had no occasion to rule.

[896] 435 U.S. 765, 777 (1978). Justice Powell wrote the opinion of the Court. Dissenting, Justices White, Brennan, and Marshall argued that while corporations were entitled to First Amendment protection, they were subject to more regulation than were individuals, and substantial state interests supported the restrictions. Id. at 802. Justice Rehnquist went further in dissent, finding no corporate constitutional protection. Id. at 822.

of the speech, not the status of the speaker, that is relevant for First Amendment analysis, thus allowing it to pass by the question of the rights a corporate person may have. The "materially affecting" requirement was found to be an impermissible proscription of speech based on the content of the speech and the identity of the interests that the speaker represented. The "exacting scrutiny" that restrictions on speech must pass was not satisfied by any of the justifications offered and the Court in any event found some of them impermissible.

Bellotti called into some question the constitutionality of the federal law that makes it unlawful for any corporation or labor union "to make a contribution or expenditure in connection with any election" for federal office or "in connection with any primary election or political convention or caucus held to select candidates" for such office.[897] The Court had previously passed on several opportunities to assess this restriction,[898] and one of the dissents in *Bellotti* noted the potential conflict.[899] While the dissent's concerns were ultimately realized in *Citizens United v. FEC*,[900] it was only after many years of the Court either distinguishing *Bellotti* or applying it narrowly.

During that interim, the Court first considered challenges to different aspects of the federal statute and to related state statutes, upholding some restrictions on corporate electoral activities, but limiting others. In *FEC v. National Right to Work Committee*,[901] the Court considered the operation of "separate segregated funds" (in common parlance, a Political Action Committee or "PAC"), through which, according to federal law, corporations can engage in specified political activities. The Court unanimously upheld a prohibition on a corporation soliciting money from other corporations for a

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[897] 2 U.S.C. § 441b. The provision began as § 313 of the Federal Corrupt Practices Act of 1925, 43 Stat. 1074, prohibiting contributions by corporations. It was made temporarily applicable to labor unions in the War Labor Disputes Act of 1943, 57 Stat. 167, and became permanently applicable in § 304 of the Taft-Hartley Act. 61 Stat. 159.

[898] All three cases involved labor unions and were decided on the basis of statutory interpretation, apparently informed with some constitutional doubts. United States v. CIO, 335 U.S. 106 (1948); United States v. United Automobile Workers, 352 U.S. 567 (1957); Pipefitters v. United States, 407 U.S. 385 (1972).

[899] *Bellotti*, 435 U.S. at 811–12 (Justice White dissenting). The majority opinion, however, saw several distinctions between the federal law and the law at issue in *Bellotti*. The Court emphasized that *Bellotti* was a referendum case, not a case involving corporate expenditures in the context of partisan candidate elections, in which the problem of corruption of elected representatives was a weighty problem. "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." Id. at 787–88 & n.26.

[900] 558 U.S. ___, No. 08–205, slip op. (2010).

[901] 459 U.S. 197 (1982).

PAC in order to make contributions or expenditures in relation to federal elections. Relying on *Bellotti* for the proposition that the government may act to prevent "both actual corruption and the appearance of corruption of elected representatives," the Court saw no reason that Congress could not, in its legislative judgment, treat unions, corporations, and similar organizations differently from individuals.[902]

However, an exception to this general principle was recognized by a divided Court in *FEC v. Massachusetts Citizens for Life, Inc.*,[903] holding the section's requirement that independent expenditures be financed by voluntary contributions to a PAC unconstitutional as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a "business corporation" or union. The Court found that one of the rationales for the special rules on corporate participation in elections—elimination of "the potential for unfair deployment of [corporate] wealth for political purposes"—had no applicability to a corporation "formed to disseminate political ideas, not to amass capital."[904] The other principal rationale—protection of corporate shareholders and other contributors from having their money used to support political candidates to whom they may be opposed—was also deemed inapplicable. The Court distinguished *National Right to Work Committee* because "restrictions on contributions require less compelling justification than restrictions on independent spending," and also explained that, "given a contributor's awareness of the political activity of [MCFL], as well as the readily available remedy of refusing further donations, the interest protecting contributors is simply insufficient to support § 441b's restriction on . . . independent spending."[905] What the Court did not address directly was whether the same analysis could have led to a different result in *National Right to Work Committee*.[906]

Clarification of *Massachusetts Citizens for Life* was provided by *Austin v. Michigan State Chamber of Commerce*,[907] in which the Court upheld application to a nonprofit corporation of Michigan's restrictions on independent expenditures by corporations. The Michigan

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[902] 459 U.S. at 210–11.

[903] 479 U.S. 238 (1986). Justice Brennan's opinion for the Court was joined by Justices Marshall, Powell, O'Connor, and Scalia; Chief Justice Rehnquist, author of the Court's opinion in *National Right to Work Comm.*, dissented from the constitutional ruling, and was joined by Justices White, Blackmun, and Stevens.

[904] 479 U.S. at 259.

[905] 479 U.S. at 259–60, 262.

[906] The Court did not spell out whether there was any significant distinction between the two organizations, NRWC and MCFL; Chief Justice Rehnquist's dissent suggested that there was not. *See* 479 U.S. at 266.

[907] 494 U.S. 652 (1990).

law, like federal law, prohibited such expenditures from corporate treasury funds, but allowed them to be made from a corporation's PAC funds. This arrangement, the Court decided, serves the state's compelling interest in ensuring that expenditure of corporate wealth, accumulated with the help of special advantages conferred by state law, does not "distort" the election process.[908] The law was sufficiently "narrowly tailored" because it permits corporations to make independent political expenditures through segregated funds that "accurately reflect contributors' support for the corporation's political views."[909] Also, the Court concluded that the Chamber of Commerce was unlike the MCFL in each of the three distinguishing features that had justified an exemption from operation of the federal law. Unlike MCFL, the Chamber was not organized solely to promote political ideas; although it had no stockholders, the Chamber's members had similar disincentives to forgo benefits of membership in order to protest the Chamber's political expression; and, by accepting corporate contributions, the Chamber could serve as a conduit for corporations to circumvent prohibitions on direct corporate contributions and expenditures.[910]

In *FEC v. Beaumont*,[911] the Court held that the federal law that bars corporations from contributing directly to candidates for federal office, but allows contributions though PACs, may constitutionally be applied to nonprofit advocacy corporations. The Court in *Beaumont* wrote that, in *National Right to Work*, it had "specifically rejected the argument . . . that deference to congressional judgments about proper limits on corporate contributions turns on details of corporate form or the affluence of particular corporations."[912] Though nonprofit advocacy corporations, the Court held in *Massachusetts Citizens for Life*, have a First Amendment right to make independent expenditures, the same is not true for direct contributions to candidates.

In *McConnell v. FEC*,[913] the Court upheld against facial constitutional challenges key provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). A majority opinion coauthored by Justices Stevens and O'Connor upheld two major provisions of BCRA: (1) the prohibition on "national party committees and their agents

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[908] Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) *Austin* found the law helped prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660.

[909] 494 U.S. at 660–61.

[910] 494 U.S. at 661–65.

[911] 539 U.S. 146 (2003).

[912] 539 U.S. at 157.

[913] 540 U.S. 93 (2003).

from soliciting, receiving, directing, or spending any soft money,"[914] which is money donated for the purpose of influencing state or local elections, or money for "mixed-purpose activities—including get-out-the-vote drives and generic party advertising,"[915] and (2) the prohibition on corporations and labor unions' using funds in their treasuries to finance "electioneering communications,"[916] which BCRA defines as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal Office," made within 60 days before a general election or 30 days before a primary election. Electioneering communications thus include both "express advocacy and so-called issue advocacy."[917]

As for the soft-money prohibition on national party committees, the Court applied "the less rigorous scrutiny applicable to contribution limits"[918] and found it "closely drawn to match a sufficiently important interest."[919] The Court's decision to use less rigorous scrutiny, it wrote, "reflects more than the limited burdens they [*i.e.*, the contribution restrictions] impose on First Amendment freedoms. It also reflects the importance of the interests that underlie contribution limits—interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'"[920]

As for the prohibition on corporations and labor unions' using their general treasury funds to finance electioneering communications, the Court applied strict scrutiny, but found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideals."[921] These corrosive and distorting effects result both from express advocacy and from so-called issue advocacy. The Court also noted that, because corporations and unions "remain free to organize and administer segregated funds, or PACs," for electioneering communications, the provision was not a complete ban on expression.[922] In response to the argument that the justifications for a ban on express advocacy did not apply to issue advocacy, the Court found that

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[914] 540 U.S. at 133.
[915] 540 U.S. at 123.
[916] 540 U.S. at 204.
[917] 540 U.S. at 190.
[918] 540 U.S. at 141.
[919] 540 U.S. at 136 (internal quotation marks omitted).
[920] 540 U.S. at 136.
[921] 540 U.S. at 205 (quoting Austin v. Michigan State Chamber of Commerce, 494 U.S. at 660).
[922] 540 U.S. at 204.

the "argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." [923]

The limitations on electioneering communication, however, soon faced renewed examination by the Court. In *Wisconsin Right to Life, Inc. v. Federal Election Comm'n* (WRTL I),[924] the Court vacated a lower court decision that had denied plaintiffs the opportunity to bring an as-applied challenge to BCRA's regulation of electioneering communications. Subsequently, in *Federal Election Commission v. Wisconsin Right to Life* (WRTL II),[925] the Court considered what standard should be used for such a challenge. Chief Justice Roberts, in the controlling opinion,[926] rejected the suggestion that an issue ad broadcast during the specified periods before elections should be considered the "functional equivalent" of express advocacy if the "intent and effect" of the ad was to influence the voter's decision in an election.[927] Rather, Chief Justice Roberts' opinion held that an issue ad is the functional equivalent of express advocacy only if the ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." [928]

Then came the case of *Citizens United v. FEC*,[929] which significantly altered the Supreme Court's jurisprudence on corporations and election law. In *Citizens United*, a non-profit corporation released a film critical of then-Senator Hillary Clinton, a candidate in the Democratic Party's 2008 Presidential primary elections, and sought to make it available to cable television subscribers within 30 days of that primary. The case began as another as-applied challenge to BCRA, but the Court asked for reargument, and, in a 5–4 decision, not only struck down the limitations on electioneering communication on its face (overruling *McConnell*) but also rejected the use of the antidistortion rationale (overruling *Austin*).

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[923] 540 U.S. at 206.

[924] 546 U.S. 410 (2006).

[925] 127 S. Ct. 2652 (2007).

[926] Only Justice Alito joined Parts III and IV of Chief Justice Roberts' opinion, which addressed the issue of as-applied challenges to BCRA. Justices Scalia (joined by Kennedy and Thomas) concurred in the judgment, but would have overturned *McConnell* and struck down BCRA's limits on issue advocacy on its face.

[927] The suggestion was made that an "intent and effect" standard had been endorsed by the Court in *McConnell*, which stated that "[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." 540 U.S. at 206. While acknowledging that an evaluation of the "intent and effect" had been relevant to the rejection of a facial challenge, Chief Justice Roberts' opinion in WRTL II denied that such a standard had been endorsed for as-applied challenges. 127 S. Ct. at 2664–66.

[928] 127 S. Ct. at 2667.

[929] 558 U.S. ___, No. 08–205, slip op. (2010).

In *Citizens United*, the Court argued that there was a tension between the right of corporations to engage in political speech, as articulated in *Bellotti* and its progeny, and the limitations on such speech allowed in *Austin* to avoid the disproportionate economic power of corporations. Reasoning that the Court had rejected similar attempts to level the playing field among differing voices with disparate economic resources,[930] the Court held that the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity of necessity prevents distinctions based on wealth.[931] In particular, the Court noted that media corporations, although statutorily exempted from these restrictions, do not receive special constitutional protection under the First Amendment,[932] and thus would be constitutionally vulnerable under an antidistortion rationale.

The Court also held that the ability of a corporation to form a PAC neither allowed that corporation to speak directly, nor did it provide a sufficient alternative method of speech. The Court, found that PACs are burdensome alternatives that are "expensive to administer and are subject to extensive regulation." [933] The Court noted that the difficulty in establishing a PAC might explain why fewer than 2,000 of the millions of corporations in the country have PACs. Further, the Court argued that even if a corporation did want to establish a PAC to speak to an urgent issue, that such corporation might not be able to establish one in time to address issues in a current campaign.

While the holding of *Citizens United* would appear to diminish the need for corporations to create PACs in order to engage in political speech, it is not clear what level of regulation will now be

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[930] *See Buckley*, 424 U.S. at 49 (First Amendment's protections do not depend on the speaker's "financial ability to engage in public discussion."); Davis v. Federal Election Commission, 554 U.S. ___, No. 07–320, slip op. (2008) (invalidating the cap on contributions to one candidate if the opponent made certain expenditures from personal funds.

[931] *Citizens United*, slip op. at 34. The Court concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.", slip op. at 42. The State of Montana had had a long-standing bar on independent political expenditures by corporations founded on a record that those expenditures in fact could lead to corruption or the appearance of corruption. In a *per curiam* opinion, with four justices dissenting, the Court struck down the Montana law as contrary to *Citizens United*. American Tradition Partnership, Inc. v. Bullock, 567 U.S. ___, No. 11–1179, slip op. (2012).

[932] Slip. op. at 35–37.

[933] 558 U.S. ___, slip op. at 21. For example, a PAC must appoint a treasurer, keep detailed records of persons making donations, preserve receipts for three years, must report changes to its organizational statement within 10 days, and must file detailed monthly reports with the FEC. Id.

allowed over speech made directly by a corporation.[934] The Court did uphold the requirements under BCRA that electioneering communications funded by anyone other than a candidate must include a disclaimer regarding who is responsible for the content of the communication, and that the person making the expenditure must disclose to the FEC the amount of the expenditure and the names of certain contributors. The Court held that these requirements could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending, helping citizens "make informed choices in the political marketplace," and facilitate the ability of shareholders to hold corporations accountable for such political speech.[935]

In *Randall v. Sorrell*, a plurality of the Court struck down a Vermont campaign finance statute's limitations on both expenditures and contributions.[936] As for the statute's expenditure limitations, the plurality found *Buckley* to control and saw no reason to overrule it and no adequate basis upon which to distinguish it. As for the statute's contribution limitations, the plurality, following *Buckley*, considered whether the "contribution limits prevent candidates from 'amassing the resources necessary for effective [campaign] advocacy'; whether they magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage; in a word, whether they are too low and too strict to survive First Amendment scrutiny."[937] The plurality found that they were.[938] Vermont's limit of $200 per gubernatorial election "(with significantly lower limits for contributions to candidates for State Senate and House of Representatives) . . . are well below the limits this Court upheld in *Buckley*," and "are the lowest in the Na-

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[934] For instance, while the Court in *National Right to Work* allowed restrictions on corporate solicitation of other corporations for PAC funds, the Court might be disinclined to allow restrictions on corporations soliciting other corporations for funds to use for direct independent expenditures.

[935] 558 U.S. ___, slip op. at 50–51 (citations omitted). The Court had previously acknowledged that as-applied challenges would be available to a group if it could show a "reasonable probability" that disclosure of its contributors' names would "subject them to threats, harassment, or reprisals from either Government officials or private parties." *McConnell*, 540 U.S. at 198 (quoting Buckley, 427 U.S. at 74).

[936] 548 U.S. 230 (2006). Justice Breyer wrote the plurality opinion, with only Chief Justice Roberts joining it in full. Justice Alito joined the opinion as to the contribution limitations but not as to the expenditure limitations. Justice Alito and three other Justices concurred in the judgment as to the limitations on both expenditures and contributions, and three Justices dissented.

[937] 548 U.S. at 248 (citation omitted).

[938] Although, as here, limits on contributions may be so low as to violate the First Amendment, "there is no constitutional basis for attacking contribution limits on the ground that they are too high. Congress has no constitutional obligation to limit contributions at all . . . ." Davis v. Federal Election Commission, 128 S. Ct. 2759, 2771 (2008) (dictum).

tion." [939] But the plurality struck down Vermont's contribution limits "based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections." [940]

Government as Regulator of the Electoral Process: Lobbying.—Legislators may depend upon representations made to them and information supplied to them by interested parties, and therefore may desire to know what the real interests of those parties are, what groups or persons they represent, and other such information. But everyone is constitutionally entitled to write his congressman or his state legislator, to cause others to write or otherwise contact legislators, and to make speeches and publish articles designed to influence legislators. Conflict is inherent. In the Federal Regulation of Lobbying Act,[941] Congress, by broadly phrased and ambiguous language, seemed to require detailed reporting and registration by all persons who solicited, received, or expended funds for purposes of lobbying; that is, to influence congressional action directly or indirectly. In *United States v. Harriss*,[942] the Court, stating that it was construing the Act to avoid constitutional doubts,[943] interpreted covered lobbying as meaning only direct attempts to influence legislation through direct communication with members of Congress.[944] So construed, the Act was constitutional; Congress had "merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose," and this was simply a measure of "self-protection." [945]

Other statutes and governmental programs affect lobbying and lobbying activities. It is not impermissible for the Federal Government to deny a business expense tax deduction for money spent to defeat legislation that would adversely affect one's business.[946] But the antitrust laws may not be applied to a concert of business enterprises that have joined to lobby the legislative branch to pass and the executive branch to enforce laws that would have a detri-

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[939] 548 U.S. at 249 (citation omitted). The plurality noted that, "in terms of real dollars (*i.e.*, adjusting for inflation)," they were lower still. Id. at 250.

[940] 548 U.S. at 253.

[941] 60 Stat. 812, 839 (1946), 2 U.S.C. §§ 261–70.

[942] 347 U.S. 612 (1954).

[943] 347 U.S. at 623.

[944] 347 U.S. at 617–24.

[945] 347 U.S. at 625. Justices Douglas, Black, and Jackson dissented. Id. at 628, 633. They thought the Court's interpretation too narrow and would have struck the statute down as being too broad and too vague, but would not have denied Congress the power to enact narrow legislation to get at the substantial evils of the situation. *See also* United States v. Rumely, 345 U.S. 41 (1953).

[946] Cammarano v. United States, 358 U.S. 498 (1959).

mental effect upon competitors, even if the lobbying was conducted unethically.[947] On the other hand, allegations that competitors combined to harass and deter others from having free and unlimited access to agencies and courts by resisting before those bodies all petitions of competitors for purposes of injury to competition are sufficient to implicate antitrust principles.[948]

Government as Regulator of Labor Relations.—Numerous problems may arise in this area,[949] but the issue here considered is the balance to be drawn between the free speech rights of an employer and the statutory rights of his employees to engage or not engage in concerted activities free of employer coercion, which may well include threats or promises or other oral or written communications. The Court has upheld prohibitions against employer interference with union activity through speech so long as the speech is coercive,[950] and that holding has been reduced to statutory form.[951] Nonetheless, there is a First Amendment tension in this area, with its myriad variations of speech forms that may be denominated "predictions," especially because determination whether particular utterances have an impermissible impact on workers is vested with an agency with no particular expertise in the protection of freedom of expression.[952]

Government as Investigator: Reporter's Privilege.—News organizations have claimed that the First Amendment compels a recognition by government of an exception to the ancient rule that every citizen owes to his government a duty to give what testimony he is capable of giving.[953] The argument for a limited exemption to permit reporters to conceal their sources and to keep confidential certain information they obtain and choose at least for the moment

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[947] Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961). *See also* UMW v. Pennington, 381 U.S. 657, 669–71 (1965).

[948] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972). Justices Stewart and Brennan thought that joining to induce administrative and judicial action was as protected as the concert in *Noerr* but concurred in the result because the complaint could be read as alleging that defendants had sought to forestall access to agencies and courts by plaintiffs. Id. at 516.

[949] *E.g.*, the speech and associational rights of persons required to join a union, Railway Employees Dep't v. Hanson, 351 U.S. 225 (1956); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public employees), restrictions on picketing and publicity campaigns, Babbitt v. United Farm Workers, 442 U.S. 289 (1979), and application of collective bargaining laws in sensitive areas, NLRB v. Yeshiva Univ., 444 U.S. 672 (1980) (faculty collective bargaining in private universities); NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (collective bargaining in religious schools).

[950] NLRB v. Virginia Electric & Power Co., 314 U.S. 469 (1941).

[951] 61 Stat. 142, § 8(c) (1947), 29 U.S.C. § 158(c).

[952] *Cf.* NLRB v. Gissel Packing Co., 395 U.S. 575, 616–20 (1969).

[953] 8 J. WIGMORE, EVIDENCE 2192 (3d ed. 1940). *See* Blair v. United States, 250 U.S. 273, 281 (1919); United States v. Bryan, 339 U.S. 323, 331 (1950).

not to publish was rejected in *Branzburg v. Hayes*[954] by a closely divided Court. "Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering which is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[955] Not only was it uncertain to what degree confidential informants would be deterred from providing information, said Justice White for the Court, but the conditional nature of the privilege claimed might not mitigate the deterrent effect, leading to claims for an absolute privilege. Confidentiality could be protected by the secrecy of grand jury proceedings and by the experience of law enforcement officials in themselves dealing with informers. Difficulties would arise as well in identifying who should have the privilege and who should not. But the principal basis of the holding was that the investigation and exposure of criminal conduct was a governmental function of such importance that it overrode the interest of reporters in avoiding the incidental burden on their newsgathering activities occasioned by such governmental inquiries.[956]

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[954] 408 U.S. 665 (1972). "The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them." Id. at 682.

[955] 408 U.S. at 690–91. The cases consolidated in *Branzburg* all involved grand juries, so the reference to criminal trials should be considered dictum.

[956] Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined the Court's opinion. Justice Powell, despite having joined the majority opinion, also submitted a concurring opinion in which he suggested a privilege might be available if, in a particular case, "the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement." 408 U.S. at 710. Justice Stewart's dissenting opinion in *Branzburg* referred to Justice Powell's concurring opinion as "enigmatic." Id. at 725. Judge Tatel of the D.C. Circuit wrote, "Though providing the majority's essential fifth vote, he [Powell] wrote separately to outline a 'case-by-case' approach that fits uncomfortably, to say the least, with the *Branzburg* majority's categorical rejection of the reporters' claims." *In re*: Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005 (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006).

The Court observed that Congress, as well as state legislatures and state courts, are free to adopt privileges for reporters.[957] Although efforts in Congress have failed, 49 states have done so—33 (plus the District of Columbia) by statute and 16 by court decision, with Wyoming the sole holdout.[958] As for federal courts, Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [959] The federal courts have not resolved whether the common law provides a journalists' privilege.[960]

Nor does the status of an entity as a newspaper (or any other form of news medium) protect it from issuance and execution on probable cause of a search warrant for evidence or other material properly sought in a criminal investigation.[961] The press had argued that to permit searches of newsrooms would threaten the ability to gather, analyze, and disseminate news, because searches would be disruptive, confidential sources would be deterred from coming forward with information because of fear of exposure, reporters would

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"[C]ourts in almost every circuit around the country interpreted Justice Powell's concurrence, along with parts of the Court's opinion, to create a balancing test when faced with compulsory process for press testimony and documents outside the grand jury context." Association of the Bar of the City of New York, The Federal Common Law of Journalists' Privilege: A Position Paper (2005) at 4–5 [http://www.abcny.org/pdf/report/White%20paper%20on%20reporters%20privilege.pdf] (citing examples).

[957] 408 U.S. at 706.

[958] The 33rd state statute enacted was the State of Washington's, which took effect on July 22, 2007. See the website of the Reporters Committee for Freedom of the Press for information on the state laws. The greatest difficulty these laws experience is the possibility of a constitutional conflict with the Fifth and Sixth Amendment rights of criminal defendants. *See Matter of Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied sub nom.* New York Times v. New Jersey, 439 U.S. 997 (1978). *See also* New York Times v. Jascalevich, 439 U.S. 1301, 1304, 1331 (1978) (applications to Circuit Justices for stay), and id. at 886 (vacating stay).

[959] Rule 501 also provides that, in civil actions and proceedings brought in federal court under state law, the availability of a privilege shall be determined in accordance with state law.

[960] See, e.g., *In re*: Grand Jury Subpoena. Judith Miller, 397 F.3d 964, 972 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005 (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006) (U.S. Court of Appeals for the District of Columbia "is not of one mind on the existence of a common law privilege").

[961] Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978). Justice Powell thought it appropriate that "a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment" when he assesses the reasonableness of a warrant in light of all the circumstances. Id. at 568 (concurring). Justices Stewart and Marshall would have imposed special restrictions upon searches when the press was the object, id. at 570 (dissenting), and Justice Stevens dissented on Fourth Amendment grounds. Id. at 577.

decline to put in writing their information, and internal editorial deliberations would be exposed. The Court thought that First Amendment interests were involved, but it seemed to doubt that the consequences alleged would occur, and it observed that the built-in protections of the warrant clause would adequately protect those interests and noted that magistrates could guard against abuses when warrants were sought to search newsrooms by requiring particularizations of the type, scope, and intrusiveness that would be permitted in the searches.[962]

Government and the Conduct of Trials.—Conflict between constitutional rights is not uncommon. One of the most difficult to resolve is the conflict between a criminal defendant's Fifth and Sixth Amendment rights to a fair trial and the First Amendment's protection of the rights to obtain and publish information about defendants and trials. Convictions obtained in the context of prejudicial pre-trial publicity[963] and during trials that were media "spectaculars"[964] have been reversed, but the prevention of such occurrences is of paramount importance to the governmental and public interest in the finality of criminal trials and the successful prosecution of criminals. However, the imposition of "gag orders" on press publication of information directly confronts the First Amendment's bar on prior restraints,[965] although the courts have a good deal more discretion in preventing the information from becoming public in the first place.[966] Perhaps the most profound debate that has arisen in recent years concerns the right of access of the public and the press to trial and pre-trial proceedings, and the Court has addressed the issue.

When the Court held that the Sixth Amendment right to a public trial did not guarantee access of the public and the press to pretrial suppression hearings,[967] a major debate flowered concerning the extent to which, if at all, the speech and press clauses pro-

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[962] Congress enacted the Privacy Protection Act of 1980, Pub. L. 96–440, 94 Stat. 1879, 42 U.S.C. § 2000aa, to protect the press and other persons having material intended for publication from federal or state searches in specified circumstances, and creating damage remedies for violations.

[963] Irvin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963).

[964] Sheppard v. Maxwell, 384 U.S. 333 (1966); *compare* Estes v. Texas, 381 U.S. 532 (1965), *with* Chandler v. Florida, 449 U.S. 560 (1981).

[965] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[966] *See*, *e.g.*, Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (disciplinary rules restricting extrajudicial comments by attorneys are void for vagueness, but such attorney speech may be regulated if it creates a "substantial likelihood of material prejudice" to the trial of a client); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (press, as party to action, restrained from publishing information obtained through discovery).

[967] Gannett Co. v. DePasquale, 443 U.S. 368 (1979).

tected the public and the press in seeking to attend trials.[968] The right of access to criminal trials against the wishes of the defendant was held protected in *Richmond Newspapers v. Virginia*,[969] but the Justices could not agree upon a majority rationale that would permit principled application of the holding to other areas in which access is sought.

Chief Justice Burger pronounced the judgment of the Court, but his opinion was joined by only two other Justices (and one of them in a separate concurrence drew conclusions probably going beyond the Chief Justice's opinion).[970] Basic to the Chief Justice's view was an historical treatment that demonstrated that trials were traditionally open. This openness, moreover, was no "quirk of history" but "an indispensable attribute of an Anglo-American trial." This characteristic flowed from the public interest in seeing fairness and proper conduct in the administration of criminal trials; the "therapeutic value" to the public of seeing its criminal laws in operation, purging the society of the outrage felt at the commission of many crimes, convincingly demonstrated why the tradition had developed and been maintained. Thus, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." The presumption has more than custom to command it. "[I]n the context of trials . . . the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted."[971]

Justice Brennan, joined by Justice Marshall, followed a significantly different route to the same conclusion. In his view, "the First Amendment . . . has a *structural* role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy

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[968] *DePasquale* rested solely on the Sixth Amendment, the Court reserving judgment on whether there is a First Amendment right of public access. 443 U.S. at 392.

[969] 448 U.S. 555 (1980). The decision was 7 to 1, with Justice Rehnquist dissenting, id. at 604, and Justice Powell not participating. Justice Powell, however, had taken the view in Gannett Co. v. DePasquale, 443 U.S. 368, 397 (1979) (concurring), that the First Amendment did protect access to trials.

[970] *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 582 (1980) (Justice Stevens concurring).

[971] 448 U.S. at 564–69. The emphasis on experience and history was repeated by the Chief Justice in his opinion for the Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press-Enterprise II).

to survive, and thus entails solicitude not only for communication itself but also for the indispensable conditions of meaningful communication."[972]

The trial court in *Richmond Newspapers* had made no findings of necessity for closure, and neither Chief Justice Burger nor Justice Brennan found the need to articulate a standard for determining when the government's or the defendant's interests could outweigh the public right of access. That standard was developed two years later. *Globe Newspaper Co. v. Superior Court*[973] involved a statute, unique to one state, that mandated the exclusion of the public and the press from trials during the testimony of a sex-crime victim under the age of 18. For the Court, Justice Brennan wrote that the First Amendment guarantees press and public access to criminal trials, both because of the tradition of openness[974] and because public scrutiny of a criminal trial serves the valuable functions of enhancing the quality and safeguards of the integrity of the factfinding process, of fostering the appearance of fairness, and of permitting public participation in the judicial process. The right is not absolute, but in order to close all or part of a trial government must show that "the denial is necessitated by a compelling governmental interest, and [that it] is narrowly tailored to serve that interest."[975] The Court was explicit that the right of access was to *criminal* trials,[976] so that the question of the openness of civil trials remains.

The Court next applied and extended the right of access in several other areas, striking down state efforts to exclude the public from *voir dire* proceedings, from a suppression hearing, and from a

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[972] 448 U.S. at 587–88 (emphasis in original, citations omitted).

[973] 457 U.S. 596 (1982). Joining Justice Brennan's opinion of the Court were Justices White, Marshall, Blackmun, and Powell. Justice O'Connor concurred in the judgment. Chief Justice Burger, with Justice Rehnquist, dissented, arguing that the tradition of openness that underlay *Richmond Newspapers*, was absent with respect to sex crimes and youthful victims and that *Richmond Newspapers* was unjustifiably extended. Id. at 612. Justice Stevens dissented on the ground of mootness. Id. at 620.

[974] That there was no tradition of openness with respect to the testimony of minor victims of sex crimes was irrelevant, the Court argued. As a general matter, all criminal trials have been open. The presumption of openness thus attaches to all criminal trials and to close any particular kind or part of one because of a particular reason requires justification on the basis of the governmental interest asserted. 457 U.S. at 605 n.13.

[975] 457 U.S. at 606–07. Protecting the well-being of minor victims was a compelling interest, the Court held, and might justify exclusion in specific cases, but it did not justify a mandatory closure rule. The other asserted interest—encouraging minors to come forward and report sex crimes—was not well served by the statute.

[976] The Court throughout the opinion identifies the right as access to *criminal trials*, even italicizing the words at one point. 457 U.S. at 605.

preliminary hearing. The Court determined in *Press-Enterprise I*[977] that historically *voir dire* had been open to the public, and that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[978] No such findings had been made by the state court, which had ordered closed, in the interest of protecting the privacy interests of some prospective jurors, 41 of the 44 days of *voir dire* in a rape-murder case. The trial court also had not considered the possibility of less restrictive alternatives, *e.g.*, *in camera* consideration of jurors' requests for protection from publicity. In *Waller v. Georgia*,[979] the Court held that "under the Sixth Amendment any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press Enterprise*,"[980] and noted that the need for openness at suppression hearings "may be particularly strong" because the conduct of police and prosecutor is often at issue.[981] And, in *Press Enterprise II*,[982] the Court held that there is a similar First Amendment right of the public to access to most criminal proceedings (here a preliminary hearing) even when the accused requests that the proceedings be closed. Thus, an accused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[983] Openness of preliminary hearings was deemed important because, under California law, the hearings can be "the final and most important step in the criminal proceeding" and therefore may be "the sole occasion for public observation of the criminal justice system," and also because the safeguard of a jury is unavailable at preliminary hearings.[984]

Government as Administrator of Prisons.—A prison inmate retains only those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penologi-

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[977] Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).
[978] 464 U.S. at 510.
[979] 467 U.S. 39 (1984).
[980] Gannett Co. v. DePasquale, 443 U.S. 368 (1979), did not involve assertion *by the accused* of his 6th Amendment right to a public trial; instead, the accused in that case had requested closure. "[T]he constitutional guarantee of a public trial is for the benefit of the defendant." Id. at 381.
[981] 467 U.S. at 47.
[982] Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986).
[983] 478 U.S. at 14.
[984] 478 U.S. at 12.

cal objectives of the corrections system.[985] The identifiable governmental interests at stake in administration of prisons are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.[986] In applying these general standards, the Court at first arrived at somewhat divergent points in assessing prison restrictions on mail and on face-to-face news interviews between reporters and prisoners. The Court's more recent deferential approach to regulation of prisoners' mail has lessened the differences.

First, in *Procunier v. Martinez*,[987] the Court invalidated mail censorship regulations that permitted authorities to hold back or to censor mail to and from prisoners whenever they thought that the letters "unduly complain," express "inflammatory . . . views," or were "defamatory" or "otherwise inappropriate."[988] The Court based this ruling not on the rights of the prisoner, but instead on the outsider's right to communicate with the prisoner either by sending or by receiving mail. Under this framework, the Court held, regulation of mail must further an important interest unrelated to the suppression of expression; regulation must be shown to further the substantial interest of security, order, and rehabilitation; and regulation must not be used simply to censor opinions or other expressions. Further, a restriction must be no greater than is necessary to the protection of the particular government interest involved.

In *Turner v. Safley*,[989] however, the Court made clear that a standard that is more deferential to the government is applicable when the free speech rights only of inmates are at stake. In upholding a Missouri restriction on correspondence between inmates at different institutions, while striking down a prohibition on inmate marriages absent a compelling reason such as pregnancy or birth of a child, the Court announced the appropriate standard: "[W]hen a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[990] Four factors "are relevant in determining the reasonable-

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[985] Pell v. Procunier, 417 U.S. 817, 822 (1974).

[986] Procunier v. Martinez, 416 U.S. 396, 412 (1974).

[987] 416 U.S. 396 (1974). *But see* Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977), in which the Court sustained prison regulations barring solicitation of prisoners by other prisoners to join a union, banning union meetings, and denying bulk mailings concerning the union from outside sources. The reasonable fears of correctional officers that organizational activities of the sort advocated by the union could impair discipline and lead to possible disorders justified the regulations.

[988] 416 U.S. at 396.

[989] 482 U.S. 78 (1987).

[990] 482 U.S. at 89. In Overton v. Bazzetta, 539 U.S. 126 (2003), the Court applied *Turner* to uphold various restrictions on visitation by children and by former

ness of a regulation at issue."[991] "First, is there a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it? Second, are there alternative means of exercising the right that remain open to prison inmates? Third, what impact will accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally? And, fourth, are ready alternatives for furthering the governmental interest available?"[992] Two years after *Turner v. Safley*, in *Thornburgh v. Abbott*, the Court restricted *Procunier v. Martinez* to the regulation of *outgoing* correspondence, finding that the needs of prison security justify a more deferential standard for prison regulations restricting incoming material, whether those incoming materials are correspondence from other prisoners, correspondence from nonprisoners, or outside publications.[993]

In *Beard v. Banks*, a plurality of the Supreme Court upheld "a Pennsylvania prison policy that 'denies newspapers, magazines, and photographs' to a group of specially dangerous and recalcitrant inmates."[994] These inmates were housed in Pennsylvania's Long Term Segregation Unit and one of the prison's penological rationales for its policy, which the plurality found to satisfy the four *Turner* factors, was to motivate better behavior on the part of the prisoners by providing them with an incentive to move back to the regular prison population.[995] Applying the four *Turner* factors to this rationale, the plurality found that (1) there was a logical connection between depriving inmates of newspapers and magazines and providing an incentive to improve behavior; (2) the Policy provided no alternatives to the deprivation of newspapers and magazines, but this was "not 'conclusive' of the reasonableness of the Policy"; (3) the impact of accommodating the asserted constitutional right would

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inmates, and on all visitation except attorneys and members of the clergy for inmates with two or more substance-abuse violations; an inmate subject to the latter restriction could apply for reinstatement of visitation privileges after two years. "If the withdrawal of all visitation privileges were permanent or for a much longer period, or if it were applied in an arbitrary manner to a particular inmate, the case would present different considerations." Id. at 137.

[991] 482 U.S. at 89.

[992] Beard v. Banks, 548 U.S. 521, 529 (2006) (citations and internal quotation marks omitted; this quotation quotes language from Turner v. Safley, 482 U.S. at 89–90).

[993] 490 U.S. 401, 411–14 (1989). Thornburgh v. Abbott noted that, if regulations deny prisoners publications on the basis of their content, but the grounds on which the regulations do so is content-neutral (*e.g.*, to protect prison security), then the regulations will be deemed neutral. Id. at 415–16.

[994] 548 U.S. 521, 524–25 (2006). This was a 4–2–2 decision, with Justice Alito, who had written the court of appeals decision, not participating.

[995] 548 U.S. at 531.

be negative; and (4) no alternative would "fully accommodate the prisoner's rights at *de minimis* cost to valid penological interests." [996] The plurality believed that its "real task in this case is not balancing these factors, but rather determining whether the Secretary shows more than simply a logical relation, that is, whether he shows a *reasonable* relation" between the Policy and legitimate penological objections, as *Turner* requires.[997] The plurality concluded that he had. Justices Thomas and Scalia concurred in the result but would do away with the *Turner* factors because they believe that "States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivation—*provided only that those deprivations are consistent with the Eighth Amendment*." [998]

Neither prisoners nor reporters have any affirmative First Amendment right to face-to-face interviews, when general public access to prisons is restricted and when there are alternatives by which the news media can obtain information respecting prison policies and conditions.[999] Prison restrictions on such interviews do indeed implicate the First Amendment rights of prisoners, the Court held, but such rights must be balanced against "the legitimate penological objectives of the corrections system" and "internal security within the corrections facilities," taking into account available alternative means of communications, such as mail and "limited visits from members of [prisoners'] families, the clergy, their attorneys, and friends of prior acquaintance." [1000]

While agreeing with a previous affirmation that "news gathering is not without its First Amendment protections," [1001] the Court denied that the First Amendment imposed upon the government any affirmative obligation to the press. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally." [1002] *Pell* and *Saxbe* did not delineate whether

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[996] 548 U.S. at 531–32.

[997] 548 U.S. at 533.

[998] 548 U.S. at 537 (Thomas, J., concurring), quoting Overton v. Bazzetta, 539 U.S. at 139 (Thomas, J., concurring) (emphasis originally in *Overton*).

[999] Pell v. Procunier, 417 U.S. 817 (1974). Justices Douglas, Brennan, and Marshall dissented. Id. at 836.

[1000] 417 U.S. at 822–25.

[1001] Branzburg v. Hayes, 408 U.S. 665, 707 (1972), *quoted in* Pell v. Procunier, 417 U.S. 817, 833 (1974).

[1002] 417 U.S. at 834. The holding was applied to federal prisons in Saxbe v. Washington Post, 417 U.S. 843 (1974). Dissenting, Justices Powell, Brennan, and Marshall argued that "at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs," that the press's role was

the "equal access" rule applied only in cases in which there was public access, so that a different rule for the press might follow when general access was denied; nor did they purport to define what the rules of equal access are. No greater specificity emerged from *Houchins v. KQED*,[1003] in which a broadcaster had sued for access to a prison from which public and press alike were barred and as to which there was considerable controversy over conditions of incarceration. Following initiation of the suit, the administrator of the prison authorized limited public tours. The tours were open to the press, but cameras and recording devices were not permitted, there was no opportunity to talk to inmates, and the tours did not include the maximum security area about which much of the controversy centered. The Supreme Court overturned the injunction obtained in the lower courts, the plurality reiterating that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. . . . [U]ntil the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally."[1004] Justice Stewart, whose vote was necessary to the disposition of the case, agreed with the equal access holding but would have approved an injunction more narrowly drawn to protect the press's right to use cameras and recorders so as to enlarge public access to the information.[1005] Thus, any question of special press access appears settled by the decision; yet the questions raised above remain: May everyone be barred from access and, if access is accorded, does the Constitution necessitate any limitation on the discretion of prison administrators?[1006]

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to make this discussion informed, and that the ban on face-to-face interviews unconstitutionally fettered this role of the press. Id. at 850, 862.

[1003] 438 U.S. 1 (1978). The decision's imprecision of meaning is partly attributable to the fact that there was no opinion of the Court. A plurality opinion represented the views of only three Justices; two Justices did not participate, three Justices dissented, and one Justice concurred with views that departed somewhat from the plurality.

[1004] 438 U.S. at 15–16.

[1005] 438 U.S. at 16.

[1006] The dissenters, Justices Stevens, Brennan, and Powell, believed that the Constitution protects the public's right to be informed about conditions within the prison and that total denial of access, such as existed prior to institution of the suit, was unconstitutional. They would have sustained the more narrowly drawn injunctive relief to the press on the basis that no member of the public had yet sought access. 438 U.S. at 19. It is clear that Justice Stewart did not believe that the Constitution affords any relief. Id. at 16. Although the plurality opinion of the Chief Justice Burger and Justices White and Rehnquist may be read as not deciding whether any public right of access exists, overall it appears to proceed on the unspoken basis that there is none. The second question, when Justice Stewart's concurring opinion and the dissenting opinion are combined, appears to be answerable qualifiedly in

Government and the Power of the Purse.—In exercise of the spending power, Congress may refuse to subsidize the exercise of First Amendment rights, but may not deny benefits solely on the basis of the exercise of such rights. The distinction between these two closely related principles seemed, initially at least, to hinge on the severity and pervasiveness of the restriction placed on exercise of First Amendment rights. What has emerged is the principle that Congress may condition the receipt of federal funds on acceptance of speech limitations on persons working for the project receiving the federal funding—even if the project also receives non-federal funds—provided that the speech limitations do not extend to the use of non-federal funds outside of the federally funded project. In *Regan v. Taxation With Representation*,[1007] the Court held that Congress could constitutionally limit tax-exempt status under § 501(c)(3) of the Internal Revenue Code to charitable organizations that do not engage in lobbying. "Congress has merely refused to pay for the lobbying out of public moneys," the Court concluded.[1008] The effect of the ruling on the organization's lobbying activities was minimal, however, since it could continue to receive tax-deductible contributions by creating a separate affiliate to conduct the lobbying.

In *FCC v. League of Women Voters*,[1009] by contrast, the Court held that the First Amendment rights of public broadcasting stations were abridged by a prohibition on all editorializing by any recipient of public funds. There was no alternative means, as there had been in *Taxation With Representation*, by which the stations could continue to receive public funding and create an affiliate to engage in the prohibited speech. The Court rejected dissenting Justice Rehnquist's argument that the general principles of *Taxation With Representation* and *Oklahoma v. Civil Service Comm'n* [1010] should be controlling.[1011] In *Rust v. Sullivan*, however, Chief Justice Rehnquist asserted for the Court that restrictions on abortion counseling and referral imposed on recipients of family planning funding under the Public Health Service Act did not constitute discrimination on the basis of viewpoint, but instead represented government's decision

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the direction of constitutional constraints upon the nature of access limitation once access is granted.

[1007] 461 U.S. 540 (1983).

[1008] 461 U.S. at 545. *See also* Cammarano v. United States, 358 U.S. 498, 512–13 (1959) (exclusion of lobbying expenses from income tax deduction for ordinary and necessary business expenses is not a regulation aimed at the suppression of dangerous ideas, and does not violate the First Amendment).

[1009] 468 U.S. 364 (1984).

[1010] 330 U.S. 127 (1947).

[1011] 468 U.S. at 399–401, & n.27.

"to fund one activity to the exclusion of the other." [1012] In addition, the Court noted, the "regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. . . . The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities." [1013] It remains to be seen what application this decision will have outside the contentious area of abortion regulation.[1014]

In *National Endowment for the Arts v. Finley*, the Supreme Court upheld the constitutionality of a federal statute requiring the NEA, in awarding grants, to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." [1015] The Court acknowledged that, if the statute were "applied in a manner that raises concern about the suppression of disfavored viewpoints," [1016] then such application might be unconstitutional. The statute on its face, however, is constitutional because it "imposes no categorical requirement," being merely "advisory." [1017] "Any content-based considerations that may be taken into account in the grant-making process are a consequence of the na-

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[1012] 500 U.S. 173, 193 (1991). Dissenting Justice Blackmun contended that *Taxation With Representation* was easily distinguishable because its restriction was on all lobbying activity regardless of content or viewpoint. Id. at 208–09.

[1013] 500 U.S. at 196 (emphasis in original). Dissenting Justice Blackmun wrote: "Under the majority's reasoning, the First Amendment could be read to tolerate *any* governmental restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past." Id. at 213 (emphasis in original).

[1014] The Court attempted to minimize the potential sweep of its ruling in *Rust*. "This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipient to speak outside the scope of the Government-funded project, is invariably sufficient to justify government control over the content of expression." 500 U.S. at 199. The Court noted several possible exceptions to the general principle: government ownership of a public forum does not justify restrictions on speech; the university setting requires heightened protections through application of vagueness and overbreadth principles; and the doctor-patient relationship may also be subject to special First Amendment protection. (The Court denied, however, that the doctor-patient relationship was significantly impaired by the regulatory restrictions at issue.) Lower courts were quick to pick up on these suggestions. *See*, *e.g.*, *Stanford Univ. v Sullivan*, 773 F. Supp. 472, 476–78 (D.D.C. 1991) (confidentiality clause in federal grant research contract is invalid because, *inter alia*, of application of vagueness principles in a university setting); Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278 (S.D.N.Y. 1992) ("offensiveness" guidelines restricting Center for Disease Control grants for preparation of AIDS-related educational materials are unconstitutionally vague).

[1015] 524 U.S. 569, 572 (1998).

[1016] 524 U.S. at 587.

[1017] 524 U.S. at 581. Justice Scalia, in a concurring opinion joined by Justice Thomas, claimed that this interpretation of the statute "gutt[ed] it." Id. at 590. He believed that the statute "establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional." Id.

ture of arts funding. . . . The 'very assumption' of the NEA is that grants will be awarded according to the 'artistic worth of competing applications,' and absolute neutrality is simply 'inconceivable.'" [1018] The Court also found that the terms of the statute, "if they appeared in a criminal statute or regulatory scheme, . . . could raise substantial vagueness concerns. . . . But when the government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe." [1019]

In contrast, in *Agency for International Development v. Alliance for Open Society International*,[1020] the Court found that the federal government could not explicitly require a federal grantee to adopt a public policy position as a condition of receiving federal funds. In *Alliance for Open Society International*, organizations that received federal dollars to combat HIV/AIDS internationally were required (1) to ensure that such funds were not being used "to promote or advocate the legalization or practice of prostitution or sex trafficking" and (2) to have a policy "explicitly opposing prostitution." [1021] While the first condition legitimately ensured that the government was not funding speech which conflicted with the purposes of the grant, the second requirement, in the view of the Court, improperly affected the recipient's protected conduct outside of the federal program.[1022] Further, the Court concluded that the organization could not, as in previous cases, avoid the requirement by establishing an affiliate to engage in opposing advocacy because of the "evident hypocrisy" that would entail.[1023]

In *Legal Services Corp. v. Valazquez*,[1024] the Court struck down a provision of the Legal Services Corporation Act that prohibited recipients of Legal Services Corporation (LSC) funds (*i.e.*, legal-aid organizations that provide lawyers to the poor in civil matters) from representing a client who seeks "to amend or otherwise challenge existing [welfare] law." This meant that, even with non-federal funds, a recipient of federal funds could not argue that a state welfare statute violated a federal statute or that a state or federal welfare law violated the Constitution. If a case was underway when such a challenge became apparent, the attorney had to withdraw. The Court distinguished this situation from that in *Rust v. Sullivan* on the ground "that the counseling activities of the doctors under Title X amounted to governmental speech," whereas "an LSC-funded attor-

[1018] 524 U.S. at 585.
[1019] 524 U.S. at 588–89.
[1020] 570 U.S. ___, No. 12–10, slip op. (2013).
[1021] 22 U.S.C. § 7631(e), (f) (2012).
[1022] See *All. for Int'l Dev.*, slip op. at 6.
[1023] *Id.* at 13.
[1024] 531 U.S. 533 (2001).

ney speaks on behalf of the client in a claim against the government for welfare benefits." [1025] Furthermore, the restriction in this case "distorts the legal system" by prohibiting "speech and expression upon which courts must depend for the proper exercise of the judicial power," and thereby is "inconsistent with accepted separation-of-powers principles." [1026]

In *United States v. American Library Association, Inc.*, a four-Justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them." [1027] The plurality considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance by requiring public libraries (public schools were not involved in the case) to limit their freedom of speech if they accept federal funds. The plurality, citing *Rust v. Sullivan*, found that, assuming that government entities have First Amendment rights (it did not decide the question), CIPA does not infringe them. This is because CIPA does not deny a benefit to libraries that do not agree to use filters; rather, the statute "simply insist[s] that public funds be spent for the purposes for which they were authorized." [1028] The plurality distinguished *Legal Services Corporation v. Velazquez* on the ground that public libraries have no role comparable to that of legal aid attorneys "that pits them against the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance." [1029]

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court upheld the Solomon Amendment, which provides, in the Court's summary, "that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds." [1030] FAIR, the group that challenged the Solomon Amendment, is an association of law schools that barred military recruiting on their campuses because of the military's

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[1025] 531 U.S. at 541, 542.
[1026] 531 U.S. at 544, 546.
[1027] 539 U.S. 194, 199 (2003).
[1028] 539 U.S. at 211.
[1029] 539 U.S. at 213 (emphasis in original). Other grounds for the plurality decision are discussed under "Non-obscene But Sexually Explicit and Indecent Expression" and "The Public Forum."
[1030] 547 U.S. 47, 51 (2006).

discrimination against homosexuals. FAIR challenged the Solomon Amendment as violating the First Amendment because it forced schools to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive specified federal funding. The Court concluded: "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds." [1031] The Court found that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." [1032] The law schools' conduct in barring military recruiters, the Court found, "is not inherently expressive," and, therefore, unlike flag burning, for example, is not "symbolic speech." [1033] Applying the *O'Brien* test for restrictions on conduct that have an incidental effect on speech, the Court found that the Solomon Amendment clearly "promotes a substantial government interest that would be achieved less effectively absent the regulation." [1034]

The Court also found that the Solomon Amendment did not unconstitutionally compel schools to speak, or even to host or accommodate the government's message. As for compelling speech, law schools must "send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. . . . This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. . . . [It] is plainly incidental to the Solomon Amendment's regulation of conduct." [1035] As for forcing one speaker to host or accommodate another, "[t]he compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." [1036] By contrast, the Court wrote, "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies." [1037] Finally, the Court found that the Solomon Amendment was not analogous to the New Jersey law that had required the Boy Scouts to accept

[1031] 547 U.S. at 60. The Court stated that Congress's authority to directly require campus access for military recruiters comes from its Article I, section 8, powers to provide for the common defense, to raise and support armies, and to provide and maintain a navy. Id. at 58.
[1032] 547 U.S. at 60.
[1033] 547 U.S. at 64, 65.
[1034] 547 U.S. at 67.
[1035] 547 U.S. at 61, 62.
[1036] 547 U.S. at 63.
[1037] 547 U.S. at 65.

a homosexual scoutmaster, and that the Supreme Court struck down as violating the Boy Scouts' "right of expressive association." [1038] Recruiters, unlike the scoutmaster, are "outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association." [1039]

The Government Speech Doctrine.—As an outgrowth of the government subsidy cases, such as *Rust v. Sullivan*,[1040] the Court has established the "government speech doctrine" that recognizes that a government entity "is entitled to say what it wishes" [1041] and to select the views that it wants to express.[1042] In this vein, when the government speaks, the government is not barred by the Free Speech Clause of the First Amendment from determining the content of what it says and can engage in viewpoint discrimination.[1043] The underlying rationale for the government speech doctrine is that the government could not "function" if the government could not favor or disfavor points of view in enforcing a program.[1044] And the Supreme Court has recognized that the government speech doctrine even extends to when the government receives private assistance in helping deliver a government controlled message.[1045] As a consequence, the Court, relying on the government speech doctrine, has rejected First Amendment challenges to (1) regulations prohibiting recipients of government funds from advocating, counseling, or referring patients for abortion; [1046] (2) disciplinary actions taken as a result of statements made by public employees pursuant to their official duties; [1047] (3) mandatory assessments made against cattle merchants when used to fund advertisements whose message was controlled by the government; [1048] (4) a city's decision to reject a monument for placement in a public park; [1049]

[1038] 547 U.S. at 68, quoting Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).

[1039] 547 U.S. at 69.

[1040] 500 U.S. 173 (1991).

[1041] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[1042] *Id.* at 833.

[1043] *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009). Nonetheless, while the First Amendment's Free Speech Clause has no applicability with regard to government speech, it is important to note that other constitutional provisions—such as the Equal Protection principles of the Fifth and Fourteenth Amendments—may constrain what the government can say. *Id.* at 468–69.

[1044] *See id.* at 468 ("Indeed, it is not easy to imagine how government could function if it lacked this freedom.").

[1045] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005).

[1046] *See Rust*, 500 U.S. at 194.

[1047] *See* Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

[1048] *See Livestock Mktg. Ass'n*, 544 U.S. at 562.

[1049] *See Pleasant Grove City*, 555 U.S. at 472.

and (5) a state's decision to reject a design for a specialty license plate for an automobile.[1050]

A central issue prompted by the government speech doctrine is determining when speech is that of the government, which can be difficult when the government utilizes or relies on private parties to relay a particular message. In *Johanns v. Livestock Marketing Association*, the Court held that the First Amendment did not prohibit the compelled subsidization of advertisements promoting the sale of beef because the underlying message of the advertisements was "effectively controlled" by the government.[1051] Four years later, in *Pleasant Grove City v. Summum*, the Court shifted from an exclusive focus on the "effective control" test in holding that "permanent monuments displayed on public property," even when provided by private parties, generally "represent government speech." [1052] In so concluding, the Court relied not only on the fact that a government, in selecting monuments for display in a park, generally exercises "effective control" and has "final approval authority" over the monument, but also on (1) the government's long history of "us-[ing] monuments to speak for the public"; and (2) the public's common understanding as to monuments and their role in conveying a message from the government.[1053] In *Walker v. Texas Division, Sons of Confederate Veterans*, the Court relied on the same analysis used in *Pleasant Grove City* to conclude that the State of Texas, in approving privately crafted designs for specialty license plates, could reject designs the state found offensive without running afoul of the Free Speech Clause.[1054] Specifically, the *Walker* Court held that license plate designs amounted to government speech because (1) states historically used license plates to convey government messages; (2) the public closely identifies license plate designs with the state; and (3) the State of Texas maintained effective control over the messages conveyed on its specialty license plates.[1055] *Walker*, therefore, appears to indicate that the Court has settled on a more flexible approach to determining what constitutes government speech.

Governmental Regulation of Communications Industries

As in the previous section, the governmental regulations here considered may have only the most indirect relation to freedom of expression, or may clearly implicate that freedom even though the

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[1050] *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. ___, No. 14–144, slip op. at 1 (2015).
[1051] *See Livestock Mktg. Ass'n*, 544 U.S. at 560.
[1052] *See Pleasant Grove City*, 555 U.S. at 470.
[1053] *Id.* at 470–73.
[1054] *See Walker*, slip op. at 1.
[1055] *See id.* at 7–12.

purpose of the particular regulation is not to reach the content of the message. First, however, the judicially formulated doctrine distinguishing commercial expression from other forms is briefly considered.

Commercial Speech.—Starting in the 1970s, the Court's treatment of "commercial speech" underwent a transformation from total nonprotection under the First Amendment to qualified protection. The conclusion that a communication proposing a commercial transaction is a different order of speech underserving of First Amendment protection was arrived at almost casually in 1942 in *Valentine v. Chrestensen*.[1056] In *Chrestensen*, the Court upheld a city ordinance prohibiting distribution on the street of "commercial and business advertising matter," as applied to an exhibitor of a submarine who distributed leaflets describing his submarine on one side and on the other side protesting the city's refusal of certain docking facilities. The doctrine was in any event limited to promotion of commercial activities; the fact that expression was disseminated for profit or through commercial channels did not expose it to any greater regulation than if it were offered for free.[1057] The doctrine lasted in this form for more than twenty years.

The Court later modified this position so that commercial speech is protected "from unwarranted governmental regulation," although its nature makes it subject to greater limitations than may be imposed on expression not solely related to the economic interests of the speaker and its audience.[1058] The change to its earlier holdings was accomplished within a brief span of time in which the Justices haltingly but then decisively moved to a new position. Applying the doctrine in a narrow five-to-four decision, the Court sustained the application of a city's ban on employment discrimination to bar sex-designated employment advertising in a newspaper.[1059] Suggesting that speech does not lose its constitutional protection simply because it appears in a commercial context, Justice Powell,

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[1056] 316 U.S. 52 (1942). *See also* Breard v. City of Alexandria, 341 U.S. 622 (1951). The doctrine was one of the bases upon which the banning of all commercials for cigarettes from radio and television was upheld. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) (three-judge court), *aff'd per curiam*, 405 U.S. 1000 (1972).

[1057] Books that are sold for profit, Smith v. California, 361 U.S. 147, 150 (1959); Ginzburg v. United States, 383 U.S. 463, 474–75 (1966), advertisements dealing with political and social matters which newspapers carry for a fee, New York Times Co. v. Sullivan, 376 U.S. 254, 265–66 (1964), motion pictures which are exhibited for an admission fee, United States v. Paramount Pictures, 334 U.S. 131, 166 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952), were all during this period held entitled to full First Amendment protection regardless of the commercial element involved.

[1058] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 561 (1980).

[1059] Pittsburgh Press Co. v. Comm'n on Human Relations, 413 U.S. 376 (1973).

for the Court, did find the placing of want-ads in newspapers to be "classic examples of commercial speech," devoid of expressions of opinions with respect to issues of social policy; so the "did no more than propose a commercial transaction." But the Justice also noted that employment discrimination, which was facilitated by the advertisements, was itself illegal.[1060]

Next, the Court overturned a conviction under a state statute that made it illegal, by sale or circulation of any publication, to encourage or prompt the procuring of an abortion. The Court held the statute unconstitutional as applied to an editor of a weekly newspaper who published an advertisement announcing the availability of legal and safe abortions in another state and detailing the assistance that would be provided state residents in obtaining abortions in the other state.[1061] The Court discerned that the advertisements conveyed information of other than a purely commercial nature, that they related to services that were legal in the other jurisdiction, and that the state could not prevent its residents from obtaining abortions in the other state or punish them for doing so.

Then, the Court swept all these distinctions away as it voided a statute that declared it unprofessional conduct for a licensed pharmacist to advertise the prices of prescription drugs.[1062] In a suit brought by consumers to protect their right to receive information, the Court held that speech that does no more than propose a commercial transaction is nonetheless of such social value as to be entitled to protection. Consumers' interests in receiving factual information about prices may even be of greater value than political debate, but in any event price competition and access to information about it is in the public interest. State interests asserted in support of the ban—protection of professionalism and the quality of prescription goods—were found either badly served or not served by the statute.[1063]

Turning from the interests of consumers to receive information to the asserted right of advertisers to communicate, the Court voided several restrictions. The Court voided a municipal ordinance that barred the display of "For sale" and "Sold" signs on residential lawns, purportedly so as to limit "white flight" resulting from a "fear psychology" that developed among white residents following sale of homes

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[1060] 413 U.S. at 385, 389. The Court continues to hold that government may ban commercial speech related to illegal activity. Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 563–64 (1980).

[1061] Bigelow v. Virginia, 421 U.S. 809 (1975).

[1062] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). Justice Rehnquist dissented. Id. at 781.

[1063] 425 U.S. at 763–64 (consumers' interests), 764–65 (social interest), 766–70 (justifications for the ban).

to nonwhites. The right of owners to communicate their intention to sell a commodity and the right of potential buyers to receive the message was protected, the Court determined; the community interest could have been achieved by less restrictive means and in any event may not be achieved by restricting the free flow of truthful information.[1064] Similarly, deciding a question it had reserved in the *Virginia Pharmacy* case, the Court held that a state could not forbid lawyers from advertising the prices they charged for the performance of routine legal services.[1065] None of the proffered state justifications for the ban was deemed sufficient to overcome the private and societal interest in the free exchange of this form of speech.[1066] Nor may a state categorically prohibit attorney advertising through mailings that target persons known to face particular legal problems,[1067] or prohibit an attorney from holding himself out as a certified civil trial specialist,[1068] or prohibit a certified public accountant from holding herself out as a certified financial planner.[1069]

However, a state has been held to have a much greater countervailing interest in regulating person-to-person solicitation of clients by attorneys; therefore, especially because in-person solicitation is "a business transaction in which speech is an essential but subordinate component," the state interest need only be important rather than compelling.[1070] Similarly, the Court upheld a rule prohibiting

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[1064] Linmark Assocs. v. Township of Willingboro, 431 U.S. 85 (1977).

[1065] Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Chief Justice Burger and Justices Powell, Stewart, and Rehnquist dissented. Id. at 386, 389, 404.

[1066] 433 U.S. at 368–79. *See also In re* R.M.J., 455 U.S. 191 (1982) (invalidating sanctions imposed on attorney for deviating in some respects from rigid prescriptions of advertising style and for engaging in some proscribed advertising practices, because the state could show neither that his advertising was misleading nor that any substantial governmental interest was served by the restraints).

[1067] Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). *Shapero* was distinguished in Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995), a 5–4 decision upholding a prohibition on targeted direct-mail solicitations to victims and their relatives for a 30-day period following an accident or disaster. "*Shapero* dealt with a broad ban on *all* direct mail solicitations" (id. at 629), the Court explained, and was not supported, as Florida's more limited ban was, by findings describing the harms to be prevented by the ban. Dissenting Justice Kennedy disagreed that there was a valid distinction, pointing out that in *Shapero* the Court had said that "the mode of communication [mailings versus potentially more abusive in-person solicitation] makes all the difference," and that mailings were at issue in both *Shapero* and *Florida Bar*. 515 U.S. at 637 (quoting *Shapero*, 486 U.S. at 475).

[1068] Peel v. Illinois Attorney Disciplinary Comm'n, 496 U.S. 91 (1990).

[1069] Ibanez v. Florida Bd. of Accountancy, 512 U.S. 136 (1994) (also ruling that Accountancy Board could not reprimand the CPA, who was also a licensed attorney, for truthfully listing her CPA credentials in advertising for her law practice).

[1070] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). *But compare In re* Primus, 426 U.S. 412 (1978). The distinction between in-person and other attorney advertising was continued in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) ("print advertising . . . in most cases . . . will lack the coercive force of the personal presence of the trained advocate").

high school coaches from recruiting middle school athletes, finding that "the dangers of undue influence and overreaching that exist when a lawyer chases an ambulance are also present when a high school coach contacts an eighth grader." [1071] The Court later refused, however, to extend this principle to in-person solicitation by certified public accountants, explaining that CPAs, unlike attorneys, are not professionally "trained in the art of persuasion," and that the typical business executive client of a CPA is "far less susceptible to manipulation" than was the accident victim in *Ohralik*.[1072] A ban on personal solicitation is "justified only in situations 'inherently conducive to overreaching and other forms of misconduct.'" [1073] To allow enforcement of such a broad prophylactic rule absent identification of a serious problem such as ambulance chasing, the Court explained, would dilute commercial speech protection "almost to nothing." [1074]

Moreover, a statute prohibiting the practice of optometry under a trade name was sustained because there was "a significant possibility" that the public might be misled through deceptive use of the same or similar trade names.[1075] But a state regulatory commission prohibition of utility advertisements "intended to stimulate the purchase of utility services" was held unjustified by the asserted interests in energy consumption and avoidance of subsidization of additional energy costs by all consumers.[1076]

Although commercial speech is entitled to First Amendment protection, the Court has clearly held that it is different from other forms of expression; it has remarked on the commonsense differences between speech that does no more than propose a commercial transaction and other varieties.[1077] The Court has developed the

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[1071] Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 298 (2007).

[1072] Edenfield v. Fane, 507 U.S. 761, 775 (1993).

[1073] Edenfield v. Fane, 507 U.S. at 774, quoting *In re* R.M.J., 455 U.S. at 203, and quoted in Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 298 (2007).

[1074] 507 U.S. at 777.

[1075] Friedman v. Rogers, 440 U.S. 1 (1979).

[1076] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557 (1980). *See also* Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980) (voiding a ban on utility's inclusion in monthly bills of inserts discussing controversial issues of public policy). However, the linking of a product to matters of public debate does not thereby entitle an ad to the increased protection afforded noncommercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983).

[1077] Commercial speech is viewed by the Court as usually hardier than other speech; because advertising is the *sine qua non* of commercial profits, it is less likely to be chilled by regulation. Thus, the difference inheres in both the nature of the speech and the nature of the governmental interest. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771–72 n.24 (1976); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978). It is, of course, important to

four-pronged *Central Hudson* test to measure the validity of restraints upon commercial expression.[1078]

Under the first prong of the test, certain commercial speech is not entitled to protection; the informational function of advertising is the First Amendment concern and if an advertisement does not accurately inform the public about lawful activity, it can be suppressed.[1079]

Second, if the speech is protected, the interest of the government in regulating and limiting it must be assessed. The state must assert a substantial interest to be achieved by restrictions on commercial speech.[1080]

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develop distinctions between commercial speech and other speech for purposes of determining when broader regulation is permissible. The Court's definitional statements have been general, referring to commercial speech as that "proposing a commercial transaction," Ohralik v. Ohio State Bar Ass'n, *supra*, or as "expression related solely to the economic interests of the speaker and its audience." Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 561 (1980). It has simply viewed as noncommercial the advertising of views on public policy that would inhere to the economic benefit of the speaker. Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980). So too, the Court has refused to treat as commercial speech charitable solicitation undertaken by professional fundraisers, characterizing the commercial component as "inextricably intertwined with otherwise fully protected speech." Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1988). By contrast, a mixing of home economics information with a sales pitch at a "Tupperware" party did not remove the transaction from commercial speech. Board of Trustees v. Fox, 492 U.S. 469 (1989). In Nike, Inc. v. Kasky, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003), Nike was sued for unfair and deceptive practices for allegedly false statements it made concerning the working conditions under which its products were manufactured. The California Supreme Court ruled that the suit could proceed, and the Supreme Court granted certiorari, but then dismissed it as improvidently granted, with a concurring and two dissenting opinions. The issue left undecided was whether Nike's statements, though they concerned a matter of public debate and appeared in press releases and letters rather than in advertisements for its products, should be deemed " 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decisions." Id. at 657 (Stevens, J., concurring). Nike subsequently settled the suit.

[1078] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557 (1980). In one case, the Court referred to the test as having three prongs, referring to its second, third, and fourth prongs, as, respectively, its first, second, and third. The Court in that case did, however, apply *Central Hudson's* first prong as well. Florida Bar v. Went For It, Inc., 515 U.S. 618, 624 (1995).

[1079] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 563, 564 (1980). Within this category fall the cases involving the possibility of deception through such devices as use of trade names, Friedman v. Rogers, 440 U.S. 1 (1979), and solicitation of business by lawyers, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), as well as the proposal of an unlawful transaction, Pittsburgh Press Co. v. Commission on Human Relations, 413 U.S. 376 (1973).

[1080] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 564, 568–69 (1980). The Court deemed the state's interests to be clear and substantial. The pattern here is similar to much due process and equal protection litigation as well as expression and religion cases in which the Court accepts the proffered interests as legitimate and worthy. *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (governmental interest in protecting USOC's exclusive

Third, the restriction cannot be sustained if it provides only ineffective or remote support for the asserted purpose.[1081] Instead, the regulation must "directly advance" the governmental interest. The Court resolves this issue with reference to aggregate effects, and does not limit its consideration to effects on the challenging litigant.[1082]

Fourth, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.[1083] The Court has rejected the idea that a "least restrictive means" test is required. Instead, what is now required is a reasonable "fit" between means and ends, with the means

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use of word "Olympic" is substantial); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (government's interest in curbing strength wars among brewers is substantial, but interest in facilitating state regulation of alcohol is not substantial). *Contrast* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993), finding a substantial federal interest in facilitating state restrictions on lotteries. "Unlike the situation in *Edge Broadcasting*," the *Coors* Court explained, "the policies of some states do not prevent neighboring states from pursuing their own alcohol-related policies within their respective borders." 514 U.S. at 486. However, in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), the Court deemed insubstantial a governmental interest in protecting postal patrons from offensive but not obscene materials. For deferential treatment of the governmental interest, *see* Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (Puerto Rico's "substantial" interest in discouraging casino gambling by residents justifies ban on ads aimed at residents even though residents may legally engage in casino gambling, and even though ads aimed at tourists are permitted).

[1081] 447 U.S. at 569. The ban here was found to directly advance one of the proffered interests. *Contrast* this holding *with* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (prohibition on display of alcohol content on beer labels does not directly and materially advance government's interest in curbing strength wars among brewers, given the inconsistencies and "overall irrationality" of the regulatory scheme); and Edenfield v. Fane, 507 U.S. 761 (1993) (Florida's ban on in-person solicitation by certified public accountants does not directly advance its legitimate interests in protecting consumers from fraud, protecting consumer privacy, and maintaining professional independence from clients), where the restraints were deemed indirect or ineffectual.

[1082] United States v. Edge Broadcasting Co., 509 U.S. 418, 427 (1993) ("this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity").

[1083] Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 565, 569–71 (1980). This test is, of course, the "least restrictive means" standard. Shelton v. Tucker, 364 U.S. 479, 488 (1960). In *Central Hudson*, the Court found the ban more extensive than was necessary to effectuate the governmental purpose. *See also* Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), where the Court held that the governmental interest in not interfering with parental efforts at controlling children's access to birth control information could not justify a ban on commercial mailings about birth control products; "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." Id. at 74. *See also* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (there are less intrusive alternatives—*e.g.*, direct limitations on alcohol content of beer—to prohibition on display of alcohol content on beer label). Note, however, that, in San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 539 (1987), the Court applied the test

"narrowly tailored to achieve the desired objective." [1084] The Court, however, does "not equate this test with the less rigorous obstacles of rational basis review; . . . the existence of 'numerous and obvious less-burdensome alternatives to the restriction on commercial speech . . . is certainly a relevant consideration in determining whether the 'between ends and means is reasonable.'" [1085]

The "reasonable fit" standard has some teeth, the Court made clear in *City of Cincinnati v. Discovery Network, Inc.*,[1086] striking down a city's prohibition on distribution of "commercial handbills" through freestanding newsracks located on city property. The city's aesthetic interest in reducing visual clutter was furthered by reducing the total number of newsracks, but the distinction between prohibited "commercial" publications and permitted "newspapers" bore "no relationship *whatsoever*" to this legitimate interest.[1087] The city could not, the Court ruled, single out commercial speech to bear the full onus when "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault." [1088] By contrast, the Court upheld a federal law that prohibited broadcast of lottery advertisements by a broadcaster in a state that prohibits lotteries, while allowing broadcast of such ads by stations in states that sponsor lotteries. There was a "reasonable fit" between the restriction and the asserted federal interest in supporting state anti-gambling policies without unduly interfering with policies of neighboring states that promote lotteries.[1089] The prohibi-

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in a manner deferential to Congress: "the restrictions [at issue] are not broader than Congress reasonably could have determined to be necessary to further these interests."

[1084] Board of Trustees v. Fox, 492 U.S. 469, 480 (1989). In a 1993 opinion the Court elaborated on the difference between reasonable fit and least restrictive alternative. "A regulation need not be 'absolutely the least severe that will achieve the desired end,' but if there are numerous and obvious less-burdensome alternatives to the restriction . . . , that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993). *But see* Thompson v. Western States Medical Center, 535 U.S. 357, 368 (2002), in which the Court quoted the fourth prong of the *Central Hudson* test without mentioning its reformulation by *Fox*, and added, again without reference to *Fox*, "In previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the government must do so." Id. at 371.

[1085] Florida Bar v. Went For It, Inc., 515 U.S. 618, 632 (1995).

[1086] 507 U.S. 410 (1993). *See also* Edenfield v. Fane, 507 U.S. 761 (1993), decided the same Term, relying on the "directly advance" third prong of *Central Hudson* to strike down a ban on in-person solicitation by certified public accountants.

[1087] 507 U.S. at 424.

[1088] 507 U.S. at 426. The Court also noted the "minute" effect of removing 62 "commercial" newsracks while 1,500 to 2,000 other newsracks remained in place. Id. at 418.

[1089] United States v. Edge Broadcasting Co., 509 U.S. 418 (1993).

tion "directly served" the congressional interest, and could be applied to a broadcaster whose principal audience was in an adjoining lottery state, and who sought to run ads for that state's lottery.[1090]

In 1999, the Court struck down a provision of the same statute as applied to advertisements for private casino gambling that are broadcast by radio and television stations located in a state where such gambling is legal.[1091] The Court emphasized the interrelatedness of the four parts of the *Central Hudson* test: "Each [part] raises a relevant question that may not be dispositive to the First Amendment inquiry, but the answer to which may inform a judgment concerning the other three." [1092] For example, although the government has a substantial interest in reducing the social costs of gambling, the fact that the Congress has simultaneously encouraged gambling, because of its economic benefits, makes it more difficult for the government to demonstrate that its restriction on commercial speech materially advances its asserted interest and constitutes a reasonable "fit." [1093] In this case, "[t]he operation of [18 U.S.C.] § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." [1094] Moreoever, "the regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." [1095]

In *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, the Court asserted that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." [1096] Subsequently, however, the Court eschewed reliance on *Posadas*,[1097] and it seems doubtful that the Court would again embrace the broad principle that government may ban all advertising of an activity that it permits but has power to pro-

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[1090] 507 U.S. at 428.

[1091] Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173 (1999).

[1092] 527 U.S. at 184.

[1093] 527 U.S. at 186–87.

[1094] 527 U.S. at 190.

[1095] 527 U.S. at 195.

[1096] 478 U.S. 328, 345–46 (1986). For discussion of the case, *see* P. Kurland, *Posadas de Puerto Rico v. Tourism Company: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,"* 1986 SUP. CT. REV. 1.

[1097] In Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (invalidating a federal ban on revealing alcohol content on malt beverage labels), the Court rejected reliance on *Posadas*, pointing out that the statement in *Posadas* had been made only after a determination that the advertising could be upheld under *Central Hudson*. The Court found it unnecessary to consider the greater-includes-lesser argument in United States v. Edge Broadcasting Co., 509 U.S. 418, 427 (1993), upholding through application of *Central Hudson* principles a ban on broadcast of lottery ads.

hibit. Indeed, the Court's very holding in *44 Liquormart, Inc. v. Rhode Island*,[1098] striking down the state's ban on advertisements that provide truthful information about liquor prices, is inconsistent with the general proposition. A Court plurality in *44 Liquormart* squarely rejected *Posadas*, calling it "erroneous," declining to give force to its "highly deferential approach," and proclaiming that a state "does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate."[1099] Four other Justices concluded that *Posadas* was inconsistent with the "closer look" that the Court has since required in applying the principles of *Central Hudson*.[1100]

The "different degree of protection" accorded commercial speech has a number of consequences as regards other First Amendment doctrine. For instance, somewhat broader times, places, and manner regulations are to be tolerated,[1101] and the rule against prior restraints may be inapplicable.[1102] Further, disseminators of commercial speech are not protected by the overbreadth doctrine.[1103] On the other hand, there are circumstances in which the nature of the restriction placed on commercial speech may alter the First Amendment analysis, and even result in the application of a heightened level of scrutiny.

For instance, in *Sorrell v. IMS Health, Inc.*,[1104] the Court struck down state restrictions on pharmacies and "data-miners" selling or leasing information on the prescribing behavior of doctors for marketing purposes and related restrictions limiting the use of that in-

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[1098] 517 U.S. 484 (1996).

[1099] 517 U.S. at 510 (opinion of Stevens, joined by Justices Kennedy, Thomas, and Ginsburg). Stevens' opinion also dismissed the *Posadas* "greater-includes-the-lesser argument" as "inconsistent with both logic and well-settled doctrine," pointing out that the First Amendment "presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." Id. at 511–512.

[1100] 517 U.S. at 531–32 (concurring opinion of O'Connor, joined by Chief Justice Rehnquist and by Justices Souter and Breyer).

[1101] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977). But, in Linmark Associates v. Township of Willingboro, 431 U.S. 85, 93–94 (1977), the Court refused to accept a times, places, and manner defense of an ordinance prohibiting "For Sale" signs on residential lawns. First, ample alternative channels of communication were not available, and second, the ban was seen rather as a content limitation.

[1102] Central Hudson Gas & Elec. Co. v. PSC, 447 U.S. 557, 571 n.13 (1980), citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772 n.24 (1976). *See* "The Doctrine of Prior Restraint," *supra*.

[1103] Bates v. State Bar of Arizona, 433 U.S. 350, 379–81 (1977); Central Hudson Gas & Electric Co. v. PSC, 447 U.S. 557, 565 n.8 (1980).

[1104] 564 U.S. ___, No. 10–779, slip op. (2011).

formation by pharmaceutical companies.[1105] These prohibitions, however, were subject to a number of exceptions, including provisions allowing such prescriber-identifying information to be used for health care research. Because the restrictions only applied to the use of this information for marketing and because they principally applied to pharmaceutical manufacturers of non-generic drugs, the Court found that these restrictions were content-based and speaker-based limits and thus subject to heightened scrutiny.[1106]

Different degrees of protection may also be discerned among different categories of commercial speech. The first prong of the *Central Hudson* test means that false, deceptive, or misleading advertisements need not be permitted; government may require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent deception.[1107] But even truthful, non-misleading commercial speech may be regulated, and the validity of such regulation is tested by application of the remaining prongs of the *Central Hudson* test. The test itself does not make further distinctions based on the content of the commercial message or the nature of the governmental interest (that interest need only be "substantial"). Recent decisions suggest, however, that further distinctions may exist. Measures aimed at preserving "a fair bargaining process" between consumer and advertiser[1108] may be more likely to pass the test[1109] than are regulations designed to implement general health, safety,

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[1105] "Detailers," marketing specialists employed by pharmaceutical manufacturers, used the reports to refine their marketing tactics and increase sales to doctors.

[1106] Although the state put forward a variety of proposed governmental interests to justify the regulations, the Court found these interests (expectation of physician privacy, discouraging harassment of physicians, and protecting the integrity of the doctor-physician relationship) were ill-served by the content-based restrictions. 564 U.S. ___, No. 10–779, slip op. at 17–21. The Court also rejected the argument that the regulations were an appropriate way to reduce health care costs, noting that "[t]he State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by diminishing detailers' ability to influence prescription decisions. Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the 'fear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech." Id. at 21–22.

[1107] Bates v. State Bar of Arizona, 433 U.S. 350, 383–84 (1977); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Requirements that advertisers disclose more information than they otherwise choose to are upheld "as long as [they] are reasonably related to the State's interest in preventing deception of consumers," the Court explaining that "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right" requiring strict scrutiny of the disclosure requirement. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 & n.14 (1985) (upholding requirement that attorney's contingent fees ad mention that unsuccessful plaintiffs might still be liable for court costs).

[1108] 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996).

[1109] *See*, *e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 465 (1978) (upholding ban on in-person solicitation by attorneys due in part to the "potential for over-

or moral concerns.[1110] As the governmental interest becomes further removed from protecting a fair bargaining process, it may become more difficult to establish the absence of less burdensome regulatory alternatives and the presence of a "reasonable fit" between the commercial speech restriction and the governmental interest.[1111]

Taxation.—Disclaiming any intimation "that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government," the Court voided a state two-percent tax on the gross receipts of advertising in newspapers with a circulation exceeding 20,000 copies a week.[1112] In the Court's view, the tax was analogous to the 18th-century English practice of imposing advertising and stamp taxes on newspapers for the express pur-

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reaching" when a trained advocate "solicits an unsophisticated, injured, or distressed lay person").

[1110] *Compare* United States v. Edge Broadcasting Co., 509 U.S. 418 (1993) (upholding federal law supporting state interest in protecting citizens from lottery information) *and* Florida Bar v. Went For It, Inc., 515 U.S. 618, 631 (1995) (upholding a 30-day ban on targeted, direct-mail solicitation of accident victims by attorneys, not because of any presumed susceptibility to overreaching, but because the ban "forestall[s] the outrage and irritation with the . . . legal profession that the [banned] solicitation . . . has engendered") *with* Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) (striking down federal statute prohibiting display of alcohol content on beer labels) *and* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (striking down state law prohibiting display of retail prices in ads for alcoholic beverages).

[1111] "[S]everal Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases." Thompson v. Western States Medical Center, 535 U.S. 357, 367 (2002). Justice Stevens has criticized the *Central Hudson* test because it seemingly allows regulation of any speech propounded in a commercial context regardless of the content of that speech. "[A]ny description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead." Rubin v. Coors Brewing Co., 514 U.S. 476, 494 (1995) (concurring opinion). The Justice repeated these views in 1996: "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1996) (a portion of the opinion joined by Justices Kennedy and Ginsburg). Justice Thomas, similarly, wrote that, in cases "in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the *Central Hudson* test should not be applied because such an interest' is *per se* illegitimate. . . ." Greater New Orleans Broadcasting Ass'n, Inc. v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring) (internal quotation marks omitted). Other decisions in which the Court majority acknowledged that some Justices would grant commercial speech greater protection than it has under the *Central Hudson* test include United States v. United Foods, Inc., 533 U.S. 405, 409–410 (2001) (mandated assessments, used for advertising, on handlers of fresh mushrooms struck down as compelled speech, rather than under *Central Hudson*), and Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554 (2001) (various state restrictions on tobacco advertising struck down under *Central Hudson* as overly burdensome).

[1112] Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

pose of pricing the opposition penny press beyond the means of the mass of the population.[1113] The tax at issue focused exclusively upon newspapers, it imposed a serious burden on the distribution of news to the public, and it appeared to be a discriminatorily selective tax aimed almost solely at the opposition to the state administration.[1114] Combined with the standard that government may not impose a tax directly upon the exercise of a constitutional right itself,[1115] these tests seem to permit general business taxes upon receipts of businesses engaged in communicating protected expression without raising any First Amendment issues.[1116]

Ordinarily, a tax singling out the press for differential treatment is highly suspect, and creates a heavy burden of justification on the state. This is so, the Court explained in 1983, because such "a powerful weapon" to single out a small group carries with it a lessened political constraint than do those measures affecting a broader based constituency, and because "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression." [1117] The state's interest in raising revenue is not sufficient justification for differential treatment of the press. Moreover, the Court refused to adopt a rule permitting analysis of the "effective burden" imposed by a differential tax; even if the current effective tax burden could be measured and upheld, the threat of increasing the burden on the press might have "censorial effects," and "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." [1118]

[1113] 297 U.S. at 245–48.

[1114] 297 U.S. at 250–51. *Grosjean* was distinguished on this latter basis in Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

[1115] Murdock v. Pennsylvania, 319 U.S. 105 (1943); Follett v. McCormick, 321 U.S. 573 (1944) (license taxes upon Jehovah's Witnesses selling religious literature invalid).

[1116] *Cf.* City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382, 252 P.2d 56 (1953), *cert. denied*, 346 U.S. 833 (1953) (Justices Black and Douglas dissenting). *See also* Cammarano v. United States, 358 U.S. 498 (1959) (no First Amendment violation to deny business expense tax deduction for expenses incurred in lobbying about measure affecting one's business); Leathers v. Medlock, 499 U.S. 439 (1991) (no First Amendment violation in applying general gross receipts tax to cable television services while exempting other communications media).

[1117] Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983) (invalidating a Minnesota use tax on the cost of paper and ink products used in a publication, and exempting the first $100,000 of such costs each calendar year; Star & Tribune paid roughly two-thirds of all revenues the state raised by the tax). The Court seemed less concerned, however, when the affected group within the press was not so small, upholding application of a gross receipts tax to cable television services even though other segments of the communications media were exempted. Leathers v. Medlock, 499 U.S. 439 (1991).

[1118] 460 U.S. at 588, 589.

Also difficult to justify is taxation that targets specific subgroups within a segment of the press for differential treatment. An Arkansas sales tax exemption for newspapers and for "religious, professional, trade, and sports journals" published within the state was struck down as an invalid content-based regulation of the press.[1119] Entirely as a result of content, some magazines were treated less favorably than others. The general interest in raising revenue was again rejected as a "compelling" justification for such treatment, and the measure was viewed as not narrowly tailored to achieve other asserted state interests in encouraging "fledgling" publishers and in fostering communications.

The Court seemed to change course somewhat in 1991, upholding a state tax that discriminated among different components of the communications media, and proclaiming that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas." [1120]

The general principle that government may not impose a financial burden based on the content of speech underlay the Court's invalidation of New York's "Son of Sam" law, which provided that a criminal's income from publications describing his crime was to be placed in escrow and made available to victims of the crime.[1121] Although the Court recognized a compelling state interest in ensuring that criminals do not profit from their crimes, and in compensating crime victims, it found that the statute was not narrowly tailored to those ends. The statute applied only to income derived from speech, not to income from other sources, and it was significantly overinclusive because it reached a wide range of literature (*e.g.*, the *Confessions of Saint Augustine* and Thoreau's *Civil Disobedience*) "that did not enable a criminal to profit from his crime while a victim remains uncompensated" [1122]

Labor Relations.—Just as newspapers and other communications businesses are subject to nondiscriminatory taxation, they are entitled to no immunity from the application of general laws regulating their relations with their employees and prescribing wage and hour standards. In *Associated Press v. NLRB*,[1123] the application of the National Labor Relations Act to a newsgathering agency was found to raise no constitutional problem. "The publisher of a news-

[1119] Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

[1120] Leathers v. Medlock, 499 U.S. 439, 453 (1991) (tax applied to all cable television systems within the state, but not to other segments of the communications media).

[1121] Simon & Schuster v. New York Crime Victims Bd., 502 U.S. 105 (1991).

[1122] 502 U.S. at 122.

[1123] 301 U.S. 103, 132 (1937).

paper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. . . . The regulation here in question has no relation whatever to the impartial distribution of news." Similarly, the Court has found no problem with requiring newspapers to pay minimum wages and observe maximum hours.[1124]

Antitrust Laws.—Resort to the antitrust laws to break up restraints on competition in the newsgathering and publishing field was found not only to present no First Amendment problem, but to comport with the government's obligation under that Amendment. Justice Black wrote: "It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not." [1125]

Thus, both newspapers and broadcasters, as well as other such industries, may not engage in monopolistic and other anticompetitive activities free of possibility of antitrust law attack,[1126] even if such activities might promote speech.[1127]

[1124] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[1125] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[1126] Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (refusal of newspaper publisher who enjoyed a substantial monopoly to sell advertising to persons also advertising over a competing radio station violates antitrust laws); United States v. Radio Corp. of America, 358 U.S. 334 (1959) (FCC approval no bar to antitrust suit); United States v. Greater Buffalo Press, 402 U.S. 549 (1971) (monopolization of color comic supplements). *See also* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (upholding FCC rules prospectively barring, and in some instances requiring divesting to prevent, the common ownership of a radio or television broadcast station and a daily newspaper located in the same community).

[1127] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) (pooling arrangement between two newspapers violates antitrust laws; First Amendment argument that one paper will fail if arrangement is outlawed rejected). In response to this decision, Congress enacted the Newspaper Preservation Act to sanction certain joint arrangements where one paper is in danger of failing. 84 Stat. 466 (1970), 15 U.S.C. §§ 1801–1804.

Broadcast Radio and Television.—Because there are a limited number of broadcast frequencies for radio and non-cable television use, the Federal Government licenses access to these frequencies, permitting some applicants to use them and denying the greater number of applicants such permission. Even though this licensing system is in form a variety of prior restraint, the Court has held that it does not present a First Amendment issue because of the unique characteristic of scarcity.[1128] Thus, the Federal Communications Commission has broad authority to determine the right of access to broadcasting,[1129] although, of course, the regulation must be exercised in a manner that is neutral with regard to the content of the materials broadcast.[1130]

In certain respects, however, governmental regulation does implicate First Amendment values, and, in *Red Lion Broadcasting Co. v. FCC*, the Court upheld an FCC regulation that required broadcasters to afford persons an opportunity to reply if they were attacked on the air on the basis of their "honesty, character, integrity or like personal qualities," or if they were legally qualified candidates and a broadcast editorial endorsed their opponent or opposed them.[1131] In *Red Lion*, Justice White explained that "differences in the characteristics of [various] media justify differences in First Amendment standards applied to them."[1132] Thus, although everyone has a right to speak, write, or publish as he will, subject to very few limitations, there is no comparable right of everyone to broadcast. The frequencies are limited and some few must be given the privilege over others. The particular licensee, however, has no First Amendment right to hold that license and his exclusive privilege may be qualified. Qualification by censorship of content is impermissible, but the First Amendment does not prevent a governmental insis-

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[1128] NBC v. United States, 319 U.S. 190 (1943); *see also* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375–79, 387–89 (1969); FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 798–802 (1978).

[1129] NBC v. United States, 319 U.S. 190 (1943); Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933; FCC v. Pottsville, 309 U.S. 134 (1940); FCC v. ABC, 347 U.S. 284 (1954); Farmers Union v. WDAY, 360 U.S. 525 (1958).

[1130] "But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views or upon any other capricious basis. If it did, or if the Commission by these regulations proposed a choice among applicants upon some such basis, the issue before us would be wholly different." NBC v. United States, 319 U.S. 190, 226 (1943).

[1131] 395 U.S. 367, 373 (1969). "The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine. . . ." Id. at 369. The two issues passed on in *Red Lion* were integral parts of the doctrine.

[1132] 395 U.S. at 386.

tence that a licensee "conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves." [1133] Furthermore, said Justice White, "[b]ecause of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." [1134] The broadcasters had argued that, if they were required to provide equal time at their expense to persons attacked and to points of view different from those expressed on the air, expression would be curbed through self-censorship, for fear of controversy and economic loss. Justice White thought this possibility "at best speculative," but if it should materialize "the Commission is not powerless to insist that they give adequate and fair attention to public issues." [1135]

In *Columbia Broadcasting System v. Democratic National Committee*,[1136] the Court rejected claims of political groups that the broadcast networks were constitutionally required to sell them broadcasting time for the presentation of views on controversial issues. The ruling terminated a broad drive to obtain that result, but the fragmented nature of the Court's multiple opinions precluded a satisfactory evaluation of the constitutional implications of the case. However, in *CBS v. FCC*,[1137] the Court held that Congress had conferred on candidates seeking federal elective office an affirmative, promptly enforceable right of reasonable access to the use of broadcast stations, to be administered through FCC control over license revocations, and held such right of access to be within Congress's power to grant, the First Amendment notwithstanding. The constitutional analysis was brief and merely restated the spectrum scarcity rationale and the role of the broadcasters as fiduciaries for the public interest.

[1133] 395 U.S. at 389.
[1134] 395 U.S. at 390.
[1135] 395 U.S. at 392–93.
[1136] 412 U.S. 94 (1973).
[1137] 453 U.S. 367 (1981). The dissent argued that the FCC had assumed, and the Court had confirmed it in assuming, too much authority under the congressional enactment. In its view, Congress had not meant to do away with the traditional deference to the editorial judgments of the broadcasters. Id. at 397 (Justices White, Rehnquist, and Stevens).

In *FCC v. League of Women Voters*,[1138] the Court took the same general approach to governmental regulation of broadcasting, but struck down a total ban on editorializing by stations receiving public funding. In summarizing the principles guiding analysis in this area, the Court reaffirmed that Congress may regulate in ways that would be impermissible in other contexts, but indicated that broadcasters are entitled to greater protection than may have been suggested by *Red Lion*. "[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. . . . [T]hese restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest." [1139] However, the earlier cases were distinguished. "[I]n sharp contrast to the restrictions upheld in *Red Lion* or in [*CBS v. FCC*], which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, § 399 directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner." [1140] The ban on all editorializing was deemed too severe and restrictive a means of accomplishing the governmental purposes—protecting public broadcasting stations from being coerced, through threat or fear of withdrawal of public funding, into becoming "vehicles for governmental propagandizing," and also keeping the stations "from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints." [1141] Expression of editorial opinion was described as a "form of speech . . . that lies at the heart of First Amendment protection," [1142] and the ban was said to be "defined solely on the basis of . . . content," the assumption being that editorial speech is speech directed at "controversial issues of public importance." [1143] Moreover, the ban on editorializing was both overinclusive, applying to commentary on local issues of no likely interest to Congress, and underinclusive, not applying at all to expression of controver-

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[1138] 468 U.S. 364 (1984), holding unconstitutional § 399 of the Public Broadcasting Act of 1967, as amended. The decision was 5–4, with Justice Brennan's opinion for the Court being joined by Justices Marshall, Blackmun, Powell, and O'Connor, and with Justices White, Rehnquist (joined by Chief Justice Burger and by Justice White), and Stevens filing dissenting opinions.

[1139] 468 U.S. at 380. The Court rejected the suggestion that only a "compelling" rather than "substantial" governmental interest can justify restrictions.

[1140] 468 U.S. at 385.

[1141] 468 U.S. at 384–85. Dissenting Justice Stevens thought that the ban on editorializing served an important purpose of "maintaining government neutrality in the free marketplace of ideas." Id. at 409.

[1142] 468 U.S. at 381.

[1143] 468 U.S. at 383.

sial opinion in the context of regular programming. Therefore, the Court concluded, the restriction was not narrowly enough tailored to fulfill the government's purposes.

Sustaining FCC discipline of a broadcaster who aired a record containing a series of repeated "barnyard" words, considered "indecent" but not obscene, the Court posited a new theory to explain why the broadcast industry is less entitled to full constitutional protection than are other communications entities.[1144] "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizens, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Second, broadcasting is uniquely accessible to children, even those too young to read. . . . The ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting." [1145] The Court emphasized the "narrowness" of its holding, which "requires consideration of a host of variables." [1146] The use of more than "an occasional expletive," the time of day of the broadcast, the likely audience, "and differences between radio, television, and perhaps closed-circuit transmissions" were all relevant in the Court's view.[1147]

Governmentally Compelled Right of Reply to Newspapers.— However divided it may have been in dealing with access to the broadcast media, the Court was unanimous in holding void under

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[1144] FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

[1145] 438 U.S. at 748–51. This was the only portion of the constitutional discussion that obtained the support of a majority of the Court. In Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 748 (1996), the Court noted that spectrum scarcity "has little to do with a case that involves the effects of television viewing on children."

[1146] 438 U.S. at 750. *See also* id. at 742–43 (plurality opinion), and id. at 755–56 (Justice Powell concurring) ("The Court today reviews only the Commission's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion.").

[1147] 438 U.S. at 750. Subsequently, the FCC began to apply its indecency standard to fleeting uses of expletives in non-sexual and non-excretory contexts. The U.S. Court of Appeals for the Second Circuit found this practice arbitrary and capricious under the Administrative Procedure Act, but the Supreme Court disagreed and upheld the FCC policy without reaching the First Amendment question. FCC v. Fox Television Stations, Inc., 556 U.S. ___, No. 07–582 (2009). *See also* CBS Corp. v. FCC, 535 F.3d 167 (3d Cir. 2008), vacated and remanded, 129 S. Ct. 2176 (2009) (invalidating, on non-constitutional grounds, a fine against CBS for broadcasting Janet Jackson's exposure of her breast for nine-sixteenths of a second during a Super Bowl halftime show). The Supreme Court vacated and remanded this decision to the Third Circuit for further consideration in light of FCC v. Fox Television Stations, Inc. Decisions regarding legislation to ban "indecent" expression in broadcast and cable media as well as in other contexts are discussed under "Non-obscene But Sexually Explicit and Indecent Expression," *infra*.

the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper.[1148] Granting that the number of newspapers had declined over the years, that ownership had become concentrated, and that new entries were prohibitively expensive, the Court agreed with proponents of the law that the problem of newspaper responsibility was a great one. But press responsibility, although desirable, "is not mandated by the Constitution," whereas freedom is. The compulsion exerted by government on a newspaper to print what it would not otherwise print, "a compulsion to publish that which 'reason tells them should not be published,'" runs afoul of the free press clause.[1149]

Cable Television

The Court has recognized that cable television "implicates First Amendment interests," because a cable operator communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering.[1150] Moreover, "settled principles of . . . First Amendment jurisprudence" govern review of cable regulation; cable is not limited by "scarce" broadcast frequencies and does not require the same less rigorous standard of review that the Court applies to regulation of broadcasting.[1151] Cable does, however, have unique characteristics that justify regulations that single out cable for special treatment.[1152] The Court in *Turner Broadcasting System v. FCC* [1153] upheld federal statutory requirements that cable systems carry local com-

[1148] Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974).

[1149] 418 U.S. at 256. The Court also adverted to the imposed costs of the compelled printing of replies but this seemed secondary to the quoted conclusion. The Court has also held that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees. Although a plurality opinion to which four Justices adhered relied heavily on *Tornillo*, there was no Court majority consensus as to rationale. Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986). *See also* Hurley v. Irish-American Gay Group, 514 U.S. 334 (1995) (state may not compel parade organizer to allow participation by a parade unit proclaiming message that organizer does not wish to endorse).

[1150] City of Los Angeles v. Preferred Communications, 476 U.S. 488 (1986) (leaving for future decision how the operator's interests are to be balanced against a community's interests in limiting franchises and preserving utility space); Turner Broadcasting System v. FCC, 512 U.S. 622, 636 (1994).

[1151] Turner Broadcasting System v. FCC, 512 U.S. 622, 638–39 (1994).

[1152] 512 U.S. at 661 (referring to the "bottleneck monopoly power" exercised by cable operators in determining which networks and stations to carry, and to the resulting dangers posed to the viability of broadcast television stations). *See also* Leathers v. Medlock, 499 U.S. 439 (1991) (application of state gross receipts tax to cable industry permissible even though other segments of the communications media were exempted).

[1153] 512 U.S. 622 (1994).

mercial and public television stations. Although these "must-carry" requirements "distinguish between speakers in the television programming market," they do so based on the manner of transmission and not on the content the messages conveyed, and hence are content-neutral.[1154] The regulations could therefore be measured by the "intermediate level of scrutiny" set forth in *United States v. O'Brien*.[1155] Two years later, however, a splintered Court could not agree on what standard of review to apply to content-based restrictions of cable broadcasts. Striking down a requirement that cable operators must, in order to protect children, segregate and block programs with patently offensive sexual material, a Court majority in *Denver Area Educational Telecommunications Consortium v. FCC*,[1156] found it unnecessary to determine whether strict scrutiny or some lesser standard applies, because it deemed the restriction invalid under any of the alternative tests. There was no opinion of the Court on the other two holdings in the case,[1157] and a plurality[1158] rejected assertions that public forum analysis,[1159] or a rule giving cable operators' editorial rights "general primacy" over the rights of programmers and viewers,[1160] should govern.

Subsequently, in *United States v. Playboy Entertainment Group, Inc.*,[1161] the Supreme Court made clear, as it had not in *Denver Consortium*, that strict scrutiny applies to content-based speech restrictions on cable television. The Court struck down a federal statute

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[1154] 512 U.S. at 645. "Deciding whether a particular regulation is content-based or content-neutral is not always a simple task," the Court confessed. Id. at 642. Indeed, dissenting Justice O'Connor, joined by Justices Scalia, Ginsburg, and Thomas, viewed the rules as content-based. Id. at 674–82.

[1155] 391 U.S. 367, 377 (1968). The Court remanded *Turner* for further factual findings relevant to the *O'Brien* test. On remand, the district court upheld the must-carry provisions, and the Supreme Court affirmed, concluding that it "cannot displace Congress's judgment respecting content-neutral regulations with our own, so long as its policy is grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." Turner Broadcasting System v. FCC, 520 U.S. 180, 224 (1997).

[1156] 518 U.S. 727, 755 (1996) (invalidating § 10(b) of the Cable Television Consumer Protection and Competition Act of 1992).

[1157] Upholding § 10(a) of the Act, which permits cable operators to prohibit indecent material on leased access channels; and striking down § 10(c), which permits a cable operator to prevent transmission of "sexually explicit" programming on public access channels. In upholding § 10(a), Justice Breyer's plurality opinion cited FCC v. Pacifica Foundation, 438 U.S. 726 (1978), and noted that cable television "is as 'accessible to children' as over-the-air broadcasting, if not more so." 518 U.S. at 744.

[1158] This section of Justice Breyer's opinion was joined by Justices Stevens, O'Connor, and Souter. 518 U.S. at 749.

[1159] Justice Kennedy, joined by Justice Ginsburg, advocated this approach, 518 U.S. at 791, and took the plurality to task for its "evasion of any clear legal standard." 518 U.S. at 784.

[1160] Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, advocated this approach.

[1161] 529 U.S. 803, 813 (2000).

designed to "shield children from hearing or seeing images resulting from signal bleed," which refers to blurred images or sounds that come through to non-subscribers.[1162] The statute required cable operators, on channels primarily dedicated to sexually oriented programming, either to scramble fully or otherwise fully block such channels, or to not provide such programming when a significant number of children are likely to be viewing it, which, under an FCC regulation meant to transmit the programming only from 10 p.m. to 6 a.m. The Court found that, even without "discount[ing] the possibility that a graphic image could have a negative impact on a young child," it could not conclude that Congress had used "the least restrictive means for addressing the problem."[1163] Congress in fact had enacted another provision that was less restrictive and that served the government's purpose. This other provision requires that, upon request by a cable subscriber, a cable operator, without charge, fully scramble or otherwise fully block any channel to which a subscriber does not subscribe.[1164]

Government Restraint of Content of Expression

As a general matter, government may not regulate speech "because of its message, its ideas, its subject matter, or its content."[1165] "It is rare that a regulation restricting speech because of its content will ever be permissible."[1166] The constitutionality of

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[1162] 529 U.S. at 806.

[1163] 529 U.S. at 826–27. The Court did not state that there is a compelling interest in preventing the possibility of a graphic image's having a negative impact on a young child, and may have implied that there is no compelling interest in preventing the possibility of a graphic image's having a negative impact on an older child. It did state: "Even upon the assumption that the government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech." Id. at 825.

[1164] 47 U.S.C. § 560.

[1165] Police Dep't of Chicago v. Mosle, 408 U.S. 92, 95 (1972). *See also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 208–12 (1975); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Carey v. Brown, 447 U.S. 455 (1980); Metromedia v. City of San Diego, 453 U.S. 490 (1981) (plurality opinion); Widmar v. Vincent, 454 U.S. 263 (1981); Regan v. Time, Inc., 468 U.S. 641 (1984).

[1166] United States v. Playboy Entertainment Group, Inc., 529 U.S. 801, 818 (2000). The distinction between, on the one hand, directly regulating, and, on the other hand, incidentally affecting, the content of expression was sharply drawn by Justice Harlan in Konigsberg v. State Bar of California, 366 U.S. 36, 49–51 (1961): "Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendments forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the gov-

content-based regulation is determined by a compelling interest test derived from equal protection analysis: the government "must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." [1167] Narrow tailoring in the case of fully protected speech requires that the government "choose[ ] the least restrictive means to further the articulated interest." [1168] Application of this test ordinarily results in invalidation of the regulation.[1169]

The Court has recognized two central ways in which a law can impose content-based restrictions, which include not only restrictions on particular viewpoints, but also prohibitions on public discussions of an entire topic.[1170] First, a government regulation of speech is content-based if the regulation on its face draws distinctions based on the message a speaker conveys.[1171] For example, in *Boos v. Barry*, the Court held that a Washington D.C. ordinance prohibiting the display of signs near any foreign embassy that brought a foreign government into "public odiom" or "public disrepute" drew a content-based distinction on its face.[1172] Second, the Court has recognized that facially content-neutral laws can be considered content-based regulations of speech if a law cannot be "justified without reference to the content of speech" or was adopted "because of disagreement with the message [the speech] conveys." [1173] As a result, in an example provided in *Sorrell v. IMS Health*, the Court noted that if a government "bent on frustrating an impending demonstration" passed a law demanding two years' notice before the issuance of parade permits, such a law, while facially content-neutral, would be content-based because its purpose was to suppress speech on a particular topic.[1174]

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ernmental interest involved." The Court set forth the test for "incidental limitations on First Amendment freedoms" in United States v. O'Brien, 391 U.S. 367, 376 (1968). *See also* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 537 (1987).

[1167] Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987).

[1168] Sable Commc'ns of Cal. v. FCC, 492 U.S. 115, 126 (1989).

[1169] *But see* Williams-Yulee v. Fla. Bar, 575 U.S. ___, No. 13–1499, slip op. (2015) (upholding a provision of the state judicial code prohibiting judicial candidates from personally soliciting campaign funds); Burson v. Freeman, 504 U.S. 191 (1992) (plurality opinion) (upholding state law prohibiting the solicitation of votes and the display or distribution of campaign literature within 100 feet of a polling place).

[1170] *See* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987) (citing Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537 (1980)).

[1171] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (holding that content-neutral "speech regulations are those that are *justified* without reference to the content of the regulated speech.") (internal quotations and citations omitted).

[1172] *See* 485 U.S. 312, 315 (1988).

[1173] *See Ward*, 491 U.S. at 791.

[1174] *See* 564 U.S. 552, 566 (2011).

Importantly, for a law that falls within the first category of recognized content-based regulations—those laws that are content-based on their face—the government's justifications or purposes for enacting that law are irrelevant to determine whether the law is subject to strict scrutiny.[1175] Put another way, for laws that facially draw distinctions based on the subject matter of the underlying speech, there is no need for a court to look into the purpose of the underlying law being challenged under the First Amendment; instead, that law is automatically subject to strict scrutiny.[1176] As such, in *Reed v. Town of Gilbert*, the Court, in invalidating provisions of a municipality's sign code that imposed more stringent restrictions on signs directing the public to an event than on signs conveying political or ideological messages, determined the sign code to be content-based and subject to strict scrutiny, notwithstanding the town's "benign," non-speech related motives for enacting the code.[1177] In so holding, the Court reasoned that the First Amendment, by targeting the "abridgement of speech," is centrally concerned with the operations of laws and not the motivations of those who enacted the laws.[1178] In this vein, the Court concluded that the "vice" of content-based legislation is not that it will "always" be used for invidious purposes, but rather that content-based restrictions necessarily lend themselves to such purposes.[1179]

Nonetheless, as discussed below, the Supreme Court has recognized that the First Amendment permits restrictions upon the content of speech in a "few limited areas," including obscenity, defamation, fraud, incitement, fighting words, and speech integral to criminal conduct.[1180] This "two-tier" approach to content-based regulations of speech derives from *Chaplinsky v. New Hampshire*, wherein the Court opined that there exist "certain well-defined and narrowly limited classes of speech [that] are no essential part of any exposition of ideas, and are of such slight social value as a step to truth" such that the government may prevent those utterances and punish those

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[1175] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 642–43 (1994) ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates, based on content.").

[1176] *See* Reed v. Town of Gilbert, 576 U.S. ___, No. 13–502, slip op. at 8 (2015) ("But *Ward*'s framework applies only if a statute is content-neutral.") (internal citations and quotations omitted).

[1177] *Id.* at 8. The *Reed* Court ultimately held that the sign code was not narrowly tailored to further the justifications for the law—aesthetics and traffic safety—because the code did allow many signs that threatened the beauty of the town and because the town could not demonstrate that directional signs posed a greater threat to safety than other types of signs that were treated differently under the code. *Id.* at 14–15.

[1178] *Id*. at 10.

[1179] *Id*.

[1180] *See* United States v. Stevens, 559 U.S. 460, 468 (2010).

uttering them without raising any constitutional issues.[1181] As the Court has generally applied *Chaplinsky* over the past several decades, if speech fell within one of the "well-defined and narrowly limited" categories, it was unprotected, regardless of its effect. If it did not, it was covered by the First Amendment, and the speech was protected unless the restraint was justified by some test relating to harm, such as the clear and present danger test or the more modern approach of balancing the presumptively protected expression against a compelling governmental interest. In more recent decades, the cases reflect a fairly consistent and sustained movement by the Court toward eliminating or severely narrowing the "two-tier" doctrine. As a result, expression that before would have been held absolutely *unprotected* (e.g., seditious speech and seditious libel, fighting words, defamation, and obscenity) received protection. While the movement was temporarily deflected by a shift in position with respect to obscenity and by the recognition of a new category of non-obscene child pornography,[1182] the most recent decisions of the Court reflect a reluctance to add any new categories of excepted speech and to interpret narrowly the excepted categories of speech that have long-established roots in First Amendment law.[1183]

Even if a category of speech is *unprotected* by the First Amendment, regulation of that speech on the basis of viewpoint may be *impermissible*. In *R.A.V. v. City of St. Paul*,[1184] the Court struck down a hate crimes ordinance that the state courts had construed to apply only to the use of "fighting words." The difficulty, the Court found, was that the ordinance discriminated further, proscribing only those fighting words that "arouse[ ] anger, alarm or resentment in others . . . on the basis of race, color, creed, religion or gender." [1185] This amounted to "special prohibitions on those speakers who express views on disfavored subjects." [1186] The fact that the government may proscribe areas of speech such as obscenity, defamation, or fighting words does not mean that these areas "may be made the vehicles for content discrimination unrelated to their distinctively proscrib-

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[1181] 315 U.S. 568, 571–72 (1942).

[1182] *See* New York v. Ferber, 458 U.S. 747, 759 (1982).

[1183] *See, e.g.*, United States v. Alvarez, 567 U.S. ___, No. 11–210, slip op. at 5 (2012) (plurality opinion) ("Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements."); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 (2011) (holding that the obscenity exception to the First Amendment does not cover violent speech); *Stevens*, 559 U.S. at 472 (declining to "carve out" an exception to First Amendment protections for depictions of illegal acts of animal cruelty); Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988) (refusing to restrict speech based on its level of "outrageousness").

[1184] 505 U.S. 377 (1992).

[1185] *Id.* at 391.

[1186] *Id.*

able content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." [1187]

Seditious Speech and Seditious Libel.—Opposition to government through speech alone has been subject to punishment throughout much of history under laws proscribing "seditious" utterances. In this country, the Sedition Act of 1798 made criminal, inter alia, malicious writings that defamed, brought into contempt or disrepute, or excited the hatred of the people against the government, the President, or the Congress, or that stirred people to sedition.[1188] In *New York Times Co. v. Sullivan*,[1189] the Court surveyed the controversy surrounding the enactment and enforcement of the Sedition Act and concluded that debate "first crystallized a national awareness of the central meaning of the First Amendment. . . . Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history . . . . [That history] reflect[s] a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." The "central meaning" discerned by the Court, quoting Madison's comment that in a republican government "the censorial power is in the people over the Government, and not in the Government over the people," is that "[t]he right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government."

Little opportunity to apply this concept of the "central meaning" of the First Amendment in the context of sedition and criminal syndicalism laws has been presented to the Court. In *Dombrowski v. Pfister* [1190] the Court, after expanding on First Amendment considerations the discretion of federal courts to enjoin state court proceedings, struck down as vague and as lacking due process proce-

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[1187] *Id.* at 383–84.

[1188] Ch. 74, 1 Stat. 596. Note also that the 1918 amendment of the Espionage Act of 1917, ch. 75, 40 Stat. 553, reached "language intended to bring the form of government of the United States . . . or the Constitution . . . or the flag . . . or the uniform of the Army or Navy into contempt, scorn, contumely, or disrepute." *Cf.* Abrams v. United States, 250 U.S. 616 (1919). For a brief history of seditious libel here and in Great Britain, *see* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 19–35, 497–516 (1941).

[1189] 376 U.S. 254, 273–76 (1964). *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Justice Holmes dissenting).

[1190] 380 U.S. 479, 492–96 (1965). A number of state laws were struck down by three-judge district courts pursuant to the latitude prescribed by this case. *E.g.*, Ware v. Nichols, 266 F. Supp. 564 (N.D. Miss. 1967) (criminal syndicalism law); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1966) (insurrection statute); McSurely v. Ratliff, 282 F. Supp. 848 (E.D. Ky. 1967) (criminal syndicalism). This latitude was then circumscribed in cases attacking criminal syndicalism and criminal anarchy laws. Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

dural protections certain features of a state "Subversive Activities and Communist Control Law." In *Brandenburg v. Ohio*,[1191] a state criminal syndicalism statute was held unconstitutional because its condemnation of advocacy of crime, violence, or unlawful methods of terrorism swept within its terms both mere advocacy as well as incitement to imminent lawless action. A seizure of books, pamphlets, and other documents under a search warrant pursuant to a state subversives suppression law was struck down under the Fourth Amendment in an opinion heavy with First Amendment overtones.[1192]

Fighting Words and Other Threats to the Peace.—In *Chaplinsky v. New Hampshire*,[1193] the Court unanimously sustained a conviction under a statute proscribing "any offensive, derisive or annoying word" addressed to any person in a public place under the state court's interpretation of the statute as being limited to "fighting words"—*i.e.*, to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." The statute was sustained as "narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace." [1194] The case is best known for Justice Murphy's famous dictum. "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." [1195]

Chaplinsky still remains viable for the principle that "the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those

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[1191] 395 U.S. 444 (1969). *See also* Garrison v. Louisiana, 379 U.S. 64 (1964); Ashton v. Kentucky, 384 U.S. 195 (1966), considered under "Defamation," *infra*.

[1192] Stanford v. Texas, 379 U.S. 476 (1965). In United States v. United States District Court, 407 U.S. 297 (1972), a government claim to be free to wiretap in national security cases was rejected on Fourth Amendment grounds in an opinion that called attention to the relevance of the First Amendment.

[1193] 315 U.S. 568 (1942).

[1194] 315 U.S. at 573.

[1195] 315 U.S. at 571–72.

personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[1196] But, in actuality, the Court has closely scrutinized statutes on vagueness and overbreadth grounds and set aside convictions as not being within the doctrine. *Chaplinsky* thus remains formally alive but of little vitality.[1197]

On the obverse side, the "hostile audience" situation, the Court once sustained a conviction for disorderly conduct of one who refused police demands to cease speaking after his speech seemingly stirred numbers of his listeners to mutterings and threatened disorders.[1198] But this case has been significantly limited by cases that hold protected the peaceful expression of views that stirs people to anger because of the content of the expression, or perhaps because of the manner in which it is conveyed, and that breach of the peace and disorderly conduct statutes may not be used to curb such expression.

The cases are not clear as to what extent the police must go in protecting the speaker against hostile audience reaction or whether only actual disorder or a clear and present danger of disorder will entitle the authorities to terminate the speech or other expressive conduct.[1199] Nor, in the absence of incitement to illegal action, may

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[1196] Cohen v. California, 403 U.S. 15, 20 (1971). Cohen's conviction for breach of the peace, occasioned by his appearance in public with an "offensive expletive" lettered on his jacket, was reversed, in part because the words were not a personal insult and there was no evidence of audience objection.

[1197] The cases hold that government may not punish profane, vulgar, or opprobrious words simply because they are offensive, but only if they are "fighting words" that have a direct tendency to cause acts of violence by the person to whom they are directed. Gooding v. Wilson, 405 U.S. 518 (1972); Hess v. Indiana, 414 U.S. 105 (1973); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Lucas v. Arkansas, 416 U.S. 919 (1974); Kelly v. Ohio, 416 U.S. 923 (1974); Karlan v. City of Cincinnati, 416 U.S. 924 (1974); Rosen v. California, 416 U.S. 924 (1974); *see also* Eaton v. City of Tulsa, 416 U.S. 697 (1974).

[1198] Feiner v. New York, 340 U.S. 315 (1951). *See also* Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which the Court held that a court could enjoin peaceful picketing because violence occurring at the same time against the businesses picketed could have created an atmosphere in which even peaceful, otherwise protected picketing could be illegally coercive. *But compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

[1199] The principle actually predates *Feiner*. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); Terminiello v. Chicago, 337 U.S. 1 (1949). For subsequent application, *see* Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Brown v. Louisiana, 383 U.S. 131 (1966); Gregory v. City of Chicago, 394 U.S. 111 (1969); Bachellar v. Maryland, 397 U.S. 564 (1970). Significant is Justice Harlan's statement of the principle reflected by *Feiner*. "Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. Feiner v. New York, 340 U.S. 315 (1951)." Cohen v. California, 403 U.S. 15, 20 (1970).

government punish mere expression or proscribe ideas,[1200] regardless of the trifling or annoying caliber of the expression.[1201]

Threats of Violence Against Individuals.—The Supreme Court has cited three "reasons why threats of violence are outside the First Amendment": "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[1202] In *Watts v. United States*, however, the Court held that only "true" threats are outside the First Amendment.[1203] The defendant in *Watts*, at a public rally at which he was expressing his opposition to the military draft, said, "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J."[1204] He was convicted of violating a federal statute that prohibited "any threat to take the life of or to inflict bodily harm upon the President of the United States." The Supreme Court reversed. Interpreting the statute "with the commands of the First Amendment clearly in mind,"[1205] it found that the defendant had not made a "true 'threat,'" but had indulged in mere "political hyperbole."[1206]

In *NAACP v. Claiborne Hardware Co.*, white merchants in Claiborne County, Mississippi, sued the NAACP to recover losses caused by a boycott by black citizens of their businesses, and to enjoin future boycott activity.[1207] During the course of the boycott, NAACP Field Secretary Charles Evers had told an audience of "black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people."[1208] The Court acknowledged that this language "might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence . . . ."[1209] Yet, no violence had followed directly from Evers'

[1200] Cohen v. California, 403 U.S. 15 (1971); Bachellar v. Maryland, 397 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1969); Schacht v. United States, 398 U.S. 58 (1970); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959); Stromberg v. California, 283 U.S. 359 (1931).

[1201] Coates v. City of Cincinnati, 402 U.S. 611 (1971); Cohen v. California, 403 U.S. 15 (1971); Gooding v. Wilson, 405 U.S. 518 (1972).

[1202] R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

[1203] 394 U.S. 705, 708 (1969) (per curiam).

[1204] 394 U.S. at 706.

[1205] 394 U.S. at 707.

[1206] 394 U.S. at 708. In Virginia v. Black, 538 U.S. 343, 359 (2003), the Court, citing *Watts*, upheld a statute that outlawed cross burnings done with the intent to intimidate. A cross burning done as "a statement of ideology, a symbol of group solidarity," or "in movies such as Mississippi Burning," however, would be protected speech. Id. at 365–366.

[1207] 458 U.S. 886 (1982). *Claiborne* is also discussed below under "Public Issue Picketing and Parading."

[1208] 458 U.S. at 900, n.29. See id. at 902 for a similar remark by Evers.

[1209] 458 U.S. at 927.

speeches, and the Court found that Evers' "emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg*. . . . An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." [1210] Although it held that, under *Brandenburg*, Evers' speech did not constitute unprotected incitement of lawless action,[1211] the Court also cited *Watts*, thereby implying that Evers' speech also did not constitute a "true threat." [1212]

In *Planned Parenthood v. American Coalition of Life Activists*, the *en banc* Ninth Circuit, by a 6-to-5 vote, upheld a damage award in favor of four physicians and two health clinics that provided medical services, including abortions, to women.[1213] The plaintiffs had sued under a federal statute that gives aggrieved persons a right of action against whoever by "threat of force . . . intentionally . . . intimidates any person because the person is or has been . . . providing reproductive health services." The defendants had published "WANTED," "unWANTED," and "GUILTY" posters with the names, photographs, addresses, and other personal information about abortion doctors, three of whom were subsequently murdered by abortion opponents. The defendants also operated a "Nuremberg Files" website that listed approximately 200 people under the label "ABORTIONIST," with the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)." [1214] The posters and the website contained no language that literally constituted a threat, but, the court found, "they connote something they do not literally say," namely "You're Wanted or You're Guilty; You'll be shot or killed," [1215] and the defendants knew that the posters caused abortion doctors to "quit out of fear for their lives." [1216]

The Ninth Circuit concluded that a "true threat" is "a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." [1217] "It is not necessary that the defendant intend to, or be able to carry out his threat;

[1210] 458 U.S. at 928.

[1211] Brandenburg v. Ohio, 395 U.S. 444 (1969). *Brandenburg* is discussed above under "Is There a Present Test?"

[1212] *Claiborne*, 458 U.S. at 928 n.71.

[1213] 290 F.3d 1058 (9th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 958 (2003).

[1214] 290 F.3d at 1065.

[1215] 290 F.3d at 1085.

[1216] 290 F.3d at 1085.

[1217] 290 F.3d at 1077.

the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat." [1218]

Judge Alex Kozinski, in one of three dissenting opinions, agreed with the majority's definition of a true threat, but believed that the majority had failed to apply it, because the speech in this case had not been "communicated as *a serious expression of intent to inflict bodily harm*. . . ." [1219] "The difference between a true threat and protected expression," Judge Kozinski wrote, "is this: A true threat warns of violence or other harm that the speaker controls. . . . Yet the opinion points to no evidence that defendants who prepared the posters would have been understood by a reasonable listener as saying that *they* will cause the harm. . . . Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg*, encouragement or even advocacy of violence is protected by the First Amendment. . . ." [1220] Moreover, the Court held in *Claiborne* that "[t]he mere fact the statements could be understood 'as intending to create a fear of violence' was insufficient to make them 'true threats' under *Watts*." [1221]

Group Libel, Hate Speech.—In *Beauharnais v. Illinois*,[1222] relying on dicta in past cases,[1223] the Court upheld a state group libel law that made it unlawful to defame a race or class of people. The defendant had been convicted under this statute after he had distributed a leaflet, part of which was in the form of a petition to his city government, taking a hard-line white-supremacy position, and calling for action to keep African Americans out of white neighborhoods. Justice Frankfurter for the Court sustained the statute along the following reasoning. Libel of an individual, he established, was a common-law crime and was now made criminal by statute in every state in the Union. These laws raise no constitutional difficulty because libel is within that class of speech that is not protected by the First Amendment. If an utterance directed at an individual may be the object of criminal sanctions, then no good reason appears to deny a state the power to punish the same utterances when they are directed at a defined group, "unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State." [1224] The Justice then re-

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[1218] 290 F.3d at 1075.
[1219] 290 F.3d at 1089 (quoting majority opinion at 1077 and adding emphasis).
[1220] 290 F.3d at 1089, 1091, 1092 (emphasis in original).
[1221] 290 F.3d at 1094 (citation omitted).
[1222] 343 U.S. 250 (1952).
[1223] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707–08 (1931).
[1224] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952).

viewed the history of racial strife in Illinois to conclude that the legislature could reasonably have feared substantial evils from unrestrained racial utterances. Nor did the Constitution require the state to accept a defense of truth, because historically a defendant had to show not only truth but publication with good motives and for justifiable ends.[1225] "Libelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.'" [1226]

Beauharnais has little continuing vitality as precedent. Its holding, premised in part on the categorical exclusion of defamatory statements from First Amendment protection, has been substantially undercut by subsequent developments, not the least of which are the Court's subjection of defamation law to First Amendment challenge and its ringing endorsement of "uninhibited, robust, and wide-open" debate on public issues in *New York Times Co. v. Sullivan*.[1227] In *R.A.V. v. City of St. Paul*, the Court, in an opinion by Justice Scalia, explained and qualified the categorical exclusions for defamation, obscenity, and fighting words. These categories of speech are not "entirely invisible to the Constitution," even though they "can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*." [1228] Content discrimination unrelated to that "distinctively proscribable content," however, runs afoul of the First Amendment.[1229] Therefore, the city's bias-motivated crime ordinance, interpreted as banning the use of fighting words known to offend on the basis of race, color, creed, religion, or gender, but not on such other possible bases as political affiliation, union membership, or homosexuality, was invalidated for its content discrimination. "The First Amendment does not permit [the city] to impose special prohibitions on those speakers who express views on disfavored subjects." [1230]

[1225] 343 U.S. at 265–66.

[1226] 343 U.S. at 266.

[1227] 376 U.S. 254 (1964). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D. Ill.) (ordinances prohibiting distribution of materials containing racial slurs are unconstitutional), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953 (1978), *cert. denied*, 439 U.S. 916 (1978) (Justices Blackmun and Rehnquist dissenting on the basis that Court should review case that is in "some tension" with *Beauharnais*). *But see* New York v. Ferber, 458 U.S. 747, 763 (1982) (obliquely citing *Beauharnais* with approval).

[1228] 505 U.S. 377, 383 (1992) (emphasis in original).

[1229] 505 U.S. at 384.

[1230] *Id.* 505 U.S. at 391. On the other hand, the First Amendment permits enhancement of a criminal penalty based on the defendant's motive in selecting a victim of a particular race. Wisconsin v. Mitchell, 508 U.S. 476 (1993). The law has long recognized motive as a permissible element in sentencing, the Court noted. Id. at 485. It distinguished *R.A.V.* as involving a limitation on speech rather than con-

In *Virginia v. Black*, the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or group of persons.[1231] Such a prohibition does not discriminate on the basis of a defendant's beliefs: "as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. . . . The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages. . . ." [1232]

Defamation.—One of the most seminal shifts in constitutional jurisprudence occurred in 1964 with the Court's decision in *New York Times Co. v. Sullivan*.[1233] The *Times* had published a paid advertisement by a civil rights organization criticizing the response of a Southern community to demonstrations led by Dr. Martin Luther King, and containing several factual errors. The plaintiff, a city commissioner in charge of the police department, claimed that the advertisement had libeled him even though he was not referred to by name or title and even though several of the incidents described had occurred prior to his assumption of office. Unanimously, the Court reversed the lower court's judgment for the plaintiff. To the contention that the First Amendment did not protect libelous publications, the Court replied that constitutional scrutiny could not be foreclosed by the "label" attached to something. "Like . . . the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." [1234] "The general proposition," the Court continued, "that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions . . . . [W]e consider this case against the background of a profound national commitment to the principle that debate on public

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duct, and because the state might permissibly conclude that bias-inspired crimes inflict greater societal harm than do non-bias inspired crimes (*e.g.*, they are more likely to provoke retaliatory crimes). Id. at 487–88. *See generally* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 SUP. CT. REV. 1.

[1231] 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as "a burning cross is not always intended to intimidate," but may constitute a constitutionally protected expression of opinion. Id. at 365–66.

[1232] 538 U.S. at 362–63.

[1233] 376 U.S. 254 (1964).

[1234] 376 U.S. at 269. Justices Black, Douglas, and Goldberg, concurring, would have held libel laws *per se* unconstitutional. Id. at 293, 297.

issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." [1235] Because the advertisement was "an expression of grievance and protest on one of the major public issues of our time, [it] would seem clearly to qualify for the constitutional protection . . . [unless] it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent." [1236]

Erroneous statement is protected, the Court asserted, there being no exception "for any test of truth." Error is inevitable in any free debate and to place liability upon that score, and especially to place on the speaker the burden of proving truth, would introduce self-censorship and stifle the free expression which the First Amendment protects.[1237] Nor would injury to official reputation afford a warrant for repressing otherwise free speech. Public officials are subject to public scrutiny and "[c]riticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputation." [1238] That neither factual error nor defamatory content could penetrate the protective circle of the First Amendment was the "lesson" to be drawn from the great debate over the Sedition Act of 1798, which the Court reviewed in some detail to discern the "central meaning of the First Amendment." [1239] Thus, it appears, the libel law under consideration failed the test of constitutionality because of its kinship with seditious libel, which violated the "central meaning of the First Amendment." "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." [1240]

In the wake of the *Times* ruling, the Court decided two cases involving the type of criminal libel statute upon which Justice Frankfurter had relied in analogy to uphold the group libel law in

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[1235] 376 U.S. at 269, 270.

[1236] 376 U.S. at 271.

[1237] 376 U.S. at 271–72, 278–79. Of course, the substantial truth of an utterance is ordinarily a defense to defamation. *See* Masson v. New Yorker Magazine, 501 U.S. 496, 516 (1991).

[1238] 376 U.S. at 272–73.

[1239] 376 U.S. at 273.

[1240] 376 U.S. at 279–80. The same standard applies for defamation contained in petitions to the government, the Court having rejected the argument that the petition clause requires absolute immunity. McDonald v. Smith, 472 U.S. 479 (1985).

Beauharnais.[1241] In neither case did the Court apply the concept of *Times* to void them altogether. *Garrison v. Louisiana* [1242] held that a statute that did not incorporate the *Times* rule of "actual malice" was invalid, while in *Ashton v. Kentucky* [1243] a common-law definition of criminal libel as "any writing calculated to create disturbances of the peace, corrupt the public morals or lead to any act, which, when done, is indictable" was too vague to be constitutional.

The teaching of *Times* and the cases following it is that expression on matters of public interest is protected by the First Amendment. Within that area of protection is commentary about the public actions of individuals. The fact that expression contains falsehoods does not deprive it of protection, because otherwise such expression in the public interest would be deterred by monetary judgments and self-censorship imposed for fear of judgments. But, over the years, the Court has developed an increasingly complex set of standards governing who is protected to what degree with respect to which matters of public and private interest.

Individuals to whom the *Times* rule applies presented one of the first issues for determination. At times, the Court has keyed it to the importance of the position held. "There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." [1244] But this focus seems to have become diffused and the concept of "public official" has appeared to take on overtones of anyone holding public elective or appointive office.[1245] Moreover, candidates for public office were subject to the *Times* rule and comment on their character

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[1241] Beauharnais v. Illinois, 343 U.S. 250, 254–58 (1952).

[1242] 379 U.S. 64 (1964).

[1243] 384 U.S. 195 (1966).

[1244] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[1245] *See* Rosenblatt v. Baer, 383 U.S. 75 (1966) (supervisor of a county recreation area employed by and responsible to the county commissioners may be public official within *Times* rule); Garrison v. Louisiana, 379 U.S. 64 (1964) (elected municipal judges); Henry v. Collins, 380 U.S. 356 (1965) (county attorney and chief of police); St. Amant v. Thompson, 390 U.S. 727 (1968) (deputy sheriff); Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970) (state legislator who was major real estate developer in area); Time, Inc. v. Pape, 401 U.S. 279 (1971) (police captain).

or past conduct, public or private, insofar as it touches upon their fitness for office, is protected.[1246]

Thus, a wide range of reporting about both public officials and candidates is protected. Certainly, the conduct of official duties by public officials is subject to the widest scrutiny and criticism.[1247] But the Court has held as well that criticism that reflects generally upon an official's integrity and honesty is protected.[1248] Candidates for public office, the Court has said, place their whole lives before the public, and it is difficult to see what criticisms could not be related to their fitness.[1249]

For a time, the Court's decisional process threatened to expand the *Times* privilege so as to obliterate the distinction between private and public figures. First, the Court created a subcategory of "public figure," which included those otherwise private individuals who have attained some prominence, either through their own efforts or because it was thrust upon them, with respect to a matter of public interest, or, in Chief Justice Warren's words, those persons who are "intimately involved in the resolution of important pub-

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The categorization does not, however, include all government employees. Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979).

[1246] Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971).

[1247] Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

[1248] Garrison v. Louisiana, 379 U.S. 64 (1964), involved charges that judges were inefficient, took excessive vacations, opposed official investigations of vice, and were possibly subject to "racketeer influences." The Court rejected an attempted distinction that these criticisms were not of the manner in which the judges conducted their courts but were personal attacks upon their integrity and honesty. "Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. . . . The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." Id. at 76–77.

[1249] In Monitor Patriot Co. v. Roy, 401 U.S. 265, 274–75 (1971), the Court said: "The principal activity of a candidate in our political system, his 'office,' so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul' when an opponent or an industrious reporter attempts to demonstrate the contrary. . . . Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns and damage to reputation is, of course, the essence of libel. But whether there remains some exiguous area of defamation against which a candidate may have full recourse is a question we need not decide in this case."

lic questions or, by reason of their fame, shape events in areas of concern to society at large."[1250] Later, the Court curtailed the definition of "public figure" by playing down the matter of public interest and emphasizing the voluntariness of the assumption of a role in public affairs that will make of one a "public figure."[1251]

Second, in a fragmented ruling, the Court applied the *Times* standard to private citizens who had simply been involved in events of public interest, usually, though not invariably, not through their own choosing.[1252] But, in *Gertz v. Robert Welch, Inc.*[1253] the Court set off on a new path of limiting recovery for defamation by private persons. Henceforth, persons who are neither public officials nor public figures may recover for the publication of defamatory falsehoods so long as state defamation law establishes a standard higher than strict liability, such as negligence; damages may not be presumed, however, but must be proved, and punitive damages will be recoverable only upon the *Times* showing of "actual malice."

The Court's opinion by Justice Powell established competing constitutional considerations. On the one hand, imposition upon the press of liability for every misstatement would deter not only false speech but much truth as well; the possibility that the press might have to prove everything it prints would lead to self-censorship and the consequent deprivation of the public of access to information. On the other hand, there is a legitimate state interest in compensating individuals for the harm inflicted on them by defamatory falsehoods. An individual's right to the protection of his own good name

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[1250] Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967) (Chief Justice Warren concurring in the result). *Curtis* involved a college football coach, and *Associated Press v. Walker*, decided in the same opinion, involved a retired general active in certain political causes. The suits arose from reporting that alleged, respectively, the fixing of a football game and the leading of a violent crowd in opposition to enforcement of a desegregation decree. The Court was extremely divided, but the rule that emerged was largely the one developed in the Chief Justice's opinion. Essentially, four Justices opposed application of the *Times* standard to "public figures," although they would have imposed a lesser but constitutionally based burden on public figure plaintiffs. Id. at 133 (plurality opinion of Justices Harlan, Clark, Stewart, and Fortas). Three Justices applied *Times*, id. at 162 (Chief Justice Warren), and 172 (Justices Brennan and White). Two Justices would have applied absolute immunity. Id. at 170 (Justices Black and Douglas). *See also* Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6 (1970).

[1251] Public figures "[f]or the most part [are] those who . . . have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

[1252] Rosenbloom v. Metromedia, 403 U.S. 29 (1971). *Rosenbloom* had been prefigured by Time, Inc. v. Hill, 385 U.S. 374 (1967), a "false light" privacy case considered *infra*

[1253] 418 U.S. 323 (1974).

is, at bottom, but a reflection of our society's concept of the worth of the individual. Therefore, an accommodation must be reached. The *Times* rule had been a proper accommodation when public officials or public figures were concerned, inasmuch as by their own efforts they had brought themselves into the public eye, had created a need in the public for information about them, and had at the same time attained an ability to counter defamatory falsehoods published about them. Private individuals are not in the same position and need greater protection. "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[1254] Thus, some degree of fault must be shown.

Generally, juries may award substantial damages in tort for presumed injury to reputation merely upon a showing of publication. But this discretion of juries had the potential to inhibit the exercise of freedom of the press, and moreover permitted juries to penalize unpopular opinion through the awarding of damages. Therefore, defamation plaintiffs who do not prove actual malice—that is, knowledge of falsity or reckless disregard for the truth—will be limited to compensation for actual provable injuries, such as out-of-pocket loss, impairment of reputation and standing, personal humiliation, and mental anguish and suffering. A plaintiff who proves actual malice will be entitled as well to collect punitive damages.[1255]

Subsequent cases have revealed a trend toward narrowing the scope of the "public figure" concept. A socially prominent litigant in a particularly messy divorce controversy was held not to be such a person,[1256] and a person convicted years before of contempt after failing to appear before a grand jury was similarly not a public figure even as to commentary with respect to his conviction.[1257] Also not a public figure for purposes of allegedly defamatory comment about the value of his research was a scientist who sought and received federal grants for research, the results of which were published in scientific journals.[1258] Public figures, the Court reiterated, are those who (1) occupy positions of such persuasive power and influence that they are deemed public figures for all purposes or (2) have thrust themselves to the forefront of particular public con-

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[1254] 418 U.S. at 347.

[1255] 418 U.S. at 348–50. Justice Brennan would have adhered to *Rosenbloom*, id. at 361, while Justice White thought the Court went too far in constitutionalizing the law of defamation. Id. at 369.

[1256] Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[1257] Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

[1258] Hutchinson v. Proxmire, 443 U.S. 111 (1979).

troversies in order to influence the resolution of the issues involved, and are public figures with respect to comment on those issues.[1259]

Commentary about matters of "public interest" when it defames someone is apparently, after *Firestone*[1260] and *Gertz*, to be protected to the degree that the person defamed is a public official or candidate for public office, public figure, or private figure. That there is a controversy, that there are matters that may be of "public interest," is insufficient to make a private person a "public figure" for purposes of the standard of protection in defamation actions.

The Court has elaborated on the principles governing defamation actions brought by private figures. First, when a private plaintiff sues a media defendant for publication of information that is a matter of public concern—the *Gertz* situation, in other words—the burden is on the plaintiff to establish the falsity of the information. Thus, the Court held in *Philadelphia Newspapers v. Hepps*,[1261] the common law rule that defamatory statements are presumptively false must give way to the First Amendment interest that true speech on matters of public concern not be inhibited. This means, as the dissenters pointed out, that a *Gertz* plaintiff must establish falsity in addition to establishing some degree of fault (*e.g.*, negligence).[1262] On the other hand, the Court held in *Dun & Bradstreet v. Greenmoss Builders* that the *Gertz* standard limiting award of presumed and punitive damages applies only in cases involving matters of public concern, and that the sale of credit reporting information to subscribers is not such a matter of public concern.[1263] What significance, if any, is to be attributed to the fact that a media defendant rather than a private defendant has been sued is left unclear. The plurality in *Dun & Bradstreet* declined to follow the lower court's rationale that *Gertz* protections are unavailable to nonmedia defendants, and a majority of Justices agreed on that point.[1264] In *Philadelphia Newspapers*, however, the Court expressly reserved the

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[1259] 443 U.S. at 134 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974)).

[1260] Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976). *See also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979).

[1261] 475 U.S. 767 (1986).

[1262] 475 U.S. at 780 (Stevens, J., dissenting).

[1263] 472 U.S. 749 (1985). Justice Powell wrote a plurality opinion joined by Justices Rehnquist and O'Connor, and Chief Justice Burger and Justice White, both of whom had dissented in *Gertz*, added brief concurring opinions agreeing that the *Gertz* standard should not apply to credit reporting. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that *Gertz* had not been limited to matters of public concern, and should not be extended to do so.

[1264] 472 U.S. at 753 (plurality); id. at 773 (Justice White); id. at 781–84 (dissent).

issue of "what standards would apply if the plaintiff sues a nonmedia defendant." [1265]

Other issues besides who is covered by the *Times* privilege are of considerable importance. The use of the expression "actual malice" has been confusing in many respects, because it is in fact a concept distinct from the common law meaning of malice or the meanings common understanding might give to it.[1266] Constitutional "actual malice" means that the defamation was published with knowledge that it was false or with reckless disregard of whether it was false.[1267] Reckless disregard is not simply negligent behavior, but publication with serious doubts as to the truth of what is uttered.[1268] A defamation plaintiff under the *Times* or *Gertz* standard has the burden of proving by "clear and convincing" evidence, not merely by the preponderance of evidence standard ordinarily borne in civil cases, that the defendant acted with knowledge of falsity or with reckless disregard.[1269] Moreover, the Court has held, a *Gertz* plaintiff has the burden of proving the actual falsity of the defamatory publication.[1270] A plaintiff suing the press [1271] for defamation under the *Times* or *Gertz* standards is not limited to attempting to prove his case without resort to discovery of the defendant's edito-

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[1265] 475 U.S. at 779 n.4. Justice Brennan added a brief concurring opinion expressing his view that such a distinction is untenable. Id. at 780.

[1266] *See*, *e.g.*, Herbert v. Lando, 441 U.S. 153, 199 (1979) (Justice Stewart dissenting).

[1267] New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964); Garrison v. Louisiana, 379 U.S. 64, 78 (1964); Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251–52 (1974).

[1268] St. Amant v. Thompson, 390 U.S. 727, 730–33 (1968); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967). A finding of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" is alone insufficient to establish actual malice. Harte-Hanks Communications v. Connaughton, 491 U.S. 657 (1989) (nonetheless upholding the lower court's finding of actual malice based on the "entire record").

[1269] Gertz v. Robert Welch, Inc., 418 U.S. 323, 331–32 (1974); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83 (1967). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964) ("convincing clarity"). A corollary is that the issue on motion for summary judgment in a *New York Times* case is whether the evidence is such that a reasonable jury might find that actual malice has been shown with convincing clarity. Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

[1270] Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) (leaving open the issue of what "quantity" or standard of proof must be met).

[1271] Because the defendants in these cases have typically been media defendants (*but see* Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965)), and because of the language in the Court's opinions, some have argued that only media defendants are protected under the press clause and individuals and others are not protected by the speech clause in defamation actions. *See* discussion, *supra*, under "Freedom of Expression: Is There a Difference Between Speech and Press?"

rial processes in the establishment of "actual malice." [1272] The state of mind of the defendant may be inquired into and the thoughts, opinions, and conclusions with respect to the material gathered and its review and handling are proper subjects of discovery. As with other areas of protection or qualified protection under the First Amendment (as well as some other constitutional provisions), appellate courts, and ultimately the Supreme Court, must independently review the findings below to ascertain that constitutional standards were met.[1273]

There had been some indications that statements of opinion, unlike assertions of fact, are absolutely protected,[1274] but the Court held in *Milkovich v. Lorain Journal Co.*[1275] that there is no constitutional distinction between fact and opinion, hence no "wholesale defamation exemption" for any statement that can be labeled "opinion." [1276] The issue instead is whether, regardless of the context in which a statement is uttered, it is sufficiently factual to be susceptible of being proved true or false. Thus, if statements of opinion may "reasonably be interpreted as stating actual facts about an individual," [1277] then the truthfulness of the factual assertions may be tested in a defamation action. There are sufficient protections for free public discourse already available in defamation law, the Court concluded, without creating "an artificial dichotomy between 'opinion' and fact." [1278]

Substantial meaning is also the key to determining whether inexact quotations are defamatory. Journalistic conventions allow some alterations to correct grammar and syntax, but the Court in *Masson v. New Yorker Magazine* [1279] refused to draw a distinction on that narrow basis. Instead, "a deliberate alteration of words [in a quotation] does not equate with knowledge of falsity for purposes

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[1272] Herbert v. Lando, 441 U.S. 153 (1979).

[1273] New York Times Co. v. Sullivan, 376 U.S. 254, 284–86 (1964). *See*, *e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982). Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 688 (1989) ("the reviewing court must consider the factual record in full"); Bose Corp. v. Consumers Union of United States, 466 U.S. 485 (1984) (the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) must be subordinated to this constitutional principle).

[1274] *See*, *e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"); Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970) (holding protected the accurate reporting of a public meeting in which a particular position was characterized as "blackmail"); Letter Carriers v. Austin, 418 U.S. 264 (1974) (holding protected a union newspaper's use of epithet "scab").

[1275] 497 U.S. 1 (1990).

[1276] 497 U.S. at 18.

[1277] 497 U.S. at 20. In *Milkovich* the Court held to be actionable assertions and implications in a newspaper sports column that a high school wrestling coach had committed perjury in testifying about a fight involving his team.

[1278] 497 U.S. at 19.

[1279] 501 U.S. 496 (1991).

of [*New York Times*] unless the alteration results in a material change in the meaning conveyed by the statement." [1280]

False Statements.—As defamatory false statements can lead to legal liability, so can false statements in other contexts run afoul of legal prohibitions. For instance, more than 100 federal criminal statutes punish false statements in areas of concern to federal courts or agencies,[1281] and the Court has often noted the limited First Amendment value of such speech.[1282] The Court, however, has declined to find that all false statements fall outside of First Amendment protection. In *United States v. Alvarez*,[1283] the Court overturned the Stolen Valor Act of 2005,[1284] which imposed criminal penalties for falsely representing oneself to have been awarded a military decoration or medal. In an opinion by Justice Kennedy, four Justices distinguished false statement statutes that threaten the integrity of governmental processes or that further criminal activity, and evaluated the Act under a strict scrutiny standard.[1285]

Noting that the Stolen Valor Act applied to false statements made "at any time, in any place, to any person," [1286] Justice Kennedy suggested that upholding this law would leave the government with the power to punish any false discourse without a clear limiting principle. Justice Breyer, in a separate opinion joined by Justice Kagan, concurred in judgment, but did so only after evaluating the prohibition under an intermediate scrutiny standard. While Justice Breyer was also concerned about the breadth of the act, his opinion went on to suggest that a similar statute, more finely tailored to situations where a specific harm is likely to occur, could withstand legal challenge.[1287]

Invasion of Privacy.—Governmental power to protect the privacy interests of its citizens by penalizing publication or authorizing causes of action for publication implicates directly First Amend-

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[1280] 501 U.S. at 517.

[1281] United States v. Wells, 519 U.S. 482, 505–507, and nn. 8–10 (1997) (Stevens, J., dissenting) (listing statute citations).

[1282] *See, e.g.,* Hustler Magazine, Inc. v. Falwell, 485 U.S. at 52 (1988) ("False statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas."); *Virginia State Bd. of Pharmacy Virginia Citizens Consumer Council*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

[1283] 567 U.S. ___, No. 11–210, slip op. (2012).

[1284] 18 U.S.C. § 704.

[1285] *Alvarez*, slip op. at 8–12 (Kenndy, J.). Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor.

[1286] *Alvarez*, slip op. at 10 (Kennedy, J). Justice Kennedy was joined in his opinion by Chief Justice Roberts, and Justices Ginsburg and Sotomayor..

[1287] *Alvarez*, slip op. at 8–9 (Breyer, J).

ment rights. Privacy is a concept composed of several aspects.[1288] As a tort concept, it embraces at least four branches of protected interests: protection from unreasonable intrusion upon one's seclusion, from appropriation of one's name or likeness, from unreasonable publicity given to one's private life, and from publicity which unreasonably places one in a false light before the public.[1289]

Although the Court has variously recognized valid governmental interests in extending protection to privacy,[1290] it has nevertheless interposed substantial free expression interests in the balance. Thus, in *Time, Inc. v. Hill*,[1291] the *Times* privilege was held to preclude recovery under a state privacy statute that permitted recovery for harm caused by exposure to public attention in any publication which contained factual inaccuracies, although not necessarily defamatory inaccuracies, in communications on matters of public interest. Since *Gertz* held that the *Times* privilege did not limit the recovery of compensatory damages for defamation by private persons, the question arose whether *Hill* applies to all "false-light" cases or only such cases involving public officials or public figures.[1292] And, more important, *Gertz* left unresolved the issue "whether the State may ever define and protect an area of privacy free from unwanted publicity in the press." [1293]

In *Cox Broadcasting*, the Court declined to pass on the broad question, holding instead that the accurate publication of information obtained from public records is absolutely privileged. Thus, the state could not permit a civil recovery for invasion of privacy occasioned by the reporting of the name of a rape victim obtained from court records and from a proceeding in open court.[1294] Neverthe-

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[1288] *See*, *e.g.*, William Prosser, Law of Torts 117 (4th ed. 1971); Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960); J. Thomas McCarthy, The Rights of Publicity and Privacy (1987); Thomas Emerson, The System of Freedom of Expression 544–61 (1970). Note that we do not have here the question of the protection of one's privacy from governmental invasion.

[1289] Restatement (Second), of Torts §§ 652A–652I (1977). These four branches were originally propounded in Prosser's 1960 article, incorporated in the Restatement, and now "routinely accept[ed]." McCarthy, § 5.8[A].

[1290] Time, Inc. v. Hill, 385 U.S. 374, 383 n.7 (1967); and id. at 402, 404 (Justice Harlan, concurring in part and dissenting in part), 411, 412–15 (Justice Fortas dissenting); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 487–89 (1975).

[1291] 385 U.S. 374 (1967). *See also* Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974).

[1292] *Cf.* Cantrell v. Forest City Publishing Co., 419 U.S. 245, 250–51 (1974); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 490 n.19 (1975).

[1293] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491 (1975).

[1294] More specifically, the information was obtained "from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." 420 U.S. at 491. There was thus involved both the First Amendment and the traditional privilege of the press to report the events of judicial proceedings. Id. at 493, 494–96.

less, the Court in appearing to retreat from what had seemed to be settled principle, that truth is a constitutionally required defense in any defamation action, whether plaintiff be a public official, public figure, or private individual, may have preserved for itself the discretion to recognize a constitutionally permissible tort of invasion of privacy through publication of truthful information.[1295] But in recognition of the conflicting interests—in expression and in privacy—it is evident that the judicial process in this area will be cautious.

Continuing to adhere to "limited principles that sweep no more broadly than the appropriate context of the instant case," the Court invalidated an award of damages against a newspaper for printing the name of a sexual assault victim lawfully obtained from a sheriff's department press release. The state was unable to demonstrate that imposing liability served a "need" to further a state interest of the highest order, since the same interest could have been served by the more limited means of self regulation by the police, since the particular *per se* negligence statute precluded inquiry into the extent of privacy invasion (*e.g.*, inquiry into whether the victim's identity was already widely known), and since the statute singled out "mass communications" media for liability rather than applying evenhandedly to anyone disclosing a victim's identity.[1296]

[1295] Thus, Justice White for the Court noted that the defense of truth is constitutionally required in suits by public officials or public figures. But "[t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamatory action brought by a private person as distinguished from a public official or public figure." 420 U.S. at 490. If truth is not a constitutionally required defense, then it would be possible for the states to make truthful defamation of private individuals actionable and, more important, truthful reporting of matters that constitute invasions of privacy actionable. *See* Brasco v. Reader's Digest, 4 Cal.3d 520, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Commonwealth v. Wiseman, 356 Mass. 251, 249 N.E.2d 610 (1969), *cert. denied*, 398 U.S. 960 (1970). Concurring in *Cohn*, 420 U.S. at 497, Justice Powell contended that the question of truth as a constitutionally required defense was long settled in the affirmative and that *Gertz* itself, which he wrote, was explainable on no other basis. But he too would reserve the question of actionable invasions of privacy through truthful reporting. "In some instances state actions that are denominated actions in defamation may in fact seek to protect citizens from injuries that are quite different from the wrongful damage to reputation flowing from false statements of fact. In such cases, the Constitution may permit a different balance. And, as today's opinion properly recognizes, causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions." 420 U.S. at 500.

[1296] The Florida Star v. B.J.F., 491 U.S. 524 (1989). The Court left open the question "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, the government may ever punish not only the unlawful acquisition, but the ensuing publication as well." Id. at 535 n.8 (emphasis in original). In Bartnicki v. Vopper, 532 U.S. 514 (2001), the Court held that a content-neutral statute prohibiting the publication of illegally intercepted communications (in this case a cell phone conversation) violates free speech where the person who publishes the

Emotional Distress Tort Actions.—In *Hustler Magazine, Inc. v. Falwell*,[1297] the Court applied the *New York Times v. Sullivan* standard to recovery of damages by public officials and public figures for the tort of intentional infliction of emotional distress. The case involved an advertisement "parody" portraying the plaintiff, described by the Court as a "nationally known minister who has been active as a commentator on politics and public affairs," as stating that he lost his virginity "during a drunken incestuous rendezvous with his mother in an outhouse."[1298] Affirming liability in this case, the Court believed, would subject "political cartoonists and satirists . . . to damage awards without any showing that their work falsely defamed its subject."[1299] A proffered "outrageousness" standard for distinguishing such parodies from more traditional political cartoons was rejected; although not doubting that "the caricature of respondent . . . is at best a distant cousin of [some] political cartoons . . . and a rather poor relation at that," the Court explained that "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views. . . ."[1300] Therefore, proof of intent to cause injury, "the gravamen of the tort," is insufficient "in the area of public debate about public figures." Additional proof that the publication contained a false statement of fact made with actual malice was necessary, the Court concluded, in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment."[1301]

The Court next considered whether an intentional infliction of emotional distress action could be brought by a father against public protestors who picketed the military funeral of his son, where the plaintiff was neither a public official nor a public figure. Based on the reasoning of *Hustler Magazine*, one might presume that the *Times* privilege would not extend to the intentional infliction of emotional distress upon a private citizen. However, in *Snyder v. Phelps*,[1302] the Court avoided addressing this issue, finding that where public protesters are addressing issues of public concern, the fact that such protests occurred in a setting likely to upset private individuals did not reduce the First Amendment protection of that speech. In *Phelps*, the congregation of the Westboro Baptist Church, based on the be-

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material did not participate in the interception, and the communication concerns a public issue.

[1297] 485 U.S. 46 (1988).
[1298] 485 U.S. at 47, 48.
[1299] 485 U.S. at 53.
[1300] 485 U.S. at 55.
[1301] 485 U.S. at 53, 56.
[1302] 562 U.S. ___, No. 09–751, slip op. (March 2, 2011).

lief that God punishes the United States for its tolerance of homosexuality, particularly in America's armed forces, had engaged in nearly 600 protests at funerals, mostly military. While it was admitted that the plaintiff had suffered emotional distress after a protest at his son's funeral, the Court declined to characterize the protests as directed at the father personally.[1303] Rather, considering the "content, form, and context" of that speech,[1304] the Court found that the dominant themes of the protest went to public concerns, and thus could not serve as the basis for a tort suit.[1305]

"Right of Publicity" Tort Actions.—In *Zacchini v. Scripps-Howard Broadcasting Co.*,[1306] the Court held unprotected by the First Amendment a broadcast of a video tape of the "entire act" of a "human cannonball" in the context of the performer's suit for damages against the company for having "appropriated" his act, thereby injuring his right to the publicity value of his performance. The Court emphasized two differences between the legal action permitted here and the legal actions found unprotected or not fully protected in defamation and other privacy-type suits. First, the interest sought to be protected was, rather than a party's right to his reputation and freedom from mental distress, the right of the performer to remuneration for putting on his act. Second, the other torts if permitted decreased the information that would be made available to the public, whereas permitting this tort action would have an impact only on "who gets to do the publishing."[1307] In both respects, the tort action was analogous to patent and copyright laws in that both provide an economic incentive to persons to make the investment required to produce a performance of interest to the public.[1308]

[1303] Signs displayed at the protest included the phrases "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." Slip op. at 2.

[1304] Slip op. at 8 (citations omitted).

[1305] Justice Alito, in dissent, argued that statements made by the defendants on signs and on a website could have been reasonably interpreted as directed at the plaintiffs, and that even if public themes were a dominant theme at the protest, that this should not prevent a suit from being brought on those statements arguably directed at private individuals. Slip op. at 9–11 (Alito, J., dissenting).

[1306] 433 U.S. 562 (1977). The "right of publicity" tort is conceptually related to one of the privacy strands: "appropriation" of one's name or likeness for commercial purposes. Id. at 569–72. Justices Powell, Brennan, and Marshall dissented, finding the broadcast protected, id. at 579, and Justice Stevens dissented on other grounds. Id. at 582.

[1307] 433 U.S. at 573–74. Plaintiff was not seeking to bar the broadcast but rather to be paid for the value he lost through the broadcasting.

[1308] 433 U.S. at 576–78. This discussion is the closest the Court has come in considering how copyright laws in particular are to be reconciled with the First Amendment. The Court emphasizes that copyright laws encourage the production of work for the public's benefit.

Publication of Legally Confidential Information.—Although a state may have valid interests in assuring the confidentiality of certain information, it may not enforce this confidentiality by criminally prosecuting nonparticipant third parties, including the press, who disclose or publish the information.[1309] The case that made this point arose in the context of the investigation of a state judge by an official disciplinary body; both by state constitutional provision and by statute, the body's proceedings were required to be confidential and the statute made the divulging of information about the proceeding a misdemeanor. For publishing an accurate report about an investigation of a sitting judge, the newspaper was indicted and convicted of violating the statute, which the state courts construed to apply to nonparticipants. Although the Court recognized the importance of confidentiality to the effectiveness of such a proceeding, it held that the publication here "lies near the core of the First Amendment" because the free discussion of public affairs, including the operation of the judicial system, is primary and the state's interests were simply insufficient to justify the encroachment on freedom of speech and of the press.[1310] The scope of the privilege thus conferred by this decision on the press and on individuals is, however, somewhat unclear, because the Court appeared to reserve consideration of broader questions than those presented by the facts of the case.[1311] It does appear, however, that government would find it difficult to punish the publication of almost any information by a nonparticipant to the process in which the information was developed to the same degree as it would be foreclosed from obtaining prior restraint of such publication.[1312] There are also limits on the extent to which government may punish dis-

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[1309] Landmark Communications v. Virginia, 435 U.S. 829 (1978). The decision by Chief Justice Burger was unanimous, Justices Brennan and Powell not participating, but Justice Stewart would have limited the holding to freedom of the press to publish. Id. at 848. *See also* Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979).

[1310] 435 U.S. at 838–42. The Court disapproved of the state court's use of the clear-and-present-danger test: "Mr. Justice Holmes' test was never intended 'to express a technical legal doctrine or to convey a formula for adjudicating cases.'" Id. at 842, quoting from Pennekamp v. Florida, 328 U.S. 331, 353 (1946) (Frankfurter, J. concurring).

[1311] Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), in the context of a civil proceeding, had held that the First Amendment did not permit the imposition of liability on the press for truthful publication of information released to the public in official court records, id. at 496, but had expressly reserved the question "whether the publication of truthful information withheld by law from the public domain is similarly privileged," id. at 497 n.27, and *Landmark* on its face appears to answer the question affirmatively. Caution is impelled, however, by the Court's similar reservation. "We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment." 435 U.S. at 840.

[1312] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

closures by *participants* in the criminal process, the Court having invalidated a restriction on a grand jury witness's disclosure of his own testimony after the grand jury had been discharged.[1313]

Obscenity.—Although public discussion of political affairs is at the core of the First Amendment, the guarantees of speech and press are broader. "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right."[1314] The right to impart and to receive "information and ideas, regardless of their social worth . . . is fundamental to our free society."[1315] Indeed, it is primarily with regard to the entertaining function of expression that the law of obscenity is concerned, as the Court has rejected any concept of "ideological" obscenity.[1316] However, this function is not the reason that obscenity is outside the protection of the First Amendment, although the Court has never really been clear about what that reason is.

Adjudication over the constitutional law of obscenity began in *Roth v. United States*,[1317] in which the Court in an opinion by Justice Brennan settled in the negative the "dispositive question" "whether obscenity is utterance within the area of protected speech and press."[1318] The Court then undertook a brief historical survey to

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[1313] Butterworth v. Smith, 494 U.S. 624 (1990).

[1314] Winters v. New York, 333 U.S. 507, 510 (1948). Illustrative of the general observation is the fact that "[m]usic, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989). Nude dancing is also. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 564 (1991).

[1315] Stanley v. Georgia, 394 U.S. 557, 564 (1969).

[1316] Winters v. New York, 333 U.S. 507 (1948); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954); Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959). The last case involved the banning of the movie *Lady Chatterley's Lover* on the ground that it dealt too sympathetically with adultery. "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Id. at 688–89.

[1317] 354 U.S. 476 (1957). Heard at the same time and decided in the same opinion was *Alberts v. California*, involving, of course, a state obscenity law. The Court's first opinion in the obscenity field was Butler v. Michigan, 352 U.S. 380 (1957), considered *infra*. Earlier the Court had divided four-to-four and thus affirmed a state court judgment that Edmund Wilson's *Memoirs of Hecate County* was obscene. Doubleday & Co. v. New York, 335 U.S. 848 (1948).

[1318] Roth v. United States, 354 U.S. 476, 481 (1957). Justice Brennan later changed his mind on this score, arguing that, because the Court had failed to develop a work-

demonstrate that "the unconditional phrasing of the First Amendment was not intended to protect every utterance." All or practically all the states that ratified the First Amendment had laws making blasphemy or profanity or both crimes, and provided for prosecutions of libels as well. It was this history that had caused the Court in *Beauharnais* to conclude that "libelous utterances are not within the area of constitutionally protected speech," and this history was deemed to demonstrate that "obscenity, too, was outside the protection intended for speech and press."[1319] "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."[1320] It was objected that obscenity legislation punishes because of incitation to impure thoughts and without proof that obscene materials create a clear and present danger of antisocial conduct. But because obscenity was not protected at all, such tests as clear and present danger were irrelevant.[1321]

"However," Justice Brennan continued, "sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press . . . . It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest."[1322] The standard that the Court thereupon adopted for the designation of material as unprotected obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole ap-

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able standard for distinguishing the obscene from the non-obscene, regulation should be confined to the protection of children and non-consenting adults. *See* Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973).

[1319] 354 U.S. at 482–83. The reference is to Beauharnais v. Illinois, 343 U.S. 250 (1952).

[1320] 354 U.S. at 484. There then followed the well-known passage from Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[1321] 354 U.S. at 486, also quoting Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

[1322] 354 U.S. at 487, 488.

peals to prurient interest." [1323] The Court defined material appealing to prurient interest as "material having a tendency to excite lustful thoughts," and defined prurient interest as "a shameful or morbid interest in nudity, sex, or excretion." [1324]

In the years after *Roth*, the Court struggled with many obscenity cases with varying degrees of success. The cases can be grouped topically, but, with the exception of those cases dealing with protection of children,[1325] unwilling adult recipients,[1326] and procedure,[1327] these cases are best explicated chronologically.

[1323] 354 U.S. at 489.

[1324] 354 U.S. at 487 n.20. A statute defining "prurient" as "that which incites lasciviousness or lust" covers more than obscenity, the Court later indicated in Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1985); obscenity consists in appeal to "a shameful or morbid" interest in sex, not in appeal to "normal, healthy sexual desires." *Brockett* involved a facial challenge to the statute, so the Court did not have to explain the difference between "normal, healthy" sexual desires and "shameful" or "morbid" sexual desires.

[1325] In Butler v. Michigan, 352 U.S. 380 (1957), the Court unanimously reversed a conviction under a statute that punished general distribution of materials unsuitable for children. Protesting that the statute "reduce[d] the adult population of Michigan to reading only what is fit for children," the Court pronounced the statute void. Narrowly drawn proscriptions for distribution or exhibition to children of materials which would not be obscene for adults are permissible, Ginsberg v. New York, 390 U.S. 629 (1968), although the Court insists on a high degree of specificity. Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Rabeck v. New York, 391 U.S. 462 (1968). Protection of children in this context is concurred in even by those Justices who would proscribe obscenity regulation for adults. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73, 113 (1973) (Justice Brennan dissenting). But children do have First Amendment protection and government may not bar dissemination of everything to them. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975) (in context of nudity on movie screen). *See also* FCC v. Pacifica Foundation, 438 U.S. 726, 749–50 (1978); Pinkus v. United States, 436 U.S. 293, 296–98 (1978).

[1326] Protection of unwilling adults was the emphasis in Rowan v. Post Office Dep't, 397 U.S. 728 (1970), which upheld a scheme by which recipients of objectionable mail could put their names on a list and require the mailer to send no more such material. But, absent intrusions into the home, FCC v. Pacifica Foundation, 438 U.S. 726 (1978), or a degree of captivity that makes it impractical for the unwilling viewer or auditor to avoid exposure, government may not censor content, in the context of materials not meeting constitutional standards for denomination as pornography, to protect the sensibilities of some. It is up to offended individuals to turn away. Erznoznik v. City of Jacksonville, 422 U.S. 205, 208–12 (1975). *But see* Pinkus v. United States, 436 U.S. 293, 300 (1978) (jury in determining community standards must include both "'sensitive' and 'insensitive' persons" in the community, but may not "focus[ ] upon the most susceptible or sensitive members when judging the obscenity of materials . . . ").

[1327] The First Amendment requires that procedures for suppressing distribution of obscene materials provide for expedited consideration, for placing the burden of proof on government, and for hastening judicial review. Additionally, Fourth Amendment search and seizure law has been suffused with First Amendment principles, so that the law governing searches for and seizures of allegedly obscene materials is more stringent than in most other areas. Marcus v. Search Warrant, 367 U.S. 717

Manual Enterprises v. Day [1328] upset a Post Office ban upon the mailing of certain magazines addressed to homosexual audiences, but resulted in no majority opinion of the Court. Nor did a majority opinion emerge in *Jacobellis v. Ohio*, which reversed a conviction for exhibiting a motion picture.[1329] Chief Justice Warren's concurrence in *Roth* [1330] was adopted by a majority in *Ginzburg v. United States*,[1331] in which Justice Brennan for the Court held that in "close" cases borderline materials could be determined to be obscene if the seller "pandered" them in a way that indicated he was catering to prurient interests. The same five-Justice majority, with Justice Harlan concurring, the same day affirmed a state conviction of a distributor of books addressed to a sado-masochistic audience, applying the "pandering" test and concluding that material could be held legally obscene if it appealed to the prurient interests of the deviate group to which it was directed.[1332] Unanimity was shattered,

(1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1964); Heller v. New York, 413 U.S. 483 (1973); Roaden v. Kentucky, 413 U.S. 496 (1973); Lo-Ji Sales v. New York, 442 U.S. 319 (1979); *see also* Walter v. United States, 447 U.S. 649 (1980). Scienter—that is, knowledge of the nature of the materials—is a prerequisite to conviction, Smith v. California, 361 U.S. 147 (1959), but the prosecution need only prove the defendant knew the contents of the material, not that he knew they were legally obscene. Hamling v. United States, 418 U.S. 87, 119–24 (1974). *See also* Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (public nuisance injunction of showing future films on basis of past exhibition of obscene films constitutes impermissible prior restraint); McKinney v. Alabama, 424 U.S. 669 (1976) (criminal defendants may not be bound by a finding of obscenity of materials in prior civil proceeding to which they were not parties). None of these strictures applies, however, to forfeitures imposed as part of a criminal penalty. Alexander v. United States, 509 U.S. 544 (1993) (upholding RICO forfeiture of the entire adult entertainment book and film business of an individual convicted of obscenity and racketeering offenses). Justice Kennedy, dissenting in *Alexander*, objected to the "forfeiture of expressive material that had not been adjudged to be obscene." Id. at 578.

[1328] 370 U.S. 478 (1962).

[1329] 378 U.S. 184 (1964). Without opinion, citing *Jacobellis*, the Court reversed a judgment that Henry Miller's *Tropic of Cancer* was obscene. Grove Press v. Gerstein, 378 U.S. 577 (1964). *Jacobellis* is best known for Justice Stewart's concurrence, contending that criminal prohibitions should be limited to "hard-core pornography." The category "may be indefinable," he added, but "I know it when I see it, and the motion picture involved in this case is not that." Id. at 197. The difficulty with this visceral test is that other members of the Court did not always "see it" the same way; two years later, for example, Justice Stewart was on opposite sides in two obscenity decisions decided on the same day. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Genera, 383 U.S. 413 (1966) (concurring on basis that book was not obscene); Mishkin v. New York, 383 U.S. 502, 518 (1966) (dissenting from finding that material was obscene).

[1330] Roth v. United States, 354 U.S. 476, 494 (1957).

[1331] 383 U.S. 463 (1966). Pandering remains relevant in pornography cases. Splawn v. California, 431 U.S. 595 (1977); Pinkus v. United States, 436 U.S. 293, 303–04 (1978).

[1332] Mishkin v. New York, 383 U.S. 502 (1966). *See* id. at 507–10 for discussion of the legal issue raised by the limited appeal of the material. The Court relied on *Mishkin* in Ward v. Illinois, 431 U.S. 767, 772 (1977).

however, when on the same day the Court held that *Fanny Hill*, a novel at that point 277 years old, was not legally obscene.[1333] The prevailing opinion again restated the *Roth* tests that, to be considered obscene, material must (1) have a dominant theme in the work considered as a whole that appeals to prurient interest, (2) be patently offensive because it goes beyond contemporary community standards, and (3) be utterly without redeeming social value.[1334]

After the divisions engendered by the disparate opinions in the three 1966 cases, the Court over the next several years submerged its differences by *per curiam* dispositions of nearly three dozen cases, in all but one of which it reversed convictions or civil determinations of obscenity. The initial case was *Redrup v. New York*,[1335] in which, after noting that the cases involved did not present special questions requiring other treatment, such as concern for juveniles, protection of unwilling adult recipients, or proscription of pandering,[1336] the Court succinctly summarized the varying positions of the seven Justices in the majority and said: "[w]hichever of the constitutional views is brought to bear upon the cases before us, it is clear that the judgments cannot stand . . . ." [1337] And so things went for several years.[1338]

Changing membership on the Court raised increasing speculation about the continuing vitality of *Roth*; it seemed unlikely the Court would long continue its *Redrup* approach.[1339] The change when it occurred strengthened the powers of government, federal, state, and local, to outlaw or restrictively regulate the sale and dissemination of materials found objectionable, and developed new standards for determining which objectionable materials are legally obscene.

[1333] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Genera, 383 U.S. 413 (1966).

[1334] 383 U.S. at 418. On the precedential effect of the *Memoirs* plurality opinion, *see* Marks v. United States, 430 U.S. 188, 192–94 (1977).

[1335] 386 U.S. 767 (1967).

[1336] 386 U.S. at 771.

[1337] 386 U.S. at 770–71. The majority was thus composed of Chief Justice Warren and Justices Black, Douglas, Brennan, Stewart, White, and Fortas.

[1338] *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 82–83 & n.8 (1973) (Justice Brennan dissenting) (describing *Redrup* practice and listing 31 cases decided on the basis of it).

[1339] *See* United States v. Reidel, 402 U.S. 351 (1971) (federal prohibition of dissemination of obscene materials through the mails is constitutional); United States v. Thirty-seven Photographs, 402 U.S. 363 (1971) (customs seizures of obscene materials from baggage of travelers are constitutional). In Grove Press v. Maryland State Bd. of Censors, 401 U.S. 480 (1971), a state court determination that the motion picture "I Am Curious (Yellow)" was obscene was affirmed by an equally divided Court, Justice Douglas not participating. And Stanley v. Georgia, 394 U.S. 557, 560–64, 568 (1969), had insisted that *Roth* remained the governing standard.

At the end of the October 1971 Term, the Court requested argument on the question whether the display of sexually oriented films or of sexually oriented pictorial magazines, when surrounded by notice to the public of their nature and by reasonable protection against exposure to juveniles, was constitutionally protected.[1340] By a five-to-four vote the following Term, the Court in *Paris Adult Theatre I v. Slaton* adhered to the principle established in *Roth* that obscene material is not protected by the First and Fourteenth Amendments even if access is limited to consenting adults.[1341] Chief Justice Burger for the Court observed that the states have wider interests than protecting juveniles and unwilling adults from exposure to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety. It does not matter that the states may be acting on the basis of unverifiable assumptions in arriving at the decision to suppress the trade in pornography; the Constitution does not require in the context of the trade in ideas that governmental courses of action be subject to empirical verification any more than it does in other fields. Nor does the Constitution embody any concept of laissez faire, or of privacy, or of Millsean "free will," that curbs governmental efforts to suppress pornography.[1342]

In *Miller v. California*,[1343] the Court prescribed standards by which unprotected pornographic materials were to be identified. Because of the inherent dangers in undertaking to regulate any form of expression, laws to regulate pornography must be carefully limited; their scope is to be confined to materials that "depict or describe patently offensive 'hard core' sexual conduct specifically de-

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[1340] Paris Adult Theatre I v. Slaton, 408 U.S. 921 (1972); Alexander v. Virginia, 408 U.S. 921 (1972).

[1341] 413 U.S. 49 (1973).

[1342] 413 U.S. at 57, 60–62, 63–64, 65–68. Delivering the principal dissent, Justice Brennan argued that the Court's *Roth* approach allowing the suppression of pornography was a failure, that the Court had not and could not formulate standards by which protected materials could be distinguished from unprotected materials, and that the First Amendment had been denigrated through the exposure of numerous persons to punishment for the dissemination of materials that fell close to one side of the line rather than the other, but more basically by deterrence of protected expression caused by the uncertainty. Id. at 73. "I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." Id. at 113. Justices Stewart and Marshall joined this opinion; Justice Douglas dissented separately, adhering to the view that the First Amendment absolutely protected all expression. Id. at 70.

[1343] 413 U.S. 15 (1973).

fined by the regulating state law, as written or construed."[1344] The law "must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[1345] The standard that a work must be "utterly without redeeming social value" before it may be suppressed was disavowed and discarded. In determining whether material appeals to a prurient interest or is patently offensive, the trier of fact, whether a judge or a jury, is not bound by a hypothetical national standard but may apply the local community standard where the trier of fact sits.[1346] Prurient interest and patent offensiveness, the Court indicated, "are essentially questions of fact."[1347] By contrast, the third or "value" prong of the *Miller* test is not subject to a community standards test; instead, the appropriate standard is "whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole."[1348]

[1344] Miller v. California, 413 U.S. 15, 27 (1973). The Court stands ready to read into federal statutes the standards it has formulated. United States v. 12 200–Ft. Reels of Film, 413 U.S. 123, 130 n.7 (1973) (Court is prepared to construe statutes proscribing materials that are "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" as limited to the types of "hard core" pornography reachable under the *Miller* standards). For other cases applying *Miller* standards to federal statutes, *see* Hamling v. United States, 418 U.S. 87, 110–16 (1974) (use of the mails); United States v. Orito, 413 U.S. 139 (1973) (transportation of pornography in interstate commerce). The Court's insistence on specificity in state statutes, either as written by the legislature or as authoritatively construed by the state court, appears to have been significantly weakened, in fact if not in enunciation, in Ward v. Illinois, 431 U.S. 767 (1977).

[1345] Miller v. California, 413 U.S. at 24.

[1346] It is the unprotected nature of obscenity that allows this inquiry; offensiveness to local community standards is, of course, a principle completely at odds with mainstream First Amendment jurisprudence. *See*, *e.g.*, Texas v. Johnson, 491 U.S. 397 (1989); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[1347] 413 U.S. at 30–34. "A juror is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." Hamling v. United States, 418 U.S. 87, 104 (1974). The holding does not compel any particular circumscribed area to be used as a "community." In federal cases, it will probably be the judicial district from which the jurors are drawn, id. at 105–106. Indeed, the jurors may be instructed to apply "community standards" without any definition being given of the "community." Jenkins v. Georgia, 418 U.S. 153, 157 (1974). In a federal prosecution for use of the mails to transmit pornography, the fact that the legislature of the state within which the transaction takes place has abolished pornography regulation except for dealings with children does not preclude permitting the jurors in the federal case to make their own definitions of what is offensive to contemporary community standards; they may be told of the legislature's decision but they are not bound by it. Smith v. United States, 431 U.S. 291 (1977).

[1348] Pope v. Illinois, 481 U.S. 497, 500–01 (1987).

The Court in *Miller* reiterated that it was not permitting an unlimited degree of suppression of materials. Only "hard core" materials were to be deemed without the protection of the First Amendment, and the Court's idea of the content of "hard core" pornography was revealed in its examples: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[1349] Subsequently, the Court held that a publication was not obscene if it "provoked only normal, healthy sexual desires." To be obscene it must appeal to "a shameful or morbid interest in nudity, sex, or excretion."[1350] The Court has also indicated that obscenity is not be limited to pictures; books containing only descriptive language may be suppressed.[1351]

First Amendment values, the Court stressed in *Miller*, "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[1352] But the Court had conferred on juries as triers of fact the determination, based upon their understanding of community standards, whether material was "patently offensive." Did not this virtually immunize these questions from appellate review? In *Jenkins v. Georgia*,[1353] the Court, while adhering to the *Miller* standards, stated that "juries [do not] have unbridled discretion in determining what is 'patently offensive.'" *Miller* was intended to make clear that only "hard-core" materials could be suppressed and this concept and the Court's descriptive itemization of some types of hardcore materials were "intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination." The Court's own viewing of the motion picture in question convinced it that "[n]othing in the movie falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything suffi-

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[1349] Miller v. California, 413 U.S. 15, 25 (1973). Quoting *Miller's* language in Hamling v. United States, 418 U.S. 87, 114 (1974), the Court reiterated that it was only "hard-core" material that was unprotected. "While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases." Referring to this language in Ward v. Illinois, 431 U.S. 767 (1977), the Court upheld a state court's power to construe its statute to reach sadomasochistic materials not within the confines of the *Miller* language.

[1350] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 498 (1984).

[1351] Kaplan v. California, 413 U.S. 115 (1973).

[1352] 413 U.S. at 25.

[1353] 418 U.S. 153 (1974).

ciently similar to such material to justify similar treatment." [1354] But, in a companion case, the Court found that a jury determination of obscenity "was supported by the evidence and consistent with" the standards.[1355]

The decisions from the *Paris Adult Theatre* and *Miller* era were rendered by narrow majorities,[1356] but nonetheless have guided the Court since. In addition, the Court's willingness to allow some regulation of non-obscene but sexually explicit or "indecent" expression reduces the importance (outside the criminal area) of whether material is classified as obscene.

Even as to materials falling within the constitutional definition of obscene, the Court has recognized a limited private, protected interest in possession within the home,[1357] unless those materials constitute child pornography. *Stanley v. Georgia* was an appeal from a state conviction for possession of obscene films discovered in appellant's home by police officers armed with a search warrant for other items which were not found. The Court reversed, holding that the mere private possession of obscene materials in the home cannot be made a criminal offense. The Constitution protects the right to receive information and ideas, the Court said, regardless of their social value, and "that right takes on an added dimension" in the context of a prosecution for possession of something in one's own home. "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." [1358] Despite the unqualified assertion in *Roth* that obscenity was not protected by the First Amendment, the Court observed, it and the cases following were concerned with the governmental interest in regulating commercial distribution of obscene materials. *Roth* and the cases following that decision are not im-

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[1354] 418 U.S. at 161. The film at issue was *Carnal Knowledge*.

[1355] Hamling v. United States, 418 U.S. 87 (1974). In Smith v. United States, 431 U.S. 291, 305–06 (1977), the Court explained that jury determinations in accordance with their own understanding of the tolerance of the average person in their community are not unreviewable. Judicial review would pass on (1) whether the jury was properly instructed to consider the entire community and not simply the members' own subjective reaction or the reactions of a sensitive or of a callous minority, (2) whether the conduct depicted fell within the examples specified in *Miller*, (3) whether the work lacked serious literary, artistic, political, or scientific value, and (4) whether the evidence was sufficient. The Court indicated that the value test of *Miller* "was particularly amenable to judicial review." The value test is not to be measured by community standards, the Court later held in Pope v. Illinois, 481 U.S. 497 (1987), but instead by a "reasonable person" standard. An erroneous instruction on this score, however, may be "harmless error." Id. at 503.

[1356] For other five-to-four decisions of the era, *see* Marks v. United States, 430 U.S. 188 (1977); Smith v. United States, 431 U.S. 291 (1977); Splawn v. California, 431 U.S. 595 (1977); and Ward v. Illinois, 431 U.S. 767 (1977).

[1357] Stanley v. Georgia, 394 U.S. 557 (1969).

[1358] 394 U.S. at 564.

paired by today's decision, the Court insisted,[1359] but in its rejection of each of the state contentions made in support of the conviction the Court appeared to be rejecting much of the basis of *Roth*. First, there is no governmental interest in protecting an individual's mind from the effect of obscenity. Second, the absence of ideological content in the films was irrelevant, since the Court will not draw a line between transmission of ideas and entertainment. Third, there is no empirical evidence to support a contention that exposure to obscene materials may incite a person to antisocial conduct; even if there were such evidence, enforcement of laws proscribing the offensive conduct is the answer. Fourth, punishment of mere possession is not necessary to punishment of distribution. Fifth, there was little danger that private possession would give rise to the objections underlying a proscription upon public dissemination, exposure to children and unwilling adults.[1360]

Stanley's broad rationale has been given a restrictive reading, and the holding has been confined to its facts. Any possible implication that *Stanley* was applicable outside the home and recognized a right to obtain pornography or a right in someone to supply it was soon dispelled.[1361] The Court has consistently rejected *Stanley's* theoretical underpinnings, upholding morality-based regulation of the behavior of consenting adults.[1362] Also, *Stanley* has been held inapplicable to possession of child pornography in the home, the Court determining that the state interest in protecting children from sexual exploitation far exceeds the interest in *Stanley* of protecting adults from themselves.[1363] Apparently for this reason, a state's conclusion that punishment of mere possession is a necessary or desirable means of reducing production of child pornography will not be closely scrutinized.[1364]

Child Pornography.—In *New York v. Ferber*,[1365] the Court recognized another category of expression that is outside the coverage

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[1359] 394 U.S. at 560–64, 568.

[1360] 394 U.S. at 565–68.

[1361] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–68 (1973). Transportation of unprotected material for private use may be prohibited, United States v. Orito, 413 U.S. 139 (1973), and the mails may be closed, United States v. Reidel, 402 U.S. 351 (1971), as may channels of international movement, United States v. Thirty-seven Photographs, 402 U.S. 363 (1971); United States v. 12 200–Ft. Reels of Film, 413 U.S. 123 (1973).

[1362] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65–70 (1973) (commercial showing of obscene films to consenting adults); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (regulation of non-obscene, nude dancing restricted to adults).

[1363] Osborne v. Ohio, 495 U.S. 103 (1990).

[1364] 495 U.S. at 109–10.

[1365] 458 U.S. 747 (1982). Decision of the Court was unanimous, although there were several limiting concurrences. *Compare*, *e.g.*, 775 (Justice Brennan, arguing for

of the First Amendment: the visual depiction of children in films or still photographs in a variety of sexual activities or exposures of the genitals. The reason that such depictions may be prohibited was the governmental interest in protecting the physical and psychological well-being of children, whose participation in the production of these materials would subject them to exploitation and harm. The state may go beyond a mere prohibition of the use of children, because it is not possible to protect children adequately without prohibiting the exhibition and dissemination of the materials and advertising about them. Thus, "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." [1366] But, because expression is involved, the government must carefully define what conduct is to be prohibited and may reach only "works that *visually* depict sexual conduct by children below a specified age." [1367]

The reach of the state may even extend to private possession of child pornography in the home. In *Osborne v. Ohio* [1368] the Court upheld a state law criminalizing the possession or viewing of child pornography as applied to someone who possessed such materials in his home. Distinguishing *Stanley v. Georgia*, the Court ruled that Ohio's interest in preventing exploitation of children far exceeded what it characterized as Georgia's "paternalistic interest" in protecting the minds of adult viewers of pornography.[1369] Because of the greater importance of the state interest involved, the Court saw less need to require states to demonstrate a strong necessity for regulating private possession as well as commercial distribution and sale.

In *Ashcroft v. Free Speech Coalition*, the Court held unconstitutional the federal Child Pornography Prevention Act (CPPA) to the extent that it prohibited pictures that were not produced with actual minors.[1370] Prohibited pictures included computer-generated ("virtual") child pornography, and photographs of adult actors who appeared to be minors, as well as "a Renaissance painting depicting a scene from classical mythology." [1371] The Court observed that statutes that prohibit child pornography that use real children are constitutional because they target "[t]he production of the work, not

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exemption of "material with serious literary, scientific, or educational value"), *with* 774 (Justice O'Connor, arguing that such material need not be excepted). The Court did not pass on the question, inasmuch as the materials before it were well within the prohibitable category. Id. at 766–74.

[1366] 458 U.S. at 763–64.

[1367] 458 U.S. at 764 (emphasis original). Child pornography need not meet *Miller* obscenity standards to be unprotected by the First Amendment. Id. at 764–65.

[1368] 495 U.S. 103 (1990).

[1369] 495 U.S. at 108.

[1370] 535 U.S. 234 (2002).

[1371] 535 U.S. at 241.

the content."[1372] The CPPA, by contrast, targeted the content, not the means of production. The government's rationales for the CPPA included that "[p]edophiles might use the materials to encourage children to participate in sexual activity" and might "whet their own sexual appetites" with it, "thereby increasing . . . the sexual abuse and exploitation of actual children."[1373] The Court found these rationales inadequate because the government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts" and "may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"[1374] The government had also argued that the existence of "virtual" child pornography "can make it harder to prosecute pornographers who do use real minors," because, "[a]s imaging technology improves . . . , it becomes more difficult to prove that a particular picture was produced using actual children."[1375] This rationale, the Court found, "turns the First Amendment upside down. The Government may not suppress lawful speech as a means to suppress unlawful speech."[1376]

In *United States v. Williams*,[1377] the Supreme Court upheld a federal statute that prohibits knowingly advertising, promoting, presenting, distributing, or soliciting material "in a manner that reflects the belief, or that is intended to cause another to believe, that the material" is child pornography that is obscene or that depicts an actual minor (*i.e.*, is child pornography that is not constitutionally protected).[1378] Under the provision, in other words, "an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute."[1379] The Court found that these activities are not constitutionally protected because "[o]ffers to engage in illegal transactions [as opposed to abstract advocacy of illegality] are categorically excluded from First Amendment protection," even "when the offeror

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[1372] 535 U.S. at 249; *see also* id. at 241.
[1373] 535 U.S. at 241.
[1374] 535 U.S. at 253.
[1375] 535 U.S. at 242.
[1376] 535 U.S. at 255. Following Ashcroft v. Free Speech Coalition, Congress enacted the PROTECT Act, Pub. L. 108–21, 117 Stat. 650 (2003), which, despite the decision in that case, defined "child pornography" so as to continue to prohibit computer-generated child pornography (but not other types of child pornography produced without an actual minor). 18 U.S.C. § 2256(8)(B). In United States v. Williams, 128 S. Ct. 1830, 1836 (2008), the Court, without addressing the PROTECT Act's new definition, cited Ashcroft v. Free Speech Coalition with approval.
[1377] 128 S. Ct. 1830 (2008).
[1378] 18 U.S.C. § 2252A(a)(3)(B).
[1379] 128 S. Ct. at 1839.

is mistaken about the factual predicate of his offer," such as when the child pornography that one offers to buy or sell does not exist or is constitutionally protected.[1380]

Non-obscene But Sexually Explicit and Indecent Expression.—There is expression, consisting of words or pictures, that some find offensive but that does not constitute obscenity and is protected by the First Amendment. Nudity portrayed in films or stills cannot be presumed obscene;[1381] nor can offensive language ordinarily be punished simply because it offends someone.[1382] Nonetheless, government may regulate sexually explicit but non-obscene expression in a variety of ways. Legitimate governmental interests may be furthered by appropriately narrow regulation, and the Court's view of how narrow regulation must be is apparently influenced not only by its view of the strength of the government's interest in regulation, but also by its view of the importance of the expression it-

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[1380] 128 S. Ct. at 1841, 1842, 1843. Justice Souter, in a dissenting opinion joined by Justice Ginsburg, agreed that "Congress may criminalize proposals unrelated to any extant image," but disagreed with respect to "proposals made with regard to specific, existing [constitutionally protected] representations." Id. at 1849. Justice Souter believed that, "if the Act stands when applied to identifiable, extant [constitutionally protected] pornographic photographs, then in practical terms *Ferber* and *Free Speech Coalition* fall. They are left as empty as if the Court overruled them formally . . . ." Id. at 1854. Justice Scalia's opinion for the majority replied that this "is simply not true . . . . Simulated child pornography will be as available as ever, so long as it is offered and sought *as such*, and not as real child pornography. . . . There is no First Amendment exception from the general principle of criminal law that a person attempting to commit a crime need not be exonerated because he has a mistaken view of the facts." Id. at 1844–45.

[1381] Erznoznik v. City of Jacksonville, 422 U.S. 205, 212–14 (1975).

[1382] *E.g.*, Cohen v. California, 403 U.S. 15 (1971). Special rules apply to broadcast speech, which, because of its pervasive presence in the home and its accessibility to children, is accorded "the most limited First Amendment protection" of all media; non-obscene but indecent language and nudity may be curtailed, with the time of day and other circumstances determining the extent of curtailment. FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978). However, efforts by Congress and the FCC to extend the indecency ban to 24 hours a day were rebuffed by an appeals court. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (invalidating regulations promulgated pursuant to Pub. L. 100–459, § 608), *cert. denied*, 503 U.S. 913 (1992). Earlier, the same court had invalidated an FCC restriction on indecent, non-obscene broadcasts from 6 a.m. to midnight, finding that the FCC had failed to adduce sufficient evidence to support the restraint. Action for Children's Television v. FCC, 852 F.2d 1332, 1335 (D.C. Cir. 1988). In 1992, however, Congress imposed a 6 a.m.-to-midnight ban on indecent programming, with a 10 p.m.-to-midnight exception for public radio and television stations that go off the air at or before midnight. Pub. L. 102–356, § 16 (1992), 47 U.S.C. § 303 note. This time, after a three-judge panel found the statute unconstitutional, the en banc court of appeals upheld it, except for its 10 p.m.-to-midnight ban on indecent material on non-public stations. Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996). *See also* "Broadcast Radio and Television," *supra*.

self. In other words, sexually explicit expression does not receive the same degree of protection afforded purely political speech.[1383]

Government has a "compelling" interest in the protection of children from seeing or hearing indecent material, but total bans applicable to adults and children alike are constitutionally suspect.[1384] In *Reno v. American Civil Liberties Union*,[1385] the Court struck down two provisions of the Communications Decency Act of 1996 (CDA), one of which would have prohibited use of an "interactive computer

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[1383] Justice Scalia, concurring in Sable Communications v. FCC, 492 U.S. 115, 132 (1989), suggested that there should be a "sliding scale" taking into account the definition of obscenity: "The more narrow the understanding of what is 'obscene,' and hence the more pornographic what is embraced within the residual category of 'indecency,' the more reasonable it becomes to insist upon greater assurance of insulation from minors." Barnes v. Glen Theatre, 501 U.S. 560 (1991), upholding regulation of nude dancing even in the absence of a threat to minors, may illustrate a general willingness by the Court to apply soft rather than strict scrutiny to regulation of more sexually explicit expression.

[1384] *See* Sable Communications v. FCC, 492 U.S. 115 (1989) (FCC's "dial-a-porn" rules imposing a total ban on "indecent" speech are unconstitutional, given less restrictive alternatives—*e.g.*, credit cards or user IDs—of preventing access by children). *Pacifica Foundation* is distinguishable, the Court reasoned, because that case did not involve a "total ban" on broadcast, and also because there is no "captive audience" for the "dial-it" medium, as there is for the broadcast medium. 492 U.S. at 127–28. Similar rules apply to regulation of cable TV. In Denver Area Educational Telecommunications Consortium v. FCC, 518 U.S. 727, 755 (1996), the Court, acknowledging that protection of children from sexually explicit programming is a "compelling" governmental interest (but refusing to determine whether strict scrutiny applies), nonetheless struck down a requirement that cable operators segregate and block indecent programming on leased access channels. The segregate-and-block restrictions, which included a requirement that a request for access be in writing, and which allowed for up to 30 days' delay in blocking or unblocking a channel, were not sufficiently protective of adults' speech and viewing interests to be considered either narrowly or reasonably tailored to serve the government's compelling interest in protecting children. In United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000), the Supreme Court, explicitly applying strict scrutiny to a content-based speech restriction on cable TV, struck down a federal statute designed to "shield children from hearing or seeing images resulting from signal bleed." Id. at 806.

The Court seems to be becoming less absolute in viewing the protection of all minors (regardless of age) from all indecent material (regardless of its educational value and parental approval) to be a compelling governmental interest. In striking down the Communications Decency Act of 1996, the Court would "neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated to a 17-year-old—no matter how much value the message may have and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute." Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). In *Playboy Entertainment Group*, 529 U.S. at 825, the Court wrote: "Even upon the assumption that the government has an interest in substituting itself for informed and empowered parents, its interest is not sufficiently compelling to justify this widespread restriction on speech." The Court also would "not discount the possibility that a graphic image could have a negative impact on a young child" (id. at 826), thereby suggesting again that it may take age into account when applying strict scrutiny.

[1385] 521 U.S. 844 (1997).

service" to display indecent material "in a manner available to a person under 18 years of age." [1386] This prohibition would, in effect, have banned indecent material from all Internet sites except those accessible by only by adults. Although intended "to deny minors access to potentially harmful speech . . . , [the CDA's] burden on adult speech," the Court wrote, "is unacceptable if less restrictive alternatives would be at least as effective . . . . [T]he Government may not 'reduc[e] the adult population . . . to . . . only what is fit for children.'" [1387]

In *Reno*, the Court distinguished *FCC v. Pacifica Foundation*,[1388] in which it had upheld the FCC's restrictions on indecent radio and television broadcasts, because (1) "[t]he CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet," (2) the CDA imposes criminal penalties, and the Court has never decided whether indecent broadcasts "would justify a criminal prosecution," and (3) radio and television, unlike the Internet, have, "as a matter of history . . . 'received the most limited First Amendment protection,' . . . in large part because warnings could not adequately protect the listener from unexpected program content. . . . [On the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material." [1389]

After the Supreme Court struck down the CDA, Congress enacted the Child Online Protection Act (COPA), which banned "material that is harmful to minors" on Web sites that have the objective of earning a profit.[1390] The Third Circuit upheld a preliminary injunction against enforcement of the statute on the ground that, "because the standard by which COPA gauges whether material is 'harmful to minors' is based on identifying 'contemporary commu-

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[1386] The other provision the Court struck down would have prohibited indecent communications, by telephone, fax, or e-mail, to minors.

[1387] 521 U.S. at 874–75. The Court did not address whether, if less restrictive alternatives would not be as effective, the government would then be permitted to reduce the adult population to only what is fit for children. Courts of appeals, however, have written that "[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations." ACLU v. Reno, 217 F.3d 162, 179 (3d Cir. 2000), *vacated and remanded sub nom.*, Ashcroft v. ACLU, 535 U.S. 564 (2002); Carlin Communications, Inc. v. FCC, 837 F.2d 546, 555 (2d Cir. 1988).

[1388] 438 U.S. 726 (1978).

[1389] 521 U.S. at 867.

[1390] "Harmful to minors" statutes ban the distribution of material to minors that is not necessarily obscene under the *Miller* test. In Ginsberg v. New York, 390 U.S. 629, 641 (1968), the Supreme Court, applying a rational basis standard, upheld New York's harmful-to-minors statute.

nity standards[,]' the inability of Web publishers to restrict access to their Web sites based on the geographic locale of the site visitor, in and of itself, imposes an impermissible burden on constitutionally protected First Amendment speech." [1391] This is because it results in communications available to a nationwide audience being judged by the standards of the community most likely to be offended. The Supreme Court vacated and remanded, holding "that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." [1392]

Upon remand, the Third Circuit again upheld the preliminary injunction, and the Supreme Court affirmed and remanded the case for trial. The Supreme Court found that the district court had not abused its discretion in granting the preliminary injunction, because the government had failed to show that proposed alternatives to COPA would not be as effective in accomplishing its goal. The primary alternative to COPA, the Court noted, is blocking and filtering software. Filters are less restrictive than COPA because "[t]hey impose selective restrictions on speech at the receiving end, not universal restriction at the source." [1393] Subsequently, the district court found COPA to violate the First Amendment and issued a permanent injunction against its enforcement; the Third Circuit affirmed, and the Supreme Court denied certioriari.[1394]

In *United States v. American Library Association, Inc.*, a four-Justice plurality of the Supreme Court upheld the Children's Internet Protection Act (CIPA), which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography, and to prevent minors from obtaining access to material that is harmful to them." [1395] The plurality asked "whether libraries would violate the First Amendment by employing the filtering software that CIPA requires." [1396] Does CIPA, in other words, effectively violate library *pa-*

[1391] ACLU v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).

[1392] Ashcroft v. ACLU, 535 U.S. 564, 585 (2002) (emphasis in original).

[1393] Ashcroft v. ACLU, 542 U.S. 656, 667 (2004). Justice Breyer, dissenting, wrote that blocking and filtering software is not a less restrictive alternative because "it is part of the status quo" and "[i]t is always less restrictive to do *nothing* than to do *something*." Id. at 684. The majority opinion countered that Congress "may act to encourage the use of filters," and "[t]he need for parental cooperation does not automatically disqualify a proposed less restrictive alternative." Id. at 669.

[1394] American Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007), *aff'd sub nom.* American Civil Liberties Union v. Mukasey, 534 F.3d 181 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1032 (2009).

[1395] 539 U.S. 194, 199 (2003).

[1396] 539 U.S. at 203.

trons' rights? The plurality concluded that it does not, after finding that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum," and that it therefore would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.[1397]

The plurality acknowledged "the tendency of filtering software to 'overblock'—that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block." [1398] It found, however, that, "[a]ssuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled." [1399]

The plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance—in other words, does it violate public *libraries*' rights by requiring them to limit their freedom of speech if they accept federal funds? The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), "CIPA does not 'penalize' libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress's decision not to subsidize their doing so." [1400]

The government may also take notice of objective conditions attributable to the commercialization of sexually explicit but nonobscene materials. Thus, the Court recognized a municipality's authority to zone land to prevent deterioration of urban areas, upholding an ordinance providing that "adult theaters" showing motion pictures that depicted "specified sexual activities" or "specified anatomical areas" could not be located within 100 feet of any two other establishments included within the ordinance or within 500 feet of a residential area.[1401] Similarly, an adult bookstore was subject to clo-

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[1397] 539 U.S. at 205.

[1398] 539 U.S. at 208.

[1399] 539 U.S. at 209. Justice Kennedy, concurring, noted that, "[i]f some libraries do not have the capacity to unblock specific Web sites or to disable the filter . . . that would be the subject for an as-applied challenge, not the facial challenge made in this case." 539 U.S. at 215. Justice Souter, dissenting, noted that "the statute says only that a library 'may' unblock, not that it must." 539 U.S. at 233.

[1400] 539 U.S. at 212.

[1401] Young v. American Mini Theatres, 427 U.S. 50 (1976). Four of the five majority Justices thought the speech involved deserved less First Amendment protection than other expression, id. at 63–71, while Justice Powell, concurring, thought the ordinance was sustainable as a measure that served valid governmental interests and only incidentally affected expression. Id. at 73. Justices Stewart, Brennan, Marshall, and Blackmun dissented. Id. at 84, 88. *Young* was followed in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), upholding a city ordinance prohibiting lo-

sure as a public nuisance where it was being used as a place for prostitution and illegal sexual activities, because the closure "was directed at unlawful conduct having nothing to do with books or other expressive activity." [1402] However, a city was held constitutionally powerless to prohibit drive-in motion picture theaters from showing films containing nudity where the screen is visible from a public street or place.[1403] Also, the FCC was unable to justify a ban on transmission of "indecent" but not obscene telephone messages.[1404]

The Court has held, however, that "live" productions containing nudity may be regulated to a greater extent than may films or publications. Whether this represents a distinction between live performances and other entertainment media, or whether it signals a more permissive approach overall to governmental regulation of non-obscene but sexually explicit material, remains to be seen. In *Barnes v. Glen Theatre, Inc.*,[1405] the Court upheld application of Indiana's public indecency statute to require that dancers in public performances of nude, non-obscene erotic dancing wear "pasties" and a "G-string" rather than appear totally nude. There was no opinion of the Court, three Justices viewing the statute as a permissible regulation of "societal order and morality," [1406] one viewing it as a permissible means of regulating supposed secondary effects of prostitution and other criminal activity,[1407] and a fifth Justice seeing no need for special First Amendment protection from a law of general applicability directed at conduct rather than expression.[1408] All but one of the Justices agreed that nude dancing is entitled to some

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cation of adult theaters within 1,000 feet of residential areas, churches, or parks, and within one mile of any school. Rejecting the claim that the ordinance regulated content of speech, the Court indicated that such time, place and manner regulations are valid if "designed to serve a substantial governmental interest" and if "allow-[ing] for reasonable alternative avenues of communication." Id. at 50. The city had a substantial interest in regulating the "undesirable secondary effects" of such businesses. And, although the suitability for adult theaters of the remaining 520 acres within the city was disputed, the Court held that the theaters "must fend for themselves in the real estate market," and are entitled only to "a reasonable opportunity to open and operate." Id. at 54. The Supreme Court also upheld zoning of sexually oriented businesses in FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990), and City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).

[1402] Arcara v. Cloud Books, 478 U.S. 697, 707 (1986).

[1403] Erznoznik v. City of Jacksonville, 422 U.S. 204 (1975).

[1404] Sable Communications of California v. FCC, 492 U.S. 115 (1989).

[1405] 501 U.S. 560 (1991).

[1406] 501 U.S. at 568 (Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy).

[1407] 501 U.S. at 581 (Justice Souter).

[1408] 501 U.S. at 572 (Justice Scalia). The Justice thus favored application of the same approach applied to free exercise of religion in Employment Division v. Smith, 494 U.S. 872 (1990).

First Amendment protection,[1409] but the result of *Barnes* was a bare minimum of protection. Numerous questions remain unanswered. In addition to the uncertainty over applicability of *Barnes* to regulation of the content of films or other shows in "adult" theaters,[1410] there is also the issue of its applicability to nudity in operas or theatrical productions not normally associated with commercial exploitation of sex.[1411] But broad implications for First Amendment doctrine are probably unwarranted.[1412] The Indiana statute was not limited in application to barrooms; had it been, then the Twenty-

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[1409] Earlier cases had established as much. *See* California v. LaRue, 409 U.S. 109, 118 (1972); Southeastern Promotions v. Conrad, 420 U.S. 546, 557–58 (1975); Doran v. Salem Inn, 422 U.S. 922, 932 (1975); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981); New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 716, 718 (1981). Presumably, then, the distinction between barroom erotic dancing, entitled to minimum protection, and social "ballroom" dancing, not expressive and hence not entitled to First Amendment protection (*see* City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989)), still hangs by a few threads. Justice Souter, concurring in *Barnes*, 501 U.S. 560, 587 (1991), recognized the validity of the distinction between ballroom and erotic dancing, a validity that had been questioned by a dissent in the lower court. Miller v. Civil City of South Bend, 904 F.2d 1081, 1128–29 (7th Cir. 1990) (Easterbrook, J.).

[1410] Although Justice Souter relied on what were essentially zoning cases (Young v. American Mini Theatres and Renton v. Playtime Theatres) to justify regulation of expression itself, he nonetheless pointed out that a pornographic movie featuring one of the respondent dancers was playing nearby without interference by the authorities. This suggests that, at least with respect to direct regulation of the degree of permissible nudity, he might draw a distinction between "live" and film performances even while acknowledging the harmful "secondary" effects associated with *both*.

[1411] The Court has not ruled directly on such issues. *See* Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) (invalidating the denial of use of a public auditorium for a production of the musical "Hair," in the absence of procedural safeguards that must accompany a system of prior restraint). Presumably the *Barnes* plurality's public-morality rationale would apply equally to the "adult" stage and to the operatic theater, while Justice Souter's secondary effects rationale would not. But the plurality ducked this issue, reinterpreting the lower court record to deny that Indiana had distinguished between "adult" and theatrical productions. 501 U.S. at 564 n.1 (Chief Justice Rehnquist); id. at 574 n.2 (Justice Scalia). On the other hand, the fact that the state authorities disclaimed any intent to apply the statute to theatrical productions demonstrated to dissenting Justice White (who was joined by Justices Marshall, Blackmun, and Stevens) that the statute was *not* a general prohibition on public nudity, but instead was targeted at "the communicative aspect of the erotic dance." Id. at 591.

[1412] The Court had only recently affirmed that music is entitled to First Amendment protection independently of the message conveyed by any lyrics (Ward v. Rock Against Racism, 491 U.S. 781 (1989)), so it seems implausible that the Court was signaling a narrowing of protection to only ideas and opinions. Rather, the Court seems willing to give government the benefit of the doubt when it comes to legitimate objectives in regulating expressive conduct that is sexually explicit. For an extensive discourse on the expressive aspects of dance and the arts in general, and the striptease in particular, *see* Judge Posner's concurring opinion in the lower court's disposition of *Barnes*. Miller v. Civil City of South Bend, 904 F.2d 1081, 1089 (7th Cir. 1990).

first Amendment would have afforded additional authority to regulate the erotic dancing.

In *Erie v. Pap's A.M.*,[1413] the Supreme Court again upheld the application of a statute prohibiting public nudity to an "adult" entertainment establishment. Although there was again only a plurality opinion, parts of that opinion were joined by five justices. These five adopted Justice Souter's position in *Barnes*, that the statute satisfied the *O'Brien* test because it was intended "to combat harmful secondary effects," such as "prostitution and other criminal activity."[1414] Justice Souter, however, although joining the plurality opinion, also dissented in part. He continued to believe that secondary effects were an adequate justification for banning nude dancing, but did not believe "that the city has made a sufficient evidentiary showing to sustain its regulation," and therefore would have remanded the case for further proceedings.[1415] He acknowledged his "mistake" in *Barnes* in failing to make the same demand for evidence.[1416]

The plurality opinion found that Erie's public nudity ban "regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*," because Erie allowed dancers to perform wearing only pasties and G-strings.[1417] It may follow that "requiring dancers to wear pasties and G-strings may not greatly reduce . . . secondary effects, but *O'Brien* requires only that the regulation further the interest of combating such effects," not that it further it to a particular extent.[1418] The plurality opinion did not address the question of whether statutes prohibiting public nudity could be applied to serious theater, but its reliance on secondary effects suggests that they could not.

Speech Plus—The Constitutional Law of Leafleting, Picketing, and Demonstrating

Communication of political, economic, social, and other views is not accomplished solely by face-to-face speech, broadcast speech, or

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[1413] 529 U.S. 277 (2000).
[1414] 529 U.S. at 292, 291.
[1415] 529 U.S. 310–311.
[1416] 529 U.S. at 316.
[1417] 529 U.S. at 301. The plurality said that, though nude dancing is "expressive conduct," we think that it falls "only within the outer ambit of the First Amendment's protection." Id. at 289. The opinion also quotes Justice Stevens to the same effect with regard to erotic materials generally. Id. at 294. In United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 826 (2000), however, the Court wrote that it "cannot be influenced . . . by the perception that the regulation in question is not a major one because the speech ['signal bleed' of sexually oriented cable programming] is not very important."
[1418] 529 U.S. at 301.

writing in newspapers, periodicals, and pamphlets. There is also "expressive conduct," which includes picketing and marching, distribution of leaflets and pamphlets, addresses to publicly assembled audiences, door-to-door solicitation, and sit-ins. There is also a class of conduct, now only vaguely defined, that has been denominated "symbolic conduct," which includes such actions as flag desecration and draft-card burnings. Because all these ways of expressing oneself involve conduct rather than mere speech, they are all much more subject to regulation and restriction than is simple speech. Some of them may be forbidden altogether. But, to the degree that these actions are intended to communicate a point of view, the First Amendment is relevant and protects some of them to a great extent. Sorting out the conflicting lines of principle and doctrine is the point of this section.

The Public Forum.—In 1895, while on the highest court of Massachusetts, future Justice Oliver Wendell Holmes rejected a contention that public property was by right open to the public as a place where the right of speech could be recognized,[1419] and on review the United States Supreme Court endorsed Holmes' view.[1420] Years later, beginning with *Hague v. CIO*,[1421] the Court reconsidered the issue. Justice Roberts wrote in *Hague*: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." Although this opinion was not itself joined by a majority of the Justices, the Court subsequently endorsed the view in several opinions.[1422]

The Roberts view was called into question in the 1960s, however, when the Court seemed to leave the issue open,[1423] and when a majority endorsed an opinion by Justice Black asserting his own

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[1419] Commonwealth v. Davis, 162 Mass. 510, 511 (1895). "For the Legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of rights of a member of the public than for the owner of a private house to forbid it in the house."

[1420] Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

[1421] 307 U.S. 496 (1939). Only Justice Black joined the Roberts opinion, but only Justices McReynolds and Butler dissented from the result.

[1422] *E.g.*, Schneider v. Town of Irvington, 308 U.S. 147, 163 (1939); Kunz v. New York, 340 U.S. 290, 293 (1951).

[1423] Cox v. Louisiana, 379 U.S. 536, 555 (1965). For analysis of this case in the broader context, *see* Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1.

narrower view of speech rights in public places.[1424] Later decisions restated and quoted the Roberts language from *Hague*, and that is now the position of the Court.[1425] Public streets and parks,[1426] including those adjacent to courthouses[1427] and foreign embassies,[1428] as well as public libraries[1429] and the grounds of legislative bodies,[1430] are open to public demonstrations, although the uses to which public areas are dedicated may shape the range of permissible expression and conduct that may occur there.[1431] Moreover, not all public properties are public forums. "[T]he First Amendment does not guarantee access to property simply because it is owned or con-

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[1424] Adderley v. Florida, 385 U.S. 39 (1966). *See* id. at 47–48; Cox v. Louisiana, 379 U.S. 559, 578 (1965) (Justice Black concurring in part and dissenting in part); Jamison v. Texas, 318 U.S. 413, 416 (1943) (Justice Black for the Court).

[1425] *E.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969); Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); Carey v. Brown, 447 U.S. 455, 460 (1980).

[1426] Hague v. CIO, 307 U.S. 496 (1939); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Coates v. City of Cincinnati, 402 U.S. 611 (1971); Grayned v. City of Rockford, 408 U.S. 104 (1972); Greer v. Spock, 424 U.S. 828, 835–36 (1976); Carey v. Brown, 447 U.S. 455 (1980).

[1427] Narrowly drawn statutes that serve the state's interests in security and in preventing obstruction of justice and influencing of judicial officers are constitutional. Cox v. Louisiana, 379 U.S. 559 (1965). A restriction on carrying signs or placards on the grounds of the Supreme Court is unconstitutional as applied to the public sidewalks surrounding the Court, since it does not sufficiently further the governmental purposes of protecting the building and grounds, maintaining proper order, or insulating the judicial decisionmaking process from lobbying. United States v. Grace, 461 U.S. 171 (1983).

[1428] In Boos v. Barry, 485 U.S. 312 (1988), the Court struck down as content-based a District of Columbia law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute." However, another aspect of the District's law, making it unlawful for three or more persons to congregate within 500 feet of an embassy and refuse to obey a police dispersal order, was upheld; under a narrowing construction, the law had been held applicable only to congregations directed at an embassy, and reasonably believed to present a threat to the peace or security of the embassy.

[1429] Brown v. Louisiana, 383 U.S. 131 (1966) (sit-in in library reading room).

[1430] Edwards v. South Carolina, 372 U.S. 229 (1963); Jeanette Rankin Brigade v. Capitol Police Chief, 342 F. Supp. 575 (D.C. 1972) (three-judge court), *aff'd*, 409 U.S. 972 (1972) (voiding statute prohibiting parades and demonstrations on United States Capitol grounds).

[1431] *E.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (sustaining ordinance prohibiting noisemaking adjacent to school if that noise disturbs or threatens to disturb the operation of the school); Brown v. Louisiana, 383 U.S. 131 (1966) (silent vigil in public library protected while noisy and disruptive demonstration would not be); Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) (wearing of black armbands as protest protected but not if it results in disruption of school); Cameron v. Johnson, 390 U.S. 611 (1968) (preservation of access to courthouse); Frisby v. Schultz, 487 U.S. 474 (1988) (ordinance prohibiting picketing "before or about" any residence or dwelling, narrowly construed as prohibiting only picketing that targets a particular residence, upheld as furthering significant governmental interest in protecting the privacy of the home).

trolled by the government." [1432] "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time." [1433] Thus, by the nature of the use to which the property is put or by tradition, some sites are simply not as open for expression as streets and parks are.[1434] But if government does open non-traditional forums for expressive activities, it may not discriminate on the basis of content or viewpoint in according access.[1435] The Court, however, remains divided with respect to the reach of the public forum doctrine.[1436]

Speech in public forums is subject to time, place, and manner regulations that take into account such matters as control of traffic in the streets, the scheduling of two meetings or demonstrations at the same time and place, the preventing of blockages of building entrances, and the like.[1437] Such regulations are closely scrutinized in order to protect free expression, and, to be valid, must be justified without reference to the content or subject matter of speech,[1438] must serve a significant governmental interest,[1439] and must leave open ample alternative channels for communication of the informa-

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[1432] United States Postal Serv. v. Council of Greenburgh Civic Assn's, 453 U.S. 114 (1981).

[1433] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

[1434] *E.g.*, Adderley v. Florida, 385 U.S. 39 (1966) (jails); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (advertising space in city rapid transit cars); Greer v. Spock, 424 U.S. 828 (1976) (military bases); United States Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981) (private mail boxes); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (interschool mail system); ISKCON v. Lee, 505 U.S. 672 (1992) (publicly owned airport terminal).

[1435] *E.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater); Madison School District v. WERC, 429 U.S. 167 (1976) (school board meeting); Heffron v. ISKCON, 452 U.S. 640 (1981) (state fair grounds); Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities).

[1436] *Compare* United States Postal Service v. Council of Greenburgh Civic Ass'ns, 454 U.S. 114, 128–31 (1981), *with* id. at 136–40 (Justice Brennan concurring), and 142 (Justice Marshall dissenting). For evidence of continuing division, *compare* ISKCON v. Lee, 505 U.S. 672 (1992) *with* id. at 693 (Justice Kennedy concurring).

[1437] *See*, *e.g.*, Heffron v. ISKCON, 452 U.S. 640, 647–50 (1981), and id. at 656 (Justice Brennan concurring in part and dissenting in part) (stating law and discussing cases); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (prohibition of sleep-in demonstration in area of park not designated for overnight camping).

[1438] Niemotko v. Maryland, 340 U.S. 268 (1951); Cox v. Louisiana, 379 U.S. 536 (1965); Police Dep't of Chicago v. Mosle, 408 U.S. 92 (1972); Madison School District v. WERC, 429 U.S. 167 (1976); Carey v. Brown, 447 U.S. 455 (1980); Widmar v. Vincent, 454 U.S. 263 (1981). In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), a divided Court permitted the city to sell commercial advertising space on the walls of its rapid transit cars but to refuse to sell political advertising space.

[1439] *E.g.*, the governmental interest in safety and convenience of persons using public forum, Heffron v. ISKCON, 452 U.S. 640, 650 (1981); the interest in preservation of a learning atmosphere in school, Grayned v. City of Rockford, 408 U.S. 104, 115 (1972); and the interest in protecting traffic and pedestrian safety in the streets, Cox v. Louisiana, 379 U.S. 536, 554–55 (1965); Kunz v. New York, 340 U.S. 290, 293–94 (1951); Hague v. CIO, 307 U.S. 496, 515–16 (1939).

tion.[1440] The Court has written that a time, place, or manner regulation "must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied . . . [s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . ." [1441] A content-neutral time, place, and manner regulation of the use of a public forum must also "contain adequate standards to guide the official's decision and render it subject to effective judicial review." [1442] Unlike a content-based licensing scheme, however, it need not "adhere to the procedural requirements set forth in *Freedman*." [1443] These requirements include that the "burden of proving that the film [or other speech] is unprotected expression must rest on the censor," and that the censor must, "within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." [1444]

A corollary to the rule forbidding regulation based on content is the principle—a merging of free expression and equal protection standards—that government may not discriminate between different kinds of messages in affording access.[1445] In order to ensure against

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[1440] Heffron v. ISKCON, 452 U.S. 640, 654–55 (1981); Consolidated Edison Co. v. PSC, 447 U.S. 530, 535 (1980).

[1441] Ward v. Rock Against Racism, 491 U.S. 781, 798–99, 800 (1989).

[1442] Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002).

[1443] 534 U.S. at 322, citing Freedman v. Maryland, 380 U.S. 51 (1965). *See* National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977).

[1444] Freedman v. Maryland, 380 U.S. 51, 58–59 (1965).

[1445] Police Dep't of Chicago v. Mosle, 408 U.S. 92 (1972) (ordinance void that barred all picketing around school building except labor picketing); Carey v. Brown, 447 U.S. 455 (1980) (same); Widmar v. Vincent, 454 U.S. 263 (1981) (striking down college rule permitting access to all student organizations except religious groups); Niemotko v. Maryland, 340 U.S. 268 (1951) (striking down denial of permission to use parks for some groups but not for others); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (striking down ordinance that prohibited symbols, such as burning crosses, that constituted fighting words that insult on the basis of some factors, such as race, but not on the basis of other factors). These principles apply only to the traditional public forum and to the governmentally created "limited public forum." Government may, without creating a limited public forum, place "reasonable" restrictions on access to nonpublic areas. *See*, *e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 48 (1983) (use of school mail system); and Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985) (charitable solicitation of federal employees at workplace). *See also* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (city may sell commercial advertising space on the walls of its rapid transit cars but refuse to sell political advertising space); Capitol Square Review Bd. v. Pinette, 515 U.S. 753 (1995) (denial of permission to Ku Klux Klan, allegedly in order to avoid Establishment Clause violation, to place a cross in plaza on grounds of state capitol); Rosenberger v. University of Virginia, 515 U.S. 819 (1995) (Univer-

covert forms of discrimination against expression and between different kinds of content, the Court has insisted that licensing systems be constructed as free as possible of the opportunity for arbitrary administration.[1446] The Court has also applied its general strictures against prior restraints in the contexts of permit systems and judicial restraint of expression.[1447]

It appears that government may not deny access to the public forum for demonstrators on the ground that the past meetings of these demonstrators resulted in violence,[1448] and may not vary a

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sity's subsidy for printing costs of student publications, available for student "news, information, opinion, entertainment, or academic communications," could not be withheld because of the religious content of a student publication); Lamb's Chapel v. Center Moriches School Dist., 508 U.S. 384 (1993) (school district rule prohibiting after-hours use of school property for showing of a film presenting a religious perspective on child-rearing and family values, but allowing after-hours use for non-religious social, civic, and recreational purposes).

[1446] *E.g.*, Hague v. CIO, 307 U.S. 496, 516 (1939); Schneider v. Town of Irvington, 308 U.S. 147, 164 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953); Staub v. City of Baxley, 355 U.S. 313, 321–25 (1958); Cox v. Louisiana, 379 U.S. 536, 555–58 (1965); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150–53 (1969). Justice Stewart for the Court described these and other cases as "holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional." Id. at 150–51. A person faced with an unconstitutional licensing law may ignore it, engage in the desired conduct, and challenge the constitutionality of the permit system upon a subsequent prosecution for violating it. Id. at 151; Jones v. Opelika, 316 U.S. 584, 602 (1942) (Chief Justice Stone dissenting), adopted per curiam on rehearing, 319 U.S. 103 (1943). *See also* City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) (upholding facial challenge to ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property); Riley v. National Fed'n of the Blind, 487 U.S. 781 (1988) (invalidating as permitting "delay without limit" licensing requirement for professional fundraisers); Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992). *But see* Walker v. City of Birmingham, 388 U.S. 307 (1967) (same rule not applicable to injunctions).

[1447] In Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), the Court reaffirmed the holdings of the earlier cases, and, additionally, both Justice Stewart, for the Court, id. at 155 n.4, and Justice Harlan concurring, id. at 162–64, asserted that the principles of Freedman v. Maryland, 380 U.S. 51 (1965), governing systems of prior censorship of motion pictures, were relevant to permit systems for parades and demonstrations. The Court also voided an injunction against a protest meeting that was issued ex parte, without notice to the protestors and with, of course, no opportunity for them to rebut the representations of the seekers of the injunction. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968).

[1448] The only precedent is Kunz v. New York, 340 U.S. 290 (1951). The holding was on a much narrower basis, but in dictum the Court said: "The court below has mistakenly derived support for its conclusions from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder and violence." Id. at 294. A different rule applies to labor picketing. *See* Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, 312 U.S. 287 (1941) (background of violence supports prohibition of all peaceful picketing). The military may ban a civilian, previously convicted of destroying government property, from reentering a military base, and may apply the ban to

demonstration licensing fee based on an estimate of the amount of hostility likely to be engendered,[1449] but the Court's position with regard to the "heckler's veto," the governmental termination of a speech or demonstration because of hostile crowd reaction, remains unclear.[1450]

The Court has defined three categories of public property for public forum analysis. First, there is the traditional public forum—places such as streets and parks that have traditionally been used for public assembly and debate, where the government may not prohibit all communicative activity and must justify content-neutral time, place, and manner restrictions as narrowly tailored to serve a legitimate interest.[1451] Second, there is the designated public forum, where the government opens property for communicative activity and thereby creates a public forum. Such a forum may be limited—hence the expression "limited public forum"—for "use by certain groups, *e.g.*, *Widmar v. Vincent* (student groups), or for discussion of certain subjects, *e.g.*, *City of Madison Joint School District v. Wisconsin PERC* (school board business)," [1452] but, within the framework of such legitimate limitations, "a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." [1453] Third, with respect to "[p]ublic property which is not by tradition or designation a forum for public communication," the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on [sic] speech is reasonable and

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prohibit the civilian from reentering the base for purposes of peaceful demonstration during an Armed Forces Day "open house." United States v. Albertini, 472 U.S. 675 (1985).

[1449] Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (a fee based on anticipated crowd response necessarily involves examination of the content of the speech, and is invalid as a content regulation).

[1450] Dicta indicate that a hostile reaction will not justify suppression of speech, Hague v. CIO, 307 U.S. 496, 502 (1939); Cox v. Louisiana, 379 U.S. 536, 551 (1965); Bachellar v. Maryland, 397 U.S. 564, 567 (1970), and one holding appears to point this way. Gregory v. City of Chicago, 394 U.S. 111 (1969). Yet the Court upheld a breach of the peace conviction of a speaker who refused to cease speaking upon the demand of police who feared imminent violence. Feiner v. New York, 340 U.S. 315 (1951). In Niemotko v. Maryland, 340 U.S. 268, 273 (1951) (concurring opinion), Justice Frankfurter wrote: "It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd whatever its size and temper and not against the speaker."

[1451] "[A]lthough a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." Pleasant Grove City, Utah v. Summum, 555 U.S. at 464..

[1452] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 46 n.7 (1983).

[1453] 460 U.S. at 46.

not an effort to suppress expression merely because public officials oppose the speaker's view." [1454] The distinction between the first and second categories, on the one hand, and third category, on the other, can therefore determine the outcome of a case, because speakers may be excluded from the first and second categories only for a "compelling" governmental interest, whereas exclusion from the third category need only be "reasonable."

The Court held that a school system did not create a limited public forum by opening an interschool mail system to use by selected civic groups "that engage in activities of interest and educational relevance to students," and that, in any event, if a limited public forum had thereby been created a teachers union rivaling the exclusive bargaining representative could still be excluded as not being "of a similar character" to the civic groups.[1455] Less problematic was the Court's conclusion that utility poles and other municipal property did not constitute a public forum for the posting of signs.[1456] More problematic was the Court's conclusion that the Combined Federal Campaign, the Federal Government's forum for coordinated charitable solicitation of federal employees, is not a limited public forum. Exclusion of various advocacy groups from participation in the Campaign was upheld as furthering "reasonable" governmental interests in offering a forum to "traditional health and welfare charities," avoiding the appearance of governmental favoritism of particular groups or viewpoints, and avoiding disruption of the federal workplace by controversy.[1457] The Court pinpointed the gov-

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[1454] 460 U.S. at 46. Candidate debates on public television are an example of this third category of public property: the "nonpublic forum." Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998). "Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine [*i.e.*, public broadcasters ordinarily are entitled to the editorial discretion to engage in viewpoint discrimination], candidate debates present the narrow exception to this rule." Id. at 675. A public broadcaster, therefore, may not engage in viewpoint discrimination in granting or denying access to candidates. Under the third type of forum analysis, however, it may restrict candidate access for "a reasonable, viewpoint-neutral" reason, such as a candidate's "objective lack of support." Id. at 683.

[1455] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). This was a 5–4 decision, with Justice White's opinion of the Court being joined by Chief Justice Burger and by Justices Blackmun, Rehnquist, and O'Connor, and with Justice Brennan's dissent being joined by Justices Marshall, Powell, and Stevens. *See also* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (student newspaper published as part of journalism class is not a public forum).

[1456] City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (upholding an outright ban on use of utility poles for signs). The Court noted that "it is of limited utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum." Id. at 815 n.32.

[1457] Cornelius v. NAACP Legal Defense and Educational Fund, 473 U.S. 788 (1985). The precedential value of *Cornelius* may be subject to question, because it was decided by 4–3 vote, the non-participating Justices (Marshall and Powell) having dissented in *Perry*. Justice O'Connor wrote the opinion of the Court, joined by Chief

ernment's intention as the key to whether a public forum has been created: "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." [1458] Under this categorical approach, the government has wide discretion in maintaining the nonpublic character of its forums, and may regulate in ways that would be impermissible were it to designate a limited public forum.[1459]

Application of the doctrine continues to create difficulty. A majority of Justices could not agree on the public forum status of a sidewalk located entirely on Postal Service property.[1460] The Court was also divided over whether nonsecured areas of an airport terminal, including shops and restaurants, constituted a public forum. Holding that the terminal was not a public forum, the Court upheld restrictions on the solicitation and receipt of funds.[1461] But the Court also invalidated a ban on the sale or distribution of literature to passers-by within the same terminal, four Justices believing that the terminal constituted a public forum, and Justice O'Connor [1462] contending that the multipurpose nature of the forum (shopping mall as well as airport) made restrictions on expression less "reasonable." [1463]

In *United States v. American Library Association, Inc.*, a four-Justice plurality of the Supreme Court found that "Internet access in public libraries is neither a 'traditional' nor a 'designated' public forum." [1464] The plurality therefore did not apply "strict scrutiny" in upholding the Children's Internet Protection Act, which, as the plurality summarized it, provides that a public school or "library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or

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Justice Burger and by Justices White and Rehnquist. Justice Blackmun, joined by Justice Brennan, dissented, and Justice Stevens dissented separately.

[1458] 473 U.S. at 802. Justice Blackmun criticized "the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers." Id. at 813–14.

[1459] Justice Kennedy criticized this approach in ISKCON v. Lee, 505 U.S. 672, 695 (1992) (concurring), contending that recognition of government's authority to designate the forum status of property ignores the nature of the First Amendment as "a limitation on government, not a grant of power." Justice Brennan voiced similar misgivings in his dissent in United States v. Kokinda: "public forum categories—originally conceived of as a way of *preserving* First Amendment rights—have been used . . . as a means of upholding restrictions on speech." 497 U.S. at 741 (citation omitted).

[1460] United States v. Kokinda, 497 U.S. 720 (1990) (upholding a ban on solicitation on the sidewalk).

[1461] ISKCON v. Lee, 505 U.S. 672 (1992).

[1462] 505 U.S. at 690.

[1463] Lee v. ISKCON, 505 U.S. 830 (1992) (per curiam).

[1464] 539 U.S. 194, 205 (2003).

child pornography, and to prevent minors from obtaining access to material that is harmful to them." [1465] The plurality found that Internet access in public libraries is not a "traditional" public forum because "[w]e have 'rejected the view that traditional public forum status extends beyond its historical confines.'" [1466] And Internet access at public libraries is not a "designated" public forum because "[a] public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to 'encourage a diversity of views from private speakers,' but for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality." [1467]

Nevertheless, although Internet access in public libraries is not a public forum, and particular Web sites, like particular newspapers, would not constitute public forums, the Internet as a whole might be viewed as a public forum, despite its lack of a historic tradition. The Supreme Court has not explicitly held that the Internet as a whole is a public forum, but, in *Reno v. ACLU*, which struck down a prohibition in the Communications Decency Act of 1996 on "indecent" material on the Internet, the Court noted that the Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can 'publish' information." [1468]

Quasi-Public Places.—The First Amendment precludes government restraint of expression and it does not require individuals to turn over their homes, businesses, or other property to those wish-

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[1465] 539 U.S. at 199.

[1466] 539 U.S. at 206.

[1467] 539 U.S. at 206 (citation omitted).

[1468] 521 U.S. at 853. A federal court of appeals wrote: "Aspects of cyberspace may, in fact, fit into the public forum category, although the Supreme Court has also suggested that the category is limited by tradition. *Compare Forbes*, 523 U.S. at 679 ('reject[ing] the view that traditional public forum status extends beyond its historic confines' [to a public television station]) *with* Reno v. ACLU, 521 U.S. 844, 851–53 (1997) (recognizing the communicative potential of the Internet, specifically the World Wide Web)." Putnam Pit, Inc. v. City of Cookeville, 221 F.3d 834, 843 (6th Cir. 2000) (alternate citations to *Forbes* and *Reno* omitted). In *Putnam Pit*, the city denied a private Web site's request that the city's Web site establish a hyperlink to it, even though the city's Web site had established hyperlinks to other private Web sites. The court of appeals found that the city's Web site was a nonpublic forum, but that even nonpublic forums must be viewpoint neutral, so it remanded the case for trial on the question of whether the city's denial of a hyperlink had discriminated on the basis of viewpoint.

ing to communicate about a particular topic.[1469] But it may be that in some instances private property is so functionally akin to public property that private owners may not forbid expression upon it. In *Marsh v. Alabama*,[1470] the Court held that the private owner of a company town could not forbid distribution of religious materials by a Jehovah's Witness on a street in the town's business district. The town, wholly owned by a private corporation, had all the attributes of any American municipality, aside from its ownership, and was functionally like any other town. In those circumstances, the Court reasoned, "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[1471] This precedent lay unused for some twenty years until the Court first indicated a substantial expansion of it, and then withdrew to a narrow interpretation.

First, in *Food Employees Union v. Logan Valley Plaza*,[1472] the Court held constitutionally protected the picketing of a store located in a shopping center by a union objecting to the store's employment of nonunion labor. Finding that the shopping center was the functional equivalent of the business district involved in *Marsh*, the Court announced there was "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership."[1473] "[T]he State," said Justice Marshall, "may not delegate the power, through the use

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[1469] In Garner v. Louisiana, 368 U.S. 157, 185, 201–07 (1961), Justice Harlan, concurring, would have reversed breach of the peace convictions of "sit-in" demonstrators who conducted their sit-in at lunch counters of department stores. He asserted that the protesters were sitting at the lunch counters where they knew they would not be served in order to demonstrate that segregation at such counters existed. "Such a demonstration . . . is as much a part of the 'free trade in ideas' . . . as is verbal expression, more commonly thought of as 'speech.'" Conviction for breach of peace was void in the absence of a clear and present danger of disorder. The Justice would not, however protect "demonstrations conducted on private property over the objection of the owner . . . , just as it would surely not encompass verbal expression in a private home if the owner has not consented." He had read the record to indicate that the demonstrators were invitees in the stores and that they had never been asked to leave by the owners or managers. *See also* Frisby v. Schultz, 487 U.S. 474 (1988) (government may protect residential privacy by prohibiting altogether picketing that targets a single residence).

[1470] 326 U.S. 501 (1946).

[1471] 326 U.S. at 506.

[1472] Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968).

[1473] 391 U.S. at 319. Justices Black, Harlan, and White dissented. Id. at 327, 333, 337.

of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." [1474] The Court observed that it would have been hazardous to attempt to distribute literature at the entrances to the center and it reserved for future decision "whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." [1475]

Four years later, the Court answered the reserved question in the negative.[1476] Several members of an antiwar group had attempted to distribute leaflets on the mall of a large shopping center, calling on the public to attend a protest meeting. Center guards invoked a trespass law against them, and the Court held that they could rightfully be excluded. The center had not dedicated its property to a public use, the Court said; rather, it had invited the public in specifically to carry on business with those stores located in the center. Plaintiffs' leafleting, not directed to any store or to the customers *qua* customers of any of the stores, was unrelated to any activity in the center. Unlike the situation in *Logan Valley Plaza*, there were reasonable alternatives by which plaintiffs could reach those who used the center. Thus, in the absence of a relationship between the purpose of the expressive activity and the business of the shopping center, the property rights of the center owner will overbalance the expressive rights to persons who would use their property to communicate.

Then, the Court formally overruled *Logan Valley Plaza*, holding that shopping centers are not functionally equivalent to the company town involved in *Marsh*.[1477] Suburban malls may be the "new town squares" in the view of sociologists, but they are private property in the eye of the law. The ruling came in a case in which a union of employees engaged in an economic strike against one store in a shopping center was barred from picketing the store within the mall. The rights of employees in such a situation are generally to be governed by federal labor laws [1478] rather than the First Amendment, although there is also the possibility that state constitu-

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[1474] 391 U.S. at 319–20.

[1475] 391 U.S. at 320 n.9.

[1476] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[1477] Hudgens v. NLRB, 424 U.S. 507 (1976). Justice Stewart's opinion for the Court asserted that *Logan Valley* had in fact been overruled by *Lloyd Corp.*, 424 U.S. at 517–18, but Justice Powell, the author of the *Lloyd Corp.* opinion, did not believe that to be the case, id. at 523.

[1478] *But see* Sears, Roebuck & Co. v. Carpenters, 436 U.S. U.S. 180 (1978).

tional provisions may be interpreted more expansively by state courts to protect some kinds of public issue picketing in shopping centers and similar places.[1479] Henceforth, only when private property "'has taken on *all* the attributes of a town'" is it to be treated as a public forum.[1480]

Picketing and Boycotts by Labor Unions.—Though "logically relevant" to what might be called "public issue" picketing, the cases dealing with application of economic pressures by labor unions are set apart by different "economic and social interests,"[1481] and consequently are dealt with separately here.

It was in a labor case that the Court first held picketing to be entitled to First Amendment protection.[1482] Striking down a flat prohibition on picketing to influence or induce someone to do something, the Court said: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . ."[1483] The Court further reasoned that "the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[1484]

The Court soon recognized several caveats. Peaceful picketing may be enjoined if it is associated with violence and intimidation.[1485] Although initially the Court continued to find picketing pro-

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[1479] In PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), the Court held that a state court interpretation of the state constitution to protect picketing in a privately owned shopping center did not deny the property owner any federal constitutional rights. *But cf.* Pacific Gas & Elec. v. Public Utilities Comm'n, 475 U.S. 1 (1986), holding that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees, a majority of Justices distinguishing *PruneYard* as not involving such forced association with others' beliefs.

[1480] Hudgens v. NLRB, 424 U.S. 507, 516–17 (1976) (quoting Justice Black's dissent in *Logan Valley Plaza*, 391 U.S. 308, 332–33 (1968)).

[1481] Niemotko v. Maryland, 340 U.S. 268, 276 (1951).

[1482] Thornhill v. Alabama, 310 U.S. 88 (1940). Picketing as an aspect of communication was recognized in Senn v. Tile Layers Union, 301 U.S. 468 (1937).

[1483] 310 U.S. at 102.

[1484] 310 U.S. at 104–05. *See also* Carlson v. California, 310 U.S. 106 (1940). In AFL v. Swing, 312 U.S. 321 (1941), the Court held unconstitutional an injunction against peaceful picketing based on a state's common-law policy against picketing in the absence of an immediate dispute between employer and employee.

[1485] Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).

tected in the absence of violence,[1486] it soon decided a series of cases recognizing a potentially far-reaching exception: injunctions against peaceful picketing in the course of a labor controversy may be enjoined when such picketing is counter to valid state policies in a domain open to state regulation.[1487] These cases proceeded upon a distinction drawn by Justice Douglas. "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulations." [1488] The apparent culmination of this course of decision was the *Vogt* case, in which Justice Frankfurter broadly rationalized all the cases and derived the rule that "a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." [1489] Although the Court has not disavowed this broad language, the *Vogt* exception has apparently not swallowed the entire *Thornhill* rule.[1490] The Court has indicated that "a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." [1491]

[1486] Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769 (1942); Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942); Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

[1487] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (upholding on basis of state policy forbidding agreements in restraint of trade an injunction against picketing to persuade business owner not to deal with non-union peddlers); International Bhd. of Teamsters v. Hanke, 339 U.S. 470 (1950) (upholding injunction against union picketing protesting non-union proprietor's failure to maintain union shop card and observe union's limitation on weekend business hours); Building Service Emp. Intern. Union v. Gazzam, 339 U.S. 532 (1950) (injunction against picketing to persuade innkeeper to sign contract that would force employees to join union in violation of state policy that employees' choice not be coerced); Local 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953) (injunction against picketing in conflict with state's right-to-work statute).

[1488] Bakery & Pastry Drivers Local v. Wohl, 315 U.S. 769, 776–77 (1942) (concurring opinion).

[1489] International Bhd. of Teamsters v. Vogt, 354 U.S. 284, 293 (1957). *See also* American Radio Ass'n v. Mobile Steamship Ass'n, 419 U.S. 215, 228–32 (1974); NLRB v. Retail Store Employees, 447 U.S. 607 (1980); International Longshoremens' Ass'n v. Allied International, 456 U.S. 212, 226–27 (1982).

[1490] The dissenters in *Vogt* asserted that the Court had "come full circle" from *Thornhill*. 354 U.S. at 295 (Justice Douglas, joined by Chief Justice Warren and Justice Black).

[1491] NLRB v. Fruit & Vegetable Packers, 377 U.S. 58, 63 (1964) (requiring—and finding absent in NLRA—"clearest indication" that Congress intended to prohibit all consumer picketing at secondary establishments). *See also* Youngdahl v. Rainfair, 355 U.S. 131, 139 (1957) (indicating that, where violence is scattered through time and much of it was unconnected with the picketing, the state should proceed against the violence rather than the picketing).

Public Issue Picketing and Parading.—The early cases held that picketing and parading were forms of expression entitled to some First Amendment protection.[1492] Those early cases did not, however, explicate the difference in application of First Amendment principles that the difference between mere expression and speech-plus would entail. Many of these cases concerned disruptions or feared disruptions of the public peace occasioned by the expressive activity and the ramifications of this on otherwise protected activity.[1493] A series of other cases concerned the permissible characteristics of permit systems in which parades and meetings were licensed, and expanded the procedural guarantees that must accompany a permissible licensing system.[1494] In one case, however, the Court applied the rules developed with regard to labor picketing to uphold an injunction against the picketing of a grocery chain by a black group to compel the chain to adopt a quota-hiring system for blacks. The Supreme Court affirmed the state court's ruling that, although no law prevented the chain from hiring blacks on a quota basis, picketing to coerce the adoption of racially discriminatory hiring was contrary to state public policy.[1495]

A series of civil rights picketing and parading cases led the Court to formulate standards much like those it has established in the labor field, but more protective of expressive activity. The process began with *Edwards v. South Carolina*,[1496] in which the Court reversed a breach of the peace conviction of several blacks for their refusal to disperse as ordered by police. The statute was so vague, the Court concluded, that demonstrators could be convicted simply because their presence "disturbed" people. Describing the demonstration upon the grounds of the legislative building in South Carolina's capital, Justice Stewart observed that "[t]he circumstances in this case reflect an exercise of these basic [First Amendment] constitutional rights in their most pristine and classic form."[1497] In subsequent cases, the Court observed: "We emphatically reject the no-

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[1492] Hague v. CIO, 307 U.S. 496 (1939); Cox v. New Hampshire, 312 U.S. 569 (1941); Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951).

[1493] Cantwell v. Connecticut, 310 U.S. 296 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Terminiello v. City of Chicago, 337 U.S. 1 (1949); Feiner v. New York, 340 U.S. 315 (1951).

[1494] *See*, *e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977); Carroll v. President & Commr's of Princess Anne, 393 U.S. 175 (1968).

[1495] Hughes v. Superior Court, 339 U.S. 460 (1950). This ruling, allowing content-based restriction, seems inconsistent with NAACP v. Claiborne Hardware, discussed under this topic, *infra*.

[1496] 372 U.S. 229 (1963).

[1497] 372 U.S. at 235. *See also* Fields v. South Carolina, 375 U.S. 44 (1963); Henry v. City of Rock Hill, 376 U.S. 776 (1964).

tion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as those amendments afford to those who communicate ideas by pure speech." [1498] "The conduct which is the subject to this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited." [1499]

The Court must determine, of course, whether the regulation is aimed primarily at conduct, as is the case with time, place, and manner regulations, or whether instead the aim is to regulate the content of speech. In a series of decisions, the Court refused to permit restrictions on parades and demonstrations, and reversed convictions imposed for breach of the peace and similar offenses, when, in the Court's view, disturbance had resulted from opposition to the messages being uttered by demonstrators.[1500] Subsequently, however, the Court upheld a ban on residential picketing in *Frisby v. Shultz*,[1501] finding that the city ordinance was narrowly tailored to serve the "significant" governmental interest in protecting residential privacy. As interpreted, the ordinance banned only picketing that targeted a single residence, and it is unclear whether the Court would uphold a broader restriction on residential picketing.[1502]

In 1982, the Justices confronted a case, that, like *Hughes v. Superior Court*,[1503] involved a state court injunction on picketing, although this one also involved a damage award. *NAACP v. Claiborne Hardware Co.*[1504] may join in terms of importance such cases as *New York Times Co. v. Sullivan* [1505] in requiring the states to observe enhanced constitutional standards before they may impose liability upon persons for engaging in expressive conduct that implicates the First Amendment. The case arose in the context of a protest against racial conditions by black citizens of Claiborne County, Mis-

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[1498] Cox v. Louisiana, 379 U.S. 536, 555 (1965).

[1499] 379 U.S. at 563.

[1500] Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Gregory v. City of Chicago, 394 U.S. 111 (1969); Bachellar v. Maryland, 397 U.S. 564 (1970). *See also* Collin v. Smith, 447 F. Supp. 676 (N.D.Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *cert. denied*, 439 U.S. 916 (1978).

[1501] 487 U.S. 474 (1988).

[1502] An earlier case involving residential picketing had been resolved on equal protection rather than First Amendment grounds, the ordinance at issue making an exception for labor picketing. Carey v. Brown, 447 U.S. 455 (1980).

[1503] 339 U.S. 460 (1950).

[1504] 458 U.S. 886 (1982).

[1505] 376 U.S. 254 (1964).

sissippi. Listing demands that included desegregation of public facilities, hiring of black policemen, hiring of more black employees by local stores, and ending of verbal abuse by police, a group of several hundred blacks unanimously voted to boycott the area's white merchants. The boycott was carried out through speeches and nonviolent picketing and solicitation of others to cease doing business with the merchants. Individuals were designated to watch stores and identify blacks patronizing the stores; their names were then announced at meetings and published. Persuasion of others included social pressures and threats of social ostracism. Acts of violence did occur from time to time, directed in the main at blacks who did not observe the boycott.

The state Supreme Court imposed joint and several liability upon leaders and participants in the boycott, and upon the NAACP, for all of the merchants' lost earnings during a seven-year period on the basis of the common law tort of malicious interference with the merchants' business, holding that the existence of acts of physical force and violence and the use of force, violence, and threats to achieve the ends of the boycott deprived it of any First Amendment protection.

Reversing, the Court observed that the goals of the boycotters were legal and that most of their means were constitutionally protected; although violence was not protected, its existence alone did not deprive the other activities of First Amendment coverage. Thus, speeches and nonviolent picketing, both to inform the merchants of grievances and to encourage other blacks to join the boycott, were protected activities, and association for those purposes was also protected.[1506] That some members of the group might have engaged in violence or might have advocated violence did not result in loss of protection for association, absent a showing that those associating had joined with intent to further the unprotected activities.[1507] Nor was protection to be denied because nonparticipants had been urged to join by speech, by picketing, by identification, by threats of social ostracism, and by other expressive acts: "[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."[1508] The boycott had a disruptive

[1506] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907–08 (1982).

[1507] 458 U.S. at 908.

[1508] 458 U.S. at 910. The Court cited Thomas v. Collins, 323 U.S. 516, 537 (1945), a labor picketing case, and Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971), a public issues picketing case, which had also relied on the labor cases. *Compare* NLRB v. Retail Store Employees, 447 U.S. 607, 618–19 (1980) (Justice Stevens concurring) (labor picketing that coerces or "signals" others to engage in activity that violates valid labor policy, rather than attempting to engage reason, prohibitable). To the contention that liability could be imposed on "store watchers" and on a group

effect upon local economic conditions and resulted in loss of business for the merchants, but these consequences did not justify suppression of the boycott. Government may certainly regulate certain economic activities having an incidental effect upon speech (*e.g.*, labor picketing or business conspiracies to restrain competition),[1509] but that power of government does not extend to suppression of picketing and other boycott activities involving, as this case did, speech upon matters of public affairs with the intent of affecting governmental action and motivating private actions to achieve racial equality.[1510]

The critical issue, however, had been the occurrence of violent acts and the lower court's conclusion that they deprived otherwise protected conduct of protection. "The First Amendment does not protect violence . . . . No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded . . . . Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."[1511] In other words, the states may impose damages for the consequences of violent conduct, but they may not award compensation for the consequences of nonviolent, protected activity.[1512] Thus, the state courts had to compute, upon proof by the merchants, what damages had been the result of violence, and could not include losses suffered as a result of all the other activities comprising the boycott. And only those nonviolent persons who associated with others with an awareness of violence

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known as "Black Hats" who also patrolled stores and identified black patronizers of the businesses, the Court did not advert to the "signal" theory. "There is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others." 458 U.S. at 925.

[1509] *See*, *e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (upholding application of *per se* antitrust liability to trial lawyers association's boycott designed to force higher fees for representation of indigent defendants by court-appointed counsel).

[1510] In evaluating the permissibility of government regulation in this context that has an incidental effect on expression, the Court applied the standards of United States v. O'Brien, which permits a regulation "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restiction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 458 U.S. at 912, n.47, quoting *O'Brien*, 391 U.S. 367, 376–77 (1968) (footnotes omitted).

[1511] 458 U.S. at 916–17.

[1512] 458 U.S. at 917–18.

and an intent to further it could similarly be held liable.[1513] Because most of the acts of violence had occurred early on, in 1966, there was no way constitutionally that much if any of the later losses of the merchants could be recovered in damages.[1514] As to the field secretary of the local NAACP, the Court refused to permit imposition of damages based upon speeches that could be read as advocating violence, because any violent acts that occurred were some time after the speeches, and a "clear and present danger" analysis of the speeches would not find them punishable.[1515] The award against the NAACP fell with the denial of damages against its local head, and, in any event, the protected right of association required a rule that would immunize the NAACP without a finding that it "authorized—either actually or apparently—or ratified unlawful conduct."[1516]

Claiborne Hardware is, thus, a seminal decision in the Court's effort to formulate standards governing state power to regulate or to restrict expressive conduct that comes close to or crosses over the line to encompass some violent activities; it requires great specificity and the drawing of fine discriminations by government so as to reach only that portion of the activity that does involve violence or the threat of violence, and forecloses the kind of "public policy" limit on demonstrations that was approved in *Hughes v. Superior Court*.[1517]

[1513] 458 U.S. at 918–29, relying on a series of labor cases and on the subversive activities association cases, *e.g.*, Scales v. United States, 367 U.S. 203 (1961), and Noto v. United States, 367 U.S. 290 (1961).

[1514] 458 U.S. at 920–26. The Court distinguished Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941), in which an injunction had been sustained against both violent and nonviolent activity, not on the basis of special rules governing labor picketing, but because the violence had been "pervasive." 458 U.S. at 923.

[1515] 458 U.S. at 926–29. The field secretary's "emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg v. Ohio*, 395 U.S. 444 (1969)."

[1516] 458 U.S. at 931. In ordinary business cases, the rule of liability of an entity for actions of its agents is broader. *E.g.*, American Soc'y of Mech. Eng'rs v. Hydrolevel Corp., 456 U.S. 556 (1982). The different rule in cases of organizations formed to achieve political purposes rather than economic goals appears to require substantial changes in the law of agency with respect to such entities. Note, 96 HARV. L. REV. 171, 174–76 (1982).

[1517] "Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity. And yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means."

"[P]etitioners' ultimate objectives were unquestionably legitimate. The charge of illegality . . . derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection."

"The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden

More recently, disputes arising from anti-abortion protests outside abortion clinics have occasioned another look at principles distinguishing lawful public demonstrations from proscribable conduct. In *Madsen v. Women's Health Center*,[1518] the Court refined principles governing issuance of "content-neutral" injunctions that restrict expressive activity.[1519] The appropriate test, the Court stated, is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant governmental interest." [1520] Regular time, place, and manner analysis (requiring that regulation be narrowly tailored to serve a significant governmental interest) "is not sufficiently rigorous," the Court explained, "because injunctions create greater risk of censorship and discriminatory application, and because of the established principle that an injunction should be no broader than necessary to achieve its desired goals." [1521] Applying its new test, the Court upheld an injunction prohibiting protesters from congregating, picketing, patrolling, demonstrating, or entering any portion of the public right-of-way within 36 feet of an abortion clinic. Similarly upheld were noise restrictions designed to ensure the health and well-being of clinic patients. Other aspects of the injunction, however, did not pass the test. Inclusion of private property within the 36-foot buffer was not adequately justified, nor was inclusion in the noise restriction of a ban on "images observable" by clinic patients. A ban on physically approaching any person within 300 feet of the clinic unless that person indicated a desire to communicate burdened more speech than necessary. Also, a ban on demonstrating within 300 feet of the residences of clinic staff was not sufficiently justified, the restriction covering a much larger zone than an earlier residential picketing ban that the Court had upheld.[1522]

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of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. [The burden can be met only] by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognizes the importance of avoiding the imposition of punishment for constitutionally protected activity. . . . A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees." 458 U.S. at 933–34.

[1518] 512 U.S. 753 (1994).

[1519] The Court rejected the argument that the injunction was necessarily content-based or viewpoint-based because it applied only to anti-abortion protesters. "An injunction by its very nature applies only to a particular group (or individuals) . . . . It does so, however, because of the group's past actions in the context of a specific dispute between real parties." There had been no similarly disruptive demonstrations by pro-abortion factions at the abortion clinic. 512 U.S. at 762.

[1520] 512 U.S. at 765.

[1521] 512 U.S. at 765.

[1522] Referring to Frisby v. Schultz, 487 U.S. 474 (1988).

In *Schenck v. Pro-Choice Network of Western New York*,[1523] the Court applied *Madsen* to another injunction that placed restrictions on demonstrating outside an abortion clinic. The Court upheld the portion of the injunction that banned "demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities" what the Court called "fixed buffer zones." [1524] It struck down a prohibition against demonstrating "within fifteen feet of any person or vehicles seeking access to or leaving such facilities" what it called "floating buffer zones." [1525] The Court cited "public safety and order" [1526] in upholding the fixed buffer zones, but it found that the floating buffer zones "burden more speech than is necessary to serve the relevant governmental interests" [1527] because they make it "quite difficult for a protester who wishes to engage in peaceful expressive activity to know how to remain in compliance with the injunction." [1528] The Court also upheld a "provision, specifying that once sidewalk counselors who had entered the buffer zones were required to 'cease and desist' their counseling, they had to retreat 15 feet from the people they had been counseling and had to remain outside the boundaries of the buffer zones." [1529]

In *Hill v. Colorado*,[1530] the Court upheld a Colorado statute that made it unlawful, within 100 feet of the entrance to any health care facility, to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." [1531] This decision is notable because it upheld a statute, and not, as in *Madsen* and *Schenck*, merely an injunction directed to particular parties. The Court found the statute to be a content-neutral time, place, and manner regulation of speech that "reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners . . . ." [1532] The restrictions were content-neutral because they regulated only the places where some speech may occur, and because they applied equally to all demonstrators, regardless of viewpoint. Although the restrictions did not apply to all speech, the "kind of cursory examination" that might

[1523] 519 U.S. 357 (1997).
[1524] 519 U.S. at 366 n.3.
[1525] 519 U.S. at 366 n.3.
[1526] 519 U.S. at 376.
[1527] 519 U.S. at 377.
[1528] 519 U.S. at 378.
[1529] 519 U.S. at 367.
[1530] 530 U.S. 703 (2000).
[1531] 530 U.S. at 707.
[1532] 530 U.S. at 714.

be required to distinguish casual conversation from protest, education, or counseling is not "problematic."[1533] The law was narrowly tailored to achieve the state's interests. The eight-foot restriction did not significantly impair the ability to convey messages by signs, and ordinarily allowed speakers to come within a normal conversational distance of their targets. Because the statute allowed the speaker to remain in one place, persons who wished to hand out leaflets could position themselves beside entrances near the path of oncoming pedestrians, and consequently were not deprived of the opportunity to get the attention of persons entering a clinic.

In *McCullen v. Coakley*, the Court retained a content-neutral analysis similar to that in *Hill*, but nonetheless struck down a statutory 35-foot buffer zone at entrances and driveways of abortion facilities.[1534] The Court concluded that the buffer zone was not narrowly tailored to serve governmental interests in maintaining public safety and preserving access to reproductive healthcare facilities, the concerns claimed by Massachusetts to underlie the law.[1535] The opinion cited several alternatives to the buffer zone that would not curtail the use of public sidewalks as traditional public fora for speech, nor significantly burden the ability of those wishing to provide "sidewalk counseling" to women approaching abortion clinics. Specifically, the Court held that, to preserve First Amendment rights, targeted measures, such as injunctions, enforcement of antiharassment ordinances, and use of general crowd control authority, as needed, are preferable to broad, prophylactic measures.[1536]

Different types of issues were presented by *Hurley v. Irish-American Gay Group*,[1537] in which the Court held that a state's public accommodations law could not be applied to compel private organizers of a St. Patrick's Day parade to accept in the parade a unit that would proclaim a message that the organizers did not wish to promote. Each participating unit affects the message conveyed by the parade organizers, the Court observed, and application of the public accommodations law to the content of the organizers' message contravened the "fundamental rule . . . that a speaker has the autonomy to choose the content of his own message."[1538]

Leafleting, Handbilling, and the Like.—In *Lovell v. City of Griffin*,[1539] the Court struck down a permit system applying to the distribution of circulars, handbills, or literature of any kind. The

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[1533] 530 U.S. at 722.
[1534] 573 U.S. ___, No. 12–1168, slip op. at 11–18 (2014).
[1535] *Id.* at 19–23.
[1536] *Id.* at 23–29.
[1537] 515 U.S. 557 (1995).
[1538] 515 U.S. at 573.
[1539] 303 U.S. 444 (1938).

First Amendment, the Court said, "necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." [1540] State courts, responding to what appeared to be a hint in *Lovell* that prevention of littering and other interests might be sufficient to sustain a flat ban on literature distribution,[1541] upheld total prohibitions and were reversed. "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions . . . . We are of the opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press." [1542] In *Talley v. California*,[1543] the Court struck down an ordinance that banned all handbills that did not carry the name and address of the author, printer, and sponsor; conviction for violating the ordinance was set aside on behalf of one distributing leaflets urging boycotts against certain merchants because of their employment discrimination. The basis of the decision is not readily ascertainable. On the one hand, the Court celebrated anonymity. "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all . . . . [I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." [1544] On the other hand, responding to the city's defense that the ordinance was aimed at providing a means to identify those responsible for fraud, false advertising, and the like, the Court noted that "the ordinance is in no manner so lim-

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[1540] 303 U.S. at 452.

[1541] 303 U.S. at 451.

[1542] Schneider v. Town of Irvington, 308 U.S. 147, 161, 162 (1939). The Court noted that the right to distribute leaflets was subject to certain obvious regulations, id. at 160, and called for a balancing, with the weight inclined to the First Amendment rights. *See also* Jamison v. Texas, 318 U.S. 413 (1943).

[1543] 362 U.S. 60 (1960).

[1544] 362 U.S. at 64, 65.

ited . . . .Therefore we do not pass on the validity of an ordinance limited to these or any other supposed evils." [1545]

Talley's anonymity rationale was strengthened in *McIntyre v. Ohio Elections Comm'n*,[1546] invalidating Ohio's prohibition on the distribution of anonymous campaign literature. There is a "respected tradition of anonymity in the advocacy of political causes," the Court noted, and neither of the interests asserted by Ohio justified the limitation. The state's interest in informing the electorate was "plainly insufficient," and, although the more weighty interest in preventing fraud in the electoral process may be accomplished by a direct prohibition, it may not be accomplished indirectly by an indiscriminate ban on a whole category of speech. Ohio could not apply the prohibition, therefore, to punish anonymous distribution of pamphlets opposing a referendum on school taxes.[1547]

The handbilling cases were distinguished in *City Council v. Taxpayers for Vincent*,[1548] in which the Court held that a city may prohibit altogether the use of utility poles for posting of signs. Although a city's concern over visual blight could be addressed by an anti-littering ordinance not restricting the expressive activity of distributing handbills, in the case of utility pole signs "it is the medium of expression itself" that creates the visual blight. Hence, the city's prohibition, unlike a prohibition on distributing handbills, was narrowly tailored to curtail no more speech than necessary to accomplish the city's legitimate purpose.[1549] Ten years later, however, the Court unanimously invalidated a town's broad ban on residential signs that permitted only residential identification signs, "for

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[1545] 362 U.S. at 64. In Zwickler v. Koota, 389 U.S. 241 (1967), the Court directed a lower court to consider the constitutionality of a statute which made it a criminal offense to publish or distribute election literature without identification of the name and address of the printer and of the persons sponsoring the literature. The lower court voided the law, but changed circumstances on a new appeal caused the Court to dismiss. Golden v. Zwickler, 394 U.S. 103 (1969).

[1546] 514 U.S. 334 (1995).

[1547] In Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999), the Court struck down a Colorado statute requiring initiative-petition circulators to wear identification badges. It found that "the restraint on speech in this case is more severe than was the restraint in *McIntyre*" because "[p]etition circulation is a less fleeting encounter, for the circulator must endeavor to persuade electors to sign the petition. . . . [T]he badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." Id. at 199. In Watchtower Bible & Tract Soc'y v. Village of Stratton, 536 U.S. 150, 166 (2002), concern for the right to anonymity was one reason that the Court struck down an ordinance that made it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit.

[1548] 466 U.S. 789 (1984).

[1549] Justice Brennan argued in dissent that adequate alternative forms of communication were not readily available because handbilling or other person-to-person methods would be substantially more expensive, and that the regulation for the sake of aesthetics was not adequately justified.

sale" signs, and signs warning of safety hazards.[1550] Prohibiting homeowners from displaying political, religious, or personal messages on their own property entirely foreclosed "a venerable means of communication that is unique and important," and that is "an unusually cheap form of communication" without viable alternatives for many residents.[1551] The ban was thus reminiscent of total bans on leafleting, distribution of literature, and door-to-door solicitation that the Court had struck down in the 1930s and 1940s. The prohibition in *Vincent* was distinguished as not removing a "uniquely valuable or important mode of communication," and as not impairing citizens' ability to communicate.[1552]

Sound Trucks, Noise.—Physical disruption may occur by other means than the presence of large numbers of demonstrators. For example, the use of sound trucks to convey a message on the streets may disrupt the public peace and may disturb the privacy of persons off the streets. The cases, however, afford little basis for a general statement of constitutional principle. *Saia v. New York*,[1553] while it spoke of "loud-speakers as today indispensable instruments of effective public speech," held only that a particular prior licensing system was void. A five-to-four majority upheld a statute in *Kovacs v. Cooper*,[1554] which was ambiguous with regard to whether all sound trucks were banned or only "loud and raucous" trucks and which the state court had interpreted as having the latter meaning. In another case, the Court upheld an antinoise ordinance which the state courts had interpreted narrowly to bar only noise that actually or immediately threatened to disrupt normal school activity during school hours.[1555] But the Court was careful to tie its ruling to the principle that the particular requirements of education necessitated observance of rules designed to preserve the school environment.[1556] More recently, reaffirming that government has "a substantial interest in protecting its citizens from unwelcome noise," the Court applied time, place, and manner analysis to uphold New York City's sound amplification guidelines designed to prevent excessive noise and assure sound quality at outdoor concerts in Central Park.[1557]

[1550] City of Ladue v. Gilleo, 512 U.S. 43 (1994).

[1551] 512 U.S. at 54, 57.

[1552] 512 U.S. at 54. The city's legitimate interest in reducing visual clutter could be addressed by "more temperate" measures, the Court suggested. Id. at 58.

[1553] 334 U.S. 558, 561 (1948).

[1554] 336 U.S. 77 (1949).

[1555] Grayned v. City of Rockford, 408 U.S. 104 (1972).

[1556] 408 U.S. at 117. Citing *Saia* and *Kovacs* as examples of reasonable time, place, and manner regulation, the Court observed: "If overamplified loudspeakers assault the citizenry, government may turn them down." Id. at 116.

[1557] Ward v. Rock Against Racism, 491 U.S. 781 (1989).

Door-to-Door Solicitation and Charitable Solicitation.—In one of the Jehovah's Witness cases, the Court struck down an ordinance forbidding solicitors or distributors of literature from knocking on residential doors in a community, the aims of the ordinance being to protect privacy, to protect the sleep of many who worked night shifts, and to protect against burglars posing as canvassers. The five-to-four majority concluded that on balance "[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." [1558]

Later, although striking down an ordinance because of vagueness, the Court observed that it "has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officers the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment." [1559] The Court indicated that its precedents supported measures that would require some form of notice to officials and the obtaining of identification in order that persons could canvas house-to-house for charitable or political purposes.

However, an ordinance that limited solicitation of contributions door-to-door by charitable organizations to those that use at least 75% of their receipts directly for charitable purposes, defined so as to exclude the expenses of solicitation, salaries, overhead, and other administrative expenses, was invalidated as overbroad.[1560] A privacy rationale was rejected, as just as much intrusion was likely by permitted as by non-permitted solicitors. A rationale of prevention of fraud was unavailing, as it could not be said that all associations that spent more than 25% of their receipts on overhead were actually engaged in a profit-making enterprise, and, in any event, more narrowly drawn regulations, such as disclosure requirements, could serve this governmental interest.

[1558] Martin v. City of Struthers, 319 U.S. 141, 147 (1943).

[1559] Hynes v. Mayor of Oradell, 425 U.S. 610, 616–17 (1976).

[1560] Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980). *See also* Larson v. Valente, 456 U.S. 228 (1982) (state law distinguishing between religious organizations and their solicitation of funds on basis of whether organizations received more than half of their total contributions from members or from public solicitation violates the Establishment Clause). Meyer v. Grant, 486 U.S. 414 (1988) (criminal penalty on use of paid circulators to obtain signatures for ballot initiative suppresses political speech in violation of First and Fourteenth Amendments).

Schaumburg was extended in *Secretary of State v. Joseph H. Munson Co.*,[1561] and *Riley v. National Federation of the Blind*.[1562] In *Munson*, the Court invalidated a Maryland statute limiting professional fundraisers to 25% of the amount collected plus certain costs, and allowing waiver of this limitation if it would effectively prevent the charity from raising contributions. In *Riley*, the Court invalidated a North Carolina fee structure containing even more flexibility.[1563] The Court saw "no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent," and was similarly hostile to any scheme that shifts the burden to the fundraiser to show that a fee structure is reasonable.[1564] Moreover, a requirement that fundraisers disclose to potential donors the percentage of donated funds previously used for charity was also invalidated in *Riley*, the Court indicating that the "more benign and narrowly tailored" alternative of disclosure to the state (accompanied by state publishing of disclosed percentages) could make the information publicly available without so threatening the effectiveness of solicitation.[1565]

In *Watchtower Bible & Tract Soc'y v. Village of Stratton*, the Court struck down an ordinance that made it a misdemeanor to engage in door-to-door advocacy—religious, political, or commercial—without first registering with the mayor and receiving a permit.[1566] "It is offensive to the very notion of a free society," the Court wrote, "that a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."[1567] The ordinance violated the right to anonymity, burdened the freedom of speech of those who hold "religious or patriotic views" that prevent them from applying for a license, and effectively banned "a signifi-

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[1561] 467 U.S. 947 (1984).

[1562] 487 U.S. 781 (1988).

[1563] A fee of up to 20% of collected receipts was deemed reasonable, a fee of between 20 and 35% was permissible if the solicitation involved advocacy or the dissemination of information, and a fee in excess of 35% was presumptively unreasonable, but could be upheld upon one of two showings: that advocacy or dissemination of information was involved, or that otherwise the charity's ability to collect money or communicate would be significantly diminished.

[1564] 487 U.S. at 793.

[1565] 487 U.S. at 800. North Carolina's requirement for licensing of professional fundraisers was also invalidated in *Riley*, id. at 801–02. In Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600 (2003), the Court held unanimously that the First Amendment does not prevent a state from bringing fraud actions against charitable solicitors who falsely represent that a "significant" amount of each dollar donated would be used for charitable purposes.

[1566] 536 U.S. 150 (2002).

[1567] 536 U.S. at 165–66.

cant amount of spontaneous speech" that might be engaged in on a holiday or weekend when it was not possible to obtain a permit.[1568]

The Problem of "Symbolic Speech".—Very little expression is "mere" speech. If it is oral, it may be noisy enough to be disturbing,[1569] and, if it is written, it may be litter;[1570] in either case, it may amount to conduct that is prohibitable in specific circumstances.[1571] Moving beyond these simple examples, one may see as well that conduct may have a communicative content, intended to express a point of view. Expressive conduct may consist in flying a particular flag as a symbol[1572] or in refusing to salute a flag as a symbol.[1573] Sit-ins and stand-ins may effectively express a protest about certain things.[1574]

Justice Jackson wrote: "There is no doubt that, in connection with the pledge, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality is a short cut from mind to mind."[1575] When conduct or action has a communicative content to it, governmental regulation or prohibition implicates the First Amendment, but this does not mean that such conduct or action is necessarily immune from governmental process. Thus, although the Court has had few opportunities to formulate First Amendment standards in this area, in upholding a congressional prohibition on draft-card burnings, it has stated the generally applicable rule. "[A] government regulation is sufficiently justified if it is within the constitutional power of Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged

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[1568] 536 U.S. at 167.

[1569] *E.g.*, Saia v. New York, 334 U.S. 558 (1948); Kovacs v. Cooper, 336 U.S. 77 (1949).

[1570] *E.g.*, Schneider v. Town of Irvington, 308 U.S. 147 (1939).

[1571] *Cf.* Cohen v. California, 403 U.S. 15 (1971).

[1572] Stromberg v. California, 283 U.S. 359 (1931).

[1573] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[1574] In Brown v. Louisiana, 383 U.S. 131 (1966), the Court held protected a peaceful, silent stand-in in a segregated public library. Speaking of speech and assembly, Justice Fortas said for the Court: "As this Court has repeatedly stated, these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities." Id. at 141–42. *See also* Garner v. Louisiana, 368 U.S. 157, 185, 201 (1961) (Justice Harlan concurring). On a different footing is expressive conduct in a place where such conduct is prohibited for reasons other than suppressing speech. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) (upholding Park Service restriction on overnight sleeping as applied to demonstrators wishing to call attention to the plight of the homeless).

[1575] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

First Amendment freedom is no greater than is essential to the furtherance of that government interest." [1576] The Court has suggested that this standard is virtually identical to that applied to time, place, or manner restrictions on expression.[1577]

Although almost unanimous in formulating and applying the test in *O'Brien*, the Court splintered when it had to deal with one of the more popular forms of "symbolic" conduct of the late 1960s and early 1970s—flag burning and other forms of flag desecration. No unifying theory capable of application to a wide range of possible flag abuse actions emerged from the early cases. Thus, in *Street v. New York*,[1578] the defendant had been convicted under a statute punishing desecration "by words or act" upon evidence that when he burned the flag he had uttered contemptuous words. The conviction was set aside because it might have been premised on his words alone or on his words and the act together, and no valid governmental interest supported penalizing verbal contempt for the flag.[1579]

A few years later the Court reversed two other flag desecration convictions, one on due process/vagueness grounds, the other under the First Amendment. These cases were decided by the Court in a manner that indicated an effort to begin to resolve the standards of First Amendment protection of "symbolic conduct." In *Smith v. Goguen*,[1580] a statute punishing anyone who "publicly . . . treats contemptuously the flag of the United States" was held unconstitutionally vague, and a conviction for wearing trousers with a small United States flag sewn to the seat was overturned. The language subjected the defendant to criminal liability under a standard "so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." [1581]

The First Amendment was the basis for reversal in *Spence v. Washington*,[1582] which set aside a conviction under a statute punishing the display of a United States flag to which something is

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[1576] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[1577] Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984).

[1578] 394 U.S. 576 (1969).

[1579] 394 U.S. at 591–93. Four dissenters concluded that the First Amendment did not preclude a flat proscription of flag burning or flag desecration for expressive purposes. Id. at 594 (Chief Justice Warren), 609 (Justice Black), 610 (Justice White), and 615 (Justice Fortas). In Radich v. New York, 401 U.S. 531 (1971), *aff'g*, 26 N.Y.2d 114, 257 N.E.2d 30 (1970), an equally divided Court, Justice Douglas not participating, sustained a flag desecration conviction of one who displayed sculptures in a gallery, using the flag in apparently sexually bizarre ways to register a social protest. Defendant subsequently obtained his release on habeas corpus, United States ex rel. Radich v. Criminal Court, 459 F.2d 745 (2d Cir. 1972), *cert. denied*, 409 U.S. 115 (1973).

[1580] 415 U.S. 566 (1974).

[1581] 415 U.S. at 578.

[1582] 418 U.S. 405 (1974).

attached or superimposed; Spence had hung his flag from his apartment window upside down with a peace symbol taped to the front and back. The act, the Court thought, was a form of communication, and because of the nature of the act, and the factual context and environment in which it was undertaken, the Court held it to be protected. The context included the fact that the flag was privately owned, that it was displayed on private property, and that there was no danger of breach of the peace. The nature of the act was that it was intended to express an idea and it did so without damaging the flag. The Court assumed that the state had a valid interest in preserving the flag as a national symbol, but left unclear whether that interest extended beyond protecting the physical integrity of the flag.[1583]

The underlying assumption that flag burning could be prohibited as a means of protecting the flag's symbolic value was later rejected. Twice, in 1989 and again in 1990, the Court held that prosecutions for flag burning at a public demonstration violated the First Amendment. First, in *Texas v. Johnson* [1584] the Court rejected a state desecration statute designed to protect the flag's symbolic value, and then in *United States v. Eichman* [1585] rejected a more limited federal statute purporting to protect only the flag's physical integrity. Both cases were decided by 5-to-4 votes, with Justice Brennan writing the Court's opinions.[1586] The Texas statute invalidated in *Johnson* defined the prohibited act of "desecration" as any physical mistreatment of the flag that the actor knew would seriously offend other persons. This emphasis on causing offense to others meant that the law was not "unrelated to the suppression of free expression" and that consequently the deferential standard of *United States v. O'Brien* was inapplicable. Applying strict scrutiny, the Court ruled that the state's prosecution of someone who burned a flag at a po-

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[1583] 418 U.S. at 408–11, 412–13. Subsequently, the Court vacated, over the dissents of Chief Justice Burger and Justices White, Blackmun, and Rehnquist, two convictions for burning flags and sent them back for reconsideration in the light of *Goguen* and *Spence*. Sutherland v. Illinois, 418 U.S. 907 (1974); Farrell v. Iowa, 418 U.S. 907 (1974). The Court, however, dismissed, "for want of a substantial federal question," an appeal from a flag desecration conviction of one who, with no apparent intent to communicate but in the course of "horseplay," blew his nose on a flag, simulated masturbation on it, and finally burned it. Van Slyke v. Texas, 418 U.S. 907 (1974).

[1584] 491 U.S. 397 (1989).

[1585] 496 U.S. 310 (1990).

[1586] In each case Justice Brennan's opinion for the Court was joined by Justices Marshall, Blackmun, Scalia, and Kennedy, and in each case Chief Justice Rehnquist and Justices White, Stevens, and O'Connor dissented. In *Johnson* the Chief Justice's dissent was joined by Justices White and O'Connor, and Justice Stevens dissented separately. In *Eichman* Justice Stevens wrote the only dissenting opinion, to which the other dissenters subscribed.

litical protest was not justified under the state's asserted interest in preserving the flag as a symbol of nationhood and national unity. The Court's opinion left little doubt that the existing federal statute, 18 U.S.C. § 700, and the flag desecration laws of 47 other states would suffer a similar fate in a similar case. Doubt remained, however, as to whether the Court would uphold a "content-neutral" statute protecting the physical integrity of the flag.

Immediately following *Johnson*, Congress enacted a new flag protection statute providing punishment for anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States."[1587] The law was designed to be content-neutral and to protect the "physical integrity" of the flag.[1588] Nonetheless, in overturning convictions of flag burners, the Court found that the law suffered from "the same fundamental flaw" as the Texas law in *Johnson*. The government's underlying interest, characterized by the Court as resting upon "a perceived need to preserve the flag's status as a symbol of our Nation and certain national ideals,"[1589] still related to the suppression of free expression. Support for this interpretation was found in the fact that most of the prohibited acts are usually associated with disrespectful treatment of the flag; this suggested to the Court "a focus on those acts likely to damage the flag's symbolic value."[1590] As in *Johnson*, such a law could not withstand "most exacting scrutiny" analysis.

The Court's ruling in *Eichman* rekindled congressional efforts, postponed with enactment of the Flag Protection Act, to amend the Constitution to authorize flag desecration legislation at the federal and state levels. In both the House and the Senate these measures failed to receive the necessary two-thirds vote.[1591]

[1587] The Flag Protection Act of 1989, Pub. L. 101–131 (1989).

[1588] *See* H.R. REP. NO. 231, 101st Cong., 1st Sess. 8 (1989) ("The purpose of the bill is to protect the physical integrity of American flags in all circumstances, regardless of the motive or political message of any flag burner").

[1589] United States v. Eichman, 496 U.S. at 316.

[1590] 496 U.S. at 317.

[1591] In the 101st Congress, the House defeated H.J. Res. 350 by vote of 254 in favor to 177 against (136 CONG. REC. H4086 (daily ed. June 21, 1990), and the Senate defeated S.J. Res. 332 by vote of 58 in favor to 42 against (136 CONG. REC. S8737 (daily ed. June 26, 1990). In every Congress since then (though the 111th in 2009), constitutional amendments to allow Congress or the states to prohibit flag desecration have been proposed. In each Congress from the 104th through the 109th (1995–2006), the House passed such a proposal, but the Senate either rejected it or did not vote on it.

RIGHTS OF ASSEMBLY AND PETITION

Background and Development

The right of petition took its rise from the modest provision made for it in chapter 61 of the Magna Carta (1215).[1592] To this meager beginning are traceable, in some measure, Parliament itself and its procedures for the enactment of legislation, the equity jurisdiction of the Lord Chancellor, and proceedings against the Crown by "petition of right." Thus, while the King summoned Parliament for the purpose of supply, the latter—but especially the House of Commons—petitioned the King for a redress of grievances as its price for meeting the financial needs of the Monarch, and as it increased in importance, it came to claim the right to dictate the form of the King's reply, until, in 1414, Commons declared itself to be "as well assenters as petitioners." Two hundred and fifty years later, in 1669, Commons further resolved that every commoner in England possessed "the inherent right to prepare and present petitions" to it "in case of grievance," and of Commons "to receive the same" and to judge whether they were "fit" to be received. Finally Chapter 5 of the Bill of Rights of 1689 asserted the right of the subjects to petition the King and "all commitments and prosecutions for such petitioning to be illegal." [1593]

Historically, therefore, the right of petition is the primary right, the right peaceably to assemble a subordinate and instrumental right, as if the First Amendment read: "the right of the people peaceably to assemble" in order to "petition the government." [1594] Today, however, the right of peaceable assembly is, in the language of the Court, "cognate to those of free speech and free press and is equally fundamental. . . . [It] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. . . . The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question . . . is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of

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[1592] C. Stephenson & F. Marcham, Sources of English Constitutional History 125 (1937).

[1593] 12 Encyclopedia of the Social Sciences 98 (1934).

[1594] United States v. Cruikshank, 92 U.S. 542, 552 (1876), reflects this view.

speech which the Constitution protects." [1595] Furthermore, the right of petition has expanded. It is no longer confined to demands for "a redress of grievances," in any accurate meaning of these words, but comprehends demands for an exercise by the government of its powers in furtherance of the interest and prosperity of the petitioners and of their views on politically contentious matters.[1596] The right extends to the "approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." [1597]

The right of petition recognized by the First Amendment first came into prominence in the early 1830s, when petitions against slavery in the District of Columbia began flowing into Congress in a constantly increasing stream, which reached its climax in the winter of 1835. Finally on January 28, 1840, the House adopted as a standing rule: "That no petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia, or any State or Territories of the United States in which it now exists, shall be received by this House, or entertained in any way whatever." Because of efforts of John Quincy Adams, this rule was repealed five years later.[1598] For many years now the rules of the House of Representatives have provided that Members having petitions to present may deliver them to the Clerk and the petitions, except such as in the judgment of the Speaker are of an obscene or insulting character, shall be entered on the Journal and the Clerk shall furnish a transcript of such record to the official reporters of debates for publication in the Record.[1599] Even so, petitions for the repeal of the espionage and sedition laws and against military measures for recruiting resulted, in World War I, in imprisonment.[1600] Proces-

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[1595] DeJonge v. Oregon, 299 U.S. 353, 364, 365 (1937). *See also* Herndon v. Lowry, 301 U.S. 242 (1937).

[1596] *See* Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961).

[1597] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). *See also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913–15 (1982); Missouri v. NOW, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1980) (because of its political nature, a boycott of states not ratifying the Equal Rights Amendment may not be subjected to antitrust suits).

[1598] The account is told in many sources. *E.g.*, Samuel flagg Bemis, John Quincy Adams and the Union, chs. 17, 18 and pp. 446–47 (1956); William Lee Miller, Arguing About Slavery: The Great Battle in the United States Congress (1996), 465–487; David P. Currie, The Constitution in Congress: Descent into the Maelstrom, 1829–1861 (2005), 3–23.

[1599] Rule 22, ¶ 1, Rules of the House of Representatives, H.R. Doc. No. 256, 101st Congress, 2d Sess. 571 (1991).

[1600] 1918 Att'y Gen. Ann. Rep. 48.

sions for the presentation of petitions in the United States have not been particularly successful. In 1894 General Coxey of Ohio organized armies of unemployed to march on Washington and present petitions, only to see their leaders arrested for unlawfully walking on the grass of the Capitol. The march of the veterans on Washington in 1932 demanding bonus legislation was defended as an exercise of the right of petition. The Administration, however, regarded it as a threat against the Constitution and called out the army to expel the bonus marchers and burn their camps. Marches and encampments have become more common since, but the results have been mixed.

The Cruikshank Case.—The right of assembly was first before the Supreme Court in 1876[1601] in the famous case of *United States v. Cruikshank*.[1602] The Enforcement Act of 1870[1603] forbade conspiring or going onto the highways or onto the premises of another to intimidate any other person from freely exercising and enjoying any right or privilege granted or secured by the Constitution of the United States. Defendants had been indicted under this Act on charges of having deprived certain citizens of their right to assemble together peaceably with other citizens "for a peaceful and lawful purpose." Although the Court held the indictment inadequate because it did not allege that the attempted assembly was for a purpose related to the Federal Government, its *dicta* broadly declared the outlines of the right of assembly. "The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States."[1604] Absorption of the assembly and petition clauses into the liberty protected by

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[1601] *See*, however, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868), in which the Court gave as one of its reasons for striking down a tax on persons leaving the state its infringement of the right of every citizen to come to the seat of government and to transact any business he might have with it.

[1602] 92 U.S. 542 (1876).

[1603] Act of May 31, 1870, ch. 114, 16 Stat. 141 (1870).

[1604] United States v. Cruikshank, 92 U.S. 542, 552–53 (1876).

the due process clause of the Fourteenth Amendment means, of course, that the *Cruikshank* limitation is no longer applicable.[1605]

The Hague Case.—Illustrative of this expansion is *Hague v. CIO*,[1606] in which the Court, though splintered with regard to reasoning and rationale, struck down an ordinance that vested an uncontrolled discretion in a city official to permit or deny any group the opportunity to conduct a public assembly in a public place. Justice Roberts, in an opinion that Justice Black joined and with which Chief Justice Hughes concurred, found protection against state abridgment of the rights of assembly and petition in the Privileges and Immunities Clause of the Fourteenth Amendment. "The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."[1607] Justices Stone and Reed invoked the Due Process Clause of the Fourteenth Amendment for the result, thereby claiming the rights of assembly and petition for aliens as well as citizens. "I think respondents' right to maintain it does not depend on their citizenship and cannot rightly be made to turn on the existence or non-existence of a purpose to disseminate information about the National Labor Relations Act. It is enough that petitioners have prevented respondents from holding meetings and disseminating information whether for the organization of labor unions or for any other lawful purpose."[1608] This due process view of Justice Stone's has carried the day over the privileges and immunities approach.

Later cases tend to merge the rights of assembly and petition into the speech and press clauses, and, indeed, all four rights may well be considered as elements of an inclusive right to freedom of expression. While certain conduct may still be denominated as either petition[1609] or assembly[1610] rather than speech, there seems

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[1605] DeJonge v. Oregon, 299 U.S. 353 (1937); Hague v. CIO, 307 U.S. 496 (1939); Bridges v. California, 314 U.S. 252 (1941); Thomas v. Collins, 323 U.S. 516 (1945).

[1606] 307 U.S. 496 (1939).

[1607] 307 U.S. at 515. For another holding that the right to petition is not absolute, *see* McDonald v. Smith, 472 U.S. 479 (1985) (the fact that defamatory statements were made in the context of a petition to government does not provide absolute immunity from libel).

[1608] 307 U.S. at 525.

[1609] *E.g.*, United States v. Harriss, 347 U.S. 612 (1954); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127 (1961); BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002).

[1610] *E.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971).

little question that similar standards will be applied in most cases.[1611] For instance, as discussed earlier, where a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern.[1612] In *Borough of Duryea, Pennsylvania v. Guarnieri*,[1613] the Court similarly held that a police chief who alleged retaliation for having filed a union grievance challenging his termination was not protected by the right to petition, because his complaints did not go to matters of public concern.[1614]

[1611] *See, e.g.*, Borough of Duryea, Pennsylvania v. Guarnieri, 564 U.S. ___, No. 09–1476, slip op. at 7 (2011) ("It is not necessary to say that the [Speech and Petition] Clauses are identical in their mandate or their purpose and effect to acknowledge that the rights of speech and petition share substantial common ground"); *But see* id. ("Courts should not presume there is always an essential equivalence in the [Speech and Petition] Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims").

[1612] Connick v. Myers, 461 U.S. 138 (1983).

[1613] 564 U.S. ___, No. 09–1476, slip op. (2011).

[1614] Justice Scalia, in dissent, disputed the majority's suggestion that a petition need be of "public concern" to be protected, noting that the Petition Clause had historically been a route for seeking relief of private concerns. Slip op. at 5–7 (2011) (Scalia, J., dissenting). Justice Scalia also suggested that the Clause should be limited to petitions directed to an executive branch or legislature, and that grievances submitted to an adjuciatory body are not so protected. Id. at 1–3.

BEARING ARMS

SECOND AMENDMENT

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

IN GENERAL

For over 200 years, despite extensive debate and much legislative action with respect to regulation of the purchase, possession, and transportation of firearms, as well as proposals to substantially curtail ownership of firearms, there was no definitive resolution by the courts of just what right the Second Amendment protects. The Second Amendment is naturally divided into two parts: its prefatory clause ("A well regulated Militia, being necessary to the security of a free State") and its operative clause ("the right of the people to keep and bear Arms shall not be infringed"). To perhaps oversimplify the opposing arguments, the "states' rights" thesis emphasized the importance of the prefatory clause, arguing that the purpose of the clause was to protect the states in their authority to maintain formal, organized militia units. The "individual rights" thesis emphasized the operative clause, so that individuals would be protected in the ownership, possession, and transportation of firearms.[1] Whatever the Amendment meant, it was seen as a bar only to federal action, not state[2] or private[3] restraints.

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[1] A sampling of the diverse literature in which the same historical, linguistic, and case law background shows the basis for strikingly different conclusions includes: STAFF OF SUBCOMM. ON THE CONSTITUTION, SENATE COMMITTEE ON THE JUDICIARY, 97th Congress, 2d Sess., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982); DON B. KATES, HANDGUN PROHIBITION AND THE ORIGINAL MEANING OF THE SECOND AMENDMENT (1984); GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT (Robert J. Cottrol ed., 1993); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Symposium, *Gun Control*, 49 LAW & CONTEMP. PROBS. 1 (1986); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995); William Van Alystyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236 (1994); Symposium, *Symposium on the Second Amendment: Fresh Looks*, 76 CHI.-KENT L. REV. 3 (2000).

[2] Presser v. Illinois, 116 U.S. 252, 265 (1886). *See also* Miller v. Texas, 153 U.S. 535 (1894); Robertson v. Baldwin, 165 U.S. 275, 281–82 (1897). The non-application of the Second Amendment to the states was reaffirmed in Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

[3] United States v. Cruikshank, 92 U.S. 542 (1876).

One of the Second Amendment cases that the Court has heard, and until recently the only case challenging a congressional enactment, seemed to affirm individual protection but only in the context of the maintenance of a militia or other such public force. In *United States v. Miller*,[4] the Court sustained a statute requiring registration under the National Firearms Act of sawed-off shotguns. After reciting the original provisions of the Constitution dealing with the militia, the Court observed that "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted with that end in view."[5] The significance of the militia, the Court continued, was that it was composed of "civilians primarily, soldiers on occasion." It was upon this force that the states could rely for defense and securing of the laws, on a force that "comprised all males physically capable of acting in concert for the common defense," who, "when called for service . . . were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[6] Therefore, "[i]n the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than 18 inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."[7]

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[4] 307 U.S. 174 (1939). The defendants had been released on the basis of the trial court determination that prosecution would violate the Second Amendment and no briefs or other appearances were filed on their behalf; the Court acted on the basis of the government's representations.

[5] 307 U.S. at 178.

[6] 307 U.S. at 179.

[7] 307 U.S. at 178. In Cases v. United States, 131 F.2d 916, 922 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943), the court, upholding a similar provision of the Federal Firearms Act, said, "Apparently, then, under the Second Amendment, the Federal Government can limit the keeping and bearing of arms by a single individual as well as by a group of individuals, but it cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well-regulated militia." *See* Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) (dictum: *Miller* holds that the "Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia'"). *See also* Hickman v. Block, 81 F.3d 98 (9th Cir.) (plaintiff lacked standing to challenge denial of permit to carry concealed weapon, because Second Amendment is a right held by states, not by private citizens), *cert. denied*, 519 U.S. 912 (1996); United States v. Gomez, 92 F.3d 770, 775 n.7 (9th Cir. 1996) (interpreting federal prohibition on possession of firearm by a felon as having a justification defense "ensures that [the provision] does not collide with the Second Amendment"). United States v. Wright, 117 F.3d 1265 (11th Cir.), *cert. denied*, 522 U.S. 1007 (1997) (member of Georgia unorganized mili-

After that decision, Congress placed greater limitations on the receipt, possession, and transportation of firearms,[8] and proposals for national registration or prohibition of firearms altogether have been made.[9] *Miller*, however, shed little light on the validity of such proposals. Pointing out that interest in the "character of the Second Amendment right has recently burgeoned," Justice Thomas, concurring in the Court's invalidation (on other grounds) of the Brady Handgun Violence Prevention Act, questioned whether the Second Amendment bars federal regulation of gun sales, and suggested that the Court might determine "at some future date . . . whether Justice Story was correct . . . that the right to bear arms has justly been considered, as the palladium of the liberties of a republic.'" [10]

It was not until 2008 that the Supreme Court definitively came down on the side of an "individual rights" theory. Relying on new scholarship regarding the origins of the Amendment,[11] the Court in *District of Columbia v. Heller* [12] confirmed what had been a growing consensus of legal scholars—that the rights of the Second Amendment adhered to individuals. The Court reached this conclusion after a textual analysis of the Amendment,[13] an examination of the historical use of prefatory phrases in statutes, and a detailed exploration of the 18th century meaning of phrases found in the Amendment. Although accepting that the historical and contemporaneous use of the phrase "keep and bear Arms" often arose in connection with military activities, the Court noted that its use was not lim-

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tia unable to establish that his possession of machine guns and pipe bombs bore any connection to the preservation or efficiency of a well regulated militia).

[8] Enacted measures include the Gun Control Act of 1968. 82 Stat. 226, 18 U.S.C. §§ 921–928. The Supreme Court's dealings with these laws have all arisen in the context of prosecutions of persons purchasing or obtaining firearms in violation of prohibitions against such conduct by convicted felons. Lewis v. United States, 445 U.S. 55 (1980); Barrett v. United States, 423 U.S. 212 (1976); Scarborough v. United States, 431 U.S. 563 (1977); United States v. Bass, 404 U.S. 336 (1971).

[9] *E.g.*, National Commission on Reform of Federal Criminal Laws, Working Papers 1031–1058 (1970), and Final Report 246–247 (1971).

[10] Printz v. United States, 521 U.S. 898, 937–39 (1997) (quoting 3 Commentaries § 1890, p. 746 (1833)). Justice Scalia, in extra-judicial writing, has sided with the individual rights interpretation of the Amendment. *See* Antonin Scalia, A Matter of Interpretation, Federal Courts and the Law, 136–37 n.13 (A. Gutmann, ed., 1997) (responding to Professor Tribe's critique of "my interpretation of the Second Amendment as a guarantee that the Federal Government will not interfere with the individual's right to bear arms for self-defense").

[11] E. Volokh, *The Commonplace Second Amendment*, 73 N. Y.U. L. Rev. 793 (1998); R. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 Tex. L. Rev. 237 (2004); E. Volokh, *"Necessary to the Security of a Free State,"* 83 Notre Dame L. Rev. 1 (2007); *What Did "Bear Arms" Mean in the Second Amendment?*, 6 Georgetown J. L. & Pub. Policy (2008).

[12] 554 U.S. 570 (2008).

[13] The "right of the people," for instance, was found in other places in the Constitution to speak to individual rights, not to collective rights (those that can only be exercised by participation in a corporate body). *Id.* at 578–80.

ited to those contexts.[14] Further, the Court found that the phrase "well regulated Militia" referred not to formally organized state or federal militias, but to the pool of "able-bodied men" who were available for conscription.[15] Finally, the Court reviewed contemporaneous state constitutions, post-enactment commentary, and subsequent case law to conclude that the purpose of the right to keep and bear arms extended beyond the context of militia service to include self-defense.

Using this "individual rights theory," the Court struck down a District of Columbia law that banned virtually all handguns, and required that any other type of firearm in a home be dissembled or bound by a trigger lock at all times. The Court rejected the argument that handguns could be banned as long as other guns (such as long-guns) were available, noting that, for a variety of reasons, handguns are the "most popular weapon chosen by Americans for self-defense in the home."[16] Similarly, the requirement that all firearms be rendered inoperable at all times was found to limit the "core lawful purpose of self-defense."[17] However, the Court specifically stated (albeit in *dicta*) that the Second Amendment did not limit prohibitions on the possession of firearms by felons and the mentally ill, penalties for carrying firearms in schools and government buildings, or laws regulating the sales of guns.[18] The Court also noted that there was a historical tradition of prohibiting the carrying of "dangerous and unusual weapons" that would not be affected by its decision.[19] The Court, however, declined to establish

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[14] *Id.* at 580–91. In so doing, the *Heller* Court rejected the argument that "only those weapons useful in warfare are protected" by the Second Amendment, as the "traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Id.* at 624–25 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)) ("We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."); *see also* Caetano v. Massachusetts, 577 U.S. ___, No. 14–10078, slip op. at 2 (2016) (vacating a ruling by a state court that a ban on stun guns did not violate the Second Amendment because such weapons were not "readily adaptable to use in the military.").

[15] *Heller*, 554 U.S. at 594–96. Similarly, the phrase "security of a free state" was found to refer not to the defense of a particular state, but to the protection of the national polity. *Id.* at 596–98.

[16] *Id.* at 628–29. Subsequently, in *Caetano v. Massachusetts*, the Court emphasized that, under *Heller*, the protections of the Second Amendment extend to firearms that were not in existence at the time of the Framers. *See Caetano*, slip op. at 2 (per curiam) (vacating and remanding a Massachusetts state court ruling upholding a state law that prohibited the possession of stun guns, in part, on the grounds that stun guns were not in common use when the Second Amendment was adopted).

[17] *Heller*, 554 U.S. at 630.

[18] *Id.* at 626.

[19] *Id.* at 627 (2008). *But see Caetano*, slip op. at 2 (rejecting, as inconsistent with *Heller*, the view that a weapon may be deemed "unusual" if it was not in com-

the standard by which future gun regulations would be evaluated.[20] And, more importantly, because the District of Columbia is a federal enclave, the Court did not have occasion to address whether it would reconsider its prior decisions that the Second Amendment does not apply to the states.

The latter issue was addressed in *McDonald v. Chicago*,[21] where a plurality of the Court, overturning prior precedent, found that the Second Amendment is incorporated through the Fourteenth Amendment and is thus enforceable against the states.[22] Relevant to this question, the Court examined whether the right to keep and bear arms is "fundamental to our scheme of ordered liberty" [23] or "deeply rooted in this Nation's history and tradition".[24] The Court, relying on historical analysis set forth previously in *Heller*, noted the English common law roots of the right to keep arms for self-defense [25] and the importance of the right to the American colonies, the drafters of the Constitution, and the states as a bulwark against overreaching federal authority.[26] Noting that by the 1850s the perceived threat that the National Government would disarm the citizens had largely faded, the Court suggested that the right to keep and bear arms became valued principally for purposes of self-defense, so that the passage of Fourteenth Amendment, in part, was intended to protect the right of ex-slaves to keep and bear arms. While it was argued by the dissent that this protection would most logically be provided by the Equal Protection Clause, not by the Due Process Clause,[27] the plurality also found enough evidence of then-existent concerns regarding the treatment of blacks by the state mi-

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mon use at the time when the Second Amendment was adopted, as well as the view that the Second Amendment only protects weapons that are "useful in warfare").

[20] *Heller*, 554 U.S. at 629 n.27 (discussing the non-application of rational basis review).

[21] 561 U.S. ___, No. 08–1521, slip op. (2010).

[22] The portion of the opinion finding incorporation was authored by Justice Alito, and joined by Chief Justice Roberts, Justice Scalia and Justice Kennedy. Justice Thomas declined to join the plurality's opinion as regards incorporation under the Due Process Clause. Instead, Justice Thomas, alone among the Justices, would have found that the Second Amendment is applicable to the states under the Privileges or Immunities Clause. For a more detailed discussion of incorporation and the Privileges or Immunities Clause, see *supra* Bill of Rights, Fourteenth Amendment and Fourteenth Amendment, Privileges or Immunities.

[23] Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[24] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).

[25] *McDonald*, 561 U.S. ___, No. 08–1521, slip op. at 20 (noting that Blackstone had asserted that the right to keep and bear arms was "one of the fundamental rights of Englishmen").

[26] 561 U.S. ___, No. 08–1521, slip op. at 20–22.

[27] 561 U.S. ___, No. 08–1521, slip op. at 23–24 (Breyer, J., dissenting).

litia to conclude that the right to bear arms was also intended to protect against generally-applicable state regulation.

QUARTERING SOLDIERS

THIRD AMENDMENT

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

IN GENERAL

There has been no Supreme Court explication of this Amendment, which was obviously one guarantee indicating a preference for the civilian over the military.[1]

[1] In fact, save for the curious case of Engblom v. Carey, 677 F.2d 957 (2d Cir. 1982), on remand, 572 F. Supp. 44 (S.D.N.Y. 1983), *aff'd per curiam*, 724 F.2d 28 (2d Cir. 1983), there has been no judicial explication of the Amendment at all.

FOURTH AMENDMENT

SEARCH AND SEIZURE

CONTENTS

SEARCH AND SEIZURE

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SEARCH AND SEIZURE

History and Scope of the Amendment

History.—Few provisions of the Bill of Rights grew so directly out of the experience of the colonials as the Fourth Amendment, embodying as it did the protection against the use of the "writs of assistance." But though the insistence on freedom from unreasonable searches and seizures as a fundamental right gained expression in the colonies late and as a result of experience,[1] there was also a rich English experience to draw on. "Every man's house is his castle" was a maxim much celebrated in England, as *Saman's Case* demonstrated in 1603.[2] A civil case of execution of process, *Saman's Case* nonetheless recognized the right of the homeowner to defend his house against unlawful entry even by the King's agents, but at the same time recognized the authority of the appropriate officers to break and enter upon notice in order to arrest or to execute the King's process. Most famous of the English cases was *Entick v. Carrington*,[3] one of a series of civil actions against state officers who, pursuant to general warrants, had raided many homes and other places in search of materials connected with John Wilkes' po-

[1] Apparently the first statement of freedom from unreasonable searches and seizures appeared in The Rights of the Colonists and a List of Infringements and Violations of Rights, 1772, in the drafting of which Samuel Adams took the lead. 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 199, 205–06 (1971).

[2] 5 Coke's Repts. 91a, 77 Eng. Rep. 194 (K.B. 1604). One of the most forceful expressions of the maxim was that of William Pitt in Parliament in 1763: "The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."

[3] 19 Howell's State Trials 1029, 95 Eng. 807 (1705).

lemical pamphlets attacking not only governmental policies but the King himself.[4]

Entick, an associate of Wilkes, sued because agents had forcibly broken into his house, broken into locked desks and boxes, and seized many printed charts, pamphlets, and the like. In an opinion sweeping in terms, the court declared the warrant and the behavior it authorized subversive "of all the comforts of society," and the issuance of a warrant for the seizure of all of a person's papers rather than only those alleged to be criminal in nature "contrary to the genius of the law of England."[5] Besides its general character, the court said, the warrant was bad because it was not issued on a showing of probable cause and no record was required to be made of what had been seized. *Entick v. Carrington*, the Supreme Court has said, is a "great judgment," "one of the landmarks of English liberty," "one of the permanent monuments of the British Constitution," and a guide to an understanding of what the Framers meant in writing the Fourth Amendment.[6]

In the colonies, smuggling rather than seditious libel afforded the leading examples of the necessity for protection against unreasonable searches and seizures. In order to enforce the revenue laws, English authorities made use of writs of assistance, which were general warrants authorizing the bearer to enter any house or other place to search for and seize "prohibited and uncustomed" goods, and commanding all subjects to assist in these endeavors. Once issued, the writs remained in force throughout the lifetime of the sovereign and six months thereafter. When, upon the death of George II in 1760, the authorities were required to obtain the issuance of new writs, opposition was led by James Otis, who attacked such writs on libertarian grounds and who asserted the invalidity of the authorizing statutes because they conflicted with English constitutionalism.[7] Otis lost and the writs were issued and used, but his arguments were much cited in the colonies not only on the immediate subject but also with regard to judicial review.

Scope of the Amendment.—The language of the provision that became the Fourth Amendment underwent some modest changes

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[4] *See also* Wilkes v. Wood, 98 Eng. 489 (C.P. 1763); Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763), *aff'd* 19 Howell's State Trials 1002, 1028; 97 Eng. Rep. 1075 (K.B. 1765).

[5] 95 Eng. 817, 818.

[6] Boyd v. United States, 116 U.S. 616, 626 (1886).

[7] The arguments of Otis and others as well as much background material are contained in Quincy's MASSACHUSETTS REPORTS, 1761–1772, App. I, pp. 395–540, and in 2 LEGAL PAPERS OF JOHN ADAMS 106–47 (Wroth & Zobel eds., 1965). *See also* Dickerson, *Writs of Assistance as a Cause of the American Revolution*, in THE ERA OF THE AMERICAN REVOLUTION: STUDIES INSCRIBED TO EVARTS BOUTELL GREENE 40 (R. Morris, ed., 1939).

on its passage through the Congress, and it is possible that the changes reflected more than a modest significance in the interpretation of the relationship of the two clauses. Madison's introduced version provided "The rights to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."[8] As reported from committee, with an inadvertent omission corrected on the floor,[9] the section was almost identical to the introduced version, and the House defeated a motion to substitute "and no warrant shall issue" for "by warrants issuing" in the committee draft. In some fashion, the rejected amendment was inserted in the language before passage by the House and is the language of the ratified constitutional provision.[10]

As noted above, the noteworthy disputes over search and seizure in England and the colonies revolved about the character of warrants. There were, however, lawful warrantless searches, primarily searches incident to arrest, and these apparently gave rise to no disputes. Thus, the question arises whether the Fourth Amendment's two clauses must be read together to mean that the only searches and seizures which are "reasonable" are those which meet the requirements of the second clause, that is, are pursuant to warrants issued under the prescribed safeguards, or whether the two clauses are independent, so that searches under warrant must comply with the second clause but that there are "reasonable" searches under the first clause that need not comply with the second clause.[11] This issue has divided the Court for some time, has seen several reversals of precedents, and is important for the resolution of many

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[8] 1 ANNALS OF CONGRESS 434–35 (June 8, 1789).

[9] The word "secured" was changed to "secure" and the phrase "against unreasonable searches and seizures" was reinstated. Id. at 754 (August 17, 1789).

[10] Id. It has been theorized that the author of the defeated revision, who was chairman of the committee appointed to arrange the amendments prior to House passage, simply inserted his provision and that it passed unnoticed. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 101–03 (1937).

[11] The amendment was originally in one clause as quoted above; it was the insertion of the defeated amendment to the language which changed the text into two clauses and arguably had the effect of extending the protection against unreasonable searches and seizures beyond the requirements imposed on the issuance of warrants. It is also possible to read the two clauses together to mean that some seizures even under warrants would be unreasonable, and this reading has indeed been effectuated in certain cases, although for independent reasons. Boyd v. United States, 116 U.S. 616 (1886); Gouled v. United States, 255 U.S. 298 (1921), overruled by Warden v. Hayden, 387 U.S. 294 (1967); *but see* id. at 303 (reserving the question whether "there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.")

cases. It is a dispute that has run most consistently throughout the cases involving the scope of the right to search incident to arrest.[12] Although the right to search the person of the arrestee without a warrant is unquestioned, how far afield into areas within and without the control of the arrestee a search may range is an interesting and crucial matter.

The Court has drawn a wavering line.[13] In *Harris v. United States*,[14] it approved as "reasonable" the warrantless search of a four-room apartment pursuant to the arrest of the man found there. A year later, however, a reconstituted Court majority set aside a conviction based on evidence seized by a warrantless search pursuant to an arrest and adopted the "cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable." [15] This rule was set aside two years later by another reconstituted majority, which adopted the premise that the test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Whether a search is reasonable, the Court said, "must find resolution in the facts and circumstances of each case." [16] However, the Court soon returned to its emphasis upon the warrant. "The [Fourth] Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part." [17] Therefore, "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through a warrant procedure." [18] Exceptions to searches under warrants were to be closely

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[12] Approval of warrantless searches pursuant to arrest first appeared in dicta in several cases. Weeks v. United States, 232 U.S. 383, 392 (1914); Carroll v. United States, 267 U.S. 132, 158 (1925); Agnello v. United States, 269 U.S. 20, 30 (1925). Whether or not there is to be a rule or a principle generally preferring or requiring searches pursuant to warrant to warrantless searches, however, has ramifications far beyond the issue of searches pursuant to arrest. United States v. United States District Court, 407 U.S. 297, 320 (1972).

[13] *Compare* Marron v. United States, 275 U.S. 192 (1927), *with* Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), *and* United States v. Lefkowitz, 285 U.S. 452 (1932).

[14] 331 U.S. 145 (1947).

[15] Trupiano v. United States, 334 U.S. 699, 705 (1948). *See also* McDonald v. United States, 335 U.S. 451 (1948).

[16] United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

[17] Chimel v. California, 395 U.S. 752, 761 (1969).

[18] Terry v. Ohio, 392 U.S. 1, 20 (1968). In United States v. United States District Court, 407 U.S. 297, 321 (1972), Justice Powell explained that the "very heart" of the Amendment's mandate is "that where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient

contained by the rationale undergirding the necessity for the exception, and the scope of a search under one of the exceptions was similarly limited.[19]

During the 1970s the Court was closely divided on which standard to apply.[20] For a while, the balance tipped in favor of the view that warrantless searches are *per se* unreasonable, with a few carefully prescribed exceptions.[21] Gradually, guided by the variable-expectation-of-privacy approach to coverage of the Fourth Amendment, the Court broadened its view of permissible exceptions and of the scope of those exceptions.[22] By 1992, it was no longer the case that the "warrants-with-narrow-exceptions" standard nor-

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to justify invasion of a citizen's private premises or conversation." Thus, what is "reasonable" in terms of a search and seizure derives content and meaning through reference to the warrant clause. Coolidge v. New Hampshire, 403 U.S. 443, 473–84 (1971). *See also* Davis v. Mississippi, 394 U.S. 721, 728 (1969); Katz v. United States, 389 U.S. 347, 356–58 (1967); Warden v. Hayden, 387 U.S. 294, 299 (1967).

[19] Chimel v. California, 395 U.S. 752, 762–64 (1969) (limiting scope of search incident to arrest). *See also* United States v. United States District Court, 407 U.S. 297 (1972) (rejecting argument that it was "reasonable" to allow President through Attorney General to authorize warrantless electronic surveillance of persons thought to be endangering the national security); Katz v. United States, 389 U.S. 347 (1967) (although officers acted with great self-restraint and reasonably in engaging in electronic seizures of conversations from a telephone booth, a magistrate's antecedent judgment was required); Preston v. United States, 376 U.S. 364 (1964) (warrantless search of seized automobile not justified because not within rationale of exceptions to warrant clause). There were exceptions, *e.g.*, Cooper v. California, 386 U.S. 58 (1967) (warrantless search of impounded car was reasonable); United States v. Harris, 390 U.S. 234 (1968) (warrantless inventory search of automobile).

[20] *See, e.g.*, Almighty-Sanchez v. United States, 413 U.S. 266 (1973), Justices Stewart, Douglas, Brennan, and Marshall adhered to the warrant-based rule, while Justices White, Blackmun, and Rehnquist, and Chief Justice Burger placed greater emphasis upon the question of reasonableness without necessary regard to the warrant requirement. Id. at 285. Justice Powell generally agreed with the former group of Justices, id. at 275 (concurring).

[21] *E.g.*, G.M. Leasing Corp. v. United States, 429 U.S. 338, 352–53 (1977) (unanimous); Marshall v. Barrow's, Inc., 436 U.S. 307, 312 (1978); Michigan v. Tyler, 436 U.S. 499, 506 (1978); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (unanimous); Arkansas v. Sanders, 442 U.S. 743 (1979) (1979); United States v. Ross, 456 U.S. 798, 824–25 (1982).

[22] *E.g.*, Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of automobile taken to police station); Texas v. White, 423 U.S. 67 (1975) (same); New York v. Belton, 453 U.S. 454 (1981) (search of vehicle incident to arrest); United States v. Ross, 456 U.S. 798 (1982) (automobile search at scene); Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) (warrantless entry into a home when police have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury); Michigan v. Fisher, 558 U.S. ___, No. 09–91 (2009) (applying *Brigham City*). On the other hand, the warrant-based standard did preclude a number of warrantless searches. *E.g.*, Almighty-Sanchez v. United States, 413 U.S. 266 (1973) (warrantless stop and search of auto by roving patrol near border); Marshall v. Barrow's, Inc., 436 U.S. 307 (1978) (warrantless administrative inspection of business premises); Mincey v. Arizona, 437 U.S. 385 (1978) (warrantless search of home that was "homicide scene"); Arizona v. Gant, 556 U.S. ___, No. 07–542 (2009) (search of vehicle incident to arrest where arrestee had no access to vehicle).

mally prevails over a "reasonableness" approach.[23] Exceptions to the warrant requirement have multiplied, tending to confine application of the requirement to cases that are exclusively "criminal" in nature. And even within that core area of "criminal" cases, some exceptions have been broadened.

The most important category of exception is that of administrative searches justified by "special needs beyond the normal need for law enforcement." Under this general rubric the Court has upheld warrantless searches by administrative authorities in public schools, government offices, and prisons, and has upheld drug testing of public and transportation employees.[24] In all of these instances, the warrant and probable cause requirements are dispensed with in favor of a reasonableness standard that balances the government's regulatory interest against the individual's privacy interest; in all of these instances, the government's interest has been found to outweigh the individual's. The broad scope of the administrative search exception is evidenced by the fact that an overlap between law enforcement objectives and administrative "special needs" does not result in application of the warrant requirement; instead, the Court has upheld warrantless inspection of automobile junkyards and dismantling operations in spite of the strong law enforcement component of the regulation.[25]

In the law enforcement context, where search by warrant is still the general rule, there has also been some loosening of the requirement. For example, the scope of a valid search "incident to arrest," once limited to areas within the immediate reach of the arrested suspect, was expanded to a "protective sweep" of the entire home, if arresting officers have a "reasonable" belief that the home harbors an individual who may pose a danger.[26] In another case, the Court shifted focus from whether exigent circumstances justified failure to obtain a warrant, to whether an officer had a "reasonable" belief that an exception to the warrant requirement applied.[27] The Court has also held that an exigent circumstances exception ap-

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[23] Of the Justices on the Court in 1992, only Justice Stevens frequently sided with the warrants-with-narrow-exceptions approach. *See*, *e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 189 (Justice Stevens joining Justice Marshall's dissent); New Jersey v. T.L.O., 469 U.S. 325, 370 (1985) (Justice Stevens dissenting); California v. Acevedo, 500 U.S. 565, 585 (1991) (Justice Stevens dissenting).

[24] *See* various headings *infra* under the general heading "Valid Searches and Seizures Without Warrants."

[25] New York v. Burger, 482 U.S. 691 (1987).

[26] Maryland v. Buie, 494 U.S. 325 (1990).

[27] Illinois v. Rodriguez, 497 U.S. 177 (1990); *see also* Missouri v. McNeely, 569 U.S. ___, No. 11–1425, slip op. (2013) (rejecting a per se exception for obtaining warrants in DWI cases and requiring that exigent circumstances be evaluated under a "totality of the circumstances" test).

plied even where the exigency arose as a result of police conduct, so long as the police conduct was "reasonable" in that it neither threatened to nor violated the Fourth Amendment.[28]

Another matter of scope that the Court has addressed is the category of persons protected by the Fourth Amendment; *i.e.*, who constitutes "the people." This phrase, the Court determined, "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with [the United States] to be considered part of that community."[29] The Fourth Amendment therefore does not apply to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. The community of protected people includes U.S. citizens who go abroad, and aliens who have voluntarily entered U.S. territory and developed substantial connections with this country. There is no resulting broad principle, however, that the Fourth Amendment constrains federal officials wherever and against whomever they act.

The Interest Protected.—For the Fourth Amendment to apply to a particular set of facts, there must be a "search" and a "seizure," occurring typically in a criminal case, with a subsequent attempt to use judicially what was seized.[30] Whether there was a search and seizure within the meaning of the Amendment, and whether a complainant's interests were constitutionally infringed, will often turn upon consideration of his interest and whether it was officially abused. What does the Amendment protect? Under the common law, there was no doubt. In *Entick v. Carrington*,[31] Lord Camden wrote: "The great end for which men entered in society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my license but he is liable to an action though the damage be nothing . . . ." Protection of property interests as the basis of the Fourth Amendment found

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[28] Kentucky v. King, 563 U.S. ___, No. 09–1272, slip op. (2011) (police justified in entering apartment after smelling burning marijuana in a hallway, knocking on apartment door, and hearing noises consistent with evidence being destroyed).

[29] United States v. Vertigo-Urquidez, 494 U.S. 259, 265 (1990).

[30] *See*, *e.g.*, California v. Hodari D., 499 U.S. 621, 626 (1991) (because there was no "seizure" of the defendant as he fled from police before being tackled, the drugs that he abandoned in flight could not be excluded as the fruits of an unreasonable seizure).

[31] 19 Howell's State Trials 1029, 1035, 95 Eng. Reg. 807, 817–18 (1765).

easy acceptance in the Supreme Court[32] and that acceptance controlled the decision in numerous cases.[33] For example, in *Olmstead v. United States*,[34] one of the two premises underlying the holding that wiretapping was not covered by the Amendment was that there had been no actual physical invasion of the defendant's premises; where there had been an invasion—a technical trespass—electronic surveillance was deemed subject to Fourth Amendment restrictions.[35]

The Court later rejected this approach. "The premise that property interests control the right of the government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."[36] Thus, because the Amendment "protects people, not places," the requirement of actual physical trespass is dispensed with and electronic surveillance was made subject to the Amendment's requirements.[37]

The new test, propounded in *Katz v. United States*, is whether there is an expectation of privacy upon which one may "justifiably" rely.[38] "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area ac-

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[32] Boyd v. United States, 116 U.S. 616, 627 (1886); Adams v. New York, 192 U.S. 585, 598 (1904).

[33] Thus, the rule that "mere evidence" could not be seized but rather only the fruits of crime, its instrumentalities, or contraband, turned upon the question of the right of the public to possess the materials or the police power to make possession by the possessor unlawful. Gouled v. United States, 255 U.S. 298 (1921), overruled by Warden v. Hayden, 387 U.S. 294 (1967). *See also* Davis v. United States, 328 U.S. 582 (1946). Standing to contest unlawful searches and seizures was based upon property interests, United States v. Jeffers, 342 U.S. 48 (1951); Jones v. United States, 362 U.S. 257 (1960), as well as decision upon the validity of a consent to search. Chapman v. United States, 365 U.S. 610 (1961); Stoner v. California, 376 U.S. 483 (1964); Frazier v. Culp, 394 U.S. 731, 740 (1969).

[34] 277 U.S. 438 (1928). *See also* Goldman v. United States, 316 U.S. 129 (1942) (detectaphone placed against wall of adjoining room; no search and seizure).

[35] Silverman v. United States, 365 U.S. 505 (1961) (spike mike pushed through a party wall until it hit a heating duct).

[36] Warden v. Hayden, 387 U.S. 294, 304 (1967).

[37] Katz v. United States, 389 U.S. 347, 353 (1967) (warrantless use of listening and recording device placed on outside of phone booth violates Fourth Amendment). *See also* Kyllo v. United States, 533 U.S. 27, 32–33 (2001) (holding presumptively unreasonable the warrantless use of a thermal imaging device to detect activity within a home by measuring heat outside the home, and noting that a contrary holding would permit developments in police technology "to erode the privacy guaranteed by the Fourth Amendment".

[38] 389 U.S. at 353. Justice Harlan, concurring, formulated a two pronged test for determining whether the privacy interest is paramount: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Id. at 361.

cessible to the public, may be constitutionally protected."[39] That is, the "capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was reasonable expectation of freedom from governmental intrusion."[40]

Katz's focus on privacy was revitalized in *Kyllo v. United States*,[41] in which the Court invalidated the warrantless use of a thermal imaging device directed at a private home from a public street. The rule devised by the Court to limit police use of new technology that can "shrink the realm of guaranteed privacy" is that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' . . . constitutes a search—at least where (as here) the technology in question is not in general public use."[42] Relying on *Katz*, the Court rejected as "mechanical" the Government's attempted distinction between off-the-wall and through-the-wall surveillance. Permitting all off-the-wall observations, the Court observed, "would leave the homeowner at the mercy of advancing technology—including technology that could discern all human activity in the home."

Although the sanctity of the home has been strongly reaffirmed, protection of privacy in other contexts becomes more problematic. A two-part test that Justice Harlan suggested in *Katz* often provides the starting point for analysis.[43] The first element, the

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[39] 389 U.S. at 351–52.

[40] Mancusi v. DeForte, 392 U.S. 364, 368 (1968) (official had a reasonable expectation of privacy in an office he shared with others, although he owned neither the premises nor the papers seized). Minnesota v. Olson, 495 U.S. 91 (1990) (overnight guest in home has a reasonable expectation of privacy). *But cf.* Minnesota v. Carter, 525 U.S. 83 (1998) (a person present in someone else's apartment for only a few hours for the purpose of bagging cocaine for later sale has no legitimate expectation of privacy); *Cf.* Rakas v. Illinois, 439 U.S. 128 (1978) (auto passengers demonstrated no legitimate expectation of privacy in glove compartment or under seat of auto). Property rights are still protected by the Amendment, however. A "seizure" of property can occur when there is some meaningful interference with an individual's possessory interests in that property, and regardless of whether there is any interference with the individual's privacy interest. Soldal v. Cook County, 506 U.S. 56 (1992) (a seizure occurred when sheriff's deputies assisted in the disconnection and removal of a mobile home in the course of an eviction from a mobile home park). The reasonableness of a seizure, however, is an additional issue that may still hinge on privacy interests. United States v. Jacobsen, 466 U.S. 109, 120–21 (1984) (DEA agents reasonably seized package for examination after private mail carrier had opened the damaged package for inspection, discovered presence of contraband, and informed agents).

[41] 533 U.S. 27 (2001).

[42] 533 U.S. at 34.

[43] Justice Harlan's opinion has been much relied upon. *See*, *e.g.*, Terry v. Ohio, 392 U.S. 1, 19 (1968); Rakas v. Illinois, 439 U.S. 128, 143–144 n.12 (1978); Smith v. Maryland, 442 U.S. 735, 740–41 (1979); United States v. Salvucci, 448 U.S. 83, 91–92

"subjective expectation" of privacy, has largely dwindled as a viable standard, because, as Justice Harlan noted in a subsequent case, "our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present."[44] As for the second element, whether one has a "legitimate" expectation of privacy that society finds "reasonable" to recognize, the Court has said that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[45]

Thus, protection of the home is at the apex of Fourth Amendment coverage because of the right associated with ownership to exclude others;[46] but ownership of other things, *i.e.*, automobiles, does not carry a similar high degree of protection.[47] That a person has taken normal precautions to maintain his privacy, that is, precautions customarily taken by those seeking to exclude others, is usually a significant factor in determining legitimacy of expectation.[48] Some expectations, the Court has held, are simply not among those that society is prepared to accept.[49] In the context of norms for the use of rapidly evolving communications devices, the Court was reluctant to consider "the whole concept of privacy expectations" at all, preferring other decisional grounds: "The judiciary risks

(1980); Rawlings v. Kentucky, 448 U.S. 98, 105–06 (1980); Bond v. United States, 529 U.S. 334, 338 (2000).

[44] United States v. White, 401 U.S. 745, 786 (1971). *See* Smith v. Maryland, 442 U.S. 735, 740 n.5 (1979) (government could not condition "subjective expectations" by, say, announcing that henceforth all homes would be subject to warrantless entry, and thus destroy the "legitimate expectation of privacy").

[45] Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978).

[46] *E.g.*, Alderman v. United States, 394 U.S. 165 (1969); Mincey v. Arizona, 437 U.S. 385 (1978); Payton v. New York, 445 U.S. 573 (1980); Kyllo v. United States, 533 U.S. 27, 31 (2001).

[47] *E.g.*, United States v. Ross, 456 U.S. 798 (1982). *See also* Donovan v. Dewey, 452 U.S. 594 (1981) (commercial premises); Maryland v. Macon, 472 U.S. 463 (1985) (no legitimate expectation of privacy in denying to undercover officers allegedly obscene materials offered to public in bookstore).

[48] *E.g.*, United States v. Chadwick, 433 U.S. 1, 11 (1977); Katz v. United States, 389 U.S. 347, 352 (1967). *But cf.* South Dakota v. Opperman, 428 U.S. 364 (1976) (no legitimate expectation of privacy in automobile left with doors locked and windows rolled up). In Rawlings v. Kentucky, 448 U.S. 98 (1980), the fact that defendant had dumped a cache of drugs into his companion's purse, having known her for only a few days and knowing others had access to the purse, was taken to establish that he had no legitimate expectation the purse would be free from intrusion.

[49] *E.g.*, United States v. Miller, 425 U.S. 435 (1976) (bank records); Smith v. Maryland, 442 U.S. 735 (1979) (numbers dialed from one's telephone); Hudson v. Palmer, 468 U.S. 517 (1984) (prison cell); Illinois v. Andreas, 463 U.S. 765 (1983) (shipping container opened and inspected by customs agents and resealed and delivered to the addressee); California v. Greenwood, 486 U.S. 35 (1988) (garbage in sealed plastic bags left at curb for collection).

error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." [50]

What seems to have emerged is a balancing standard that requires "an assessing of the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." Whereas Justice Harlan saw a greater need to restrain police officers through the warrant requirement as the intrusions on individual privacy grow more extensive,[51] the Court's solicitude for law enforcement objectives frequently tilts the balance in the other direction.

Application of this balancing test, because of the Court's weighing of law enforcement investigative needs,[52] and its subjective evaluation of privacy needs, has led to the creation of a two-tier or sliding-tier scale of privacy interests. The privacy test was originally designed to permit a determination that an interest protected by the Fourth Amendment had been invaded.[53] If it had been, then ordinarily a warrant was required, subject only to the narrowly defined exceptions, and the scope of the search under those exceptions was "strictly tied to and justified by the circumstances which rendered its initiation permissible." [54] But the Court now uses the test to determine whether the interest invaded is important or persuasive enough so that a warrant is required to justify it; [55] if the individual has a lesser expectation of privacy, then the invasion may be justified, absent a warrant, by the reasonableness of the intrusion.[56] Exceptions to the warrant requirement are no longer evaluated solely by

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[50] City of Ontario v. Quon, 560 U.S. ___, No. 08–1332, slip op. at 10 (2010) The Court cautioned that "[a] broad holding concerning employees' privacy expectations vis-a-vis employer-provided technological equipment might have implications for future cases that cannot be predicted." Id. at 11–12.

[51] United States v. White, 401 U.S. 745, 786–87 (1971) (Justice Harlan dissenting).

[52] *E.g.*, Robbins v. California, 453 U.S. 420, 429, 433–34 (1981) (Justice Powell concurring), quoted with approval in United States v. Ross, 456 U.S. 798, 815–16 & n.21 (1982).

[53] Katz v. United States, 389 U.S. 347, 351–52 (1967).

[54] Terry v. Ohio, 392 U.S. 1, 19 (1968).

[55] The prime example is the home, so that for entries either to search or to arrest, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton v. New York, 445 U.S. 573, 590 (1980); Steagald v. United States, 451 U.S. 204, 212 (1981); Kirk v. Louisiana, 536 U.S. 635 (2002) (per curiam). *See also* Mincey v. Arizona, 437 U.S. 385 (1978). Privacy in the home is not limited to intimate matters. "In the home *all* details are intimate details, because the entire area is held safe from prying government eyes." Kyllo v. United States, 533 U.S. 27, 37 (2001).

[56] One has a diminished expectation of privacy in automobiles. Arkansas v. Sanders, 442 U.S. 753, 761 (1979) (collecting cases); United States v. Ross, 456 U.S. 798,

the justifications for the exception, *e.g.*, exigent circumstances, and the scope of the search is no longer tied to and limited by the justification for the exception.[57] The result has been a considerable expansion, beyond what existed prior to *Katz*, of the power of police and other authorities to conduct searches.

In *United States v. Jones*,[58] the Court seemed to revitalize the significance of governmental trespass in determining whether a Fourth Amendment search has occurred. In *Jones*, the Court considered whether the attachment of a Global-Positioning-System (GPS) device to a car used by a suspected narcotics dealer and the monitoring of such device for twenty-eight days, constituted a search. Although the Court ruled unanimously that this month-long monitoring violated Jones's rights, it splintered on the reasoning. A majority of the Court relied on the theory of common law trespass to find that the attachment of the device to the car represented a physical intrusion into Jones's constitutionally protected "effect" or private property.[59] While this holding obviated the need to assess the month-

804–09 (1982). A person's expectation of privacy in personal luggage and other closed containers is substantially greater than in an automobile, United States v. Chadwick, 433 U.S. 1, 13 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979), although, if the luggage or container is found in an automobile as to which there exists probable cause to search, the legitimate expectancy diminishes accordingly. United States v. Ross, *supra*. There is also a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel. California v. Carney, 471 U.S. 386 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not adapted for immediate vehicular use).

[57] *E.g.*, Texas v. White, 423 U.S. 67 (1975) (if probable cause to search automobile existed at scene, it can be removed to station and searched without warrant); United States v. Robinson, 414 U.S. 218 (1973) (once an arrest has been validly made, search pursuant thereto is so minimally intrusive in addition that scope of search is not limited by necessity of security of officer); United States v. Edwards, 415 U.S. 800 (1974) (incarcerated suspect; officers need no warrant to take his clothes for test because little additional intrusion). *But see* Ybarra v. Illinois, 444 U.S. 85 (1979) (officers on premises to execute search warrant of premises may not without more search persons found on premises).

[58] 565 U.S. ___, No. 10–1259, slip op. (2012).

[59] *Id.* at 3–7. The physical trespass analysis was reprised in subsequent opinions. In its 2013 decision in *Florida v. Jardines*, the Court assessed whether a law enforcement officer had the legal authority to conduct a drug sniff with a trained canine on the front porch of a suspect's home. Reviewing the law of trespass, the Court observed that visitors to a home, including the police, must have either explicit or implicit authority from the homeowner to enter upon and engage in various activities in the curtilage (i.e., the area immediately surrounding the home). Finding that the use of the dog to find incriminating evidence exceeded "background social norms" of what a visitor is normally permitted to do on another's property, the Court held that the drug sniff constituted a search. 569 U.S. ___, No. 11–564, slip op. at 5–8 (2013). Similarly, in its 2015 per curiam opinion in *Grady v. North Carolina*, the Court emphasized the "physical intru[sion]" on a person when it found that attaching a device to a person's body, without consent, for the purpose of tracking the person's movements, constitutes a search within the meaning of the Fourth Amendment. 575 U.S. ___, No. 14–593, slip op. at 4–5 (2015). Neither the majority in *Jardines*

long tracking under *Katz*'s reasonable expectation of privacy test, five Justices, who concurred either with the majority opinion or concurred with the judgment, would have held that long-term GPS tracking can implicate an individual's expectation of privacy.[60] Some have read these concurrences as partly premised on the idea that while government access to a small data set—for example, one trip in a vehicle—might not violate one's expectation of privacy, aggregating a month's worth of personal data allows the government to create a "mosaic" about an individual's personal life that violates that individual's reasonable expectation of privacy.[61] As a consequence, these concurring opinions could potentially have significant implications for the scope of the Fourth Amendment in relation to current and future technologies, such as cell phone tracking and wearable technologies that do not require a physical trespass to monitor a person's activities and that can aggregate a wealth of personal data about users.[62]

Arrests and Other Detentions.—That the Fourth Amendment was intended to protect against arbitrary arrests as well as against unreasonable searches was early assumed by Chief Justice Marshall[63] and is now established law.[64] At common law, warrant-

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nor the Court in *Grady* addressed whether the challenged conduct violates a reasonable expectation of privacy under *Katz v. United States*. *Grady*, slip op. at 5; *Jardines*, slip op. at 8–10.

[60] *Jones*, slip op. at 14 (Alito, J., concurring in the judgment, joined by Ginsburg, Breyer, Kagan, JJ.) (concluding that respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the respondent's vehicle); *id.* at 3 (Sotomayor, J., concurring) (disagreeing with Justice Alito's "approach" to the specific case but agreeing "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.").

[61] *See, e.g.*, United States v. Graham, 846 F.Supp. 2d 384, 394 (D. Md. 2012) ("It appears as though a five-Justice majority is willing to accept the principle that government surveillance over time can implicate an individual's reasonable expectation of privacy."), *aff'd*, ___ F.3d ___, No. 12–4659, slip op. at 31 (4th Cir. 2015); *In re* Application for Telephone Information Needed for a Criminal Investigation, 119 F. Supp. 3d. 1011, 1021–22 (N.D. Cal. 2015) (discussing the import of the two concurring opinions from *Jones*); United States v. Brooks, 911 F. Supp. 2d 836, 842 (D. Ariz. 2012) (noting that "[w]hile it does appear that in some future case, a five justice 'majority' is willing to accept the principle that Government surveillance can implicate an individual's reasonable expectation of privacy over time, *Jones* does not dictate the result of the case at hand . . . "); *but see* United States v. Graham, ___ F.3d ___, No. 12–4659, 2016 WL 3068018, at *10 (4th Cir. May 31, 2016) (arguing that Justice Alito's *Jones* concurrence should be read more narrowly so as to not implicate government access to information collected by third-party actors, no matter the quantity of information collected); *In re* Application of FBI, No. BR 14–01, 2014 WL 5463097, at *10 (FISA Ct. Mar. 20, 2014) ("While the concurring opinions in *Jones* may signal that some or even most of the Justices are ready to revisit certain settled Fourth Amendment principles, the decision in *Jones* itself breaks no new ground . . .").

[62] *See generally* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012).

[63] *Ex parte* Burford, 7 U.S. (3 Cr.) 448 (1806).

less arrests of persons who had committed a breach of the peace or a felony were permitted,[65] and this history is reflected in the fact that the Fourth Amendment is satisfied if the arrest is made in a public place on probable cause, regardless of whether a warrant has been obtained.[66] However, in order to effectuate an arrest in the home, absent consent or exigent circumstances, police officers must have a warrant.[67]

The Fourth Amendment applies to "seizures" and it is not necessary that a detention be a formal arrest in order to bring to bear the requirements of warrants, or probable cause in instances in which warrants are not required.[68] Some objective justification must be shown to validate all seizures of the person,[69] including seizures

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[64] Giordenello v. United States, 357 U.S. 480, 485–86 (1958); United States v. Watson, 423 U.S. 411, 416–18 (1976); Payton v. New York, 445 U.S. 573, 583–86 (1980); Steagald v. United States, 451 U.S. 204, 211–13 (1981).

[65] 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883). At common law warrantless arrest was also permissible for some misdemeanors not involving a breach of the peace. See the lengthy historical treatment in Atwater v. City of Lago Vista, 532 U.S. 318, 326–45 (2001).

[66] United States v. Watson, 423 U.S. 411 (1976). *See also* United States v. Santana, 427 U.S. 38 (1976) (sustaining warrantless arrest of suspect in her home when she was initially approached in her doorway and then retreated into house). However, a suspect arrested on probable cause but without a warrant is entitled to a prompt, nonadversary hearing before a magistrate under procedures designed to provide a fair and reliable determination of probable cause in order to keep the arrestee in custody. Gerstein v. Pugh, 420 U.S. 103 (1975). A "prompt" hearing now means a hearing that is administratively convenient. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (authorizing "as a general matter" detention for up to 48 hours without a probable-cause hearing, after which time the burden shifts to the government to demonstrate extraordinary circumstances justifying further detention).

[67] Payton v. New York, 445 U.S. 573 (1980) (voiding state law authorizing police to enter private residence without a warrant to make an arrest); Steagald v. United States, 451 U.S. 204 (1981) (officers with arrest warrant for A entered B's home without search warrant and discovered incriminating evidence; violated Fourth Amendment in absence of warrant to search the home); Hayes v. Florida, 470 U.S. 811 (1985) (officers went to suspect's home and took him to police station for fingerprinting).

[68] United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"). *See also* Reid v. Georgia, 448 U.S. 438 (1980); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 16–19 (1968); Kaupp v. Texas, 538 U.S. 626 (2003). Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. *See*, *e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985) (police officer's fatal shooting of a fleeing suspect); Brower v. County of Inyo, 489 U.S. 593 (1989) (police roadblock designed to end car chase with fatal crash); Scott v. Harris, 550 U.S. 372 (2007) (police officer's ramming fleeing motorist's car from behind in attempt to stop him); Plumhoff v. Rickard, 572 U.S. ___, No. 12–1117, slip op. (2014) (police use of 15 gunshots to end a police chase).

[69] The justification must be made to a neutral magistrate, not to the arrestee. There is no constitutional requirement that an officer inform an arrestee of the rea-

that involve only a brief detention short of arrest, although the nature of the detention will determine whether probable cause or some reasonable and articulable suspicion is necessary.[70]

The Fourth Amendment does not require an officer to consider whether to issue a citation rather than arresting (and placing in custody) a person who has committed a minor offense—even a minor traffic offense. In *Atwater v. City of Lago Vista*,[71] the Court, even while acknowledging that the case before it involved "gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment," refused to require that "case-by-case determinations of government need" to place traffic offenders in custody be subjected to a reasonableness inquiry, "lest every discretionary judgment in the field be converted into an occasion for constitutional review."[72] Citing some state statutes that limit warrantless arrests for minor offenses, the Court contended that the matter is better left to statutory rule than to application of broad constitutional principle.[73] Thus, *Atwater* and *County of Riverside v. McLaughlin*[74] together mean that—as far as the Constitution is concerned—police officers have almost unbridled discretion to decide whether to issue a summons for a minor traffic offense or whether instead to place the offending motorist in jail, where she may be kept for up to 48 hours with little recourse. Even when an arrest

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son for his arrest. Devenpeck v. Alford, 543 U.S. 146, 155 (2004) (the offense for which there is probable cause to arrest need not be closely related to the offense stated by the officer at the time of arrest).

[70] Delaware v. Prouse, 440 U.S. 648, 650 (1979) ("unreasonable seizure . . . to stop an automobile . . . for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion" that a law was violated); Brown v. Texas, 443 U.S. 47, 51 (1979) (detaining a person for the purpose of requiring him to identify himself constitutes a seizure requiring a "reasonable, articulable suspicion that a crime had just been, was being, or was about to be committed"); Reid v. Georgia, 448 U.S. 438, 441 (1980) (requesting ticket stubs and identification from persons disembarking from plane not reasonable where stated justifications would apply to "a very large category of innocent travelers," *e.g.*, travelers arrived from "a principal place of origin of cocaine"); Michigan v. Summers, 452 U.S. 692, 705 (1981) ("it is constitutionally reasonable to require that [a] citizen . . . remain while officers of the law execute a valid warrant to search his home"); Illinois v. McArthur, 531 U.S. 326 (2001) (approving "securing" of premises, preventing homeowner from reentering, while a search warrant is obtained); Los Angeles County v. Rettele, 550 U.S. 609 (2007) (where deputies executing a search warrant did not know that the house being searched had recently been sold, it was reasonable to hold new homeowners, who had been sleeping in the nude, at gunpoint for one to two minutes without allowing them to dress or cover themselves, even though the deputies knew that the homeowners were of a different race from the suspects named in the warrant).

[71] 532 U.S. 318 (2001).

[72] 532 U.S. at 346–47.

[73] 532 U.S. at 352.

[74] 500 U.S. 44 (1991).

for a minor offense is prohibited by state law, the arrest will not violate the Fourth Amendment if it was based on probable cause.[75]

Until relatively recently, the legality of arrests was seldom litigated in the Supreme Court because of the rule that a person detained pursuant to an arbitrary seizure—unlike evidence obtained as a result of an unlawful search—remains subject to custody and presentation to court.[76] But the application of self-incrimination and other exclusionary rules to the states and the heightening of their scope in state and federal cases alike brought forth the rule that verbal evidence, confessions, and other admissions, like all derivative evidence obtained as a result of unlawful seizures, could be excluded.[77] Thus, a confession made by one illegally in custody must be suppressed, unless the causal connection between the illegal arrest and the confession had become so attenuated that the latter should not be deemed "tainted" by the former.[78] Similarly, fingerprints and other physical evidence obtained as a result of an unlawful arrest must be suppressed.[79]

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[75] Virginia v. Moore, 128 S. Ct. 1598 (2008). *See also* Heien v. North Carolina, 574 U.S. ___, No. 13–604, slip op. at 5 (2014) (holding that a mistake of law can give rise to the reasonable suspicion necessary to uphold the seizure of a vehicle). The law enforcement officer in *Heien* had stopped the vehicle because it had only one working brake light, which the officer understood to be a violation of the North Carolina vehicle code. *Id.* at 2. However, a North Carolina court subsequently held, in a case of first impression, that the vehicle code only requires one working brake light. *Id.* at 3. In holding that reasonable suspicion can rest on a mistaken understanding of a legal prohibition, a majority of the Supreme Court noted prior cases finding that mistakes of fact do not preclude reasonable suspicion and concluded that "reasonable men make mistakes of law, too." *Id.* at 5–6 (citing Illinois v. Rodriguez, 497 U.S. 177, 183–86 (1990), and Hill v. California, 401 U.S. 797, 802–05 (1971), as cases involving mistakes of fact).

[76] Ker v. Illinois, 119 U.S. 436, 440 (1886); *see also* Albrecht v. United States, 273 U.S. 1 (1927); Frisbie v. Collins, 342 U.S. 519 (1952).

[77] Wong Sun v. United States, 371 U.S. 471 (1963). Such evidence is the "fruit of the poisonous tree," Nardone v. United States, 308 U.S. 338, 341 (1939), that is, evidence derived from the original illegality. Previously, if confessions were voluntary for purposes of the self-incrimination clause, they were admissible notwithstanding any prior official illegality. Colombe v. Connecticut, 367 U.S. 568 (1961).

[78] Although there is a presumption that the illegal arrest is the cause of the subsequent confession, the presumption is rebuttable by a showing that the confession is the result of "an intervening . . . act of free will." Wong Sun v. United States, 371 U.S. 471, 486 (1963). The factors used to determine whether the taint has been dissipated are the time between the illegal arrest and the confession, whether there were intervening circumstances (such as consultation with others, *Miranda* warnings, etc.), and the degree of flagrancy and purposefulness of the official conduct. Brown v. Illinois, 422 U.S. 590 (1975) (*Miranda* warnings alone insufficient); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982); Kaupp v. Texas, 538 U.S. 626 (2003). In Johnson v. Louisiana, 406 U.S. 356 (1972), the fact that the suspect had been taken before a magistrate who advised him of his rights and set bail, after which he confessed, established a sufficient intervening circumstance.

[79] Davis v. Mississippi, 394 U.S. 721 (1969); Taylor v. Alabama, 457 U.S. 687 (1982). In United States v. Crews, 445 U.S. 463 (1980), the Court, unanimously but

Searches and Inspections in Noncriminal Cases.—Certain early cases held that the Fourth Amendment was applicable only when a search was undertaken for criminal investigatory purposes,[80] and the Supreme Court until recently employed a reasonableness test for such searches without requiring either a warrant or probable cause in the absence of a warrant.[81] But, in 1967, the Court in two cases held that administrative inspections to detect building code violations must be undertaken pursuant to warrant if the occupant objects.[82] "We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. . . . But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[83] Certain administrative inspections used to enforce regulatory schemes with regard to such items as alcohol and firearms are, however, exempt from the Fourth Amendment warrant requirement and may be authorized simply by statute.[84]

Camara and *See* were reaffirmed in *Marshall v. Barlow's, Inc.*,[85] in which the Court held to violate the Fourth Amendment a provision of the Occupational Safety and Health Act that authorized federal inspectors to search the work area of any employment facility covered by the Act for safety hazards and violations of regulations,

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for a variety of reasons, held proper the identification in court of a defendant, who had been wrongly arrested without probable cause, by the crime victim. The court identification was not tainted by either the arrest or the subsequent in-custody identification. *See also* Hayes v. Florida, 470 U.S. 811, 815 (1985), suggesting in dictum that a "narrowly circumscribed procedure for fingerprinting detentions on less than probable cause" may be permissible.

[80] *In re* Strouse, 23 Fed. Cas. 261 (No. 13,548) (D. Nev. 1871); *In re* Meador, 16 Fed. Cas. 1294, 1299 (No. 9375) (N.D. Ga. 1869).

[81] Abel v. United States, 362 U.S. 217 (1960); Frank v. Maryland, 359 U.S. 360 (1959); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[82] Camara v. Municipal Court, 387 U.S. 523 (1967) (home); See v. City of Seattle, 387 U.S. 541 (1967) (commercial warehouse).

[83] Camara v. Municipal Court, 387 U.S. 523, 530 (1967).

[84] Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Biswell, 406 U.S. 311 (1972). *Colonnade*, involving liquor, was based on the long history of close supervision of the industry. *Biswell*, involving firearms, introduced factors that were subsequently to prove significant. Thus, although the statute was of recent enactment, firearms constituted a pervasively regulated industry, so that dealers had no reasonable expectation of privacy, because the law provides for regular inspections. Further, warrantless inspections were needed for effective enforcement of the statute.

[85] 436 U.S. 307 (1978). Dissenting, Justice Stevens, with Justices Rehnquist and Blackmun, argued that not the warrant clause but the reasonableness clause should govern administrative inspections. Id. at 325.

without a warrant or other legal process. The liquor and firearms exceptions were distinguished on the basis that those industries had a long tradition of close government supervision, so that a person in those businesses gave up his privacy expectations. But OSHA was a relatively recent statute and it regulated practically every business in or affecting interstate commerce; it was not open to a legislature to extend regulation and then follow it with warrantless inspections. Additionally, OSHA inspectors had unbounded discretion in choosing which businesses to inspect and when to do so, leaving businesses at the mercy of possibly arbitrary actions and certainly with no assurances as to limitation on scope and standards of inspections. Further, warrantless inspections were not necessary to serve an important governmental interest, as most businesses would consent to inspection and it was not inconvenient to require OSHA to resort to an administrative warrant in order to inspect sites where consent was refused.[86]

In *Donovan v. Dewey*,[87] however, the Court seemingly limited *Barlow's* reach and articulated a new standard that appeared to permit extensive governmental inspection of commercial property without a warrant. Under the Federal Mine Safety and Health Act, governing underground and surface mines (including stone quarries), federal officers are directed to inspect underground mines at least four times a year and surface mines at least twice a year, pursuant to extensive regulations as to standards of safety. The statute specifically provides for absence of advanced notice and requires the Secretary of Labor to institute court actions for injunctive and other relief in cases in which inspectors are denied admission. Sustaining the statute, the Court proclaimed that government had a "greater latitude" to conduct warrantless inspections of commercial prop-

[86] Administrative warrants issued on the basis of less than probable cause but only on a showing that a specific business had been chosen for inspection on the basis of a general administrative plan would suffice. Even without a necessity for probable cause, the requirement would assure the interposition of a neutral officer to establish that the inspection was reasonable and was properly authorized. 436 U.S. at 321, 323. The dissenters objected that the warrant clause was being constitutionally diluted. Id. at 325. Administrative warrants were approved also in Camara v. Municipal Court, 387 U.S. 523, 538 (1967). Previously, one of the reasons given for finding administrative and noncriminal inspections not covered by the Fourth Amendment was the fact that the warrant clause would be as rigorously applied to them as to criminal searches and seizures. Frank v. Maryland, 359 U.S. 360, 373 (1959). *See also* Almeida-Sanchez v. United States, 413 U.S. 266, 275 (1973) (Justice Powell concurring) (suggesting a similar administrative warrant procedure empowering police and immigration officers to conduct roving searches of automobiles in areas near the Nation's borders); id. at 270 n.3 (indicating that majority Justices were divided on the validity of such area search warrants); id. at 288 (dissenting Justice White indicating approval); United States v. Martinez-Fuerte, 428 U.S. 543, 547 n.2, 562 n.15 (1976).

[87] 452 U.S. 594 (1981).

erty than of homes, because of "the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."[88]

Dewey was distinguished from *Barlow's* in several ways. First, *Dewey* involved a single industry, unlike the broad coverage in *Barlow's*. Second, the OSHA statute gave minimal direction to inspectors as to time, scope, and frequency of inspections, while FMSHA specified a regular number of inspections pursuant to standards. Third, deference was due Congress's determination that unannounced inspections were necessary if the safety laws were to be effectively enforced. Fourth, FMSHA provided businesses the opportunity to contest the search by resisting in the civil proceeding the Secretary had to bring if consent was denied.[89] The standard of a long tradition of government supervision permitting warrantless inspections was dispensed with, because it would lead to "absurd results," in that new and emerging industries posing great hazards would escape regulation.[90]

Dewey was applied in *New York v. Burger*[91] to inspection of automobile junkyards and vehicle dismantling operations, a situation where there is considerable overlap between administrative and penal objectives. Applying the *Dewey* three-part test, the Court concluded that New York has a substantial interest in stemming the tide of automobile thefts, that regulation of vehicle dismantling reasonably serves that interest, and that statutory safeguards provided adequate substitute for a warrant requirement. The Court rejected the suggestion that the warrantless inspection provisions were designed as an expedient means of enforcing the penal laws, and instead saw narrower, valid regulatory purposes to be served, such as establishing a system for tracking stolen automobiles and parts, and enhancing the ability of legitimate businesses to compete. "[A] State can address a major social problem *both* by way of an admin-

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[88] Donovan v. Dewey, 452 U.S. 594, 598–99 (1981).

[89] 452 U.S. at 596–97, 604–05. Pursuant to the statute, however, the Secretary has promulgated regulations providing for the assessment of civil penalties for denial of entry and Dewey had been assessed a penalty of $1,000. Id. at 597 n.3. It was also true in *Barlow's* that the government resorted to civil process upon refusal to admit. 436 U.S. at 317 & n.12.

[90] Donovan v. Dewey, 452 U.S. 594, 606 (1981). Duration of regulation will now be a factor in assessing the legitimate expectation of privacy of a business. Id. *Accord*, New York v. Burger, 482 U.S. 691 (1987) (although duration of regulation of vehicle dismantling was relatively brief, history of regulation of junk business generally was lengthy, and current regulation of dismantling was extensive).

[91] 482 U.S. 691 (1987).

istrative scheme *and* through penal sanctions," the Court declared; in such circumstances warrantless administrative searches are permissible in spite of the fact that evidence of criminal activity may well be uncovered in the process.[92]

Most recently, however, in *City of Los Angeles v. Patel*, the Court declined to extend the "more relaxed standard" applicable to searches of closely regulated businesses to hotels when invalidating a Los Angeles ordinance that gave police the ability to inspect hotel registration records without advance notice and carried a six-month term of imprisonment and a $1,000 fine for hotel operators who failed to make such records available.[93] The *Patel* Court, characterizing inspections pursuant to this ordinance as "administrative searches,"[94] held "that a hotel owner must be afforded an *opportunity* to have a neutral decision maker review an officer's demand to search the registry before he or she faces penalties for failing to comply" for such a search to be permissible under the Fourth Amendment.[95] In so doing, the Court expressly declined to treat the hotel industry as a "closely regulated" industry subject to the more relaxed standard applied in *Dewey* and *Burger* on the grounds that doing so would "permit what has always been a narrow exception to swallow the rule."[96] The Court emphasized that, over the prior 45 years, it had recognized only four industries as having "such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise."[97] These four industries involve liquor sales, firearms dealing, mining, and running an automobile junkyard, and the Court distinguished hotel operations from these industries, in part, because "nothing inherent in the operation of hotels poses a clear and significant risk

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[92] 482 U.S. at 712 (emphasis in original).

[93] 576 U.S. ___, No. 13–1175, slip op. at 14 (2014). *Patel* involved a facial, rather than an as-applied, challenge to the Los Angeles ordinance. The Court clarified that facial challenges under the Fourth Amendment are "not categorically barred or especially disfavored." *Id.* at 4. Some had apparently taken the Court's earlier statement in *Sibron v. New York*, 392 U.S. 40 (1968), that "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case," *id.* at 59, to foreclose facial Fourth Amendment challenges. *Patel*, slip op. at 5. However, the *Patel* Court construed *Sibron*'s language to mean only that "claims for facial relief under the Fourth Amendment are unlikely to succeed when there is substantial ambiguity as to what conduct a statute authorizes." *Id.*

[94] *Patel*, slip op. at 10.

[95] *Id.* at 11. The Court further noted that actual pre-compliance review need only occur in those "rare instances" where a hotel owner objects to turning over the registry, and that the Court has never "attempted to prescribe" the exact form of such review. *Id.* at 10–11.

[96] *Id.* at 14.

[97] *Id.* (quoting *Barlow's*, 436 U.S. at 313).

to the public welfare."[98] However, the Court also suggested that, even if hotels were to be seen as pervasively regulated, the Los Angeles ordinance would still be deemed unreasonable because (1) there was no substantial government interest informing the regulatory scheme; (2) warrantless inspections were not necessary to further the government's purpose; and (3) the inspection program did not provide, in terms of the certainty and regularity of its application, a constitutionally adequate substitute for a warrant.[99]

In other contexts, not directly concerned with whether an industry is comprehensively regulated, the Court has also elaborated the constitutional requirements affecting administrative inspections and searches. In *Michigan v. Tyler*,[100] for example, it subdivided the process by which an investigation of the cause of a fire may be conducted. Entry to fight the fire is, of course, an exception based on exigent circumstances, and no warrant or consent is needed; fire fighters on the scene may seize evidence relating to the cause under the plain view doctrine. Additional entries to investigate the cause of the fire must be made pursuant to warrant procedures governing administrative searches. Evidence of arson discovered in the course of such an administrative inspection is admissible at trial, but if the investigator finds probable cause to believe that arson has occurred and requires further access to gather evidence for a possible prosecution, he must obtain a criminal search warrant.[101]

One curious case has approved a system of "home visits" by welfare caseworkers, in which the recipients are required to admit the worker or lose eligibility for benefits.[102] In another unusual case, the Court held that a sheriff's assistance to a trailer park owner in

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[98] *Id.* The majority further stated that the existence of regulations requiring hotels to maintain licenses, collect taxes, and take other actions did not establish a "comprehensive scheme of regulation" distinguishing hotels from other industries. *Id.* at 15. It also opined that the historical practice of treating hotels as public accommodations does not necessarily mean that hotels are to be treated as comprehensively regulated for purposes of warrantless searches. *Id.* at 14–15.

[99] *Id*. at 16. Specifically, the Court noted that the government's alleged interest in ensuring that hotel operators not falsify their records, as they could if given an opportunity for pre-compliance review, applied to every recordkeeping requirement. *Id*. The Court similarly noted that there were other ways to further the city's interest in warrantless inspections (e.g., *ex parte* warrants) and that the ordinance failed to sufficiently constrain a police officer's discretion as to which hotels to search and under what circumstances. *Id*.

[100] 436 U.S. 499 (1978).

[101] The Court also held that, after the fire was extinguished, if fire investigators were unable to proceed at the moment, because of dark, steam, and smoke, it was proper for them to leave and return at daylight without any necessity of complying with its mandate for administrative or criminal warrants. 436 U.S. at 510–11. *But cf.* Michigan v. Clifford, 464 U.S. 287 (1984) (no such justification for search of private residence begun at 1:30 p.m. when fire had been extinguished at 7 a.m.).

[102] Wyman v. James, 400 U.S. 309 (1971). It is not clear what rationale the majority used. It appears to have proceeded on the assumption that a "home visit" was

disconnecting and removing a mobile home constituted a "seizure" of the home.[103]

In addition, there are now a number of situations, some of them analogous to administrative searches, where "'special needs' beyond normal law enforcement . . . justify departures from the usual warrant and probable cause requirements."[104] In one of these cases the Court, without acknowledging the magnitude of the leap from one context to another, has taken the *Dewey/Burger* rationale—developed to justify warrantless searches of business establishments—and applied it to justify the significant intrusion into personal privacy represented by urinalysis drug testing. Because of the history of pervasive regulation of the railroad industry, the Court reasoned, railroad employees have a diminished expectation of privacy that makes mandatory urinalysis less intrusive and more reasonable.[105]

With respect to automobiles, the holdings are mixed. Random stops of automobiles to check drivers' licenses, vehicle registrations, and safety conditions were condemned as too intrusive; the degree to which random stops would advance the legitimate governmental interests involved did not outweigh the individual's legitimate expectations of privacy.[106] On the other hand, in *South Da-*

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not a search and that the Fourth Amendment does not apply when criminal prosecution is not threatened. Neither premise is valid under *Camara* and its progeny, although *Camara* preceded *Wyman*. Presumably, the case would today be analyzed under the expectation of privacy/need/structural protection theory of the more recent cases.

[103] Soldal v. Cook County, 506 U.S. 56, 61 (1992) (home "was not only seized, it literally was carried away, giving new meaning to the term 'mobile home'").

[104] City of Ontario v. Quon, 560 U.S. ___, No. 08–1332, slip op. (2010) (reasonableness test for obtaining and reviewing transcripts of on-duty text messages of police officer using government-issued equipment); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (administrative needs of probation system justify warrantless searches of probationers' homes on less than probable cause); Hudson v. Palmer, 468 U.S. 517, 526 (1984) (no Fourth Amendment protection from search of prison cell); New Jersey v. T.L.O., 469 U.S. 325 (1985) (simple reasonableness standard governs searches of students' persons and effects by public school authorities); O'Connor v. Ortega, 480 U.S. 709 (1987) (reasonableness test for work-related searches of employees' offices by government employer); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (neither probable cause nor individualized suspicion is necessary for mandatory drug testing of railway employees involved in accidents or safety violations). All of these cases are discussed *infra* under the general heading "Valid Searches and Seizures Without Warrants."

[105] *Skinner*, 489 U.S. at 627.

[106] Delaware v. Prouse, 440 U.S. 648 (1979). Standards applied in this case had been developed in the contexts of automobile stops at fixed points or by roving patrols in border situations. Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

kota v. Opperman,[107] the Court sustained the admission of evidence found when police impounded an automobile from a public street for multiple parking violations and entered the car to secure and inventory valuables for safekeeping. Marijuana was discovered in the glove compartment.

Searches and Seizures Pursuant to Warrant

Emphasis upon the necessity of warrants places the judgment of an independent magistrate between law enforcement officers and the privacy of citizens, authorizes invasion of that privacy only upon a showing that constitutes probable cause, and limits that invasion by specification of the person to be seized, the place to be searched, and the evidence to be sought.[108] Although a warrant is issued *ex parte*, its validity may be contested in a subsequent suppression hearing if incriminating evidence is found and a prosecution is brought.[109]

Issuance by Neutral Magistrate.—In numerous cases, the Court has referred to the necessity that warrants be issued by a "judicial officer" or a "magistrate."[110] "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evi-

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[107] 428 U.S. 364 (1976). *See also* Cady v. Dombrowski, 413 U.S. 433 (1973) (sustaining admission of criminal evidence found when police conducted a warrantless search of an out-of-state policeman's automobile following an accident, in order to find and safeguard his service revolver). The Court in both cases emphasized the reduced expectation of privacy in automobiles and the noncriminal purposes of the searches.

[108] Although the exceptions may be different for arrest warrants and search warrants, the requirements for the issuance of the two are the same. Aguilar v. Texas, 378 U.S. 108, 112 n.3 (1964). Also, the standards by which the validity of warrants are to be judged are the same, whether federal or state officers are involved. Ker v. California, 374 U.S. 23 (1963).

[109] Most often, in the suppression hearings, the defendant will challenge the sufficiency of the evidence presented to the magistrate to constitute probable cause. Spinelli v. United States, 393 U.S. 410 (1969); United States v. Harris, 403 U.S. 573 (1971). He may challenge the veracity of the statements used by the police to procure the warrant and otherwise contest the accuracy of the allegations going to establish probable cause, but the Court has carefully hedged his ability to do so. Franks v. Delaware, 438 U.S. 154 (1978). He may also question the power of the official issuing the warrant, Coolidge v. New Hampshire, 403 U.S. 443, 449–53 (1971), or the specificity of the particularity required. Marron v. United States, 275 U.S. 192 (1927).

[110] United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Giordenello v. United States, 357 U.S. 480, 486 (1958); Jones v. United States, 362 U.S. 257, 270 (1960); Katz v. United States, 389 U.S. 347, 356 (1967); United States v. United States District Court, 407 U.S. 297, 321 (1972); United States v. Chadwick, 433 U.S. 1, 9 (1977); Lo-Ji Sales v. New York, 442 U.S. 319 (1979).

dence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." [111] These cases do not mean that only a judge or an official who is a lawyer may issue warrants, but they do stand for two tests of the validity of the power of the issuing party to so act. "He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search." [112] The first test cannot be met when the issuing party is himself engaged in law enforcement activities,[113] but the Court has not required that an issuing party have that independence of tenure and guarantee of salary that characterizes federal judges.[114] And, in passing on the second test, the Court has been essentially pragmatic in assessing whether the issuing party possesses the capacity to determine probable cause.[115]

Probable Cause.—The concept of "probable cause" is central to the meaning of the warrant clause. Neither the Fourth Amendment nor the federal statutory provisions relevant to the area define "probable cause"; the definition is entirely a judicial construct. An applicant for a warrant must present to the magistrate facts sufficient to enable the officer himself to make a determination of probable cause. "In determining what is probable cause . . . [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit . . . for the belief that

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[111] Johnson v. United States, 333 U.S. 10, 13–14 (1948).

[112] Shadwick v. City of Tampa, 407 U.S. 345, 354 (1972).

[113] Coolidge v. New Hampshire, 403 U.S. 443, 449–51 (1971) (warrant issued by state attorney general who was leading investigation and who as a justice of the peace was authorized to issue warrants); Mancusi v. DeForte, 392 U.S. 364, 370–72 (1968) (subpoena issued by district attorney could not qualify as a valid search warrant); Lo-Ji Sales v. New York, 442 U.S. 319 (1979) (justice of the peace issued open-ended search warrant for obscene materials, accompanied police during its execution, and made probable cause determinations at the scene as to particular items).

[114] Jones v. United States, 362 U.S. 257, 270–71 (1960) (approving issuance of warrants by United States Commissioners, many of whom were not lawyers and none of whom had any guarantees of tenure and salary); Shadwick v. City of Tampa, 407 U.S. 345 (1972) (approving issuance of arrest warrants for violation of city ordinances by city clerks who were assigned to and supervised by municipal court judges). The Court reserved the question "whether a State may lodge warrant authority in someone entirely outside the sphere of the judicial branch. Many persons may not qualify as the kind of 'public civil officers' we have come to associate with the term 'magistrate.' Had the Tampa clerk been entirely divorced from a judicial position, this case would have presented different considerations." Id. at 352.

[115] 407 U.S. at 350–54 (placing on defendant the burden of demonstrating that the issuing official lacks capacity to determine probable cause). *See also* Connally v. Georgia, 429 U.S. 245 (1977) (unsalaried justice of the peace who receives a sum of money for each warrant issued but nothing for reviewing and denying a warrant is not sufficiently detached).

the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant." [116] Probable cause is to be determined according to "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." [117] Warrants are favored in the law and their use will not be thwarted by a hypertechnical reading of the supporting affidavit and supporting testimony.[118] For the same reason, reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant." [119] Courts will sustain the determination of probable cause so long as "there was substantial basis for [the magistrate] to conclude that" there was probable cause.[120]

Much litigation has concerned the sufficiency of the complaint to establish probable cause. Mere conclusory assertions are not enough.[121] In *United States v. Ventresca*,[122] however, an affidavit by a law enforcement officer asserting his belief that an illegal distill-

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[116] Dumbra v. United States, 268 U.S. 435, 439, 441 (1925). "[T]he term 'probable cause' . . . means less than evidence which would justify condemnation." Lock v. United States, 11 U.S. (7 Cr.) 339, 348 (1813). *See* Steele v. United States, 267 U.S. 498, 504–05 (1925). It may rest upon evidence that is not legally competent in a criminal trial, Draper v. United States, 358 U.S. 307, 311 (1959), and it need not be sufficient to prove guilt in a criminal trial. Brinegar v. United States, 338 U.S. 160, 173 (1949). *See* United States v. Ventresca, 380 U.S. 102, 107–08 (1965). An "anticipatory" warrant does not violate the Fourth Amendment as long as there is probable cause to believe that the condition precedent to execution of the search warrant will occur and that, once it has occurred, "there is a fair probability that contraband or evidence of a crime will be found in a specified place." United States v. Grubbs, 547 U.S. 90, 95 (2006), quoting Illinois v. Gates, 462 U.S. 213, 238 (1983). "An anticipatory warrant is 'a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place.'" 547 U.S. at 94.

[117] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[118] United States v. Ventresca, 380 U.S. 102, 108–09 (1965).

[119] Jones v. United States, 362 U.S. 257, 270–71 (1960). Similarly, the preference for proceeding by warrant leads to a stricter rule for appellate review of trial court decisions on warrantless stops and searches than is employed to review probable cause to issue a warrant. Ornelas v. United States, 517 U.S. 690 (1996) (determinations of reasonable suspicion to stop and probable cause to search without a warrant should be subjected to *de novo* appellate review).

[120] Aguilar v. Texas, 378 U.S. 108, 111 (1964). It must be emphasized that the issuing party "must judge for himself the persuasiveness of the facts relied on by a [complainant] to show probable cause." Giordenello v. United States, 357 U.S. 480, 486 (1958). An insufficient affidavit cannot be rehabilitated by testimony after issuance concerning information possessed by the affiant but not disclosed to the magistrate. Whiteley v. Warden, 401 U.S. 560 (1971).

[121] Byars v. United States, 273 U.S. 28 (1927) (affiant stated he "has good reason to believe and does believe" that defendant has contraband materials in his possession); Giordenello v. United States, 357 U.S. 480 (1958) (complainant merely stated

ery was being operated in a certain place, explaining that the belief was based upon his own observations and upon those of fellow investigators, and detailing a substantial amount of these personal observations clearly supporting the stated belief, was held to be sufficient to constitute probable cause. "Recital of some of the underlying circumstances in the affidavit is essential," the Court said, observing that "where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause," the reliance on the warrant process should not be deterred by insistence on too stringent a showing.[123]

Requirements for establishing probable cause through reliance on information received from an informant has divided the Court in several cases. Although involving a warrantless arrest, *Draper v. United States*[124] may be said to have begun the line of cases. A previously reliable, named informant reported to an officer that the defendant would arrive with narcotics on a particular train, and described the clothes he would be wearing and the bag he would be carrying; the informant, however, gave no basis for his information. FBI agents met the train, observed that the defendant fully fit the description, and arrested him. The Court held that the corroboration of part of the informer's tip established probable cause to support the arrest. A case involving a search warrant, *Jones v. United States*,[125] apparently considered the affidavit as a whole to see whether the tip plus the corroborating information provided a substantial basis for finding probable cause, but the affidavit also set forth the reliability of the informer and sufficient detail to indicate that the tip was based on the informant's personal observation. *Aguilar v. Texas*[126] held insufficient an affidavit that merely asserted that the police had "reliable information from a credible person" that narcotics were in a certain place, and held that when the affiant relies on an informant's tip he must present two types of evidence to the magistrate. First, the affidavit must indicate the informant's basis of knowledge—the circumstances from which the

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his conclusion that defendant had committed a crime). *See also* Nathanson v. United States, 290 U.S. 41 (1933).

[122] 380 U.S. 102 (1965).

[123] 380 U.S. at 109.

[124] 358 U.S. 307 (1959). For another case applying essentially the same probable cause standard to warrantless arrests as govern arrests by warrant, *see* McCray v. Illinois, 386 U.S. 300 (1967) (informant's statement to arresting officers met *Aguilar* probable cause standard). *See also* Whitely v. Warden, 401 U.S. 560, 566 (1971) (standards must be "at least as stringent" for warrantless arrest as for obtaining warrant).

[125] 362 U.S. 257 (1960).

[126] 378 U.S. 108 (1964).

informant concluded that evidence was present or that crimes had been committed—and, second, the affiant must present information that would permit the magistrate to decide whether or not the informant was trustworthy. Then, in *Spinelli v. United States*,[127] the Court applied *Aguilar* in a situation in which the affidavit contained both an informant's tip and police information of a corroborating nature.

The Court rejected the "totality" test derived from *Jones* and held that the informant's tip and the corroborating evidence must be separately considered. The tip was rejected because the affidavit contained neither any information which showed the basis of the tip nor any information which showed the informant's credibility. The corroborating evidence was rejected as insufficient because it did not establish any element of criminality but merely related to details which were innocent in themselves. No additional corroborating weight was due as a result of the bald police assertion that defendant was a known gambler, although the tip related to gambling. Returning to the totality test, however, the Court in *United States v. Harris*[128] approved a warrant issued largely on an informer's tip that over a two-year period he had purchased illegal whiskey from the defendant at the defendant's residence, most recently within two weeks of the tip. The affidavit contained rather detailed information about the concealment of the whiskey, and asserted that the informer was a "prudent person," that defendant had a reputation as a bootlegger, that other persons had supplied similar information about him, and that he had been found in control of illegal whiskey within the previous four years. The Court determined that the detailed nature of the tip, the personal observation thus revealed, and the fact that the informer had admitted to criminal behavior by his purchase of whiskey were sufficient to enable the magistrate to find him reliable, and that the supporting evidence, including defendant's reputation, could supplement this determination.

The Court expressly abandoned the two-part *Aguilar-Spinelli* test and returned to the "totality of the circumstances" approach to evaluate probable cause based on an informant's tip in *Illinois v. Gates*.[129] The main defect of the two-part test, Justice Rehnquist concluded

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[127] 393 U.S. 410 (1969). Both concurring and dissenting Justices recognized tension between *Draper* and *Aguilar*. *See* id. at 423 (Justice White concurring), id. at 429 (Justice Black dissenting and advocating the overruling of *Aguilar*).

[128] 403 U.S. 573 (1971). *See also* Adams v. Williams, 407 U.S. 143, 147 (1972) (approving warrantless stop of motorist based on informant's tip that "may have been insufficient" under *Aguilar* and *Spinelli* as basis for warrant).

[129] 462 U.S. 213 (1983). Justice Rehnquist's opinion of the Court was joined by Chief Justice Burger and by Justices Blackmun, Powell, and O'Connor. Justices Brennan, Marshall, and Stevens dissented.

for the Court, was in treating an informant's reliability and his basis for knowledge as independent requirements. Instead, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." [130] In evaluating probable cause, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." [131]

Particularity.—"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." [132] This requirement thus acts to limit the scope of the search, as the executing officers should be limited to looking in places where the described object could be expected to be found.[133] The purpose of the particularity requirement extends beyond prevention of general searches; it also assures the person whose property is being searched of the lawful authority of the executing officer and of the limits of his power to search. It follows, therefore, that the warrant itself must describe with particularity the items to be seized, or that such itemization must appear in documents incorporated by reference in

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[130] 462 U.S. at 213.

[131] 462 U.S. at 238. For an application of the *Gates* "totality of the circumstances" test to the warrantless search of a vehicle by a police officer, see, e.g. *Florida v. Harris*, 568 U.S. ___, No. 11–817, slip op. (2013).

[132] Marron v. United States, 275 U.S. 192, 196 (1927). *See* Stanford v. Texas, 379 U.S. 476 (1965). Of course, police who are lawfully on the premises pursuant to a warrant may seize evidence of crime in "plain view" even if that evidence is not described in the warrant. Coolidge v. New Hampshire, 403 U.S. 443, 464–71 (1971).

[133] In Terry v. Ohio, 392 U.S. 1, 17–19, (1968), the Court wrote: "This Court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. Kremen v. United States, 353 U.S. 346 (1957); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356–58 (1931); see United States v. Di Re, 332 U.S. 581, 586–87 (1948). The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. Warden v. Hayden, 387 U.S. 294, 310 (1967) (Justice Fortas concurring); see, *e.g.*, Preston v. United States, 376 U.S. 364, 367–368 (1964); Agnello v. United States, 296 U.S. 20, 30–31 (1925)." *See also* Andresen v. Maryland, 427 U.S. 463, 470–82 (1976), and id. at 484, 492–93 (Justice Brennan dissenting). In Stanley v. Georgia, 394 U.S. 557, 569 (1969), Justices Stewart, Brennan, and White would have based the decision on the principle that a valid warrant for gambling paraphernalia did not authorize police upon discovering motion picture films in the course of the search to project the films to learn their contents.

the warrant and actually shown to the person whose property is to be searched.[134]

First Amendment Bearing on Probable Cause and Particularity.—Where the warrant process is used to authorize seizure of books and other items that may be protected by the First Amendment, the Court has required government to observe more exacting standards than in other cases.[135] Seizure of materials arguably protected by the First Amendment is a form of prior restraint that requires strict observance of the Fourth Amendment. At a minimum, a warrant is required, and additional safeguards may be required for large-scale seizures. Thus, in *Marcus v. Search Warrant*,[136] the seizure of 11,000 copies of 280 publications pursuant to warrant issued *ex parte* by a magistrate who had not examined any of the publications but who had relied on the conclusory affidavit of a policeman was voided. Failure to scrutinize the materials and to particularize the items to be seized was deemed inadequate, and it was further noted that police "were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." [137] A state procedure that was designed to comply with *Marcus* by the presentation of copies of books to be seized to the magistrate for his scrutiny prior to issuance of a warrant was nonetheless found inadequate by a plurality of the Court, which concluded that "since the warrant here authorized the sheriff to seize all copies of the specified titles, and since [appellant] was not afforded a hearing on the question of the obscenity even of the seven novels [seven of 59 listed titles were reviewed by the magistrate] before the warrant issued, the procedure was . . . constitutionally deficient." [138]

Confusion remains, however, about the necessity for and the character of prior adversary hearings on the issue of obscenity. In a later decision the Court held that, with adequate safeguards, no pre-

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[134] Groh v. Ramirez, 540 U.S. 551 (2004) (a search based on a warrant that did not describe the items to be seized was "plainly invalid"; particularity contained in supporting documents not cross-referenced by the warrant and not accompanying the warrant is insufficient); United States v. Grubbs, 547 U.S. 90, 97, 99 (2006) (because the language of the Fourth Amendment "specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized[,]' . . . the Fourth Amendment does not require that the triggering condition for an anticipatory warrant be set forth in the warrant itself."

[135] Marcus v. Search Warrant, 367 U.S. 717, 730–31 (1961); Stanford v. Texas, 379 U.S. 476, 485 (1965). For First Amendment implications of seizures under the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), see First Amendment: Obscenity and Prior Restraint.

[136] 367 U.S. 717 (1961). *See* Kingsley Books v. Brown, 354 U.S. 436 (1957).

[137] Marcus v. Search Warrant, 367 U.S. 717, 732 (1961).

[138] A Quantity of Books v. Kansas, 378 U.S. 205, 210 (1964).

seizure adversary hearing on the issue of obscenity is required if the film is seized not for the purpose of destruction as contraband (the purpose in *Marcus* and *A Quantity of Books*), but instead to preserve a copy for evidence.[139] It is constitutionally permissible to seize a copy of a film pursuant to a warrant as long as there is a prompt post-seizure adversary hearing on the obscenity issue. Until there is a judicial determination of obscenity, the Court advised, the film may continue to be exhibited; if no other copy is available either a copy of it must be made from the seized film or the film itself must be returned.[140]

The seizure of a film without the authority of a constitutionally sufficient warrant is invalid; seizure cannot be justified as incidental to arrest, as the determination of obscenity may not be made by the officer himself.[141] Nor may a warrant issue based "solely on the conclusory assertions of the police officer without any inquiry by the [magistrate] into the factual basis for the officer's conclusions."[142] Instead, a warrant must be "supported by affidavits setting forth specific facts in order that the issuing magistrate may 'focus searchingly on the question of obscenity.'"[143] This does not mean, however, that a higher standard of probable cause is required in order to obtain a warrant to seize materials protected by the First Amendment. "Our reference in *Roaden* to a 'higher hurdle . . . of reasonableness' was not intended to establish a 'higher' standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the 'exigency' exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate . . . ."[144]

In *Stanford v. Texas*,[145] the Court voided a seizure of more than 2,000 books, pamphlets, and other documents pursuant to a warrant that merely authorized the seizure of books, pamphlets, and other written instruments "concerning the Communist Party of Texas."

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[139] Heller v. New York, 413 U.S. 483 (1973).

[140] Id. at 492–93. *But cf.* New York v. P.J. Video, Inc., 475 U.S. 868, 875 n.6 (1986), rejecting the defendant's assertion, based on *Heller*, that only a single copy rather than all copies of allegedly obscene movies should have been seized pursuant to warrant.

[141] Roaden v. Kentucky, 413 U.S. 496 (1973). *See also* Lo-Ji Sales v. New York, 442 U.S. 319 (1979); Walter v. United States, 447 U.S. 649 (1980). These special constraints are inapplicable when obscene materials are purchased, and there is consequently no Fourth Amendment search or seizure. Maryland v. Macon, 472 U.S. 463 (1985).

[142] Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636, 637 (1968) (per curiam).

[143] New York v. P.J. Video, Inc., 475 U.S. 868, 873–74 (1986) (quoting Marcus v. Search Warrant, 367 U.S. 717, 732 (1961)).

[144] New York v. P.J. Video, Inc., 475 U.S. 868, 875 n.6 (1986).

[145] 379 U.S. 476 (1965).

"[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms." [146]

However, the First Amendment does not bar the issuance or execution of a warrant to search a newsroom to obtain photographs of demonstrators who had injured several policemen, although the Court appeared to suggest that a magistrate asked to issue such a warrant should guard against interference with press freedoms through limits on type, scope, and intrusiveness of the search.[147]

Property Subject to Seizure.—There has never been any doubt that search warrants could be issued for the seizure of contraband and the fruits and instrumentalities of crime.[148] But, in *Gouled v. United States*,[149] a unanimous Court limited the classes of property subject to seizures to these three and refused to permit a seizure of "mere evidence," in this instance papers of the defendant that were to be used as evidence against him at trial. The Court recognized that there was "no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure," [150] but their character as evidence rendered them immune. This immunity "was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals." [151] More evaded than followed, the

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[146] 379 U.S. at 485–86. *See also* Marcus v. Search Warrant, 367 U.S. 717, 723 (1961).

[147] Zurcher v. Stanford Daily, 436 U.S. 547 (1978). *See* id. at 566 (containing suggestion mentioned in text), and id. at 566 (Justice Powell concurring) (more expressly adopting that position). In the Privacy Protection Act, Pub. L. 96–440, 94 Stat. 1879 (1980), 42 U.S.C. § 2000aa, Congress provided extensive protection against searches and seizures not only of the news media and news people but also of others engaged in disseminating communications to the public, unless there is probable cause to believe the person protecting the materials has committed or is committing the crime to which the materials relate.

[148] United States v. Lefkowitz, 285 U.S. 452, 465–66 (1932). Of course, evidence seizable under warrant is subject to seizure without a warrant in circumstances in which warrantless searches are justified.

[149] 255 U.S. 298 (1921). United States v. Lefkowitz, 285 U.S. 452 (1932), applied the rule in a warrantless search of premises. The rule apparently never applied in case of a search of the person. *Cf.* Schmerber v. California, 384 U.S. 757 (1966).

[150] Gouled v. United States, 255 U.S. 298, 306 (1921).

[151] Warden v. Hayden, 387 U.S. 294, 303 (1967). *See* Gouled v. United States, 255 U.S. 298, 309 (1921). The holding was derived from dicta in Boyd v. United States, 116 U.S. 616, 624–29 (1886).

"mere evidence" rule was overturned in 1967.[152] It is now settled that such evidentiary items as fingerprints,[153] blood,[154] urine samples,[155] fingernail and skin scrapings,[156] voice and handwriting exemplars,[157] conversations,[158] and other demonstrative evidence may be obtained through the warrant process or without a warrant where "special needs" of government are shown.[159]

However, some medically assisted bodily intrusions have been held impermissible, *e.g.*, forcible administration of an emetic to induce vomiting,[160] and surgery under general anesthetic to remove a bullet lodged in a suspect's chest.[161] Factors to be weighed in determining which medical tests and procedures are reasonable include the extent to which the procedure threatens the individual's safety or health, "the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and the importance of the evidence to the prosecution's case.[162]

In *Warden v. Hayden*,[163] Justice Brennan for the Court cautioned that the items there seized were not "'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of

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[152] Warden v. Hayden, 387 U.S. 294 (1967).

[153] Davis v. Mississippi, 394 U.S. 721 (1969).

[154] Schmerber v. California, 384 U.S. 757 (1966); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (warrantless blood testing for drug use by railroad employee involved in accident).

[155] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (warrantless drug testing of railroad employee involved in accident).

[156] Cupp v. Murphy, 412 U.S. 291 (1973) (sustaining warrantless taking of scrapings from defendant's fingernails at the station house, on the basis that it was a very limited intrusion and necessary to preserve evanescent evidence).

[157] United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973) (both sustaining grand jury subpoenas to produce voice and handwriting exemplars, as no reasonable expectation of privacy exists with respect to those items).

[158] Berger v. New York, 388 U.S. 41, 44 n.2 (1967). *See also* id. at 97 n.4, 107–08 (Justices Harlan and White concurring), 67 (Justice Douglas concurring).

[159] Another important result of Warden v. Hayden is that third parties not suspected of culpability in crime are subject to the issuance and execution of warrants for searches and seizures of evidence. Zurcher v. Stanford Daily, 436 U.S. 547, 553–60 (1978). Justice Stevens argued for a stiffer standard for issuance of warrants to nonsuspects, requiring in order to invade their privacy a showing that they would not comply with a less intrusive method, such as a subpoena. Id. at 577 (dissenting).

[160] Rochin v. California, 342 U.S. 165 (1952).

[161] Winston v. Lee, 470 U.S. 753 (1985).

[162] Winston v. Lee, 470 U.S. 753, 761–63 (1985). Chief Justice Burger concurred on the basis of his reading of the Court's opinion "as not preventing detention of an individual if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband materials secreted internally." Id. at 767. *Cf.* United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

[163] 387 U.S. 294, 302–03 (1967). Seizure of a diary was at issue in Hill v. California, 401 U.S. 797, 805 (1971), but it had not been raised in the state courts and was deemed waived.

the Fifth Amendment. . . . This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." This merging of Fourth and Fifth Amendment considerations derived from *Boyd v. United States*,[164] the first case in which the Supreme Court considered at length the meaning of the Fourth Amendment. *Boyd* was a quasi-criminal proceeding for the forfeiture of goods alleged to have been imported in violation of law, and concerned a statute that authorized court orders to require defendants to produce any document that might "tend to prove any allegation made by the United States." [165] The entire Court agreed that there was a self-incrimination problem, but Justice Bradley for a majority of the Justices also used the Fourth Amendment.

Although the statute did not authorize a search but instead compelled the production of documents, the Justice concluded that the law was well within the restrictions of the Search and Seizure Clause.[166] With this point established, the Justice relied on Lord Camden's opinion in *Entick v. Carrington* [167] for the proposition that seizure of items to be used as evidence only was impermissible. Justice Bradley announced that the "essence of the offence" committed by the government against Boyd "is not the breaking of his doors, and the rummaging of his drawers . . . but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." [168]

Although it may be doubtful that the equation of search warrants with subpoenas and other compulsory process ever really amounted to much of a limitation,[169] the Court currently dispenses with any theory of "convergence" of the two amendments.[170] Thus, in *Andresen v. Maryland*,[171] police executed a warrant to search defendant's offices for specified documents pertaining to a fraudulent sale of land, and the Court sustained the admission of the papers

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[164] 116 U.S. 616 (1886).
[165] Act of June 22, 1874, § 5, 18 Stat. 187.
[166] Boyd v. United States, 116 U.S. 616, 622 (1886).
[167] Howell's State Trials 1029, 95 Eng. Rep. 807 (1765).
[168] Boyd v. United States, 116 U.S. 616, 630 (1886).
[169] *E.g.*, Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209–09 (1946).
[170] Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391, 405–14 (1976). *Fisher* states that "the precise claim sustained in *Boyd* would now be rejected for reasons not there considered." Id. at 408.
[171] 427 U.S. 463 (1976).

discovered as evidence at his trial. The Fifth Amendment was inapplicable, the Court held, because there had been no compulsion of defendant to produce or to authenticate the documents.[172] As for the Fourth Amendment, because the "business records" seized were evidence of criminal acts, they were properly seizable under the rule of *Warden v. Hayden*; the fact that they were "testimonial" in nature (records in the defendant's handwriting) was irrelevant.[173] Acknowledging that "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers," the Court observed that, although some "innocuous documents" would have to be examined to ascertain which papers were to be seized, authorities, just as with electronic "seizures" of telephone conversations, "must take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy."[174]

Although *Andresen* was concerned with business records, its discussion seemed equally applicable to "personal" papers, such as diaries and letters, as to which a much greater interest in privacy exists. The question of the propriety of seizure of such papers continues to be the subject of reservation in opinions,[175] but it is far from clear that the Court would accept any such exception should the issue be presented.[176]

Execution of Warrants.—The Fourth Amendment's "general touchstone of reasonableness . . . governs the method of execution of the warrant."[177] Until recently, however, most such issues have been dealt with by statute and rule.[178] It was a rule at common law that before an officer could break and enter he must give notice of his office, authority, and purpose and must in effect be refused admittance,[179] and until recently this has been a statutory

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[172] 427 U.S. at 470–77.

[173] 427 U.S. at 478–84.

[174] 427 U.S. at 482, n.11. Minimization, as required under federal law, has not proved to be a significant limitation. Scott v. United States, 425 U.S. 917 (1976).

[175] *E.g.*, United States v. Miller, 425 U.S. 435, 440, 444 (1976); Fisher v. United States, 425 U.S. 391, 401 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21, 78–79 (1974) (Justice Powell concurring).

[176] *See*, Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments,* 90 HARV. L. REV. 945 (1977).

[177] United States v. Ramirez, 523 U.S. 65, 71 (1998).

[178] Rule 41(c), Federal Rules of Criminal Procedure, provides, inter alia, that the warrant shall command its execution in the daytime, unless the magistrate "for reasonable cause shown" directs in the warrant that it be served at some other time. *See* Jones v. United States, 357 U.S. 493, 498–500 (1958); Gooding v. United States, 416 U.S. 430 (1974). A separate statutory rule applies to narcotics cases. 21 U.S.C. § 879(a).

[179] *Semayne's Case*, 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604).

requirement in the federal system [180] and generally in the states. In *Ker v. California*,[181] the Court considered the rule of announcement as a constitutional requirement, although a majority there found circumstances justifying entry without announcement.

In *Wilson v. Arkansas*,[182] the Court determined that the common law "knock and announce" rule is an element of the Fourth Amendment reasonableness inquiry. The rule is merely a presumption, however, that yields under various circumstances, including those posing a threat of physical violence to officers, those in which a prisoner has escaped and taken refuge in his dwelling, and those in which officers have reason to believe that destruction of evidence is likely. The test, articulated two years later in *Richards v. Wisconsin*,[183] is whether police have "a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime." In *Richards*, the Court held that there is no blanket exception to the rule whenever officers are executing a search warrant in a felony drug investigation; instead, a case-by-case analysis is required to determine whether no-knock entry is justified under the circumstances.[184] Similarly, if officers choose to knock and announce before searching for drugs, circumstances may justify forced entry if there is not a prompt response.[185] Recent federal laws providing for the issuance of warrants authorizing in certain circumstances "no-knock" entries to execute warrants will no doubt present the Court with opportunities to explore the configurations of the rule of announcement.[186] A statute regulating the expiration of a warrant and issuance of another "should

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[180] 18 U.S.C. § 3109. *See* Miller v. United States, 357 U.S. 301 (1958); Wong Sun v. United States, 371 U.S. 471 (1963).

[181] 374 U.S. 23 (1963). *Ker* was an arrest warrant case, but no reason appears for differentiating search warrants. Eight Justices agreed that federal standards should govern and that the rule of announcement was of constitutional stature, but they divided 4-to-4 whether entry in this case had been pursuant to a valid exception. Justice Harlan who had dissented from the federal standards issue joined the four finding a justifiable exception to carry the result.

[182] 514 U.S. 927 (1995).

[183] 520 U.S. 385, 394 (1997).

[184] The fact that officers may have to destroy property in order to conduct a no-knock entry has no bearing on the reasonableness of their decision not to knock and announce. United States v. Ramirez, 523 U.S. 65 (1998).

[185] United States v. Banks, 540 U.S. 31 (2003) (forced entry was permissible after officers executing a warrant to search for drugs knocked, announced "police search warrant," and waited 15–20 seconds with no response).

[186] In narcotics cases, magistrates are authorized to issue "no-knock" warrants if they find there is probable cause to believe (1) the property sought may, and if notice is given, will be easily and quickly destroyed or (2) giving notice will endanger the life or safety of the executing officer or another person. 21 U.S.C. § 879(b). *See also* D.C. Code, § 23–591.

be liberally construed in favor of the individual." [187] Similarly, just as the existence of probable cause must be established by fresh facts, so the execution of the warrant should be done in timely fashion so as to ensure so far as possible the continued existence of probable cause.[188]

Because police actions in execution of a warrant must be related to the objectives of the authorized intrusion, and because privacy of the home lies at the core of the Fourth Amendment, police officers violate the Amendment by bringing members of the media or other third parties into a home during execution of a warrant if presence of those persons was not in aid of execution of the warrant.[189]

In executing a warrant for a search of premises and of named persons on the premises, police officers may not automatically search someone else found on the premises.[190] If they can articulate some reasonable basis for fearing for their safety they may conduct a "patdown" of the person, but in order to search they must have probable cause particularized with respect to that person. However, in *Michigan v. Summers*,[191] the Court held that officers arriving to execute a warrant for the search of a house could detain, without being required to articulate any reasonable basis and necessarily therefore without probable cause, the owner or occupant of the house, whom they encountered on the front porch leaving the premises. The Court determined that such a detention, which was "substantially less intrusive" than an arrest, was justified because of the law enforcement interests in minimizing the risk of harm to officers, facilitating entry and conduct of the search, and preventing flight in the event incriminating evidence is found.[192] For the same

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[187] Sgro v. United States, 287 U.S. 206 (1932).

[188] Sgro v. United States, 287 U.S. 206 (1932).

[189] Wilson v. Layne, 526 U.S. 603 (1999). *Accord*, Hanlon v. Berger, 526 U.S. 808 (1999) (media camera crew "ride-along" with Fish and Wildlife Service agents executing a warrant to search respondent's ranch for evidence of illegal taking of wildlife).

[190] Ybarra v. Illinois, 444 U.S. 85 (1979) (patron in a bar), relying on and reaffirming United States v. Di Re, 332 U.S. 581 (1948) (occupant of vehicle may not be searched merely because there are grounds to search the automobile). *But see* Maryland v. Pringle, 540 U.S. 366 (2003) (distinguishing *Ybarra* on basis that passengers in car often have "common enterprise," and noting that the tip in *Di Re* implicated only the driver.

[191] 452 U.S. 692 (1981).

[192] 452 U.S. at 701–06. *Ybarra* was distinguished on the basis of its greater intrusiveness and the lack of sufficient connection with the premises. Id. at 695 n.4. By the time Summers was searched, police had probable cause to do so. Id. at 695. The warrant here was for contraband, id. at 701, and a different rule may apply with respect to warrants for other evidence, id. at 705 n.20. In Los Angeles County v. Rettele, 550 U.S. 609 (2007), the Court found no Fourth Amendment violation where deputies did not know that the suspects had sold the house that the deputies

reasons, officers may use "reasonable force," including handcuffs, to effectuate a detention.[193] Also, under some circumstances, officers may search premises on the mistaken but reasonable belief that the premises are described in an otherwise valid warrant.[194]

Limits on detention incident to a search were addressed in *Bailey v. United States,* a case in which an occupant exited his residence and traveled some distance before being stopped and detained.[195] The *Bailey* Court held that the detention was not constitutionally sustainable under the rule announced in *Summers*.[196] According to the Court, application of the categorical exception to probable cause requirements for detention incident to a search is determined by spatial proximity, that is, whether the occupant is found "within the immediate vicinity of the premises to be searched," [197] and not by temporal proximity, that is, whether the occupant is detained "as soon as reasonably practicable" consistent with safety and security. In so holding, the Court reasoned that limiting the *Summers* rule to the area within which an occupant poses a real threat ensures that the scope of the rule regarding detention incident to a search is confined to its underlying justification.[198]

Although, for purposes of execution, as for many other matters, there is little difference between search warrants and arrest warrants, one notable difference is that the possession of a valid arrest warrant cannot authorize authorities to enter the home of a third party looking for the person named in the warrant; in order to do

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had a warrant to search. The deputies entered the house and found the new owners, of a different race from the suspects, sleeping in the nude. The deputies held the new owners at gunpoint for one to two minutes without allowing them to dress or cover themselves. As for the difference in race, the Court noted that, "[w]hen the deputies ordered [Caucasian] respondents from their bed, they had no way of knowing whether the African-American suspects were elsewhere in the house." Id. at 613. As for not allowing the new owners to dress or cover themselves, the Court quoted its statement in Michigan v. Summers that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." Id. at 1993 (quoting 452 U.S. at 702–03).

[193] Muehler v. Mena, 544 U.S. 93, 98–99 (2005) (also upholding questioning the handcuffed detainee about her immigration status).

[194] Maryland v. Garrison, 480 U.S. 79 (1987) (officers reasonably believed there was only one "third floor apartment" in city row house when in fact there were two).

[195] 568 U.S. ___, No. 11–770, slip op. (2013). In *Bailey*, the police obtained a warrant to search Bailey's residence for firearms and drugs *Id.* at 2. Meanwhile, detectives staked out the residence, saw Bailey leave and drive away, and then called in a search team. *Id.* While the search was proceeding, the detectives tailed Bailey for about a mile before stopping and detaining him. *Id*. at 2–3.

[196] As an alternative ground, the district court had found that stopping Bailey was lawful as an investigatory stop under *Terry v. Ohio*, 392 U.S. 1, 20 (1968), but the Supreme Court offered no opinion on whether, assuming the stop was valid under *Terry*, the resulting interaction between law enforcement and Bailey could independently have justified Bailey's detention. *Bailey*, slip op. at 14.

[197] *Bailey*, slip op. at 13–14.

[198] *Id.* at 13.

that, they need a search warrant signifying that a magistrate has determined that there is probable cause to believe the person named is on the premises.[199]

Valid Searches and Seizures Without Warrants

Although the Supreme Court stresses the importance of warrants and has repeatedly referred to searches without warrants as "exceptional,"[200] it appears that the greater number of searches, as well as the vast number of arrests, take place without warrants. The Reporters of the American Law Institute Project on a Model Code of Pre-Arraignment Procedure have noted "their conviction that, as a practical matter, searches without warrant and incidental to arrest have been up to this time, and may remain, of greater practical importance" than searches pursuant to warrants. "[T]he evidence on hand . . . compel[s] the conclusion that searches under warrants have played a comparatively minor part in law enforcement, except in connection with narcotics and gambling laws."[201] Nevertheless, the Court frequently asserts that "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions.'"[202] The exceptions are said to be "jealously and carefully drawn,"[203] and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative."[204] Although the record indicates an effort to categorize the exceptions, the number and breadth of those exceptions have been growing.

Detention Short of Arrest: Stop and Frisk.—Arrests are subject to the requirements of the Fourth Amendment, but the courts have followed the common law in upholding the right of police offi-

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[199] Steagald v. United States, 451 U.S. 204 (1981). An arrest warrant is a necessary and sufficient authority to enter a suspect's home to arrest him. Payton v. New York, 445 U.S. 573 (1980).

[200] *E.g.*, Johnson v. United States, 333 U.S. 10, 14 (1948); McDonald v. United States, 335 U.S. 451, 453 (1948); Camara v. Municipal Court, 387 U.S. 523, 528–29 (1967); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352–53, 355 (1977).

[201] American Law Institute, A Model Code of Pre-Arraignment Procedure, Tent. Draft No. 3 (Philadelphia: 1970), xix.

[202] Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); G.M. Leasing Corp. v. United States, 429 U.S. 338, 352–53, 358 (1977).

[203] Jones v. United States, 357 U.S. 493, 499 (1958).

[204] McDonald v. United States, 335 U.S. 451, 456 (1948). In general, with regard to exceptions to the warrant clause, conduct must be tested by the reasonableness standard enunciated by the first clause of the Amendment, Terry v. Ohio, 392 U.S. 1, 20 (1968). The Court's development of its privacy expectation tests, discussed under "The Interest Protected," *supra*, substantially changed the content of that standard.

cers to take a person into custody without a warrant if they have probable cause to believe that the person to be arrested has committed a felony or a misdemeanor in their presence.[205] Probable cause is, of course, the same standard required to be met in the issuance of an arrest warrant, and must be satisfied by conditions existing prior to the police officer's stop, what is discovered thereafter not sufficing to establish probable cause retroactively.[206] There are, however, instances when a police officer's suspicions will have been aroused by someone's conduct or manner, but probable cause for placing such a person under arrest will be lacking.[207] In *Terry v. Ohio*,[208] the Court, with only Justice Douglas dissenting, approved an on-the-street investigation by a police officer that involved "patting down" the subject of the investigation for weapons.

Terry arose when a police officer observed three individuals engaging in conduct which appeared to him, on the basis of training and experience, to be the "casing" of a store for a likely armed robbery. Upon approaching the men, identifying himself, and not receiving prompt identification, the officer seized one of the men, patted the exterior of his clothes, and discovered a gun. Chief Justice Warren for the Court wrote that the Fourth Amendment was applicable "whenever a police officer accosts an individual and restrains his freedom to walk away."[209] Because the warrant clause is necessarily and practically of no application to the type of on-the-street encounter present in *Terry*, the Chief Justice continued, the question was whether the policeman's actions were reasonable. The test of reasonableness in this sort of situation is whether the police officer can point to "specific and articulable facts which, taken together with rational inferences from those facts," would lead a neutral magistrate on review to conclude that a man of reasonable caution would be warranted in believing that possible criminal behavior was at hand and that both an investigative stop and a "frisk" was required.[210] Because the conduct witnessed by the police officer reasonably led him to believe that an armed robbery was in prospect, he was as reasonably led to believe that the men were armed and probably dangerous and that his safety required a "frisk." Because the object of the "frisk" is the discovery of dangerous weapons, "it must therefore be confined in scope to an intrusion reasonably de-

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[205] United States v. Watson, 423 U.S. 411 (1976).

[206] Henry v. United States, 361 U.S. 98 (1959); Johnson v. United States, 333 U.S. 10, 16–17 (1948); Sibron v. New York, 392 U.S. 40, 62–63 (1968).

[207] "The police may not arrest upon mere suspicion but only on 'probable cause.'" Mallory v. United States, 354 U.S. 449, 454 (1957).

[208] 392 U.S. 1 (1968).

[209] 392 U.S. at 16. *See* id. at 16–20.

[210] 392 U.S. at 20, 21, 22.

signed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." [211]

In a later case, the Court held that an officer may seize an object if, in the course of a weapons frisk, "plain touch" reveals the presence of the object, and the officer has probable cause to believe it is contraband.[212] The Court viewed the situation as analogous to that covered by the "plain view" doctrine: obvious contraband may be seized, but a search may not be expanded to determine whether an object is contraband.[213] Also impermissible is physical manipulation, without reasonable suspicion, of a bus passenger's carry-on luggage stored in an overhead compartment.[214]

Terry did not rule on a host of problems, including the grounds that could permissibly lead an officer to momentarily stop a person on the street or elsewhere in order to ask questions rather than frisk for weapons, the right of the stopped individual to refuse to cooperate, and the permissible response of the police to that refusal. The Court provided a partial answer in 2004, when it upheld a state law that required a suspect to disclose his name in the course of a valid *Terry* stop.[215] Questions about a suspect's identity "are a routine and accepted part of many *Terry* stops," the Court explained.[216]

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[211] 392 U.S. at 23–27, 29. *See also* Sibron v. New York, 392 U.S. 40 (1968) (after policeman observed defendant speak with several known narcotics addicts, he approached him and placed his hand in defendant's pocket, thus discovering narcotics; this was impermissible, because he lacked a reasonable basis for the frisk and in any event his search exceeded the permissible scope of a weapons frisk); Adams v. Williams, 407 U.S. 143 (1972) (stop and frisk based on informer's in-person tip that defendant was sitting in an identified parked car, visible to informer and officer, in a high crime area at 2 a.m., with narcotics and a gun at his waist); Pennsylvania v. Mimms, 434 U.S. 106 (1977) (after validly stopping car, officer required defendant to get out of car, observed bulge under his jacket, and frisked him and seized weapon; while officer did not suspect driver of crime or have an articulable basis for safety fears, safety considerations justified his requiring driver to leave car); Maryland v. Wilson, 519 U.S. 408, 413 (1997) (after validly stopping car, officer may order passengers as well as driver out of car; "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger"); Arizona v. Johnson, 129 S. Ct. 781, 786 (2009) (after validly stopping car, officer may frisk (patdown for weapons) both the driver and any passengers whom he reasonably concludes "might be armed and presently dangerous").

[212] Minnesota v. Dickerson, 508 U.S. 366 (1993).

[213] 508 U.S. at 375, 378–79. In *Dickerson* the Court held that seizure of a small plastic container that the officer felt in the suspect's pocket was not justified; the officer should not have continued the search, manipulating the container with his fingers, after determining that no weapon was present.

[214] Bond v. United States, 529 U.S. 334 (2000) (bus passenger has reasonable expectation that, although other passengers might handle his bag in order to make room for their own, they will not "feel the bag in an exploratory manner").

[215] Hiibel v. Sixth Judicial Dist. Ct., 542 U.S. 177 (2004).

[216] 542 U.S. at 186.

After *Terry*, the standard for stops for investigative purposes evolved into one of "reasonable suspicion of criminal activity." That test permits some stops and questioning without probable cause in order to allow police officers to explore the foundations of their suspicions.[217] Although it did not elaborate a set of rules to govern the application of the tests, the Court was initially restrictive in recognizing permissible bases for reasonable suspicion.[218] Extensive intrusions on individual privacy, *e.g.*, transportation to the station house for interrogation and fingerprinting, were invalidated in the absence of probable cause,[219] although the Court has held that an uncorroborated, anonymous tip is insufficient basis for a *Terry* stop, and that there is no "firearms" exception to the reasonable suspicion requirement.[220] More recently, however, the Court has taken less restrictive approaches.[221]

It took the Court some time to settle on a test for when a "seizure" has occurred, and the Court has recently modified its approach. The issue is of some importance, since it is at this point that Fourth Amendment protections take hold. The *Terry* Court rec-

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[217] In United States v. Cortez, 449 U.S. 411 (1981), a unanimous Court attempted to capture the "elusive concept" of the basis for permitting a stop. Officers must have "articulable reasons" or "founded suspicions," derived from the totality of the circumstances. "Based upon that whole picture the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id. at 417–18. The inquiry is thus quite fact-specific. In the anonymous tip context, the same basic approach requiring some corroboration applies regardless of whether the standard is probable cause or reasonable suspicion; the difference is that less information, or less reliable information, can satisfy the lower standard. Alabama v. White, 496 U.S. 325 (1990).

[218] *E.g.*, Brown v. Texas, 443 U.S. 47 (1979) (individual's presence in high crime area gave officer no articulable basis to suspect him of crime); Delaware v. Prouse, 440 U.S. 648 (1979) (reasonable suspicion of a license or registration violation is necessary to authorize automobile stop; random stops impermissible); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (officers could not justify random automobile stop solely on basis of Mexican appearance of occupants); Reid v. Georgia, 448 U.S. 438 (1980) (no reasonable suspicion for airport stop based on appearance that suspect and another passenger were trying to conceal the fact that they were traveling together). *But cf.* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (halting vehicles at fixed checkpoints to question occupants as to citizenship and immigration status permissible, even if officers should act on basis of appearance of occupants).

[219] Davis v. Mississippi, 394 U.S. 721 (1969); Dunaway v. New York, 442 U.S. 200 (1979). Illinois v. Wardlow, 528 U.S. 119 (2000) (unprovoked flight from high crime area upon sight of police produces "reasonable suspicion").

[220] Florida v. J.L., 529 U.S. 266 (2000) (reasonable suspicion requires that a tip be reliable in its assertion of illegality, not merely in its identification of someone).

[221] *See, e.g.*, Prado Navarette v. California, 572 U.S. ___, No. 12–9490, slip op. (2014) (anonymous 911 call reporting an erratic swerve by a particular truck traveling in a particular direction held to be sufficient to justify stop); United States v. Sokolow, 490 U.S. 1, 9 (1989) (airport stop based on drug courier profile may rely on a combination of factors that individually may be "quite consistent with innocent travel"); United States v. Hensley, 469 U.S. 221 (1985) (reasonable suspicion to stop a motorist may be based on a "wanted flyer" as long as issuance of the flyer has been based on reasonable suspicion).

ognized in dictum that "not all personal intercourse between policemen and citizens involves 'seizures' of persons," and suggested that "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." [222] Years later Justice Stewart proposed a similar standard—that a person has been seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." [223] A majority of the Justices subsequently endorsed this reasonable perception standard [224] and applied it in several cases in which admissibility of evidence turned on whether a seizure of the person not justified by probable cause or reasonable suspicion had occurred prior to the uncovering of the evidence. No seizure occurred, for example, when INS agents seeking to identify illegal aliens conducted workforce surveys within a garment factory; while some agents were positioned at exits, others systematically moved through the factory and questioned employees.[225] This brief questioning, even with blocked exits, amounted to "classic consensual encounters rather than Fourth Amendment seizures." [226] The Court also ruled that no seizure had occurred when police in a squad car drove alongside a suspect who had turned and run down the sidewalk when he saw the squad car approach. Under the circumstances (no siren, flashing lights, display of a weapon, or blocking of the suspect's path), the Court concluded, the police conduct "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [one's] freedom of movement." [227]

Soon after, however, the Court departed from the *Mendenhall* reasonable-perception standard and adopted a more formalistic approach, holding that an actual chase with evident intent to capture did not amount to a "seizure" because the suspect had not complied with the officer's order to halt. The Court in *California v. Hodari D.* wrote that *Mendenhall* stated a "necessary" but not a "sufficient" condition for a seizure of the person through show of authority.[228] A Fourth Amendment "seizure" of the person, the Court determined, is the same as a common law arrest; there must be either application of physical force (or the laying on of hands), or submis-

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[222] 392 U.S. at 19, n.16.

[223] United States v. Mendenhall, 446 U.S. 544, 554 (1980).

[224] *See, e.g.*, Florida v. Royer, 460 U.S. 491 (1983), in which there was no opinion of the Court, but in which the test was used by the plurality of four, id. at 502, and also endorsed by dissenting Justice Blackmun, id. at 514.

[225] INS v. Delgado, 466 U.S. 210 (1984).

[226] 466 U.S. at 221.

[227] Michigan v. Chesternut, 486 U.S. 567, 575 (1988).

[228] 499 U.S. 621, 628 (1991). As in Michigan v. Chesternut, *supra*, the suspect dropped incriminating evidence while being chased.

sion to the assertion of authority.[229] Indications are, however, that *Hodari D.* did not signal the end of the reasonable perception standard, but merely carved an exception applicable to chases and perhaps other encounters between suspects and police.

Later in the same term the Court ruled that the *Mendenhall* "free-to-leave" inquiry was misplaced in the context of a police sweep of a bus, but that a modified reasonable perception approach still governed.[230] In conducting a bus sweep, aimed at detecting illegal drugs and their couriers, police officers typically board a bus during a stopover at a terminal and ask to inspect tickets, identification, and sometimes luggage of selected passengers. The Court did not focus on whether an "arrest" had taken place, as adherence to the *Hodari D.* approach would have required, but instead suggested that the appropriate inquiry is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[231] "When the person is seated on a bus and has no desire to leave," the Court explained, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter."[232]

A *Terry* search need not be limited to a stop and frisk of the person, but may extend as well to a protective search of the passenger compartment of a car if an officer possesses "a reasonable belief, based on specific and articulable facts . . . that the suspect is dangerous and . . . may gain immediate control of weapons."[233] How lengthy a *Terry* detention may be varies with the circumstances. In approving a 20-minute detention of a driver made necessary by the driver's own evasion of drug agents and a state police decision to

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[229] Adherence to this approach would effectively nullify the Court's earlier position that Fourth Amendment protections extend to "seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975), *quoted in* INS v. Delgado, 466 U.S. 210, 215 (1984).

[230] Florida v. Bostick, 501 U.S. 429 (1991).

[231] 501 U.S. at 436.

[232] 501 U.S. at 436. The Court asserted that the case was "analytically indistinguishable from *Delgado*. Like the workers in that case [subjected to the INS 'survey' at their workplace], Bostick's freedom of movement was restricted by a factor independent of police conduct—*i.e.*, by his being a passenger on a bus." Id. *See also* United States v. Drayton, 536 U.S. 194 (2002), applying *Bostick* to uphold a bus search in which one officer stationed himself in the front of the bus and one in the rear, while a third officer worked his way from rear to front, questioning passengers individually. Under these circumstances, and following the arrest of his traveling companion, the defendant had consented to the search of his person.

[233] Michigan v. Long, 463 U.S. 1032 (1983) (suspect appeared to be under the influence of drugs, officer spied hunting knife exposed on floor of front seat and searched remainder of passenger compartment). Similar reasoning has been applied to uphold a "protective sweep" of a home in which an arrest is made if arresting officers have a reasonable belief that the area swept may harbor another individual posing a danger to the officers or to others. Maryland v. Buie, 494 U.S. 325 (1990).

hold the driver until the agents could arrive on the scene, the Court indicated that it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." [234]

Similar principles govern detention of luggage at airports in order to detect the presence of drugs; *Terry* "limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause." [235] The general rule is that "when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* . . . would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope." [236] Seizure of luggage for an expeditious "canine sniff" by a dog trained to detect narcotics can satisfy this test even though seizure of luggage is in effect detention of the traveler, since the procedure results in "limited disclosure," impinges only slightly on a traveler's privacy interest in the contents of personal luggage, and does not constitute a search within the meaning of the Fourth Amendment.[237] By contrast, taking a suspect to an interrogation room on grounds short of probable cause, retaining his air ticket, and retrieving his luggage without his permission taints consent given under such circumstances to open the luggage, since by then the detention had exceeded the bounds of a permissible *Terry* investigative stop and amounted to an invalid arrest.[238] But the same requirements for brevity of de-

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[234] United States v. Sharpe, 470 U.S. 675, 686 (1985). A more relaxed standard has been applied to detention of travelers at the border, the Court testing the reasonableness in terms of "the period of time necessary to either verify or dispel the suspicion." United States v. Montoya de Hernandez, 473 U.S. 531, 544 (1985) (approving warrantless detention for more than 24 hours of traveler suspected of alimentary canal drug smuggling).

[235] United States v. Place, 462 U.S. 696, 709 (1983).

[236] 462 U.S. at 706.

[237] 462 U.S. at 707. However, the search in *Place* was not expeditious, and hence exceeded Fourth Amendment bounds, when agents took 90 minutes to transport luggage to another airport for administration of the canine sniff. The length of a detention short of an arrest has similarly been a factor in other cases. *Compare* Illinois v. Caballes, 543 U.S. 405 (2005) (a canine sniff around the perimeter of a car following a routine traffic stop does not offend the Fourth Amendment if the duration of the stop is justified by the traffic offense) *with* Rodriguez v. United States, 575 U.S. ___, No. 13–9972, slip op. at 3, 5–6 (2015) (finding that the stop in question had been prolonged for seven to eight minutes beyond the time needed to resolve the traffic offense in order to conduct a canine sniff).

[238] Florida v. Royer, 460 U.S. 491 (1983). On this much the plurality opinion of Justice White (id. at 503), joined by three other Justices, and the concurring opinion of Justice Brennan (id. at 509) were in agreement.

tention and limited scope of investigation are apparently inapplicable to border searches of international travelers, the Court having approved a 24-hour detention of a traveler suspected of smuggling drugs in her alimentary canal.[239]

Search Incident to Arrest.—The common-law rule permitting searches of the person of an arrestee as an incident to the arrest has occasioned little controversy in the Court.[240] The Court has even upheld a search incident to an illegal (albeit not unconstitutional) arrest.[241] The dispute has centered around the scope of the search. Because it was the stated general rule that the scope of a warrantless search must be strictly tied to and justified by the circumstances that rendered its justification permissible, and because it was the rule that the justification of a search of the arrestee was to prevent destruction of evidence and to prevent access to a weapon,[242] it was argued to the court that a search of the person of the defendant arrested for a traffic offense, which discovered heroin in a crumpled cigarette package, was impermissible, because there could have been no destructible evidence relating to the offense for which he was arrested and no weapon could have been concealed in the cigarette package. The Court rejected this argument, ruling that "no additional justification" is required for a custodial arrest of a suspect based on probable cause.[243]

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[239] United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

[240] Weeks v. United States, 232 U.S. 383, 392 (1914); Carroll v. United States, 267 U.S. 132, 158 (1925); Agnello v. United States, 269 U.S. 20, 30 (1925).

[241] Virginia v. Moore, 128 S. Ct. 1598 (2008) (holding that, where an arrest for a minor offense is prohibited by state law, the arrest will not violate the Fourth Amendment if it was based on probable cause).

[242] Terry v. Ohio, 392 U.S. 1, 19 (1968); Chimel v. California, 395 U.S. 752, 762, 763 (1969). The Court, in *Birchfield v. North Dakota*, 579 U.S. ___, No. 14–1468, slip op. (2016), explained that the precedent allowing for a warrantless search of an arrestee in order to prevent the destruction of evidence applies to both evidence that could be actively destroyed by a suspect and to evidence that can be destroyed due to a natural process, such as the natural dissipation of the alcohol content in a suspect's blood. *Id.* at 30–31.

[243] United States v. Robinson, 414 U.S. 218, 235 (1973). *See also* id. at 237–38 (Justice Powell concurring). The Court applied the same rule in Gustafson v. Florida, 414 U.S. 260 (1973), involving a search of a motorist's person following his custodial arrest for an offense for which a citation would normally have issued. Unlike the situation in *Robinson*, police regulations did not require the *Gustafson* officer to take the suspect into custody, nor did a departmental policy guide the officer as to when to conduct a full search. The Court found these differences inconsequential, and left for another day the problem of pretextual arrests in order to obtain basis to search. Soon thereafter, the Court upheld conduct of a similar search at the place of detention, even after a time lapse between the arrest and search. United States v. Edwards, 415 U.S. 800 (1974).

The Court has disavowed a case-by-case evaluation of searches made post-arrest[244] and instead has embraced categorical evaluations as to post-arrest searches. Thus, in *Riley v. California*,[245] the Court declined to extend the holding of *United States v. Robinson* to the search of the digital data contained in a cell phone found on an arrestee. Specifically, the Court distinguished a search of cell phones, which contain vast quantities of personal data, from the limited physical search at issue in *Robinson*.[246] Focusing primarily on the rationale that searching cell phones would prevent the destruction of evidence, the government argued that cell phone data could be destroyed remotely or become encrypted by the passage of time. The Court, however, both discounted the prevalence of these events and the efficacy of warrantless searches to defeat them. Rather, the Court noted that other means existed besides a search of a cell phone to secure the data contained therein, including turning the phone off or placing the phone in a bag that isolates it from radio waves.[247] Because of the more substantial privacy interests at stake when digital data is involved in a search incident to an arrest and because of the availability of less intrusive alternatives to a warrantless search, the Court in *Riley* concluded that, as a "simple" categorical rule, before police can search a cell phone incident to an arrest, the police must "get a warrant."[248]

Two years after *Riley*, the Court again crafted a new brightline rule with respect to searches following an arrest in another "situation[] that could not have been envisioned when the Fourth Amendment was adopted."[249] In *Birchfield v. North Dakota*, the Court examined whether compulsory breath and blood tests administered in order to determine the blood alcohol concentration (BAC) of an automobile driver, following the arrest of that driver for suspected "drunk driving," are unreasonable under the search incident to arrest exception to the Fourth Amendment's warrant requirement.[250] In examining laws criminalizing the refusal to submit to either a breath or blood test, similar to *Riley*, the Court relied on a general

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[244] In this vein, the search incident to arrest exception to the warrant requirement differs from other exceptions to the warrant requirement, such as the exigent circumstances exception. *See Birchfield*, slip op. at 15–16 (noting that while "other exceptions to the warrant requirement 'apply categorically'," the exigent circumstances exception to the warrant requirement applies on a case-by-case basis) (quoting Missouri v. McNeely, 569 U.S. ___, No. 11–1425, slip op. at 7 n.3 (2013)).

[245] 573 U.S. ___, No. 13–132, slip op. (2014).

[246] "Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 17.

[247] *Id.* at 14.

[248] *Id.* at 28.

[249] See *Birchfield*, slip op. at 19.

[250] *Id.* at 19.

balancing approach used to assess whether a given category of searches is reasonable, weighing the individual privacy interests implicated by such tests against any legitimate state interests.[251] With respect to *breath* tests, the *Birchfield* Court viewed the privacy intrusions posed by such tests as "almost negligible" in that a breath test is functionally equivalent to the process of using a straw to drink a beverage and yields a limited amount of useful information for law enforcement agents.[252] In contrast, the Court concluded that a mandatory *blood* test raised more serious privacy interests,[253] as blood tests pierce the skin, extract a part of the subject's body, and provide far more information than a breathalyzer test.[254] Turning to the state's interest in obtaining BAC readings for persons arrested for drunk driving, the *Birchfield* Court acknowledged the government's "paramount interest" in preserving public safety on highways, including the state's need to deter drunk driving from occurring in the first place through the imposition of criminal penalties for failing to cooperate with drunk driving investigations.[255] Weighing these competing interests, the Court ultimately concluded that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving because the "impact of breath tests on privacy is slight," whereas the "need for BAC testing is great."[256] In so doing, the Court rejected the alternative of requiring the state to obtain a warrant prior to the administration of a BAC breath test, noting (1) the need for clear, categorical rules to provide police adequate guidance in the context of a search incident to an arrest and (2) the potential administrative burdens that would be incurred if warrants were required prior to every breathalyzer test.[257] Nonetheless, the Court reached a "different conclusion" with respect to *blood* tests, finding that such tests are "significantly more intrusive" and their "reasonability must be judged in light of the availability of the less intrusive alternative of a breath test."[258] As a consequence, the Court held that while a warrantless breath test

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[251] *Id.*

[252] *Id.* at 20–22. The Court disclaimed a criminal defendant's possessory interest in the air in his lungs, as air in one's lungs is not a part of one's body and is regularly exhaled from the lungs as a natural process. *Id.* at 21.

[253] "Blood tests are a different matter." *Id.* at 22.

[254] *Id.* at 21–23.

[255] *Id.* at 24–25.

[256] *Id.* at 33.

[257] *Id.* at 25–28. The *Birchfield* Court also rejected "more costly" and previously tried alternatives to penalties for refusing a breath test, such as sobriety checkpoints, ignition interlocks, and the use of treatment programs. *Id.* at 29–30.

[258] *Id.* at 33. In so doing, the Court rejected the argument that warrantless blood tests are needed as an alternative to warrantless breath tests to detect impairing substances other than alcohol or to obtain the BAC of an unconscious or uncooperative driver. *Id.* at 34. In such situations, the Court reasoned that the state could

following a drunk-driving arrest is categorically permissible as a reasonable search under the Fourth Amendment, a warrantless blood test cannot be justified by the search incident to arrest doctrine.[259]

However, the Justices have long found themselves in disagreement about the scope of the search incident to arrest as it extends beyond the person to the area in which the person is arrested—most commonly either his premises or his vehicle. Certain early cases went both ways on the basis of some fine distinctions,[260] but in *Harris v. United States*,[261] the Court approved a search of a four-room apartment pursuant to an arrest under warrant for one crime, where the search turned up evidence of another crime. A year later, in *Trupiano v. United States*,[262] a raid on a distillery resulted in the arrest of a man found on the premises and a seizure of the equipment; the Court reversed the conviction because the officers had had time to obtain a search warrant and had not done so. "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest."[263]

The Court overruled *Trupiano* in *United States v. Rabinowitz*,[264] in which officers had arrested the defendant in his one-room office pursuant to an arrest warrant and proceeded to search the room completely. The Court observed that the issue was not whether the officers had the time and opportunity to obtain a search warrant but whether the search incident to arrest was reasonable. Though *Rabinowitz* referred to searches of the area within the arrestee's "immediate control,"[265] it provided no standard by which this area was to be determined, and extensive searches were permitted under the rule.[266]

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obtain a warrant for the blood test, or in the case of an uncooperative driver, prosecute the defendant for refusing to undergo the breath test. *Id.* at 34–35.

[259] *Id.* at 37–38.

[260] *Compare* Marron v. United States, 275 U.S. 192 (1927), *with* Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931), *and* United States v. Lefkowitz, 285 U.S. 452 (1932).

[261] 331 U.S. 145 (1947).

[262] 334 U.S. 699 (1948).

[263] 334 U.S. at 708.

[264] 339 U.S. 56 (1950).

[265] 339 U.S. at 64.

[266] *Cf.* Chimel v. California, 395 U.S. 752, 764–65 & n.10 (1969). But, in Kremen v. United States, 353 U.S. 346 (1957), the Court held that the seizure of the entire contents of a house and the removal to F.B.I. offices 200 miles away for examination, pursuant to an arrest under warrant of one of the persons found in the house, was unreasonable. In decisions contemporaneous to and subsequent to *Chimel*, applying pre-*Chimel* standards because that case was not retroactive, Williams v. United

In *Chimel v. California*,[267] however, a narrower view was asserted, the primacy of warrants was again emphasized, and a standard by which the scope of searches pursuant to arrest could be ascertained was set out. "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of someone who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

"There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant."[268]

Although the viability of *Chimel* had been in doubt for some time as the Court refined and applied its analysis of reasonable and justifiable expectations of privacy,[269] it has in some but not all contexts survived the changed rationale. Thus, in *Mincey v. Arizona*,[270] the Court rejected a state effort to create a "homicide-scene" exception for a warrantless search of an entire apartment extending over four days. The occupant had been arrested and removed and it was true, the Court observed, that a person legally

States, 401 U.S. 646 (1971), the Court has applied *Rabinowitz* somewhat restrictively. *See* Von Cleef v. New Jersey, 395 U.S. 814 (1969), which followed *Kremen*; Shipley v. California, 395 U.S. 818 (1969), and Vale v. Louisiana, 399 U.S. 30 (1970) (both involving arrests outside the house with subsequent searches of the house); Coolidge v. New Hampshire, 403 U.S. 443, 455–57 (1971). Substantially extensive searches were, however, approved in Williams v. United States, 401 U.S. 646 (1971), and Hill v. California, 401 U.S. 797 (1971).

[267] 395 U.S. 752 (1969).

[268] 395 U.S. at 762–63.

[269] *See*, *e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 492, 493, 510 (1971), in which the four dissenters advocated the reasonableness argument rejected in *Chimel*.

[270] 437 U.S. 385, 390–91 (1978). *Accord*, Flippo v. West Virginia, 528 U.S. 11 (1999) (per curiam).

taken into custody has a lessened right of privacy in his person, but he does not have a lessened right of privacy in his entire house. And, in *United States v. Chadwick*,[271] emphasizing a person's reasonable expectation of privacy in his luggage or other baggage, the Court held that, once police have arrested and immobilized a suspect, validly seized bags are not subject to search without a warrant.[272] Police may, however, in the course of jailing an arrested suspect, conduct an inventory search of the individual's personal effects, including the contents of a shoulder bag, since "the scope of a stationhouse search may in some circumstances be even greater than those supporting a search immediately following arrest."[273]

Chimel has, however, been qualified by another consideration. Not only may officers search areas within the arrestee's immediate control in order to alleviate any threat posed by the arrestee, but they may extend that search if there may be a threat posed by "unseen third parties in the house." A "protective sweep" of the entire premises (including an arrestee's home) may be undertaken on less than probable cause if officers have a "reasonable belief," based on "articulable facts," that the area to be swept may harbor an individual posing a danger to those on the arrest scene.[274]

Stating that it was "in no way alter[ing] the fundamental principles established in the *Chimel* case," the Court in *New York v. Belton*[275] held that police officers who had made a valid arrest of the occupant of a vehicle could make a contemporaneous search of the entire passenger compartment of the automobile, including containers found therein. Believing that a fairly simple rule understandable to authorities in the field was desirable, the Court ruled "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably,

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[271] 433 U.S. 1 (1977). Defendant and his luggage, a footlocker, had been removed to the police station, where the search took place.

[272] If, on the other hand, a sealed shipping container had already been opened and resealed during a valid customs inspection, and officers had maintained surveillance through a "controlled delivery" to the suspect, there is no reasonable expectation of privacy in the contents of the container and officers may search it, upon the arrest of the suspect, without having obtained a warrant. Illinois v. Andreas, 463 U.S. 765 (1983).

[273] Illinois v. LaFayette, 462 U.S. 640, 645 (1983) (inventory search) (following South Dakota v. Opperman, 428 U.S. 364 (1976)). Similarly, an inventory search of an impounded vehicle may include the contents of a closed container. Colorado v. Bertine, 479 U.S. 367 (1987). Inventory searches of closed containers must, however, be guided by a police policy containing standardized criteria for exercise of discretion. Florida v. Wells, 495 U.S. 1 (1990).

[274] Maryland v. Buie, 494 U.S. 325, 334 (1990). This "sweep" is not to be a full-blown, "top-to-bottom" search, but only "a cursory inspection of those spaces where a person may be found." Id. at 335–36.

[275] 453 U.S. 454, 460 n.3 (1981).

within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" [276]

Belton was "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." [277] In *Arizona v. Gant*,[278] however, the Court disavowed this understanding of *Belton* [279] and held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest." [280]

Vehicular Searches.—In the early days of the automobile, the Court created an exception for searches of vehicles, holding in *Carroll v. United States* [281] that vehicles may be searched without warrants if the officer undertaking the search has probable cause to believe that the vehicle contains contraband. The Court explained that the mobility of vehicles would allow them to be quickly moved from the jurisdiction if time were taken to obtain a warrant.[282]

Initially, the Court limited *Carroll's* reach, holding impermissible the warrantless seizure of a parked automobile merely because it is movable, and indicating that vehicles may be stopped only while moving or reasonably contemporaneously with move-

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[276] 453 U.S. at 460 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)). In this particular instance, Belton had been removed from the automobile and handcuffed, but the Court wished to create a general rule removed from the fact-specific nature of any one case. "'Container' here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk." 453 U.S. at 460–61 n.4.

[277] Arizona v. Gant, 556 U.S. ___, No. 07–542, slip op. at 8 (2009).

[278] 556 U.S. ___, No. 07–542 (2009).

[279] "To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would . . . untether the rule from the justifications underlying the *Chimel* exception . . . ." Slip op. at 9.

[280] 556 U.S. ___, No. 07–542, slip op. at 18. Justice Alito, in a dissenting opinion joined by Chief Justice Roberts and Justice Kennedy and in part by Justice Breyer, wrote that "there can be no doubt that" the majority had overruled *Belton*. Slip op. at 2.

[281] 267 U.S. 132 (1925). *Carroll* was a Prohibition-era liquor case, whereas a great number of modern automobile cases involve drugs.

[282] 267 U.S. at 153. *See also* Husty v. United States, 282 U.S. 694 (1931); Scher v. United States, 305 U.S. 251 (1938); Brinegar v. United States, 338 U.S. 160 (1949). All of these cases involved contraband, but in Chambers v. Maroney, 399 U.S. 42 (1970), the Court, without discussion, and over Justice Harlan's dissent, id. at 55, 62, extended the rule to evidentiary searches.

ment.[283] The Court also ruled that the search must be reasonably contemporaneous with the stop, so that it was not permissible to remove the vehicle to the station house for a warrantless search at the convenience of the police.[284]

The Court next developed a reduced privacy rationale to supplement the mobility rationale, explaining that "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property."[285] "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view.'"[286] Although motor homes serve as residences and as repositories for personal effects, and their contents are often shielded from public view, the Court extended the automobile exception to them as well, holding that there is a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel, hence "readily mobile."[287]

The reduced expectancy concept has broadened police powers to conduct automobile searches without warrants, but they still must have probable cause to search a vehicle[288] and they may not make random stops of vehicles on the roads, but instead must base stops of individual vehicles on probable cause or some "articulable and reasonable suspicion"[289] of traffic or safety violation or some other

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[283] Coolidge v. New Hampshire, 403 U.S. 443, 458–64 (1971). This portion of the opinion had the adherence of a plurality only, Justice Harlan concurring on other grounds, and there being four dissenters. Id. at 493, 504, 510, 523.

[284] Preston v. United States, 376 U.S. 364 (1964); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

[285] Arkansas v. Sanders, 442 U.S. 753, 761 (1979).

[286] Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion), *quoted in* United States v. Chadwick, 433 U.S. 1, 12 (1977). *See also* United States v. Ortiz, 422 U.S. 891, 896 (1975); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); South Dakota v. Opperman, 428 U.S. 364, 367–68 (1976); Robbins v. California, 453 U.S. 420, 424–25 (1981); United States v. Ross, 456 U.S. 798, 807 n.9 (1982).

[287] California v. Carney, 471 U.S. 386, 393 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not "readily mobile").

[288] Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (roving patrols); United States v. Ortiz, 422 U.S. 891 (1975). *Cf.* Colorado v. Bannister, 449 U.S. 1 (1980). An automobile's "ready mobility [is] an exigency sufficient to excuse failure to obtain a search warrant once probable cause is clear"; there is no need to find the presence of "unforeseen circumstances" or other additional exigency. Pennsylvania v. Labron, 527 U.S. 465 (1996). *Accord*, Maryland v. Dyson, 527 U.S. 465 (1999) (per curiam). *Cf.* Florida v. Harris, 568 U.S. ___, No. 11–817, slip op. (2013).

[289] Delaware v. Prouse, 440 U.S. 648, 663 (1979) (discretionary random stops of motorists to check driver's license and automobile registration constitute Fourth Amendment violation); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (violation for roving patrols on lookout for illegal aliens to stop vehicles on highways near inter-

criminal activity.[290] If police stop a vehicle, then the vehicle's passengers as well as its driver are deemed to have been seized from the moment the car comes to a halt, and the passengers as well as the driver may challenge the constitutionality of the stop.[291] Likewise, a police officer may frisk (patdown for weapons) both the driver and any passengers whom he reasonably concludes "might be armed and presently dangerous." [292]

By contrast, fixed-checkpoint stops in the absence of any individualized suspicion have been upheld for purposes of promoting highway safety [293] or policing the international border,[294] but not for more generalized law enforcement purposes.[295] Once police have validly stopped a vehicle, they may also, based on articulable facts warranting a reasonable belief that weapons may be present, conduct a *Terry*-type protective search of those portions of the passenger compartment in which a weapon could be placed or hidden.[296] And, in the absence of such reasonable suspicion as to weapons,

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national borders when only ground for suspicion is that occupants appear to be of Mexican ancestry). *But cf.* United States v. Arvizu, 534 U.S. 266 (2002) (reasonable suspicion justified stop by border agents of vehicle traveling on unpaved backroads in an apparent effort to evade a border patrol checkpoint on the highway). In *Prouse*, the Court cautioned that it was not precluding the states from developing methods for spot checks, such as questioning all traffic at roadblocks, that involve less intrusion or that do not involve unconstrained exercise of discretion. 440 U.S. at 663.

[290] An officer who observes a traffic violation may stop a vehicle even if his real motivation is to investigate for evidence of other crime. Whren v. United States, 517 U.S. 806 (1996). The existence of probable cause to believe that a traffic violation has occurred establishes the constitutional reasonableness of traffic stops regardless of the actual motivation of the officers involved, and regardless of whether it is customary police practice to stop motorists for the violation observed. Similarly, pretextual arrest of a motorist who has committed a traffic offense is permissible. Arkansas v. Sullivan, 532 U.S. 769 (2001) (per curiam) (upholding search of the motorist's car for a crime not related to the traffic offense).

[291] Brendlin v. California, 551 U.S. 249, 263 (2007).

[292] Arizona v. Johnson, 129 S. Ct. 781, 786 (2009).

[293] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (upholding a sobriety checkpoint at which all motorists are briefly stopped for preliminary questioning and observation for signs of intoxication).

[294] United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding border patrol checkpoint, over 60 miles from the border, for questioning designed to apprehend illegal aliens). *See also* United States v. Flores-Montano, 541 U.S. 149 (2004) (upholding a search at the border involving disassembly of a vehicle's fuel tank).

[295] City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (vehicle checkpoint set up for the "primary purpose [of] detect[ing] evidence of ordinary criminal wrongdoing" (here interdicting illegal narcotics) does not fall within the highway safety or border patrol exception to the individualized suspicion requirement, and hence violates the Fourth Amendment). *Edmond* was distinguished in Illinois v. Lidster, 540 U.S. 419 (2004), upholding use of a checkpoint to ask motorists for help in solving a recent hit-and-run accident that had resulted in death. The public interest in solving the crime was deemed "grave," while the interference with personal liberty was deemed minimal.

[296] Michigan v. Long, 463 U.S. 1032, 1049 (1983) (holding that contraband found in the course of such a search is admissible).

police may seize contraband and suspicious items "in plain view" inside the passenger compartment.[297]

Although officers who have stopped a car to issue a routine traffic citation may conduct a *Terry*-type search, even including a pat-down of driver and passengers if there is reasonable suspicion that they are armed and dangerous, they may not conduct a full-blown search of the car[298] unless they exercise their discretion to arrest the driver instead of issuing a citation.[299] And once police have probable cause to believe there is contraband in a vehicle, they may remove the vehicle from the scene to the station house in order to conduct a search, without thereby being required to obtain a warrant.[300] "[T]he justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period re-

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[297] Texas v. Brown, 460 U.S. 730 (1983). Similarly, because there is no reasonable privacy interest in the vehicle identification number, required by law to be placed on the dashboard so as to be visible through the windshield, police may reach into the passenger compartment to remove items obscuring the number and may seize items in plain view while doing so. New York v. Class, 475 U.S. 106 (1986). Because there also is no legitimate privacy interest in possessing contraband, and because properly conducted canine sniffs are "generally likely[] to reveal only the presence of contraband," police may conduct a canine sniff around the perimeter of a vehicle stopped for a traffic offense so long as the stop is not prolonged beyond the time needed to process the traffic violation. *Compare* Illinois v. Caballes, 543 U.S. 405 (2005) (a canine sniff around the perimeter of a car following a routine traffic stop does not offend the Fourth Amendment if the duration of the stop is justified by the traffic offense) *with* Rodriguez v. United States, 575 U.S. ___, No. 13–9972, slip op. at 3, 5–6 (2015) (finding that the stop in question had been prolonged for seven to eight minutes beyond the time needed to resolve the traffic offense in order to conduct a canine sniff).

[298] Knowles v. Iowa, 525 U.S. 113 (1998) (invalidating an Iowa statute permitting a full-blown search incident to a traffic citation).

[299] *See* Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (police officers, in their discretion, may arrest a motorist for a minor traffic offense rather than issuing a citation); New York v. Belton, 453 U.S. 454 (1981) (officers who arrest an occupant of a vehicle may make a contemporaneous search of the entire passenger compartment, including closed containers); Thornton v. United States, 541 U.S. 615 (2004) (the *Belton* rule applies regardless of whether the arrestee exited the car at the officer's direction, or whether he did so prior to confrontation); Arizona v. Gant, 556 U.S. ___, No. 07–542 (U.S. Apr. 21 (2009), slip op. at 18 (the *Belton* rule applies "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest"); Arkansas v. Sullivan, 532 U.S. 769 (2001) (pretextual arrest of motorist who has committed a traffic offense is permissible even if purpose is to search vehicle for evidence of other crime).

[300] Michigan v. Thomas, 458 U.S. 259 (1982). The same rule applies if it is the vehicle itself that is forfeitable contraband; police, acting without a warrant, may seize the vehicle from a public place. Florida v. White, 526 U.S. 559 (1999).

quired for the police to obtain a warrant."[301] Because of the lessened expectation of privacy, inventory searches of impounded automobiles are justifiable in order to protect public safety and the owner's property, and any evidence of criminal activity discovered in the course of the inventories is admissible in court.[302] The Justices were evenly divided, however, on the propriety of warrantless seizure of an arrestee's automobile from a public parking lot several hours after his arrest, its transportation to a police impoundment lot, and the taking of tire casts and exterior paint scrapings.[303]

Police in undertaking a warrantless search of an automobile may not extend the search to the persons of the passengers therein[304] unless there is a reasonable suspicion that the passengers are armed and dangerous, in which case a *Terry* patdown is permissible,[305] or unless there is individualized suspicion of criminal activity by the passengers.[306] But because passengers in an automobile have no reasonable expectation of privacy in the interior area of the car, a warrantless search of the glove compartment and the spaces under the seats, which turned up evidence implicating the passengers, invaded no Fourth Amendment interest of the passengers.[307] Luggage and other closed containers found in automobiles may also be subjected to warrantless searches based on probable cause, regardless of whether the luggage or containers belong to the driver or to a passenger, and regardless of whether it is the driver or a passenger who is under suspicion.[308] The same rule now applies whether the police have probable cause to search only the containers[309] or

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[301] Michigan v. Thomas, 458 U.S. at 261. *See also* Chambers v. Maroney, 399 U.S. 42 (1970); Texas v. White, 423 U.S. 67 (1975); United States v. Ross, 456 U.S. 798, 807 n.9 (1982).

[302] Cady v. Dombrowski, 413 U.S. 433 (1973); South Dakota v. Opperman, 428 U.S. 364 (1976). *See also* Cooper v. California, 386 U.S. 58 (1967); United States v. Harris, 390 U.S. 234 (1968). Police, in conducting an inventory search of a vehicle, may open closed containers in order to inventory contents. Colorado v. Bertine, 479 U.S. 367 (1987).

[303] Cardwell v. Lewis, 417 U.S. 583 (1974). Justice Powell concurred on other grounds.

[304] United States v. Di Re, 332 U.S. 581 (1948);Ybarra v. Illinois, 444 U.S. 85, 94–96 (1979).

[305] Knowles v. Iowa, 525 U.S. 113, 118 (1998).

[306] Maryland v. Pringle, 540 U.S. 366 (2003) (probable cause to arrest passengers based on officers finding $783 in glove compartment and cocaine hidden beneath back seat armrest, and on driver and passengers all denying ownership of the cocaine).

[307] Rakas v. Illinois, 439 U.S. 128 (1978).

[308] Wyoming v. Houghton, 526 U.S. 295, 307 (1999) ("police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search").

[309] California v. Acevedo, 500 U.S. 565 (1991) (overruling Arkansas v. Sanders, 442 U.S. 753 (1979).

whether they have probable cause to search the automobile for something capable of being held in the container.[310]

Vessel Searches.—Not only is the warrant requirement inapplicable to brief stops of vessels, but also none of the safeguards applicable to stops of automobiles on less than probable cause are necessary predicates to stops of vessels. In *United States v. Villamonte-Marquez*,[311] the Court upheld a random stop and boarding of a vessel by customs agents, lacking any suspicion of wrongdoing, for purpose of inspecting documentation. The boarding was authorized by statute derived from an act of the First Congress,[312] and hence had "an impressive historical pedigree" carrying with it a presumption of constitutionality. Moreover, "important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area" justify application of a less restrictive rule for vessel searches. The reason why random stops of vehicles have been held impermissible under the Fourth Amendment, the Court explained, is that stops at fixed checkpoints or roadblocks are both feasible and less subject to abuse of discretion by authorities. "But no reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do."[313] Because there is a "substantial" governmental interest in enforcing documentation laws, "especially in waters where the need to deter or apprehend smugglers is great," the Court found the "limited" but not "minimal" intrusion occasioned by boarding for documentation inspection to be reasonable.[314] Dissenting Justice Brennan argued that the Court for the first time was approving "a completely random seizure and detention of persons and an entry onto private, noncommercial premises by police officers, without any

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[310] United States v. Ross, 456 U.S. 798 (1982). A *Ross* search of a container found in an automobile need not occur soon after its seizure. United States v. Johns, 469 U.S. 478 (1985) (three-day time lapse). *See also* Florida v. Jimeno, 500 U.S. 248 (1991) (consent to search automobile for drugs constitutes consent to open containers within the car that might contain drugs).

[311] 462 U.S. 579 (1983).

[312] 19 U.S.C. § 1581(a), derived from § 31 of the Act of Aug. 4, 1790, ch. 35, 1 Stat. 164.

[313] 462 U.S. at 589. Justice Brennan's dissent argued that a fixed checkpoint was feasible in this case, involving a ship channel in an inland waterway. Id. at 608 n.10. The fact that the Court's rationale was geared to the difficulties of law enforcement in the open seas suggests a reluctance to make exceptions to the general rule. Note as well the Court's later reference to this case as among those "reflect[ing] longstanding concern for the protection of the integrity of the border." United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

[314] 462 U.S. at 593.

limitations whatever on the officers' discretion or any safeguards against abuse."[315]

Consent Searches.—Fourth Amendment rights, like other constitutional rights, may be waived, and one may consent to a search of his person or premises by officers who have not complied with the Amendment.[316] The Court, however, has insisted that the burden is on the prosecution to prove the voluntariness of the consent[317] and awareness of the right of choice.[318] Reviewing courts must determine on the basis of the totality of the circumstances whether consent has been freely given or has been coerced. Actual knowledge of the right to refuse consent is not essential for a search to be found voluntary, and police therefore are not required to inform a person of his rights, as through a Fourth Amendment version of *Miranda* warnings.[319] But consent will not be regarded as voluntary when the officer asserts his official status and claim of right and the occupant yields because of these factors.[320] When consent is obtained through the deception of an undercover officer or an informer's gaining admission without advising a suspect who he is, the Court has held that the suspect has simply assumed the risk that an invitee would betray him, and evidence obtained through the deception is admissible.[321] Moreover, while the Court has appeared to endorse implied consent laws that view individuals who engage in certain regulated activities as having implicitly agreed

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[315] 462 U.S. at 598. Justice Brennan contended that all previous cases had required some "discretion-limiting" feature such as a requirement of probable cause, reasonable suspicion, fixed checkpoints instead of roving patrols, and limitation of border searches to border areas, and that these principles set forth in Delaware v. Prouse, 440 U.S. 648 (1979), should govern. Id. at 599, 601.

[316] Amos v. United States, 255 U.S. 313 (1921); Zap v. United States, 328 U.S. 624 (1946); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[317] Bumper v. North Carolina, 391 U.S. 543 (1968).

[318] Johnson v. United States, 333 U.S. 10, 13 (1948).

[319] Schneckloth v. Bustamonte, 412 U.S. 218, 231–33 (1973). See also Ohio v. Robinette, 519 U.S. 33 (1996) (officer need not always inform a detained motorist that he is free to go before consent to search auto may be deemed voluntary); United States v. Drayton, 536 U.S. 194, 207 (2002) (totality of circumstances indicated that bus passenger consented to search even though officer did not explicitly state that passenger was free to refuse permission).

[320] Amos v. United States, 255 U.S. 313 (1921); Johnson v. United States, 333 U.S. 10 (1948); Bumper v. North Carolina, 391 U.S. 543 (1968).

[321] On Lee v. United States, 343 U.S. 747 (1952); Lopez v. United States, 373 U.S. 427 (1963); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); United States v. White, 401 U.S. 745 (1971). *Cf.* Osborn v. United States, 385 U.S. 323 (1966) (prior judicial approval obtained before wired informer sent into defendant's presence). Problems may be encountered by police, however, in special circumstances. *See* Massiah v. United States, 377 U.S. 201 (1964); United States v. Henry, 447 U.S. 264 (1980); United States v. Karo, 468 U.S. 705 (1984) (installation of beeper with consent of informer who sold container with beeper to suspect is permissible with prior judicial approval, but use of beeper to monitor private residence is not).

to certain searches related to that activity and the enforcement of such laws through civil penalties,[322] the implied consent doctrine does not extend so far as to deem individuals to have impliedly consented to a search on "pain of committing a criminal offense." [323]

Additional issues arise in determining the validity of consent to search when consent is given not by the suspect, but by a third party. In the earlier cases, third-party consent was deemed sufficient if that party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." [324] Now, however, actual common authority over the premises is not required; it is sufficient if the searching officer had a reasonable but mistaken belief that the third party had common authority and could consent to the search.[325] If, however, one occupant consents to a search of shared premises, but a physically present co-occupant expressly objects to the search, the search is unreasonable.[326] Common social expectations inform the analysis. A person at the threshold of a residence could not confidently conclude he was welcome to enter over the express objection of a present cotenant. Expectations may change, however, if the objecting co-

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[322] *See, e.g.*, Missouri v. McNeely, 569 U.S. ___, No. 11–1425, slip op. at 18 (2013) (plurality opinion) (discussing implied consent laws that "require motorists, as a condition of operating a motor vehicle, . . . to consent to [blood alcohol concentration] testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense" or risk losing their license); South Dakota v. Neville, 459 U.S. 553, 554, 563–64 (1983).

[323] See Birchfield v. North Dakota, 579 U.S. ___, No. 14–1468, slip op. at 36–37 (2016).

[324] United States v. Matlock, 415 U.S. 164, 171 (1974) (valid consent by woman with whom defendant was living and sharing the bedroom searched). *See also* Chapman v. United States, 365 U.S. 610 (1961) (landlord's consent insufficient); Stoner v. California, 376 U.S. 483 (1964) (hotel desk clerk lacked authority to consent to search of guest's room); Frazier v. Culp, 394 U.S. 731 (1969) (joint user of duffel bag had authority to consent to search).

[325] Illinois v. Rodriguez, 497 U.S. 177 (1990). *See also* Florida v. Jimeno, 500 U.S. 248, 251 (1991) (it was "objectively reasonable" for officer to believe that suspect's consent to search his car for narcotics included consent to search containers found within the car).

[326] Georgia v. Randolph, 547 U.S. 103 (2006) (warrantless search of a defendant's residence based on his estranged wife's consent was unreasonable and invalid as applied to a physically present defendant who expressly refused to permit entry). The Court in *Randolph* admitted that it was "drawing a fine line," id. at 121, between situations where the defendant is present and expressly refuses consent, and that of United States v. Matlock, 415 U.S. 164, 171 (1974), and Illinois v. Rodriguez, 497 U.S. 177 (1990), where the defendants were nearby but were not asked for their permission. In a dissenting opinion, Chief Justice Roberts observed that the majority's ruling "provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room." 547 U.S. at 127.

tenant leaves, or is removed from, the premises with no prospect of imminent return.[327]

Border Searches.—"That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."[328] Authorized by the First Congress,[329] the customs search in these circumstances requires no warrant, no probable cause, not even the showing of some degree of suspicion that accompanies even investigatory stops.[330] Moreover, although prolonged detention of travelers beyond the routine customs search and inspection must be justified by the *Terry* standard of reasonable suspicion having a particularized and objective basis, *Terry* protections as to the length and intrusiveness of the search do not apply.[331] Motor vehicles may be searched at the border, even to the extent of removing, disassembling, and reassembling the fuel tank.[332]

Inland stoppings and searches in areas away from the borders are a different matter altogether. Thus, in *Almeida-Sanchez v. United States*,[333] the Court held that a warrantless stop and search of defendant's automobile on a highway some 20 miles from the border

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[327] Fernandez v. California, 571 U.S. ___, No. 12–7822, slip op. (2014) (consent by co-occupant sufficient to overcome objection of a second co-occupant who was arrested and removed from the premises, so long as the arrest and removal were objectively reasonable).

[328] United States v. Ramsey, 431 U.S. 606, 616 (1977) (sustaining search of incoming mail). *See also* Illinois v. Andreas, 463 U.S. 765 (1983) (opening by customs inspector of locked container shipped from abroad).

[329] Act of July 31, 1789, ch. 5, §§ 23, 24, 1 Stat. 43. *See* 19 U.S.C. §§ 507, 1581, 1582.

[330] Carroll v. United States, 267 U.S. 132, 154 (1925); United States v. Thirty-seven Photographs, 402 U.S. 363, 376 (1971); Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973).

[331] United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (approving warrantless detention incommunicado for more than 24 hours of traveler suspected of alimentary canal drug smuggling). The traveler was strip searched, and then given a choice between an abdominal x-ray or monitored bowel movements. Because the suspect chose the latter option, the court disavowed decision as to "what level of suspicion, if any, is required for . . . strip, body cavity, or involuntary x-ray searches." Id. at 541 n.4.

[332] United States v. Flores-Montano, 541 U.S. 149 (2004).

[333] 413 U.S. 266 (1973). Justices White, Blackmun, Rehnquist, and Chief Justice Burger would have found the search reasonable upon the congressional determination that searches by such roving patrols were the only effective means to police border smuggling. Id. at 285. Justice Powell, concurring, argued in favor of a general, administrative warrant authority not tied to particular vehicles, much like the type of warrant suggested for noncriminal administrative inspections of homes and commercial establishments for health and safety purposes, id. at 275, but the Court has not yet had occasion to pass on a specific case. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 547 n.2, 562 n.15 (1976).

by a roving patrol lacking probable cause to believe that the vehicle contained illegal aliens violated the Fourth Amendment. Similarly, the Court invalidated an automobile search at a fixed checkpoint well removed from the border; while agreeing that a fixed checkpoint probably gave motorists less cause for alarm than did roving patrols, the Court nonetheless held that the invasion of privacy entailed in a search was just as intrusive and must be justified by a showing of probable cause or consent.[334] On the other hand, when motorists are briefly stopped, not for purposes of a search but in order that officers may inquire into their residence status, either by asking a few questions or by checking papers, different results are achieved, so long as the stops are not truly random. Roving patrols may stop vehicles for purposes of a brief inquiry, provided officers are "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that an automobile contains illegal aliens; in such a case the interference with Fourth Amendment rights is "modest" and the law enforcement interests served are significant.[335] Fixed checkpoints provide additional safeguards; here officers may halt all vehicles briefly in order to question occupants even in the absence of any reasonable suspicion that the particular vehicle contains illegal aliens.[336]

"Open Fields".—In *Hester v. United States*,[337] the Court held that the Fourth Amendment did not protect "open fields" and that, therefore, police searches in such areas as pastures, wooded areas, open water, and vacant lots need not comply with the requirements of warrants and probable cause. The Court's announcement in *Katz v. United States*[338] that the Amendment protects "people not places" cast some doubt on the vitality of the open fields prin-

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[334] United States v. Ortiz, 422 U.S. 891 (1975).

[335] United States v. Brignoni-Ponce, 422 U.S. 873 (1975). However, stopping of defendant's car solely because the officers observed the Mexican appearance of the occupants was unjustified. Id. at 886. *Contrast* United States v. Cortez, 449 U.S. 411 (1981), and United States v. Arvizu, 534 U.S. 266 (2002), where border agents did have grounds for reasonable suspicion that the vehicle they stopped contained illegal aliens.

[336] United States v. Martinez-Fuerte, 428 U.S. 543 (1976). The Court deemed the intrusion on Fourth Amendment interests to be quite limited, even if officers acted on the basis of the Mexican appearance of the occupants in referring motorists to a secondary inspection area for questioning, whereas the elimination of the practice would deny to the government its only practicable way to apprehend smuggled aliens and to deter the practice. Similarly, outside of the border/aliens context, the Court has upheld use of fixed "sobriety" checkpoints at which all motorists are briefly stopped for preliminary questioning and observation for signs of intoxication. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

[337] 265 U.S. 57 (1924). *See also* Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 86 (1974).

[338] 389 U.S. 347, 353 (1967). *Cf.* Cady v. Dombrowski, 413 U.S. 433, 450 (1973) (citing *Hester* approvingly).

ciple, but all such doubts were cast away in *Oliver v. United States*.[339] Invoking *Hester's* reliance on the literal wording of the Fourth Amendment (open fields are not "effects") and distinguishing *Katz*, the Court ruled that the open fields exception applies to fields that are fenced and posted. "[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[340] Nor may an individual demand privacy for activities conducted within outbuildings and visible by trespassers peering into the buildings from just outside.[341] Even within the curtilage and notwithstanding that the owner has gone to the extreme of erecting a 10-foot high fence in order to screen the area from ground-level view, there is no reasonable expectation of privacy from naked-eye inspection from fixed-wing aircraft flying in navigable airspace.[342] Similarly, naked-eye inspection from helicopters flying even lower contravenes no reasonable expectation of privacy.[343] And aerial photography of commercial facilities secured from ground-level public view is permissible, the Court finding such spaces more analogous to open fields than to the curtilage of a dwelling.[344]

"Plain View".—Somewhat similar in rationale is the rule that objects falling in the "plain view" of an officer who has a right to be in the position to have that view are subject to seizure without a warrant[345] or that, if the officer needs a warrant or probable cause to search and seize, his lawful observation will provide grounds there-

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[339] 466 U.S. 170 (1984) (approving warrantless intrusion past no trespassing signs and around locked gate, to view field not visible from outside property).

[340] 466 U.S. at 178. *See also* California v. Greenwood, 486 U.S. 35 (1988) (approving warrantless search of garbage left curbside "readily accessible to animals, children, scavengers, snoops, and other members of the public").

[341] United States v. Dunn, 480 U.S. 294 (1987) (space immediately outside a barn, accessible only after crossing a series of "ranch-style" fences and situated one-half mile from the public road, constitutes unprotected "open field").

[342] California v. Ciraolo, 476 U.S. 207 (1986). Activities within the curtilage are nonetheless still entitled to some Fourth Amendment protection. The Court has described four considerations for determining whether an area falls within the curtilage: proximity to the home, whether the area is included within an enclosure also surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to shield the area from view of passersby. United States v. Dunn, 480 U.S. 294 (1987) (barn 50 yards outside of fence surrounding home, used for processing chemicals, and separated from public access only by a series of livestock fences, by a chained and locked driveway, and by one-half mile's distance, is not within curtilage).

[343] Florida v. Riley, 488 U.S. 445 (1989) (view through partially open roof of greenhouse).

[344] Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (suggesting that aerial photography of the curtilage would be impermissible).

[345] Washington v. Chrisman, 455 U.S. 1 (1982) (officer lawfully in dorm room may seize marijuana seeds and pipe in open view); United States v. Santana, 427 U.S. 38 (1976) ("plain view" justification for officers to enter home to arrest after observing defendant standing in open doorway); Harris v. United States, 390 U.S.

for.[346] The plain view doctrine is limited, however, by the probable cause requirement: officers must have probable cause to believe that items in plain view are contraband before they may search or seize them.[347]

The Court has analogized from the plain view doctrine to hold that, once officers have lawfully observed contraband, "the owner's privacy interest in that item is lost," and officers may reseal a container, trace its path through a controlled delivery, and seize and reopen the container without a warrant.[348]

Public Schools.—In *New Jersey v. T.L.O.*,[349] the Court set forth the principles governing searches by public school authorities. The Fourth Amendment applies to searches conducted by public school officials because "school officials act as representatives of the State, not merely as surrogates for the parents."[350] However, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[351] Neither the warrant requirement nor the probable cause standard is appropriate, the Court ruled. Instead, a simple reasonableness standard governs all searches of students' persons and effects by school authorities.[352] A search must be reasonable at its inception, *i.e.*, there must

234 (1968) (officer who opened door of impounded automobile and saw evidence in plain view properly seized it); Ker v. California, 374 U.S. 23 (1963) (officers entered premises without warrant to make arrest because of exigent circumstances seized evidence in plain sight). *Cf.* Coolidge v. New Hampshire, 403 U.S. 443, 464–73 (1971), and id. at 510 (Justice White dissenting). Maryland v. Buie, 494 U.S. 325 (1990) (items seized in plain view during protective sweep of home incident to arrest); Texas v. Brown, 460 U.S. 730 (1983) (contraband on car seat in plain view of officer who had stopped car and asked for driver's license); New York v. Class, 475 U.S. 106 (1986) (evidence seen while looking for vehicle identification number). There is no requirement that the discovery of evidence in plain view must be "inadvertent." *See* Horton v. California, 496 U.S. 128 (1990) (in spite of Amendment's particularity requirement, officers with warrant to search for *proceeds* of robbery may seize *weapons* of robbery in plain view).

[346] Steele v. United States, 267 U.S. 498 (1925) (officers observed contraband in view through open doorway; had probable cause to procure warrant). *Cf.* Taylor v. United States, 286 U.S. 1 (1932) (officers observed contraband in plain view in garage, warrantless entry to seize was unconstitutional).

[347] Arizona v. Hicks, 480 U.S. 321 (1987) (police lawfully in apartment to investigate shooting lacked probable cause to inspect expensive stereo equipment to record serial numbers).

[348] Illinois v. Andreas, 463 U.S. 765, 771 (1983) (locker customs agents had opened, and which was subsequently traced). *Accord*, United States v. Jacobsen, 466 U.S. 109 (1984) (inspection of package opened by private freight carrier who notified drug agents).

[349] 469 U.S. 325 (1985).

[350] 469 U.S. at 336.

[351] 469 U.S. at 340.

[352] This single rule, the Court explained, will permit school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice Stevens, the Court was "unwill-

be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." [353] School searches must also be reasonably related in scope to the circumstances justifying the interference, and "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." [354] In applying these rules, the Court upheld as reasonable the search of a student's purse to determine whether the student, accused of violating a school rule by smoking in the lavatory, possessed cigarettes. The search for cigarettes uncovered evidence of drug activity held admissible in a prosecution under the juvenile laws.

In *Safford Unified School District #1 v. Redding*,[355] a student found in possession of prescription ibuprofen pills at school stated that the pills had come from another student, 13-year-old Savana Redding. The Court found that the first student's statement was sufficiently plausible to warrant suspicion that Savana was involved in pill distribution, and that this suspicion was enough to justify a search of Savana's backpack and outer clothing.[356] School officials, however, had also "directed Savana to remove her clothes down to her underwear, and then 'pull out' her bra and the elastic band on her underpants" [357]—an action that the Court thought could fairly be labeled a strip search. Taking into account that "adolescent vulnerability intensifies the patent intrusiveness of the exposure" and that, according to a study, a strip search can "result in serious emotional damage," the Court found that the search violated the Fourth Amendment.[358] "Because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear," the Court wrote, "the content of the suspicion failed to match the degree of intrusion." [359] But, even though the Court found that the search had violated the Fourth Amendment, it found that the school officials who conducted the search were protected from

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ing to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." Id. at n.9.

[353] 469 U.S. at 342. The Court has further elaborated that this "reasonable suspicion" standard is met if there is a "moderate chance" of finding evidence of wrongdoing. Safford Unified School District #1 v. Redding, 557 U.S. ___, No. 08–479, slip op. at 5 (2009).

[354] 469 U.S. at 342.

[355] 557 U.S. ___, No. 08–479 (2009).

[356] 557 U.S. ___, No. 08–479, slip op. at 7.

[357] 557 U.S. ___, No. 08–479, slip op. at 8.

[358] 557 U.S. ___, No. 08–479, slip op. at 8.

[359] 557 U.S. ___, No. 08–479, slip op. at 1, 9. Justice Thomas dissented from the finding of a Fourth Amendment violation.

liability through qualified immunity, because the law prior to *Redding* was not clearly established.[360]

Government Workplace.—Similar principles apply to a public employer's work-related search of its employees' offices, desks, or file cabinets, except that in this context the Court distinguished searches conducted for law enforcement purposes. In *O'Connor v. Ortega*,[361] a majority of Justices agreed, albeit on somewhat differing rationales, that neither a warrant nor a probable cause requirement should apply to employer searches "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct."[362] Four Justices would require a case-by-case inquiry into the reasonableness of such searches;[363] one would hold that such searches "do not violate the Fourth Amendment."[364]

In *City of Ontario v. Quon*,[365] the Court bypassed adopting an approach for determining a government employee's reasonable expectation of privacy, an issue unresolved in *O'Connor*. Rather, the *Quon* Court followed the "special needs" holding in *O'Connor* and found that, even assuming a reasonable expectation of privacy, a city's warrantless search of the transcripts of a police officer's on-duty text messages on city equipment was reasonable because it was justified at its inception by noninvestigatory work-related purposes and was not excessively intrusive.[366] A jury had found the purpose of the search to be to determine whether the city's contract with its wireless service provider was adequate, and the Court held that "reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether [the officer's] overages were the result of work-related messaging or personal use."[367]

Prisons and Regulation of Probation and Parole.—The "undoubted security imperatives involved in jail supervision" require "defer[ence] to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to the problems of jail secu-

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[360] *See* "Alternatives to the Exclusionary Rule," *infra*. Justices Stevens and Ginsburg dissented from the grant of qualified immunity.

[361] 480 U.S. 709 (1987).

[362] 480 U.S. at 725. Not at issue was whether there must be individualized suspicion for investigations of work-related misconduct.

[363] This position was stated in Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and by Justices White and Powell.

[364] 480 U.S. at 732 (Scalia, J., concurring in judgment).

[365] 560 U.S. ___, No. 08–1332, slip op. (2010).

[366] In *Quon*, a police officer was dismissed after a review of the transcripts of his on-duty text messages revealed that a large majority of his texting was not related to work, and some messages were sexually explicit.

[367] 560 U.S. ___, No. 08–1332, slip op. at 13 (2010).

rity."[368] So saying, the Court, in *Florence v. Board of Chosen Freeholders*, upheld routine strip searches, including close-up visual cavity inspections, as part of processing new arrestees for entry into the general inmate population, without the need for individualized suspicion and without an exception for those arrested for minor offenses.[369] Correctional officials had asserted significant penological interests to justify routine strip searches of new arrivals: detecting and preventing the introduction into the inmate population of infections, infestations, and contraband of all sorts; and identifying gang members. Having cited serious concerns and having applied their professional expertise, the officials had, in the Court's opinion, acted reasonably and not clearly overreacted. But despite taking a deferential approach and recounting the grave dangers correctional officers face, the Florence Court did not hold that individuals being processed for detention have no privacy rights at all. In separate concurrences, moreover, two members of the five-Justice majority held out the prospect of exceptions and refinements in future rulings on blanket strip search policies for new detainees.[370]

The Court in *Maryland v. King* cited a legitimate interest in having safe and accurate booking procedures to identify persons being taken into custody in order to sustain taking DNA samples from those charged with serious crimes.[371] Tapping the "unmatched potential of DNA identification" facilitates knowing with certainty who the arrestee is, the arrestee's criminal history, the danger the arrestee poses to others, the arrestee's flight risk, and other relevant facts.[372] By comparison, the Court characterized an arrestee's expectation of privacy as diminished and the intrusion posed by a cheek swab as minimal.[373]

Searches of prison cells by prison administrators are not limited even by a reasonableness standard, the Court's having held that "the Fourth Amendment proscription against unreasonable searches

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[368] Florence v. Board of Chosen Freeholders, 566 U.S. ___, No. 10–945, slip op. at 2, 9 (2012). *See also, e.g.,* Bell v. Wolfish, 441 U.S. 520 (1979). The Florence Court made clear it was referring to "jails" in "a broad sense to include prisons and other detention facilities." 566 U.S. ___, No. 10–945, slip op. at 1 (2012).

[369] 566 U.S. ___, No. 10–945, slip op. (2012). The Court upheld similarly invasive strip searches of all inmates following contact visits in Bell v. Wolfish. 441 U.S. 520, 558–60 (1979).

[370] 566 U.S. ___, No. 10–945, slip op. (2012) (Roberts, C.J., concurring); 566 U.S. ___, No. 10–945, slip op. (2012) (Alito, J., concurring). In the opinion of the dissenters, a strip search of the kind conducted in Florence is unconstitutional if given to an arriving detainee arrested for a minor offense not involving violence or drugs, absent a reasonable suspicion to believe that the new arrival possesses contraband. 566 U.S. ___, No. 10–945, slip op. (2012) (Breyer, J., dissenting).

[371] 569 U.S. ___, No. 12–207, slip op. (2013).

[372] *Id.* at 10–18, 23.

[373] *Id.* at 23–26.

does not apply within the confines of the prison cell."[374] Thus, prison administrators may conduct random "shakedown" searches of inmates' cells without the need to adopt any established practice or plan, and inmates must look to the Eighth Amendment or to state tort law for redress against harassment, malicious property destruction, and the like.

Neither a warrant nor probable cause is needed for an administrative search of a probationer's home. It is enough, the Court ruled in *Griffin v. Wisconsin*, that such a search was conducted pursuant to a valid regulation that itself satisfies the Fourth Amendment's reasonableness standard (*e.g.*, by requiring "reasonable grounds" for a search).[375] "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements."[376] "Probation, like incarceration, is a form of criminal sanction," the Court noted, and a warrant or probable cause requirement would interfere with the "ongoing [non-adversarial] supervisory relationship" required for proper functioning of the system.[377] A warrant is also not required if the purpose of a search of a probationer is investigate a crime rather than to supervise probation.[378]

"[O]n the 'continuum' of state-imposed punishments . . . , parolees have [even] fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."[379] The Fourth Amendment, therefore, is not violated by a warrantless search of a parolee that is predicated upon a parole condition to which a prisoner agreed to observe during the balance of his sentence.[380]

Drug Testing.—In two 1989 decisions the Court held that no warrant, probable cause, or even individualized suspicion is re-

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[374] Hudson v. Palmer, 468 U.S. 517, 526 (1984). *See also* Bell v. Wolfish, 441 U.S. 520, 555–57 (1979) ("It is difficult to see how the detainee's interest in privacy is infringed by the room-search rule [allowing unannounced searches]. No one can rationally doubt that room searches represent an appropriate security measure . . . .").

[375] 483 U.S. 868 (1987) (search based on information from police detective that there was or might be contraband in probationer's apartment).

[376] 483 U.S. at 873–74.

[377] 483 U.S. at 879.

[378] United States v. Knights, 534 U.S. 112 (2001) (probationary status informs both sides of the reasonableness balance).

[379] Samson v. California, 547 U.S. 843, 850 (2006) (internal quotation marks altered).

[380] 547 U.S. at 852. The parole condition at issue in *Samson* required prisoners to "agree in writing to be subject to a search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." Id. at 846, quoting Cal. Penal Code Ann. § 3067(a).

quired for mandatory drug testing of certain classes of railroad and public employees. In each case, "special needs beyond the normal need for law enforcement" were identified as justifying the drug testing. In *Skinner v. Railway Labor Executives' Ass'n*,[381] the Court upheld regulations requiring railroads to administer blood, urine, and breath tests to employees involved in certain train accidents or violating certain safety rules; in *National Treasury Employees Union v. Von Raab*[382] the Court upheld a Customs Service screening program requiring urine testing of employees seeking transfer or promotion to positions having direct involvement with drug interdiction, or to positions requiring the incumbent to carry firearms.

The Court in *Skinner* found a "compelling" governmental interest in testing the railroad employees without any showing of individualized suspicion, since operation of trains by anyone impaired by drugs "can cause great human loss before any signs of impairment become noticeable."[383] By contrast, the intrusions on privacy were termed "limited." Blood and breath tests were passed off as routine; the urine test, although more intrusive, was deemed permissible because of the "diminished expectation of privacy" in employees having some responsibility for safety in a pervasively regulated industry.[384] The lower court's emphasis on the limited effectiveness of the urine test (it detects past drug use but not necessarily the level of impairment) was misplaced, the Court ruled. It is enough that the test may provide some useful information for an accident investigation; in addition, the test may promote deterrence as well as detection of drug use.[385]

In *Von Raab* the governmental interests underlying the Customs Service's screening program were also termed "compelling": to ensure that persons entrusted with a firearm and the possible use of deadly force not suffer from drug-induced impairment of perception and judgment, and that "front-line [drug] interdiction personnel [be] physically fit, and have unimpeachable integrity and judgment."[386] The possibly "substantial" interference with privacy interests of these Customs employees was justified, the Court concluded, be-

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[381] 489 U.S. 602 (1989).
[382] 489 U.S. 656 (1989).
[383] 489 U.S. at 628.
[384] 489 U.S. at 628.
[385] 489 U.S. at 631–32.
[386] *Von Raab*, 489 U.S. at 670–71. Dissenting Justice Scalia discounted the "feeble justifications" relied upon by the Court, believing instead that the "only plausible explanation" for the drug testing program was the "symbolism" of a government agency setting an example for other employers to follow. 489 U.S. at 686–87.

cause, "[u]nlike most private citizens or government employees generally, they have a diminished expectation of privacy." [387]

Emphasizing the "special needs" of the public school context, reflected in the "custodial and tutelary" power that schools exercise over students, and also noting schoolchildren's diminished expectation of privacy, the Court in *Vernonia School District v. Acton* [388] upheld a school district's policy authorizing random urinalysis drug testing of students who participate in interscholastic athletics. The Court redefined the term "compelling" governmental interest. The phrase does not describe a "fixed, minimum quantum of governmental concern," the Court explained, but rather "describes an interest which appears *important enough* to justify the particular search at hand." [389] Applying this standard, the Court concluded that "deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . or deterring drug use by engineers and trainmen." [390] On the other hand, the interference with privacy interests was not great, the Court decided, since schoolchildren are routinely required to submit to various physical examinations and vaccinations. Moreover, "[l]egitimate privacy expectations are even less [for] student athletes, since they normally suit up, shower, and dress in locker rooms that afford no privacy, and since they voluntarily subject themselves to physical exams and other regulations above and beyond those imposed on non-athletes." [391] The Court "caution[ed] against the assumption that suspicionless drug testing will readily pass muster in other contexts," identifying as "the most significant element" in *Vernonia* the fact that the policy was implemented under the government's responsibilities as guardian and tutor of schoolchildren.[392]

Seven years later, the Court in *Board of Education v. Earls* [393] extended *Vernonia* to uphold a school system's drug testing of all junior high and high school students who participated in extracurricular activities. The lowered expectation of privacy that athletes have "was not essential" to the decision in *Vernonia*, Justice Thomas wrote for a 5–4 Court majority.[394] Rather, that decision "depended primarily upon the school's custodial responsibility and au-

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[387] 489 U.S. at 672.
[388] 515 U.S. 646 (1995).
[389] 515 U.S. at 661.
[390] 515 U.S. at 661.
[391] 515 U.S. at 657.
[392] 515 U.S. at 665.
[393] 536 U.S. 822 (2002).
[394] 536 U.S. at 831.

thority." [395] Another distinction was that, although there was some evidence of drug use among the district's students, there was no evidence of a significant problem, as there had been in *Vernonia*. Rather, the Court referred to "the nationwide epidemic of drug use," and stated that there is no "threshold level" of drug use that need be present.[396] Because the students subjected to testing in *Earls* had the choice of not participating in extra-curricular activities rather than submitting to drug testing, the case stops short of holding that public school authorities may test all junior and senior high school students for drugs. Thus, although the Court's rationale seems broad enough to permit across-the-board testing,[397] Justice Breyer's concurrence, emphasizing among other points that "the testing program avoids subjecting the entire school to testing," [398] raises some doubt on this score. The Court also left another basis for limiting the ruling's sweep by asserting that "regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren." [399]

In two other cases, the Court found that there were no "special needs" justifying random testing. Georgia's requirement that candidates for state office certify that they had passed a drug test, the Court ruled in *Chandler v. Miller* [400] was "symbolic" rather than "special." There was nothing in the record to indicate any actual fear or suspicion of drug use by state officials, the required certification was not well designed to detect illegal drug use, and candidates for state office, unlike the customs officers held subject to drug testing in *Von Raab*, are subject to "relentless" public scrutiny. In the second case, a city-run hospital's program for drug screening of preg-

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[395] 536 U.S. at 831.

[396] 536 U.S. at 836.

[397] Drug testing was said to be a "reasonable" means of protecting the school board's "important interest in preventing and deterring drug use among its students," and the decision in *Vernonia* was said to depend "primarily upon the school's custodial responsibility and authority." 536 U.S. at 838, 831.

[398] Concurring Justice Breyer pointed out that the testing program "preserves an option for a conscientious objector," who can pay a price of nonparticipation that is "serious, but less severe than expulsion." 536 U.S. at 841. Dissenting Justice Ginsburg pointed out that extracurricular activities are "part of the school's educational program" even though they are in a sense "voluntary." "Voluntary participation in athletics has a distinctly different dimension" because it "expose[s] students to physical risks that schools have a duty to mitigate." Id. at 845, 846.

[399] 536 U.S. at 831–32. The best the Court could do to support this statement was to assert that "some of these clubs and activities require occasional off-campus travel and communal undress," to point out that all extracurricular activities "have their own rules and requirements," and to quote from general language in *Vernonia*. Id. Dissenting Justice Ginsburg pointed out that these situations requiring a change of clothes on occasional out-of-town trips are "hardly equivalent to the routine communal undress associated with athletics." Id. at 848.

[400] 520 U.S. 305 (1997).

nant patients suspected of cocaine use was invalidated because its purpose was to collect evidence for law enforcement.[401] In the previous three cases in which random testing had been upheld, the Court pointed out, the "special needs" asserted as justification were "divorced from the general interest in law enforcement."[402] By contrast, the screening program's focus on law enforcement brought it squarely within the Fourth Amendment's restrictions.

Electronic Surveillance and the Fourth Amendment

The Olmstead Case.—With the invention of the microphone, the telephone, and the dictagraph recorder, it became possible to "eavesdrop" with much greater secrecy and expediency. Inevitably, the use of electronic devices in law enforcement was challenged, and in 1928 the Court reviewed convictions obtained on the basis of evidence gained through taps on telephone wires in violation of state law. On a five-to-four vote, the Court held that wiretapping was not within the confines of the Fourth Amendment.[403] Chief Justice Taft, writing the opinion of the Court, relied on two lines of argument for the conclusion. First, because the Amendment was designed to protect one's property interest in his premises, there was no search so long as there was no physical trespass on premises owned or controlled by a defendant. Second, all the evidence obtained had been secured by hearing, and the interception of a conversation could not qualify as a seizure, for the Amendment referred only to the seizure of tangible items. Furthermore, the violation of state law did not render the evidence excludable, since the exclusionary rule operated only on evidence seized in violation of the Constitution.[404]

Federal Communications Act.—Six years after the decision in *Olmstead*, Congress enacted the Federal Communications Act and included in § 605 of the Act a broadly worded proscription on which the Court seized to place some limitation upon governmental wire-

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[401] Ferguson v. City of Charleston, 532 U.S. 67 (2001).

[402] 532 U.S. at 79.

[403] Olmstead v. United States, 277 U.S. 438 (1928).

[404] Among the dissenters were Justice Holmes, who characterized "illegal" wiretapping as "dirty business," 277 U.S. at 470, and Justice Brandeis, who contributed to his opinion the famous peroration about government as "the potent, the omnipresent, teacher" which "breeds contempt for law" among the people by its example. Id. at 485. More relevant here was his lengthy argument rejecting the premises of the majority, an argument which later became the law of the land. (1) "To protect [the right to be left alone], every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." Id. at 478. (2) "There is, in essence, no difference between the sealed letter and the private telephone message. . . . The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject . . . may be overheard." Id. at 475–76.

tapping.[405] Thus, in *Nardone v. United States*,[406] the Court held that wiretapping by federal officers could violate § 605 if the officers both intercepted and divulged the contents of the conversation they overheard, and that testimony in court would constitute a form of prohibited divulgence. Such evidence was therefore excluded, although wiretapping was not illegal under the Court's interpretation if the information was not used outside the governmental agency. Because § 605 applied to intrastate as well as interstate transmissions,[407] there was no question about the applicability of the ban to state police officers, but the Court declined to apply either the statute or the due process clause to require the exclusion of such evidence from state criminal trials.[408] State efforts to legalize wiretapping pursuant to court orders were held by the Court to be precluded by the fact that Congress in § 605 had intended to occupy the field completely to the exclusion of the states.[409]

Nontelephonic Electronic Surveillance.—The trespass rationale of *Olmstead* was used in cases dealing with "bugging" of premises rather than with tapping of telephones. Thus, in *Goldman v. United States*,[410] the Court found no Fourth Amendment violation when a listening device was placed against a party wall so that conversations were overheard on the other side. But when officers drove a "spike mike" into a party wall until it came into contact with a heating duct and thus broadcast defendant's conversations, the Court determined that the trespass brought the case within the Amend-

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[405] Ch. 652, 48 Stat. 1103 (1934), providing, inter alia, that ". . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, purport, effect, or meaning of such intercepted communication to any person." Nothing in the legislative history indicated what Congress had in mind in including this language. The section, which appeared at 47 U.S.C. § 605, was rewritten by Title III of the Omnibus Crime Act of 1968, 82 Stat. 22, § 803, so that the "regulation of the interception of wire or oral communications in the future is to be governed by" the provisions of Title III. S. REP. NO. 1097, 90th Cong., 2d Sess. 107–08 (1968).

[406] 302 U.S. 379 (1937). Derivative evidence, that is, evidence discovered as a result of information obtained through a wiretap, was similarly inadmissible, Nardone v. United States, 308 U.S. 338 (1939), although the testimony of witnesses might be obtained through the exploitation of wiretap information. Goldstein v. United States, 316 U.S. 114 (1942). Eavesdropping on a conversation on an extension telephone with the consent of one of the parties did not violate the statute. Rathbun v. United States, 355 U.S. 107 (1957).

[407] Weiss v. United States, 308 U.S. 321 (1939).

[408] Schwartz v. Texas, 344 U.S. 199 (1952). At this time, evidence obtained in violation of the Fourth Amendment could be admitted in state courts. Wolf v. Colorado, 338 U.S. 25 (1949). Although *Wolf* was overruled by Mapp v. Ohio, 367 U.S. 643 (1961), it was some seven years later and after wiretapping itself had been made subject to the Fourth Amendment that *Schwartz* was overruled in Lee v. Florida, 392 U.S. 378 (1968).

[409] Bananti v. United States, 355 U.S. 96 (1957).

[410] 316 U.S. 129 (1942).

ment.[411] In so holding, the Court, without alluding to the matter, overruled in effect the second rationale of *Olmstead*, the premise that conversations could not be seized.

The Berger and Katz Cases.—In *Berger v. New York*,[412] the Court confirmed the obsolescence of the alternative holding in *Olmstead* that conversations could not be seized in the Fourth Amendment sense.[413] *Berger* held unconstitutional on its face a state eavesdropping statute under which judges were authorized to issue warrants permitting police officers to trespass on private premises to install listening devices. The warrants were to be issued upon a showing of "reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded." For the five-Justice majority, Justice Clark discerned several constitutional defects in the law. "First, . . . eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described."

"The purpose of the probable-cause requirement of the Fourth Amendment to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed is thereby wholly aborted. Likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations. It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded. . . .' But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized. . . . Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. Moreover, the statute permits . . . extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is 'in the

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[411] Silverman v. United States, 365 U.S. 505 (1961). *See also* Clinton v. Virginia, 377 U.S. 158 (1964) (physical trespass found with regard to amplifying device stuck in a partition wall with a thumb tack).

[412] 388 U.S. 41 (1967).

[413] 388 U.S. at 50–53.

public interest.' . . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. . . . Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." [414]

Both Justices Black and White in dissent accused the *Berger* majority of so construing the Fourth Amendment that no wiretapping-eavesdropping statute could pass constitutional scrutiny,[415] and, in *Katz v. United States*,[416] the Court in an opinion by one of the *Berger* dissenters, Justice Stewart, modified some of its language and pointed to Court approval of some types of statutorily-authorized electronic surveillance. Just as *Berger* had confirmed that one rationale of the *Olmstead* decision, the inapplicability of "seizure" to conversations, was no longer valid, *Katz* disposed of the other rationale. In the latter case, officers had affixed a listening device to the outside wall of a telephone booth regularly used by Katz and activated it each time he entered; since there had been no physical trespass into the booth, the lower courts held the Fourth Amendment not relevant. The Court disagreed, saying that "once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." [417] Because the surveillance

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[414] 388 U.S. at 58–60. Justice Stewart concurred because he thought that the affidavits in this case had not been sufficient to show probable cause, but he thought the statute constitutional in compliance with the Fourth Amendment. Id. at 68. Justice Black dissented, arguing that the Fourth Amendment was not applicable to electronic eavesdropping but that in any event the "search" authorized by the statute was reasonable. Id. at 70. Justice Harlan dissented, arguing that the statute with its judicial gloss was in compliance with the Fourth Amendment. Id. at 89. Justice White thought both the statute and its application in this case were constitutional. Id. at 107.

[415] 388 U.S. at 71, 113.

[416] 389 U.S. 347 (1967).

[417] 389 U.S. at 353. "We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine

of Katz's telephone calls had not been authorized by a magistrate, it was invalid; however, the Court thought that "it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the government asserts in fact took place."[418] The notice requirement, which had loomed in *Berger* as an obstacle to successful electronic surveillance, was summarily disposed of.[419] Finally, Justice Stewart observed that it was unlikely that electronic surveillance would ever come under any of the established exceptions so that it could be conducted without prior judicial approval.[420]

Following *Katz*, Congress enacted in 1968 a comprehensive statute authorizing federal officers and permitting state officers pursuant to state legislation complying with the federal law to seek warrants for electronic surveillance to investigate violations of prescribed

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there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."

[418] 389 U.S. at 354. The "narrowly circumscribed" nature of the surveillance was made clear by the Court in the immediately preceding passage. "[The Government agents] did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself." Id. For similar emphasis upon precision and narrow circumscription, *see* Osborn v. United States, 385 U.S. 323, 329–30 (1966).

[419] "A conventional warrant ordinarily serves to notify the suspect of an intended search . . . . In omitting any requirement of advance notice, the federal court . . . simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence." 389 U.S. at 355 n.16.

[420] 389 U.S. at 357–58. Justice Black dissented, feeling that the Fourth Amendment applied only to searches for and seizures of tangible things and not conversations. Id. at 364. Two "beeper" decisions support the general applicability of the warrant requirement if electronic surveillance will impair legitimate privacy interests. *Compare* United States v. Knotts, 460 U.S. 276 (1983) (no Fourth Amendment violation in relying on a beeper, installed without warrant, to aid in monitoring progress of a car on the public roads, since there is no legitimate expectation of privacy in destination of travel on the public roads), *with* United States v. Karo, 468 U.S. 705 (1984) (beeper installed without a warrant may not be used to obtain information as to the continuing presence of an item within a private residence).

classes of criminal legislation.[421] The Court has not yet had occasion to pass on the federal statute and to determine whether its procedures and authorizations comport with the standards sketched in *Osborn*, *Berger*, and *Katz* or whether those standards are somewhat more flexible than they appear to be on the faces of the opinions.[422]

Warrantless "National Security" Electronic Surveillance.—In *Katz v. United States*,[423] Justice White sought to preserve for a future case the possibility that in "national security cases" electronic surveillance upon the authorization of the President or the Attorney General could be permissible without prior judicial approval. The Executive Branch then asserted the power to wiretap and to "bug" in two types of national security situations, against domestic subversion and against foreign intelligence operations, first basing its authority on a theory of "inherent" presidential power and then in the Supreme Court withdrawing to the argument that such surveillance was a "reasonable" search and seizure and therefore valid under the Fourth Amendment. Unanimously, the Court held that at least in cases of domestic subversive investigations, compliance with the warrant provisions of the Fourth Amendment was required.[424] Whether or not a search was reasonable, wrote Justice Powell for the Court, was a question which derived much of its answer from the warrant clause; except in a few narrowly circumscribed classes of situations, only those searches conducted pursu-

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[421] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, 18 U.S.C. §§ 2510–20.

[422] The Court has interpreted the statute several times without reaching the constitutional questions. United States v. Kahn, 415 U.S. 143 (1974); United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974); United States v. Donovan, 429 U.S. 413 (1977); Scott v. United States, 436 U.S. 128 (1978); Dalia v. United States, 441 U.S. 238 (1979); United States v. New York Telephone Co., 434 U.S. 159 (1977); United States v. Caceres, 440 U.S. 741 (1979). *Dalia supra*, did pass on one constitutional issue, whether the Fourth Amendment mandated specific warrant authorization for a surreptitious entry to install an authorized "bug." *See also* Smith v. Maryland, 442 U.S. 735 (1979) (no reasonable expectation of privacy in numbers dialed on one's telephone, so Fourth Amendment does not require a warrant to install "pen register" to record those numbers).

[423] 389 U.S. 347, 363–64 (1967) (concurring opinion). Justices Douglas and Brennan rejected the suggestion. Id. at 359–60 (concurring opinion). When it enacted its 1968 electronic surveillance statute, Congress alluded to the problem in ambiguous fashion, 18 U.S.C. § 2511(3), which the Court subsequently interpreted as having expressed no congressional position at all. United States v. United States District Court, 407 U.S. 297, 302–08 (1972).

[424] United States v. United States District Court, 407 U.S. 297 (1972). Chief Justice Burger concurred in the result and Justice White concurred on the ground that the 1968 law required a warrant in this case, and therefore did not reach the constitutional issue. Id. at 340. Justice Rehnquist did not participate. Justice Powell carefully noted that the case required "no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." Id. at 308.

ant to warrants were reasonable. The Government's duty to preserve the national security did not override the guarantee that before government could invade the privacy of its citizens it must present to a neutral magistrate evidence sufficient to support issuance of a warrant authorizing that invasion of privacy.[425] This protection was even more needed in "national security cases" than in cases of "ordinary" crime, the Justice continued, because the tendency of government so often is to regard opponents of its policies as a threat and hence to tread in areas protected by the First Amendment as well as by the Fourth.[426] Rejected also was the argument that courts could not appreciate the intricacies of investigations in the area of national security or preserve the secrecy which is required.[427]

The question of the scope of the President's constitutional powers, if any, remains judicially unsettled.[428] Congress has acted, however, providing for a special court to hear requests for warrants for electronic surveillance in foreign intelligence situations, and permitting the President to authorize warrantless surveillance to acquire foreign intelligence information provided that the communications to be monitored are exclusively between or among foreign powers

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[425] The case contains a clear suggestion that the Court would approve a congressional provision for a different standard of probable cause in national security cases. "We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime.' The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crimes specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some future crisis or emergency. . . . Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen right deserving protection. . . . It may be that Congress, for example, would judge that the application and affidavit showing probable cause need not follow the exact requirements of § 2518 but should allege other circumstances more appropriate to domestic security cases. . . ." 407 U.S. at 322–23.

[426] 407 U.S. at 313–24.

[427] 407 U.S. at 320.

[428] *See* United States v. Butenko, 494 F.2d 593 (3d Cir.), *cert. denied*, 419 U.S. 881 (1974); Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), *appeal after remand*, 565 F.2d 742 (D.C. Cir. 1977), *on remand*, 444 F. Supp. 1296 (D.D.C. 1978), *aff'd in part, rev'd in part*, 606 F.2d 1172 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981); Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981); United States v. Truong Ding Hung, 629 F.2d 908 (4th Cir. 1980), after remand, 667 F.2d 1105 (4th Cir. 1981); Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982).

and there is no substantial likelihood any "United States person" will be overheard.[429]

Enforcing the Fourth Amendment: The Exclusionary Rule

The Fourth Amendment declares a right to be free from unreasonable searches and seizures, but how this right translates into concrete terms is not specified. Several possible methods of enforcement have been suggested, but only one—the exclusionary rule—has been applied with any frequency by the Supreme Court, and Court in recent years has limited its application.

Alternatives to the Exclusionary Rule.—Theoretically, there are several alternatives to the exclusionary rule. An illegal search and seizure may be criminally actionable and officers undertaking one thus subject to prosecution, but the examples when officers are criminally prosecuted for overzealous law enforcement are extremely rare.[430] A police officer who makes an illegal search and seizure is subject to internal departmental discipline, which may be backed up by the oversight of police review boards in the few jurisdictions that have adopted them, but, again, the examples of disciplinary actions are exceedingly rare.[431]

Civil remedies are also available. Persons who have been illegally arrested or who have had their privacy invaded will usually have a tort action available under state statutory or common law, or against the Federal Government under the Federal Tort Claims Act.[432] Moreover, police officers acting under color of state law who violate a person's Fourth Amendment rights are subject to a suit in federal court for damages and other remedies [433] under a civil rights statute.[434] Although federal officers and others acting under color

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[429] Foreign Intelligence Surveillance Act of 1978, Pub. L. 95–511, 92 Stat. 1797, 50 U.S.C. §§ 1801–1811. *See* United States v. Belfield, 692 F.2d 141 (D.C. Cir. 1982) (upholding constitutionality of disclosure restrictions in Act).

[430] Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955).

[431] Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123 (1967).

[432] 28 U.S.C. §§ 1346(b), 2671–2680. Section 2680(h) prohibits suits against the Federal Government for false arrest and specified other intentional torts, but contains an exception "with regard to acts or omissions of investigative or law enforcement officials of the United States Government."

[433] If there are continuing and recurrent violations, federal injunctive relief would be available. *Cf.* Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966); Wheeler v. Goodman, 298 F. Supp. 935 (preliminary injunction), 306 F. Supp. 58 (permanent injunction) (W.D.N.C. 1969), *vacated on jurisdictional grounds*, 401 U.S. 987 (1971).

[434] 42 U.S.C. § 1983 (1964). *See* Monroe v. Pape, 365 U.S. 167 (1961). In some circumstances, the officer's liability may be attributed to the municipality. Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978). These claims that officers have used excessive force in the course of an arrest or investigatory stop are to be analyzed under the Fourth Amendment, not under substantive due process. The

of federal law are not subject to this statute, the Supreme Court has held that a right to damages for a violation of Fourth Amendment rights arises by implication and that this right is enforceable in federal courts.[435]

Although a damages remedy might be made more effectual,[436] legal and practical problems stand in the way.[437] Law enforcement officers have available to them the usual common-law defenses, the most important of which is the claim of good faith.[438] Such "good faith" claims, however, are not based on the subjective intent of the officer. Instead, officers are entitled to qualified immunity "where clearly established law does not show that the search violated the Fourth Amendment," [439] or where they had an objectively reasonable belief that a warrantless search later determined to violate the Fourth Amendment was supported by probable cause or exigent circumstances.[440] On the practical side, persons subjected to illegal ar-

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test is "whether the officers' actions are 'objectively reasonable' under the facts and circumstances confronting them." Graham v. Connor, 490 U.S. 386, 397 (1989) (cited with approval in Scott v. Harris, 550 U.S. 372, 381 (2007), in which a police officer's ramming a fleeing motorist's car from behind in an attempt to stop him was found reasonable).

[435] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The possibility had been hinted at in Bell v. Hood, 327 U.S. 678 (1946).

[436] *See*, *e.g.*, Chief Justice Burger's dissent in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411, 422–24 (1971), which suggests a statute allowing suit against the government in a special tribunal and a statutory remedy in lieu of the exclusionary rule.

[437] Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).

[438] This is the rule in actions under 42 U.S.C. § 1983, Pierson v. Ray, 386 U.S. 547 (1967), and on remand in *Bivens* the court of appeals promulgated the same rule to govern trial of the action. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972).

[439] Pearson v. Callahan, 555 U.S. ___, No. 07–751, slip op. (2009), quoted in Safford Unified School District #1 v. Redding, 557 U.S. ___, No. 08–479, slip op. at 11 (2009). In Saucier v. Katz, 533 U.S. 194 (2001), the Court had mandated a two-step procedure to determine whether an officer has qualified immunity: first, a determination whether the officer's conduct violated a constitutional right, and then a determination whether the right had been clearly established. In *Pearson*, the Court held "that, while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 555 U.S. ___, No. 07–751, slip op. at 10. *See also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[440] Anderson v. Creighton, 483 U.S. 635 (1987). The qualified immunity inquiry "has a further dimension" beyond what is required in determining whether a police officer used excessive force in arresting a suspect: the officer may make "a reasonable mistake" in his assessment of what the law requires. Saucier v. Katz, 533 U.S. 194, 205–06 (2001). *See also* Brosseau v. Haugen, 543 U.S. 194, 201 (2004) (because cases create a "hazy border between excessive and acceptable force," an officer's misunderstanding as to her authority to shoot a suspect attempting to flee in a vehicle was not unreasonable); Malley v. Briggs, 475 U.S. 335, 345 (1986) (qualified immu-

rests and searches and seizures are often disreputable persons toward whom juries are unsympathetic, or they are indigent and unable to sue. The result, therefore, is that the Court has emphasized exclusion of unconstitutionally seized evidence in subsequent criminal trials as the only effective enforcement method.

Development of the Exclusionary Rule.—Exclusion of evidence as a remedy for Fourth Amendment violations found its beginning in *Boyd v. United States*,[441] which, as noted above, involved not a search and seizure but a compulsory production of business papers, which the Court likened to a search and seizure. Further, the Court analogized the Fifth Amendment's self-incrimination provision to the Fourth Amendment's protections to derive a rule that required exclusion of the compelled evidence because the defendant had been compelled to incriminate himself by producing it.[442] *Boyd* was closely limited to its facts and an exclusionary rule based on Fourth Amendment violations was rejected by the Court a few years later, with the Justices adhering to the common-law rule that evidence was admissible however acquired.[443]

Nevertheless, ten years later the common-law view was itself rejected and an exclusionary rule propounded in *Weeks v. United*

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nity protects police officers who applied for a warrant unless "a reasonably well-trained officer in [the same] position would have known that his affidavit failed to establish probable cause and that he should not have applied for a warrant"). *But see* Mullenix v. Luna, 577 U.S. ___, No. 14–1143, slip op. at 8 (2015) (per curiam) ("The Court has . . . never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone be the basis for denying qualified immunity.").

[441] 116 U.S. 616 (1886).

[442] "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man in a criminal case to be a witness against himself, which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." 116 U.S. at 633. It was this use of the Fifth Amendment's clearly required exclusionary rule, rather than one implied from the Fourth, on which Justice Black relied, and, absent a Fifth Amendment self-incrimination violation, he did not apply such a rule. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring opinion); Coolidge v. New Hampshire, 403 U.S. 443, 493, 496–500 (1971) (dissenting opinion). The theory of a "convergence" of the two Amendments has now been disavowed by the Court. *See* discussion, *supra*, under "Property Subject to Seizure."

[443] Adams v. New York, 192 U.S. 585 (1904). Since the case arose from a state court and concerned a search by state officers, it could have been decided simply by holding that the Fourth Amendment was inapplicable. *See* National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914).

States.[444] Weeks had been convicted on the basis of evidence seized from his home in the course of two warrantless searches; some of the evidence consisted of private papers such as those sought to be compelled in *Boyd*. Unanimously, the Court held that the evidence should have been excluded by the trial court. The Fourth Amendment, Justice Day said, placed on the courts as well as on law enforcement officers restraints on the exercise of power compatible with its guarantees. "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[445] The basis of the ruling is ambiguous, but seems to have been an assumption that admission of illegally seized evidence would itself violate the Fourth Amendment. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secured against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[446]

Because the Fourth Amendment does not restrict the actions of state officers,[447] there was originally no question about the application of an exclusionary rule in state courts[448] as a mandate of federal constitutional policy.[449] But, in *Wolf v. Colorado*,[450] a unanimous Court held that freedom from unreasonable searches and seizures

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[444] 232 U.S. 383 (1914).

[445] 232 U.S. at 392.

[446] 232 U.S. at 393.

[447] Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855); National Safe Deposit Co. v. Stead, 232 U.S. 58, 71 (1914).

[448] The history of the exclusionary rule in the state courts was surveyed by Justice Frankfurter in Wolf v. Colorado, 338 U.S. 25, 29, 33–38 (1949). The matter was canvassed again in Elkins v. United States, 364 U.S. 206, 224–32 (1960).

[449] During the period in which the Constitution did not impose any restrictions on state searches and seizures, the Court permitted the introduction in evidence in federal courts of items seized by state officers which had they been seized by federal officers would have been inadmissible, Weeks v. United States, 232 U.S. 383, 398 (1914), so long as no federal officer participated in the search, Byars v. United States, 273 U.S. 28 (1927), or the search was not made on behalf of federal law enforcement purposes. Gambino v. United States, 275 U.S. 310 (1927). This rule became known as the "silver platter doctrine" after the phrase coined by Justice Frankfurter in Lustig v. United States, 338 U.S. 74, 78–79 (1949): "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not

was such a fundamental right as to be protected against state violations by the Due Process Clause of the Fourteenth Amendment.[451] However, the Court held that the right thus guaranteed did not require that the exclusionary rule be applied in the state courts, because there were other means to observe and enforce the right. "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective."[452]

It developed, however, that the Court had not vested in the states total discretion with regard to the admissibility of evidence, as the Court proceeded to evaluate under the due process clause the methods by which the evidence had been obtained. Thus, in *Rochin v. California*,[453] evidence of narcotics possession had been obtained by forcible administration of an emetic to defendant at a hospital after officers had been unsuccessful in preventing him from swallowing certain capsules. The evidence, said Justice Frankfurter for the Court, should have been excluded because the police methods were too objectionable. "This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is bound to offend even hardened sensibilities. They are methods too close to the rack and screw."[454] The *Rochin* standard was limited in *Irvine v. California*,[455] in which defendant was convicted of bookmaking activities on the basis of evidence secured by police who repeatedly broke into his house and

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a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter." In Elkins v. United States, 364 U.S. 206 (1960), the doctrine was discarded by a five-to-four majority, which held that, because Wolf v. Colorado, 338 U.S. 25 (1949), had made state searches and seizures subject to federal constitutional restrictions through the Fourteenth Amendment's due process clause, the "silver platter doctrine" was no longer constitutionally viable. During this same period, since state courts were free to admit any evidence no matter how obtained, evidence illegally seized by federal officers could be used in state courts, Wilson v. Schnettler, 365 U.S. 381 (1961), although the Supreme Court ruled out such a course if the evidence had first been offered in a federal trial and had been suppressed. Rea v. United States, 350 U.S. 214 (1956).

[450] 338 U.S. 25 (1949).

[451] "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U.S. at 27–28.

[452] 338 U.S. at 31.

[453] 342 U.S. 165 (1952). The police had initially entered defendant's house without a warrant. Justices Black and Douglas concurred in the result on self-incrimination grounds.

[454] 342 U.S. at 172.

[455] 347 U.S. 128 (1954).

concealed electronic gear to broadcast every conversation in the house. Justice Jackson's plurality opinion asserted that *Rochin* had been occasioned by the element of brutality, and that while the police conduct in *Irvine* was blatantly illegal the admissibility of the evidence was governed by *Wolf*, which should be consistently applied for purposes of guidance to state courts. The Justice also entertained considerable doubts about the efficacy of the exclusionary rule.[456] *Rochin* emerged as the standard, however, in a later case in which the Court sustained the admissibility of the results of a blood test administered while defendant was unconscious in a hospital following a traffic accident, the Court observing the routine nature of the test and the minimal intrusion into bodily privacy.[457]

Then, in *Mapp v. Ohio*,[458] the Court held that the exclusionary rule applied to the states. It was "logically and constitutionally necessary," wrote Justice Clark for the majority, "that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right" to be secure from unreasonable searches and seizures. "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."[459] The Court further held that, because illegally seized evidence was to be excluded from both federal and state courts, the standards by which the question of legality was to be determined should be the same, regardless of whether the court in which the evidence was offered was state or federal.[460]

The Foundations of the Exclusionary Rule.—Important to determination of such questions as the application of the exclusionary rule to the states and the ability of Congress to abolish or to limit it is the fixing of the constitutional source and the basis of

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[456] 347 U.S. at 134–38. Justice Clark, concurring, announced his intention to vote to apply the exclusionary rule to the states when the votes were available. Id. at 138. Justices Black and Douglas dissented on self-incrimination grounds, id. at 139, and Justice Douglas continued to urge the application of the exclusionary rule to the states. Id. at 149. Justices Frankfurter and Burton dissented on due process grounds, arguing the relevance of *Rochin*. Id. at 142.

[457] Breithaupt v. Abram, 352 U.S. 432 (1957). Chief Justice Warren and Justices Black and Douglas dissented. Though a due process case, the results of the case have been reaffirmed directly in a Fourth Amendment case. Schmerber v. California, 384 U.S. 757 (1966).

[458] 367 U.S. 643 (1961).

[459] 367 U.S. at 655–56. Justice Black concurred, doubting that the Fourth Amendment itself compelled adoption of an exclusionary rule but relying on the Fifth Amendment for authority. Id. at 661. Justice Stewart would not have reached the issue but would have reversed on other grounds, id. at 672, while Justices Harlan, Frankfurter, and Whittaker dissented, preferring to adhere to *Wolf*. Id. at 672. Justice Harlan advocated the overruling of *Mapp* down to the conclusion of his service on the Court. *See* Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (concurring opinion).

[460] Ker v. California, 374 U.S. 23 (1963).

the rule. For some time, it was not clear whether the exclusionary rule was derived from the Fourth Amendment, from some union of the Fourth and Fifth Amendments, or from the Court's supervisory power over the lower federal courts. It will be recalled that in *Boyd* [461] the Court fused the search and seizure clause with the provision of the Fifth Amendment protecting against compelled self-incrimination. In *Weeks v. United States*,[462] though the Fifth Amendment was mentioned, the holding seemed clearly to be based on the Fourth Amendment. Nevertheless, in opinions following *Weeks* the Court clearly identified the basis for the exclusionary rule as the Self-Incrimination Clause of the Fifth Amendment.[463] Then, in *Mapp v. Ohio*,[464] the Court tied the rule strictly to the Fourth Amendment, finding exclusion of evidence seized in violation of the Amendment to be the "most important constitutional privilege" of the right to be free from unreasonable searches and seizures, finding that the rule was "an essential part of the right of privacy" protected by the Amendment.

"This Court has ever since [Weeks was decided in 1914] required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and *constitutionally required*—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.'" [465] It was a necessary step in the application of the rule to the states to find that the rule was of constitutional origin rather than a result of an exercise of the Court's supervisory power over the lower federal courts, because the latter

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[461] Boyd v. United States, 116 U.S. 616 (1886).

[462] 232 U.S. 383 (1914). Defendant's room had been searched and papers seized by officers acting without a warrant. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." Id. at 393.

[463] *E.g.*, Gouled v. United States, 255 U.S. 298, 306, 307 (1921); Amos v. United States, 255 U.S. 313, 316 (1921); Agnello v. United States, 269 U.S. 20, 33–34 (1925); McGuire v. United States, 273 U.S. 95, 99 (1927). In Olmstead v. United States, 277 U.S. 438, 462 (1928), Chief Justice Taft ascribed the rule both to the Fourth and the Fifth Amendments, while in dissent Justices Holmes and Brandeis took the view that the Fifth Amendment was violated by the admission of evidence seized in violation of the Fourth. Id. at 469, 478–79. Justice Black was the only modern proponent of this view. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring opinion); Coolidge v. New Hampshire, 403 U.S. 443, 493, 496–500 (1971) (dissenting opinion). *See*, however, Justice Clark's plurality opinion in Ker v. California, 374 U.S. 23, 30 (1963), in which he brought up the self-incrimination clause as a supplementary source of the rule, a position which he had discarded in *Mapp*.

[464] 367 U.S. 643, 656 (1961). Wolf v. Colorado, 338 U.S. 25, 28 (1949), also ascribed the rule to the Fourth Amendment exclusively.

[465] Mapp v. Ohio, 367 U.S. 643, 648 (1961) (emphasis added).

could not constitutionally be extended to the state courts.[466] In fact, in *Wolf v. Colorado*,[467] in declining to extend the exclusionary rule to the states, Justice Frankfurter seemed to find the rule to be based on the Court's supervisory powers. *Mapp* establishes that the rule is of constitutional origin, but this does not necessarily establish that it is immune to statutory revision.

Suggestions appear in a number of cases, including *Weeks*, to the effect that admission of illegally seized evidence is itself unconstitutional.[468] These suggestions were often combined with a rationale emphasizing "judicial integrity" as a reason to reject the proffer of such evidence.[469] Yet the Court permitted such evidence to be introduced into trial courts when the defendant lacked "standing" to object to the search and seizure that produced the evidence[470] or when the search took place before the announcement of the deci-

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[466] An example of an exclusionary rule not based on constitutional grounds may be found in McNabb v. United States, 318 U.S. 332 (1943), and Mallory v. United States, 354 U.S. 449 (1957), in which the Court enforced a requirement that arrestees be promptly presented to a magistrate by holding that incriminating admissions obtained during the period beyond a reasonable time for presentation would be inadmissible. The rule was not extended to the States, *cf.* Culombe v. Connecticut, 367 U.S. 568, 598–602 (1961), but the Court's resort to the self-incrimination clause in reviewing confessions made such application irrelevant in most cases in any event. For an example of a transmutation of a supervisory rule into a constitutional rule, *see* McCarthy v. United States, 394 U.S. 459 (1969), and Boykin v. Alabama, 395 U.S. 238 (1969).

[467] *Weeks* "was not derived from the explicit requirements of the Fourth Amendment . . . . The decision was a matter of judicial implication." 338 U.S. 25, 28 (1949). Justice Black was more explicit. "I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." Id. at 39–40. He continued to adhere to the supervisory power basis in strictly search-and-seizure cases, Berger v. New York, 388 U.S. 41, 76 (1967) (dissenting), except where self-incrimination values were present. Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring). *See also* id. at 678 (Justice Harlan dissenting); Elkins v. United States, 364 U.S. 206, 216 (1960) (Justice Stewart for the Court).

[468] "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution . . . ." Weeks v. United States, 232 U.S. 383, 392 (1914). In Mapp v. Ohio, 367 U.S. 643, 655, 657 (1961), Justice Clark maintained that "the Fourth Amendment include[s] the exclusion of the evidence seized in violation of its provisions" and that it, and the Fifth Amendment with regard to confessions "assures . . . that no man is to be convicted on unconstitutional evidence." In Terry v. Ohio, 392 U.S. 1, 12, 13 (1968), Chief Justice Warren wrote: "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. . . . A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence."

[469] Elkins v. United States, 364 U.S. 206, 222–23 (1960); Mapp v. Ohio, 367 U.S. 643, 660 (1961). *See* McNabb v. United States, 318 U.S. 332, 339–40 (1943).

[470] *See* "Operation of the Rule: Standing," *infra*.

sion extending the exclusionary rule to the states.[471] At these times, the Court turned to the "basic postulate of the exclusionary rule itself. The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[472] "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."[473]

Narrowing Application of the Exclusionary Rule.—For as long as we have had the exclusionary rule, critics have attacked it, challenged its premises, disputed its morality.[474] By the early 1980s, a majority of Justices had stated a desire either to abolish the rule or to sharply curtail its operation,[475] and numerous opinions had rejected all doctrinal bases other than deterrence.[476] At the same

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[471] Linkletter v. Walker, 381 U.S. 618 (1965).

[472] Elkins v. United States, 364 U.S. 206, 217 (1960).

[473] Linkletter v. Walker, 381 U.S. 618, 636–37 (1965). The Court advanced other reasons for its decision as well. Id. at 636–40.

[474] Among the early critics were Judge Cardozo, People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (the criminal will go free "because the constable has blundered"), and Dean Wigmore. 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE 2183–84 (3d ed. 1940). For extensive discussion of criticism and support, with citation to the literature, *see* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2 (4th ed. 2004).

[475] *E.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Chief Justice Burger: rule ought to be discarded now, rather than wait for a replacement as he argued earlier); id. at 536 (Justice White: modify rule to admit evidence seized illegally but in good faith); Schneckloth v. Bustamonte, 412 U.S. 218, 261 (1973) (Justice Powell); Brown v. Illinois, 422 U.S. 590, 609 (1975) (Justice Powell); Robbins v. California, 453 U.S. 420, 437 (1981) (Justice Rehnquist); California v. Minjares, 443 U.S. 916 (1979) (Justice Rehnquist, joined by Chief Justice Burger); Coolidge v. New Hampshire, 403 U.S. 443, 510 (1971) (Justice Blackmun joining Justice Black's dissent that "the Fourth Amendment supports no exclusionary rule").

[476] *E.g.*, United States v. Janis, 428 U.S. 433, 446 (1976) (deterrence is the "prime purpose" of the rule, "if not the sole one."); United States v. Calandra, 414 U.S. 338, 347–48 (1974); United States v. Peltier, 422 U.S. 531, 536–39 (1975); Stone v. Powell, 428 U.S. 465, 486 (1976); Rakas v. Illinois, 439 U.S. 128, 134 n.3, 137–38 (1978); Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979). Thus, admission of the fruits of an unlawful search or seizure "work[s] no new Fourth Amendment wrong," the wrong being "fully accomplished by the unlawful search or seizure itself," United States v. Calandra, 414 U.S. at 354, and the exclusionary rule does not "cure the invasion of the defendant's rights which he has already suffered." Stone v. Powell, 428 U.S. at 540 (Justice White dissenting). "Judicial integrity" is not infringed by the mere admission of evidence seized wrongfully. "[T]he courts must not commit or encourage violations of the Constitution," and the integrity issue is answered by whether exclusion would deter violations by others. United States v. Janis, 428 U.S. at 458 n.35; United States v. Calandra, 414 U.S. at 347, 354; United States v. Peltier, 422 U.S. at 538; Michigan v. Tucker, 417 U.S. 433, 450 n.25 (1974).

time, these opinions voiced strong doubts about the efficacy of the rule as a deterrent, and advanced public interest values in effective law enforcement and public safety as reasons to discard the rule altogether or curtail its application.[477] Thus, the Court emphasized the high costs of enforcing the rule to exclude reliable and trustworthy evidence, even when violations have been technical or in good faith, and suggested that such use of the rule may well "generat[e] disrespect for the law and administration of justice,"[478] as well as free guilty defendants.[479] No longer does the Court declare that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[480]

Although the exclusionary rule has not been completely repudiated, its use has been substantially curbed. For instance, defendants who themselves were not subjected to illegal searches and seizures may not object to the introduction of evidence illegally obtained from co-conspirators or codefendants,[481] and even a defendant whose rights have been infringed may find the evidence admitted, not as proof of guilt, but to impeach his testimony.[482] Further, evidence obtained through a wrongful search and seizure may sometimes be used directly in the criminal trial, if the prosecution can show a sufficient attenuation of the link between police misconduct and obtaining the evidence.[483] Defendants who have been convicted after trials in which they were given a full and fair opportu-

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[477] United States v. Janis, 428 U.S. 433, 448–54 (1976), contains a lengthy review of the literature on the deterrent effect of the rule and doubts about that effect. *See also* Stone v. Powell, 428 U.S. 465, 492 n.32 (1976).

[478] Stone v. Powell, 428 U.S. at 490, 491.

[479] Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 416 (1971) (Chief Justice Burger dissenting).

[480] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

[481] *E.g.*, Rakas v. Illinois, 439 U.S. 128 (1978); United States v. Padilla, 508 U.S. 77 (1993) (only persons whose privacy or property interests are violated may object to a search on Fourth Amendment grounds; exerting control and oversight over property by virtue of participation in a criminal conspiracy does not alone establish such interests); United States v. Salvucci, 448 U.S. 83 (1980); Rawlings v. Kentucky, 448 U.S. 98 (1980). In United States v. Payner, 447 U.S. 727 (1980), the Court held it impermissible for a federal court to exercise its supervisory power to police the administration of justice in the federal system to suppress otherwise admissible evidence on the ground that federal agents had flagrantly violated the Fourth Amendment rights of third parties in order to obtain evidence to use against others when the agents knew that the defendant would be unable to challenge their conduct under the Fourth Amendment.

[482] United States v. Havens, 446 U.S. 620 (1980); Walder v. United States, 347 U.S. 62 (1954). *Cf.* Agnello v. United States, 269 U.S. 20 (1925) (now vitiated by *Havens*). The impeachment exception applies only to the defendant's own testimony, and may not be extended to use illegally obtained evidence to impeach the testimony of other defense witnesses. James v. Illinois, 493 U.S. 307 (1990).

[483] Wong Sun v. United States, 371 U.S. 471, 487–88 (1963); Alderman v. United States, 394 U.S. 165, 180–85 (1969); Brown v. Illinois, 422 U.S. 590 (1975); Taylor v.

nity to raise claims of Fourth Amendment violations may not subsequently raise those claims on federal habeas corpus because, the Court found, the costs outweigh the minimal deterrent effect.[484]

The exclusionary rule is inapplicable in parole revocation hearings,[485] and a violation of the "knock-and-announce" rule (the procedure that police officers must follow to announce their presence before entering a residence with a lawful warrant)[486] does not require suppression of the evidence gathered pursuant to a search.[487] If an arrest or a search that was valid at the time it took place becomes bad through the subsequent invalidation of the statute under which the arrest or search was made, the Court has held that evidence obtained thereby is nonetheless admissible.[488] In other cases,

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Alabama, 457 U.S. 687 (1982); Utah v. Strieff, 579 U.S. ___, No. 14–1373, slip op. (2016). United States v. Ceccolini, 435 U.S. 268 (1978), refused to exclude the testimony of a witness discovered through an illegal search. Because a witness was freely willing to testify and therefore more likely to come forward, the application of the exclusionary rule was not to be tested by the standard applied to exclusion of inanimate objects. Deterrence would be little served and relevant and material evidence would be lost to the prosecution. In New York v. Harris, 495 U.S. 14 (1990), the Court refused to exclude a station-house confession made by a suspect whose arrest at his home had violated the Fourth Amendment because, even though probable cause had existed, no warrant had been obtained. And, in Segura v. United States, 468 U.S. 796 (1984), evidence seized pursuant to a warrant obtained after an illegal entry was admitted because there had been an independent basis for issuance of the warrant. This rule also applies to evidence observed in plain view during the initial illegal search. Murray v. United States, 487 U.S. 533 (1988). *See also* United States v. Karo, 468 U.S. 705 (1984) (excluding consideration of tainted evidence, there was sufficient untainted evidence in affidavit to justify finding of probable cause and issuance of search warrant).

[484] Stone v. Powell, 428 U.S. 465, 494 (1976).

[485] Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357 (1998).

[486] The "knock and announce" requirement is codified at 18 U.S.C. § 3109, and the Court has held that the rule is also part of the Fourth Amendment reasonableness inquiry. Wilson v. Arkansas, 514 U.S. 927 (1995).

[487] Hudson v. Michigan, 547 U.S. 586 (2006). Writing for the majority, Justice Scalia explained that the exclusionary rule was inappropriate because the purpose of the knock-and-announce requirement was to protect human life, property, and the homeowner's privacy and dignity; the requirement has never protected an individual's interest in preventing seizure of evidence described in a warrant. Id. at 594. Furthermore, the Court believed that the "substantial social costs" of applying the exclusionary rule would outweigh the benefits of deterring knock-and-announce violations by applying it. Id. The Court also reasoned that other means of deterrence, such as civil remedies, were available and effective, and that police forces have become increasingly professional and respectful of constitutional rights in the past half-century. Id. at 599. Justice Kennedy wrote a concurring opinion emphasizing that "the continued operation of the exclusionary rule . . . is not in doubt." Id. at 603. In dissent, Justice Breyer asserted that the majority's decision "weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection." Id. at 605.

[488] Michigan v. DeFillippo, 443 U.S. 31 (1979) (statute creating substantive criminal offense). Statutes that authorize unconstitutional searches and seizures but which have not yet been voided at the time of the search or seizure may not create this effect, however, Torres v. Puerto Rico, 442 U.S. 465 (1979); Ybarra v. Illinois, 444

a grand jury witness was required to answer questions even though the questions were based on evidence obtained from an unlawful search and seizure,[489] and federal tax authorities were permitted in a civil proceeding to use evidence that had been unconstitutionally seized from a defendant by state authorities.[490]

A significant curtailment of the exclusionary rule came in 1984 with the adoption of a "good faith" exception. In *United States v. Leon*,[491] the Court created an exception for evidence obtained as a result of officers' objective, good-faith reliance on a warrant, later found to be defective, issued by a detached and neutral magistrate. Justice White's opinion for the Court could find little benefit in applying the exclusionary rule where there has been good-faith reliance on an invalid warrant. Thus, there was nothing to offset the "substantial social costs exacted by the [rule]."[492] "The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," and in any event the Court considered it unlikely that the rule could have much deterrent effect on the actions of truly neutral magistrates.[493] Moreover, the Court thought that the rule should not be applied "to deter objectively reasonable law enforcement activity," and that "[p]enalizing the officer for the magistrate's error . . . cannot logically contribute to the deterrence of Fourth Amendment violations."[494] The Court also suggested some circumstances in which courts would be unable to find that officers' reliance on a warrant was objectively reasonable: if the officers have been "dishonest or reckless in preparing their affidavit," if it should have been obvious that the magistrate had "wholly abandoned" his neutral role, or if the warrant was obviously deficient on its face (*e.g.*, lacking in particularity).

U.S. 85 (1979). This aspect of *Torres* and *Ybarra* was to a large degree nullified by Illinois v. Krull, 480 U.S. 340 (1987), rejecting a distinction between substantive and procedural statutes and holding the exclusionary rule inapplicable in the case of a police officer's objectively reasonable reliance on a statute later held to violate the Fourth Amendment. Similarly, the exclusionary rule does not require suppression of evidence that was seized incident to an arrest that was the result of a clerical error by a court clerk. Arizona v. Evans, 514 U.S. 1 (1995).

[489] United States v. Calandra, 414 U.S. 338 (1974).

[490] United States v. Janis, 428 U.S. 433 (1976). Similarly, the rule is inapplicable in civil proceedings for deportation of aliens. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).

[491] 468 U.S. 897 (1984). The same objectively reasonable "good-faith" rule now applies in determining whether officers obtaining warrants are entitled to qualified immunity from suit. Malley v. Briggs, 475 U.S. 335 (1986).

[492] 468 U.S. at 907.

[493] 468 U.S. at 916–17.

[494] 468 U.S. at 919, 921.

The Court applied the *Leon* standard in *Massachusetts v. Sheppard*,[495] holding that an officer possessed an objectively reasonable belief that he had a valid warrant after he had pointed out to the magistrate that he had not used the standard form, and the magistrate had indicated that the necessary changes had been incorporated in the issued warrant. Then, the Court then extended *Leon* to hold that the exclusionary rule is inapplicable to evidence obtained by an officer acting in objectively reasonable reliance on a statute later held to violate the Fourth Amendment.[496] Justice Blackmun's opinion for the Court reasoned that application of the exclusionary rule in such circumstances would have no more deterrent effect on officers than it would when officers reasonably rely on an invalid warrant, and no more deterrent effect on legislators who enact invalid statutes than on magistrates who issue invalid warrants.[497] Finally, the Court has held that the exclusionary rule does not apply if the police conduct a search in objectively reasonable reliance on binding judicial precedent, even a defendant successfully challenges that precedent.[498]

The Court also applied *Leon* to allow the admission of evidence obtained incident to an arrest that was based on a mistaken belief that there was probable cause to arrest, where the mistaken belief had resulted from a negligent bookkeeping error by a police employee other than the arresting officer. In *Herring v. United States*,[499] a police employee had failed to remove from the police computer database an arrest warrant that had been recalled five months earlier, and the arresting officer as a consequence mistakenly believed that the arrest warrant remained in effect. The Court upheld the

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[495] 468 U.S. 981 (1984).

[496] Illinois v. Krull, 480 U.S. 340 (1987). The same difficult-to-establish qualifications apply: there can be no objectively reasonable reliance "if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws," or if "a reasonable officer should have known that the statute was unconstitutional." Id. at 355.

[497] Dissenting Justice O'Connor disagreed with this second conclusion, suggesting that the grace period "during which the police may freely perform unreasonable searches . . . creates a positive incentive [for legislatures] to promulgate unconstitutional laws," and that the Court's ruling "destroys all incentive on the part of individual criminal defendants to litigate the violation of their Fourth Amendment rights" and thereby obtain a ruling on the validity of the statute. 480 U.S. at 366, 369.

[498] Davis v. United States, 564 U.S. ___, No. 09–11328, slip op. (2011). Justice Breyer, in dissent, points out that under Griffith v. Kentucky, 479 U.S. 314 (1987), "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ." Thus, the majority opinion in Davis would allow the incongruous result that a defendant could prove his Fourth Amendment rights had been violated, but could still be left without a viable remedy. Id. at 2 (Breyer, J., dissenting).

[499] 555 U.S. ___, No. 07–513, slip op. (2009), *Herring* was a five-to-four decision, with two dissenting opinions.

admission of evidence because the error had been "the result of isolated negligence attenuated from the arrest." [500] Although the Court did "not suggest that all recordkeeping errors by the police are immune from the exclusionary rule," it emphasized that, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." [501]

Herring is significant because previous cases applying the good-faith exception to the exclusionary rule have involved principally Fourth Amendment violations not by the police, but by other governmental entities, such as the judiciary or the legislature. Although the error in *Herring* was committed by a police employee other than the arresting officer, the introduction of a balancing test to evaluate police conduct raises the possibility that even Fourth Amendment violations caused by the negligent actions of an arresting officer might in the future evade the application of the exclusionary rule.[502]

For instance, it is unclear from the Court's analysis in *Leon* and its progeny whether a majority of the Justices would also support a good-faith exception for evidence seized without a warrant, although there is some language broad enough to apply to warrantless seizures.[503] It is also unclear what a good-faith exception would

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[500] 129 S. Ct. at 698.

[501] 129 S. Ct. at 703, 702. Justice Ginsburg, in a dissent joined by Justices Stevens, Souter, and Breyer, stated that "the Court's opinion underestimates the need for a forceful exclusionary rule and the gravity of recordkeeping errors in law enforcement." Id. at 706. Justice Ginsburg added that the majority's suggestion that the exclusionary rule "is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless . . . runs counter to a foundational premise of tort law—that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care." Id. at 708. Justice Breyer, in a dissent joined by Justice Souter, noted that, although the Court had previously held that recordkeeping errors made by a court clerk do not trigger the exclusionary rule, Arizona v. Evans, 514 U.S. 1 (1995), he believed that recordkeeping errors made by the police should trigger the rule, as the majority's "case-by-case, multifactored inquiry into the degree of police culpability" would be difficult for the courts to administer. Id. at 711.

[502] *See Leon*, 468 U.S. 897, 926 (1984) (articulating, in *dicta*, an "intentional or reckless" misconduct standard for obviating "good faith" reliance on an invalid warrant).

[503] The thrust of the analysis in *Leon* was with the reasonableness of reliance on a warrant. The Court several times, however, used language broad enough to apply to warrantless searches as well. *See*, *e.g.*, 468 U.S. at 909 (quoting Justice White's concurrence in Illinois v. Gates): "the balancing approach that has evolved . . . 'forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that

mean in the context of a warrantless search, because the objective reasonableness of an officer's action in proceeding without a warrant is already taken into account in determining whether there has been a Fourth Amendment violation.[504] The Court's increasing willingness to uphold warrantless searches as not "unreasonable" under the Fourth Amendment, however, may reduce the frequency with which the good-faith issue arises in the context of the exclusionary rule.[505]

Another significant curtailment of the exclusionary rule involves the attenuation exception, which permits the use of evidence discovered through the government's unconstitutional conduct if the "causal link" between that misconduct and the discovery of the evidence is seen by the reviewing courts as sufficiently remote or has been interrupted by some intervening circumstances.[506] In a series of decisions issued over several decades, the Court has invoked this exception in upholding the admission of challenged evidence. For example, in *Wong Sun v. United States*, the Court upheld the admission of an unsigned statement made by a defendant who initially had been unlawfully arrested because, thereafter, the defendant was lawfully arraigned, released on his own recognizance, and, only then, voluntarily returned several days later to make the unsigned statement.[507] Similarly, in its 1984 decision in *Segura v. United States*, the Court upheld the admission of evidence obtained following an illegal entry into a residence because the evidence was seized the next day pursuant to a valid search warrant that had been issued based on information obtained by law enforcement before the illegal entry.[508]

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a search or seizure was in accord with the Fourth Amendment'"; and id. at 919: "[the rule] cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."

[504] *See* Yale Kamisar, *Gates, 'Probable Cause', 'Good Faith', and Beyond*, 69 IOWA L. REV. 551, 589 (1984) (imposition of a good-faith exception on top of the "already diluted" standard for validity of a warrant "would amount to double dilution").

[505] *See*, *e.g.*, Illinois v. Rodriguez, 497 U.S. 177 (1990) (upholding search premised on officer's reasonable but mistaken belief that a third party had common authority over premises and could consent to search); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (no requirement of knowing and intelligent waiver in consenting to warrantless search); New York v. Belton, 453 U.S. 454 (1981) (upholding warrantless search of entire interior of passenger car, including closed containers, as incident to arrest of driver); Arizona v. Gant, 556 U.S. ___, No. 07–542 (U.S. Apr. 21 (2009), slip op. at 18 (the *Belton* rule applies "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that the vehicle contains evidence of the offense of arrest"); United States v. Ross, 456 U.S. 798 (1982) (upholding warrantless search of movable container found in a locked car trunk).

[506] Utah v. Strieff, 579 U.S. ___, No. 14–1373, slip op. at 5 (2016).

[507] 371 U.S. 471, 491 (1963).

[508] 468 U.S. 796, 813–16 (1984).

More recently, in its 2016 decision in *Utah v. Strieff*, the Court rejected a challenge to the admission of certain evidence obtained as the result of an unlawful stop on the grounds that the discovery of an arrest warrant after the stop attenuated the connection between the unlawful stop and the evidence seized incident to the defendant's arrest.[509] As a threshold matter, the Court rejected the state court's view that the attenuation exception applies only in cases involving "an independent act of a defendant's 'free will.' "[510] Instead, the Court relied on three factors it had set forth in a Fifth Amendment case, *Brown v. Illinois*,[511] to determine whether the subsequent lawful acquisition of evidence was sufficiently attenuated from the initial misconduct: (1) the "temporal proximity" between the two acts; (2) the presences of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.[512] On the whole, the *Strieff* Court, reiterating that "suppression of evidence should be the courts' "last resort, not our first impulse,"[513] concluded that the circumstances of the case weighed in favor of the admission of the challenged evidence. While the closeness in time between the initial stop and the search was seen by the Court as favoring suppression,[514] the presence of intervening circumstances in the form of a valid warrant for the defendant's arrest strongly favored the state,[515] and in the Court's view, there was no indication that this unlawful stop was part of any "systematic or recurrent police misconduct."[516] In particular, the Court, relying on the second factor, emphasized that the discovery of a warrant "broke the causal chain" between the unlawful stop and the discovery of the challenged evidence.[517] As such, the *Strieff* Court appeared to establish a rule that the existence of a valid warrant, "predat[ing the] investigation" and "entirely unconnected with the stop," gener-

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[509] *Strieff*, slip op. at 1. The state in *Strieff* had conceded that law enforcement lacked reasonable suspicion for the stop, *id.* at 2, and the Supreme Court characterized the search of the defendant following his arrest as a lawful search incident to arrest, *id.* at 8.

[510] Id. at 5 (quoting State v. Strieff, 457 P.3d 532, 544 (Utah 2015)).

[511] *See* 422 U.S. 590, 603–04 (1970) (holding that the state supreme court in this case had erroneously concluded that *Miranda* warnings always served to purge the taint of an illegal arrest).

[512] *See Strieff*, slip op. at 6–9.

[513] *Id.* at 8 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006) (internal quotations omitted)).

[514] *Id.* at 6 (noting that "only minutes" passed between the unlawful stop and the discovery of the challenged evidence).

[515] *Id.* at 6–7. The *Strieff* Court emphasized that it viewed the warrant as "compelling" the officer to arrest the suspect. *Id.* at 9; *see also id.* at 7 (similar).

[516] *Id.* at 8.

[517] *Id.* at 9.

ally favors finding sufficient attenuation between the unlawful conduct and the discovery of evidence.[518]

Operation of the Rule: Standing.—The Court for a long period followed a rule of "standing" by which it determined whether a party was the appropriate person to move to suppress allegedly illegal evidence. Akin to Article III justiciability principles, which emphasize that one may ordinarily contest only those government actions that harm him, the standing principle in Fourth Amendment cases "require[d] of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." [519] Subsequently, the Court departed from the concept of standing to telescope the inquiry into one inquiry rather than two. Finding that standing served no useful analytical purpose, the Court has held that the issue of exclusion is to be determined solely upon a resolution of the substantive question whether the claimant's Fourth Amendment rights have been violated. "We can think of no decided cases of this Court that would have come out differently had we concluded . . . that the type of standing requirement . . . reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of 'standing,' will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same." [520] One must therefore show that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." [521]

The *Katz* reasonable expectation of privacy rationale has now displaced property-ownership concepts that previously might have supported either standing to suppress or the establishment of an interest that has been invaded. Thus, it is no longer sufficient to allege possession or ownership of seized goods to establish the interest, if a justifiable expectation of privacy of the defendant was not violated in the seizure.[522] Also, it is no longer sufficient that one merely be lawfully on the premises in order to be able to object

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[518] *Id.* at 7.

[519] Jones v. United States, 362 U.S. 257, 261 (1960). That is, the movant must show that he was "a victim of search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of search or seizure directed at someone else." Id. *See* Alderman v. United States, 394 U.S. 165, 174 (1969).

[520] Rakas v. Illinois, 439 U.S. 128, 139 (1978).

[521] 439 U.S. at 140.

[522] Previously, when ownership or possession was the issue, such as a charge of possessing contraband, the Court accorded "automatic standing" to one on the basis,

to an illegal search; rather, one must show some legitimate interest in the premises that the search invaded.[523] The same illegal search might, therefore, invade the rights of one person and not of another.[524] Again, the effect of the application of the privacy rationale has been to narrow considerably the number of people who can complain of an unconstitutional search.

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first, that to require him to assert ownership or possession at the suppression hearing would be to cause him to incriminate himself with testimony that could later be used against him, and, second, that the government could not simultaneously assert that defendant was in possession of the items and deny that it had invaded his interests. Jones v. United States, 362 U.S. 257, 261–65 (1960). *See also* United States v. Jeffers, 342 U.S. 48 (1951). In Simmons v. United States, 390 U.S. 377 (1968), however, the Court held inadmissible at the subsequent trial admissions made in suppression hearings. When it then held that possession alone was insufficient to give a defendant the interest to move to suppress, because he must show that the search itself invaded his interest, the second consideration was mooted as well, and thus the "automatic standing" rule was overturned. United States v. Salvucci, 448 U.S. 83 (1980) (stolen checks found in illegal search of apartment of the mother of the defendant, in which he had no interest; defendant could not move to suppress on the basis of the illegal search); Rawlings v. Kentucky, 448 U.S. 98 (1980) (drugs belonging to defendant discovered in illegal search of friend's purse, in which he had no privacy interest; admission of ownership insufficient to enable him to move to suppress).

[523] Rakas v. Illinois, 439 U.S. 128 (1978) (passengers in automobile had no privacy interest in interior of the car; could not object to illegal search). United States v. Padilla, 508 U.S. 77 (1993) (only persons whose privacy or property interests are violated may object to a search on Fourth Amendment grounds; exerting control and oversight over property by virtue of participation in a criminal conspiracy does not alone establish such interests). Jones v. United States, 362 U.S. 257 (1960), had established the rule that anyone legitimately on the premises could object; the rationale was discarded but the result in *Jones* was maintained because he was there with permission, he had his own key, his luggage was there, he had the right to exclude and therefore a legitimate expectation of privacy. Similarly maintained were the results in United States v. Jeffers, 342 U.S. 48 (1951) (hotel room rented by defendant's aunts to which he had a key and permission to store things); Mancusi v. DeForte, 392 U.S. 364 (1968) (defendant shared office with several others; though he had no reasonable expectation of absolute privacy, he could reasonably expect to be intruded on only by other occupants and not by police).

[524] *E.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980) (fearing imminent police search, defendant deposited drugs in companion's purse where they were discovered in course of illegal search; defendant had no legitimate expectation of privacy in her purse, so that *his* Fourth Amendment rights were not violated, although hers were).

FIFTH AMENDMENT

RIGHTS OF PERSONS

CONTENTS

RIGHTS OF PERSONS

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INDICTMENT BY GRAND JURY

The history of the grand jury is rooted in the common and civil law, extending back to Athens, pre-Norman England, and the Assize of Clarendon promulgated by Henry II.[1] The right seems to have been first mentioned in the colonies in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the colony of New York.[2] Included from the first in Madison's introduced draft of the Bill of Rights, the provision elicited no recorded debate and no opposition. "The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on

[1] Morse, *A Survey of the Grand Jury System*, 10 Ore. L. Rev. 101 (1931).

[2] 1 Bernard Schwartz, The Bill of Rights: A Documentary History 162, 166 (1971). The provision read: "That in all Cases Capital or Criminal there shall be a grand Inquest who shall first present the offence. . . ."

such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor."[3]

The prescribed constitutional function of grand juries in federal courts[4] is to return criminal indictments, but the juries serve a considerably broader series of purposes as well. Principal among these is the investigative function, which is served through the fact that grand juries may summon witnesses by process and compel testimony and the production of evidence generally. Operating in secret, under the direction but not control of a prosecutor, not bound by many evidentiary and constitutional restrictions, such juries may examine witnesses in the absence of their counsel and without informing them of the object of the investigation or the place of the witnesses in it.[5] The exclusionary rule is inapplicable in grand jury

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[3] Costello v. United States, 350 U.S. 359, 362 (1956). "The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges . . . . Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." United States v. Mandujano, 425 U.S. 564, 571 (1976) (plurality opinion). *See* id. at 589–91 (Justice Brennan concurring).

[4] This provision applies only in federal courts and is not applicable to the states, either as an element of due process or as a direct command of the Fourteenth Amendment. Hurtado v. California, 110 U.S. 516 (1884); Palko v. Connecticut, 302 U.S. 319, 323 (1937); Alexander v. Louisiana, 405 U.S. 625, 633 (1972).

[5] Witnesses are not entitled to have counsel present in the room. FED. R. CIV. P. 6(d). The validity of this restriction was asserted in dictum in *In re* Groban, 352 U.S. 330, 333 (1957), and inferentially accepted by the dissent in that case. Id. at 346–47 (Justice Black, distinguishing grand juries from the investigative entity before the Court). The decision in Coleman v. Alabama, 399 U.S. 1 (1970), deeming the preliminary hearing a "critical stage of the prosecution" at which counsel must be provided, called this rule in question, inasmuch as the preliminary hearing and the grand jury both determine whether there is probable cause with regard to a suspect. *See* id. at 25 (Chief Justice Burger dissenting). In United States v. Mandujano, 425 U.S. 564, 581 (1976) (plurality opinion), Chief Justice Burger wrote: "Respondent was also informed that if he desired he could have the assistance of counsel, but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play." By

proceedings, with the result that a witness called before a grand jury may be questioned on the basis of knowledge obtained through the use of illegally seized evidence.[6] In thus allowing the use of evidence obtained in violation of the Fourth Amendment, the Court nonetheless restated the principle that, although free of many rules of evidence that bind trial courts, grand juries are not unrestrained by constitutional consideration.[7] A witness called before a grand jury is not entitled to be informed that he may be indicted for the offense under inquiry[8] and the commission of perjury by a

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emphasizing the point of institution of criminal proceedings, relevant to the right of counsel at line-ups and the like, the Chief Justice not only reasserted the absence of a right to counsel in the room but also, despite his having referred to it, cast doubt upon the existence of any constitutional requirement that a grand jury witness be permitted to consult with counsel out of the room, and, further, raised the implication that a witness or putative defendant unable to afford counsel would have no right to appointed counsel. Concurring, Justice Brennan argued that access to counsel was essential and constitutionally required for the protection of constitutional rights; Brennan accepted the likelihood, without agreeing, that consultation outside the room would be adequate to preserve a witness' rights, id. at 602–09 (with Justice Marshall). Justices Stewart and Blackmun reserved judgment. Id. at 609. The dispute appears ripe for revisiting.

[6] United States v. Calandra, 414 U.S. 338 (1974). The Court has interpreted a provision of federal wiretap law, 18 U.S.C. § 2515, to prohibit use of unlawful wiretap information as a basis for questioning witnesses before grand juries. Gelbard v. United States, 408 U.S. 41 (1972).

[7] "Of course, the grand jury's subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law. . . . Although, for example, an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid . . . , the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. . . . Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. . . . The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena *duces tecum* will be disallowed if it is 'far too sweeping in its terms to be regarded as reasonable' under the Fourth Amendment. Hale v. Henkel, 201 U.S. 43, 76 (1906). Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs." United States v. Calandra, 414 U.S. 338, 346 (1974). *See also* United States v. Dionisio, 410 U.S. 1, 11–12 (1973). Grand juries must operate within the limits of the First Amendment and may not harass the exercise of speech and press rights. Branzburg v. Hayes, 408 U.S. 665, 707–08 (1972). Protection of Fourth Amendment interests is as extensive before the grand jury as before any investigative officers, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Hale v. Henkel, 201 U.S. 43, 76–77 (1906), but not more so either. United States v. Dionisio, 410 U.S. 1 (1973) (subpoena to give voice exemplars); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplars). The Fifth Amendment's Self-Incrimination Clause must be respected. Blau v. United States, 340 U.S. 159 (1950); Hoffman v. United States, 341 U.S. 479 (1951). On common-law privileges, *see* Blau v. United States, 340 U.S. 332 (1951) (husband-wife privilege); Alexander v. United States, 138 U.S. 353 (1891) (attorney-client privilege). The traditional secrecy of grand jury proceedings has been relaxed a degree to permit a limited discovery of testimony. *Compare* Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959), *with* Dennis v. United States, 384 U.S. 855 (1966). *See* Fed. R. Crim. P. 6(e) (secrecy requirements and exceptions).

[8] United States v. Washington, 431 U.S. 181 (1977). Because defendant when he appeared before the grand jury was warned of his rights to decline to answer

witness before the grand jury is punishable, irrespective of the nature of the warning given him when he appears and regardless of the fact that he may already be a putative defendant when he is called.[9]

Of greater significance were two cases in which the Court held the Fourth Amendment to be inapplicable to grand jury subpoenas requiring named parties to give voice exemplars and handwriting samples to the grand jury for identification purposes.[10] According to the Court, the issue turned on a dual inquiry—"whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable 'seizure' within the meaning of the Fourth Amendment."[11] First, a subpoena to appear was held not to be a seizure, because it entailed significantly less social and personal affront than did an arrest or an investigative stop, and because every citizen has an obligation, which may be onerous at times, to appear and give whatever aid he may to a grand jury.[12] Second, the directive to make a voice recording or to produce handwriting samples did not bring the Fourth Amendment into play because no one has any expectation of privacy in the characteristics of either his voice or his handwriting.[13] Because the Fourth Amendment was inapplicable, there was no necessity for the government to make a preliminary showing of the reasonableness of the grand jury requests.

Besides indictments, grand juries may also issue reports that may indicate nonindictable misbehavior, mis- or malfeasance of pub-

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questions on the basis of self-incrimination, the decision was framed in terms of those warnings, but the Court twice noted that it had not decided, and was not deciding, "whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses . . . ." Id. at 186.

[9] United States v. Mandujano, 425 U.S. 564 (1976); United States v. Wong, 431 U.S. 174 (1977). Mandujano had been told of his right to assert the privilege against self-incrimination, of the consequences of perjury, and of his right to counsel, but not to have counsel with him in the jury room. Chief Justice Burger and Justices White, Powell, and Rehnquist took the position that no *Miranda* warning was required because there was no police custodial interrogation and that in any event commission of perjury was not excusable on the basis of lack of any warning. Justices Brennan, Marshall, Stewart, and Blackmun agreed that whatever rights a grand jury witness had, perjury was punishable and not to be excused. Id. at 584, 609. Wong was assumed on appeal not to have understood the warnings given her and the opinion proceeds on the premise that absence of warnings altogether does not preclude a perjury prosecution.

[10] United States v. Dionisio, 410 U.S. 1 (1973); United States v. Mara, 410 U.S. 19 (1973).

[11] *Dionisio*, 410 U.S. at 9.

[12] 410 U.S. at 9–13.

[13] 410 U.S. at 13–15. The privacy rationale proceeds from Katz v. United States, 389 U.S. 347 (1967).

lic officers, or other objectionable conduct.[14] Despite the vast power of grand juries, there is little in the way of judicial or legislative response designed to impose some supervisory restrictions on them.[15]

Within the meaning of this article a crime is made "infamous" by the quality of the punishment that may be imposed.[16] "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another."[17] Imprisonment in a state prison or penitentiary, with or without hard labor,[18] or imprisonment at hard labor in the workhouse of the District of Columbia,[19] falls within this category. The pivotal question is whether the offense is one for which the court is authorized to award such punishment; the sentence actually imposed is immaterial. "When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury."[20] Thus, an act that authorized imprisonment at hard labor for one year, as well as deportation, of Chinese aliens found to be unlawfully within the United States, created an offense that could be tried only upon indictment.[21] Counterfeiting,[22] fraudulent alteration of poll books,[23] fraudulent voting,[24] and embezzlement,[25] have been declared to be infamous crimes. It is immaterial how Congress has classified the offense.[26] An act punishable by a fine of not more than $1,000 or imprisonment for not more than six months is a misdemeanor, which can be tried without indictment, even though

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[14] The grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime." Blair v. United States, 250 U.S. 273, 281 (1919). On the reports function of the grand jury, *see In re* Grand Jury January, 1969, 315 F. Supp. 662 (D. Md. 1970), and Report of the January 1970 Grand Jury (Black Panther Shooting) (N.D. Ill., released May 15, 1970). Congress has now specifically authorized issuance of reports in cases concerning public officers and organized crime. 18 U.S.C. § 333.

[15] Congress has required that in the selection of federal grand juries, as well as petit juries, random selection of a fair cross section of the community is to take place, and has provided a procedure for challenging discriminatory selection by moving to dismiss the indictment. 28 U.S.C. §§ 1861–68. Racial discrimination in selection of juries is constitutionally proscribed in both state and federal courts. *See* discussion under "Juries," *infra*.

[16] *Ex parte* Wilson, 114 U.S. 417 (1885).

[17] 114 U.S. at 427.

[18] Mackin v. United States, 117 U.S. 348, 352 (1886).

[19] United States v. Moreland, 258 U.S. 433 (1922).

[20] *Ex parte* Wilson, 114 U.S. 417, 426 (1885).

[21] Wong Wing v. United States, 163 U.S. 228, 237 (1896).

[22] *Ex parte* Wilson, 114 U.S. 417 (1885).

[23] Mackin v. United States, 117 U.S. 348 (1886).

[24] Parkinson v. United States, 121 U.S. 281 (1887).

[25] United States v. DeWalt, 128 U.S. 393 (1888).

[26] *Ex parte* Wilson, 114 U.S. 417, 426 (1885).

the punishment exceeds that specified in the statutory definition of "petty offenses." [27]

A person can be tried only upon the indictment as found by the grand jury, and especially upon its language found in the charging part of the instrument.[28] A change in the indictment that does not narrow its scope deprives the court of the power to try the accused.[29] Although additions to offenses alleged in an indictment are prohibited, the Court has now ruled that it is permissible "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it," as, for example, a lesser included offense.[30] There being no constitutional requirement that an indictment be presented by a grand jury in a body, an indictment delivered by the foreman in the absence of other grand jurors is valid.[31] If valid on its face, an indictment returned by a legally constituted, non-biased grand jury satisfies the requirement of the Fifth Amendment and is enough to call for a trial on the merits; it is not open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury.[32]

The protection of indictment by grand jury extends to all persons except those serving in the armed forces. All persons in the regular armed forces are subject to court martial rather than grand jury indictment or trial by jury.[33] The exception's limiting words "when in actual service in time of war or public danger" apply only to members of the militia, not to members of the regular armed forces. In 1969, in *O'Callahan v. Parker*, the Court held that offenses that are not "service connected" may not be punished under military law, but instead must be tried in the civil courts in the jurisdiction where

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[27] Duke v. United States, 301 U.S. 492 (1937).

[28] *See* Stirone v. United States, 361 U.S. 212 (1960), which held that a variation between pleading and proof deprived petitioner of his right to be tried only upon charges presented in the indictment.

[29] *Ex parte* Bain, 121 U.S. 1, 12 (1887). *Ex parte* Bain was overruled in United States v. Miller, 471 U.S. 130 (1985), to the extent that it held that a narrowing of an indictment is impermissible. *Ex parte* Bain was also overruled to the extent that it held that it held that a defective indictment was not just substantive error, but that it deprived a court of subject-matter jurisdiction over a case. United States v. Cotton, 535 U.S. 625 (2002). While a defendant's failure to challenge an error of substantive law at trial level may result in waiver of such issue for purpose of appeal, challenges to subject-matter jurisdiction may be made at any time. Thus, where a defendant failed to assert his right to a non-defective grand jury indictment, appellate review of the matter would limited to a "plain error" analysis. 535 U.S. at 631 (2002).

[30] United States v. Miller, 471 U.S. 130, 144 (1985).

[31] Breese v. United States, 226 U.S. 1 (1912).

[32] Costello v. United States, 350 U.S. 359 (1956); Lawn v. United States, 355 U.S. 339 (1958); United States v. Blue, 384 U.S. 251 (1966). *Cf.* Gelbard v. United States, 408 U.S. 41 (1972).

[33] Johnson v. Sayre, 158 U.S. 109, 114 (1895). *See also* Lee v. Madigan, 358 U.S. 228, 232–35, 241 (1959).

the acts took place.[34] In 1987, however, this decision was overruled, with the Court emphasizing the "plain language" of Article I, § 8, clause 14,[35] and not directly addressing any possible limitation stemming from the language of the Fifth Amendment.[36] "[T]he requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged."[37] Even under the service connection rule, it was held that offenses against the laws of war, whether committed by citizens or by alien enemy belligerents, could be tried by a military commission.[38]

DOUBLE JEOPARDY

Development and Scope

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[39] A second "vitally important interest[ ]" embod-

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[34] 395 U.S. 258 (1969); *see also* Relford v. Commandant, 401 U.S. 355 (1971) (offense committed on military base against persons lawfully on base was service connected). But courts-martial of civilian dependents and discharged servicemen have been barred. Id. *See* "Trial and Punishment of Offenses: Servicemen, Civilian Employees, and Dependents" under Article I.

[35] This clause confers power on Congress to "make rules for the government and regulation of the land and naval forces."

[36] Solorio v. United States, 483 U.S. 435 (1987). A 5–4 majority favored overruling *O'Callahan*: Chief Justice Rehnquist's opinion for the Court was joined by Justices White, Powell, O'Connor, and Scalia. Justice Stevens concurred in the judgment but thought it unnecessary to reexamine *O'Callahan*. Dissenting Justice Marshall, joined by Justices Brennan and Blackmun, thought the service connection rule justified by the language of the Fifth Amendment's exception, based on the nature of cases (those "*arising in* the land or naval forces") rather than the status of defendants.

[37] 483 U.S. at 450–51.

[38] *Ex parte* Quirin, 317 U.S. 1, 43, 44 (1942).

[39] Green v. United States, 355 U.S. 184, 187–88 (1957). The passage is often quoted with approval by the Court. *E.g.*, Crist v. Bretz, 437 U.S. 28, 35 (1978); United States v. DiFrancesco, 449 U.S. 117, 127–28 (1980); Yeager v. United States, 557 U.S. ___, No. 08–67, slip op. at 7 (2009). For a comprehensive effort to assess the purposes of application of the clause, *see* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

ied in the Double Jeopardy Clause "is the preservation of 'the finality of judgments.'" [40]

The concept of double jeopardy goes far back in history, but its development was uneven and its meaning has varied. The English development, under the influence of Coke and Blackstone, came gradually to mean that a defendant at trial could plead former conviction or former acquittal as a special plea in bar to defeat the prosecution.[41] In this country, the common-law rule was in some cases limited to this rule and in other cases extended to bar a new trial even though the former trial had not concluded in either an acquittal or a conviction. The rule's elevation to fundamental status by its inclusion in several state bills of rights following the Revolution continued the differing approaches.[42] Madison's version of the guarantee as introduced in the House of Representatives read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense." [43] Opposition in the House proceeded on the proposition that the language could be construed to prohibit a second trial after a successful appeal by a defendant and would therefore either constitute a hazard to the public by freeing the guilty or, more likely, result in a detriment to defendants because appellate courts would be loath to reverse convictions if no new trial could follow, but a motion to strike "or trial" from the clause failed.[44] As approved by the Senate, however, and accepted by the House for referral to the states, the present language of the clause was inserted.[45]

Throughout most of its history, this clause was binding only against the Federal Government. In *Palko v. Connecticut*,[46] the Court re-

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[40] Yeager v. United States, 557 U.S. ___, No. 08–67, slip op. at 6, 7 (2009), quoting Crist v. Bretz, 437 U.S. 28, 33 (1978).

[41] M. Friedland, Double Jeopardy part 1 (1969); Crist v. Bretz, 437 U.S. 28, 32–36 (1978), and id. at 40 (Justice Powell dissenting); United States v. Wilson, 420 U.S. 332, 340 (1975).

[42] J. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 21–27 (1969). The first bill of rights that expressly adopted a double jeopardy clause was the New Hampshire Constitution of 1784. "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." Art. I, Sec. XCI, 4 F. Thorpe, *The Federal and State Constitution*, reprinted in H.R. Doc. No. 357, 59th Congress, 2d Sess. 2455 (1909). A more comprehensive protection was included in the Pennsylvania Declaration of Rights of 1790, which had language almost identical to the present Fifth Amendment provision. Id. at 3100.

[43] 1 Annals of Congress 434 (June 8, 1789).

[44] Id. at 753.

[45] 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1149, 1165 (1971). In Crist v. Bretz, 437 U.S. 28, 40 (1978) (dissenting), Justice Powell attributed to inadvertence the broadening of the "rubric" of double jeopardy to incorporate the common law rule against dismissal of the jury prior to verdict, a question the majority passed over as being "of academic interest only." Id. at 34 n.10.

[46] 302 U.S. 319 (1937).

jected an argument that the Fourteenth Amendment incorporated all the provisions of the first eight Amendments as limitations on the states and enunciated the due process theory under which most of those Amendments do now apply to the states. Some guarantees in the Bill of Rights, Justice Cardozo wrote, were so fundamental that they are "of the very essence of the scheme of ordered liberty" and "neither liberty nor justice would exist if they were sacrificed."[47] But the Double Jeopardy Clause, like many other procedural rights of defendants, was not so fundamental; it could be absent and fair trials could still be had. Of course, a defendant's due process rights, absent double jeopardy consideration *per se*, might be violated if the state "creat[ed] a hardship so acute and shocking as to be unendurable," but that was not the case in *Palko*.[48] In *Benton v. Maryland*, however, the Court concluded "that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage. . . . Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments."[49] Therefore, the double jeopardy limitation now applies to both federal and state governments and state rules on double jeopardy, with regard to such matters as when jeopardy attaches, must be considered in the light of federal standards.[50]

In a federal system, different units of government[51] may have different interests to serve in the definition of crimes and the enforcement of their laws, and where the different units have overlapping jurisdictions a person may engage in conduct that will violate the laws of more than one unit.[52] Although the Court had long accepted in dictum the principle that prosecution by two governments of the same defendant for the same conduct would not constitute double jeopardy, it was not until *United States v. Lanza*[53] that the conviction in federal court of a person previously convicted in a state court for performing the same acts was sustained. "We

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[47] 302 U.S. at 325, 326.

[48] 302 U.S. at 328.

[49] 395 U.S. 784, 795, 795 (1969) (citation omitted).

[50] Crist v. Bretz, 437 U.S. 28, 37–38 (1978). *But see* id. at 40 (Justices Powell and Rehnquist and Chief Justice Burger dissenting) (standard governing states should be more relaxed).

[51] Id. *See also* cases cited in Bartkus v. Illinois, 359 U.S. 121, 132 n.19 (1959), and Abbate v. United States, 359 U.S. 187, 192–93 (1959).

[52] The problem was recognized as early as Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820), and the rationale of the doctrine was confirmed within thirty years. Fox v. Ohio, 46 U.S. (5 How.) 410 (1847); United States v. Marigold, 50 U.S. (9 How.) 560 (1850); Moore v. Illinois, 55 U.S. (14 How.) 13 (1852).

[53] 260 U.S. 377 (1922).

have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."[54] The "dual sovereignty" doctrine is not only tied into the existence of two sets of laws often serving different federal-state purposes and the now overruled principle that the Double Jeopardy Clause restricts only the national government and not the states,[55] but it also reflects practical considerations that undesirable consequences could follow an overruling of the doctrine. Thus, a state might preempt federal authority by first prosecuting and providing for a lenient sentence (as compared to the possible federal sentence) or acquitting defendants who had the sympathy of state authorities as against federal law enforcement.[56] The application of the clause to the states has therefore worked no change in the "dual sovereign" doctrine.[57] The dual sovereignty doctrine has also been applied to permit successive prosecutions by two states for the same conduct,[58] and to permit a federal prosecution after a conviction in an Indian tribal court for an offense stemming from the same conduct.[59] Of course, when in fact two different units of the government are subject to the same sovereign, the Double Jeop-

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[54] 260 U.S. at 382. *See also* Hebert v. Louisiana, 272 U.S. 312 (1924); Screws v. United States, 325 U.S. 91, 108 (1945); Jerome v. United States, 318 U.S. 101 (1943).

[55] Benton v. Maryland, 395 U.S. 784 (1969), extended the clause to the states.

[56] Reaffirmation of the doctrine against double jeopardy claims as to the Federal Government and against due process claims as to the states occurred in Abbate v. United States, 359 U.S. 187 (1959), and Bartkus v. Illinois, 359 U.S. 121 (1959), both cases containing extensive discussion and policy analyses. The Justice Department follows a policy of generally not duplicating a state prosecution brought and carried out in good faith, *see* Petite v. United States, 361 U.S. 529, 531 (1960); Rinaldi v. United States, 434 U.S. 22 (1977), and several provisions of federal law forbid a federal prosecution following a state prosecution. *E.g.*, 18 U.S.C. §§ 659, 660, 1992, 2117. The Brown Commission recommended a general statute to this effect, preserving discretion in federal authorities to proceed upon certification by the Attorney General that a United States interest would be unduly harmed if there were no federal prosecution. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 707 (1971).

[57] United States v. Wheeler, 435 U.S. 313 (1978) (dual sovereignty doctrine permits federal prosecution of an Indian for statutory rape following his plea of guilty in a tribal court to contributing to the delinquency of a minor, both charges involving the same conduct; tribal law stemmed from the retained sovereignty of the tribe and did not flow from the Federal Government).

[58] Heath v. Alabama, 474 U.S. 82 (1985) (defendant who crossed state line in the course of a kidnap and murder was prosecuted for murder in both states).

[59] United States v. Lara, 541 U.S. 193 (2004) (federal prosecution for assaulting a federal officer after tribal conviction for "violence to a policeman"). The Court concluded that Congress has power to recognize tribal sovereignty to prosecute nonmember Indians, that Congress had done so, and that consequently the tribal prosecution was an exercise of tribal sovereignty, not an exercise of delegated federal power on which a finding of double jeopardy could be based.

ardy Clause does bar separate prosecutions by them for the same offense.[60]

The clause speaks of being put in "jeopardy of life or limb," which as derived from the common law, generally referred to the possibility of capital punishment upon conviction, but it is now settled that the clause protects with regard "to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute."[61] Despite the clause's literal language, it can apply as well to sanctions that are civil in form if they clearly are applied in a manner that constitutes "punishment."[62] Ordinarily, however, civil *in rem* forfeiture proceedings may not be considered punitive for purposes of double jeopardy analysis.[63] and the same is true of civil commitment following expiration of a prison term.[64]

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[60] *See, e.g.*, Waller v. Florida, 397 U.S. 387 (1970) (trial by municipal court precluded trial for same offense by state court); Grafton v. United States, 206 U.S. 333 (1907) (trial by military court-martial precluded subsequent trial in territorial court). More recently, in *Puerto Rico v. Sanchez Valle*, the Court held that the separate prosecution of an individual by the United States and Puerto Rico for the same underlying conduct ran afoul of the Double Jeopardy Clause because the two governments are not "separate sovereigns." *See* 579 U.S. ___, No. 15–108, slip op. at 17–18 (2016). Even though Puerto Rico came to exercise self-rule through a popularly ratified constitution in the mid-twentieth century, the Court concluded that the "original source" for its authority to prosecute crimes ultimately derived from Congress and, specifically, a federal statute which authorized the people of Puerto Rico to draft their own constitution, meaning that the challenged prosecution amounted to a reprosecution by the same sovereign. *See id.* at 14–16 (2016).

[61] *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 169 (1874). The clause generally has no application in noncriminal proceedings. Helvering v. Mitchell, 303 U.S. 391 (1938).

[62] The clause applies in juvenile court proceedings that are formally civil. Breed v. Jones, 421 U.S. 519 (1975). *See also* United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984); United States v. Halper, 490 U.S. 435 (1989) (civil penalty under the False Claims Act constitutes punishment if it is overwhelmingly disproportionate to compensating the government for its loss, and if it can be explained only as serving retributive or deterrent purposes); Montana Dep't of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (tax on possession of illegal drugs, "to be collected only after any state or federal fines or forfeitures have been satisfied," constitutes punishment for purposes of double jeopardy). *But see* Seling v. Young, 531 U.S. 250 (2001) (a statute that has been held to be civil and not criminal in nature cannot be deemed punitive "as applied" to a single individual). The issue of whether a law is civil or punitive in nature is essentially the same for *ex post facto* and for double jeopardy analysis. 531 U.S. at 263.

[63] United States v. Ursery, 518 U.S. 267 (1996) (forfeitures, pursuant to 19 U.S.C. § 981 and 21 U.S.C. § 881, of property used in drug and money laundering offenses, are not punitive). The Court in *Ursery* applied principles that had been set forth in Various Items of Personal Property v. United States, 282 U.S. 577 (1931) (forfeiture of distillery used in defrauding government of tax on spirits), and United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (forfeiture, pursuant to 18 U.S.C. § 924(d), of firearms "used or intended to be used in" firearms offenses). A two-part inquiry is followed. First, the Court inquires whether Congress intended the forfeiture proceeding to be civil or criminal. Then, if Congress intended that the proceeding be civil, the court determines whether there is nonetheless the "clearest proof"

Because a prime purpose of the clause is to protect against the burden of multiple trials, a defendant who raises and loses a double jeopardy claim during pretrial or trial may immediately appeal the ruling; this is a rare exception to the general rule prohibiting appeals from nonfinal orders.[65]

During the 1970s, the Court decided an uncommonly large number of cases raising double jeopardy claims.[66] Instead of the clarity that often emerges from intense consideration of a particular issue, however, double jeopardy doctrine has descended into a state of "confusion," with the Court acknowledging that its decisions "can hardly be characterized as models of consistency and clarity."[67] In large part, the re-evaluation of doctrine and principle has not resulted in the development of clear and consistent guidelines because of the differing emphases of the Justices upon the purposes of the clause and the consequent shifting coalition of majorities based on highly technical distinctions and individualistic fact patterns. Thus, some Justices have expressed the belief that the purpose of the clause is only to protect final judgments relating to culpability, either of acquittal or conviction, and that English common law rules designed to protect the defendant's right to go to the first jury picked had early in our jurisprudence become confused with the Double Jeopardy Clause. Although they accept the present understanding, they do so as part of the Court's superintending of the federal courts and not because the understanding is part and parcel of the clause; in so doing, of course, they are likely to find more prosecutorial discretion in the trial process.[68] Others have expressed the view that the clause not only protects the integrity of final judgments but, more important, that it protects the accused against the strain and burden of multiple trials, which would also enhance the ability of gov-

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that the sanction is "so punitive" as to transform it into a criminal penalty. *89 Firearms*, 465 U.S. at 366.

[64] Kansas v. Hendricks, 521 U.S. 346, 369–70 (1997) (commitment under state's Sexually Violent Predator Act).

[65] Abney v. United States, 431 U.S. 651 (1977).

[66] *See* United States v. DiFrancesco, 449 U.S. 117, 126–27 (1980) (citing cases).

[67] Burks v. United States, 437 U.S. 1, 9, 15 (1978). One result is instability in the law. Thus, *Burks* overruled, to the extent inconsistent, four cases decided between 1950 and 1960, and United States v. Scott, 437 U.S. 82 (1978), overruled a case decided just three years earlier, United States v. Jenkins, 420 U.S. 358 (1975).

[68] *See* Crist v. Bretz, 437 U.S. 28, 40 (1978) (dissenting opinion). Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, argued that, with the Double Jeopardy Clause so interpreted, the Due Process Clause could be relied on to prevent prosecutorial abuse during the trial designed to abort the trial and obtain a second one. Id. at 50. All three have joined, indeed, in some instances, have authored, opinions adverting to the role of the double jeopardy clause in protecting against such prosecutorial abuse. *E.g.*, United States v. Scott, 437 U.S. 82, 92–94 (1978); Oregon v. Kennedy, 456 U.S. 667 (1982) (but narrowing scope of concept).

ernment to convict.[69] Still other Justices have engaged in a form of balancing of defendants' rights with society's rights to determine when reprosecution should be permitted when a trial ends prior to a final judgment not hinged on the defendant's culpability.[70] Thus, the basic area of disagreement, though far from the only one, centers on the trial from the attachment of jeopardy to the final judgment.

Reprosecution Following Mistrial

The common law generally required that the previous trial must have ended in a judgment, of conviction or acquittal, but the constitutional rule is that jeopardy attaches much earlier, in jury trials when the jury is sworn, and in trials before a judge without a jury, when the first evidence is presented.[71] Therefore, if after jeopardy attaches the trial is terminated for some reason, it may be that a second trial, even if the termination was erroneous, is barred.[72] The reasons the Court has given for fixing the attachment of jeopardy at a point prior to judgment and thus making some terminations of trials before judgment final insofar as the defendant is concerned

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[69] United States v. Scott, 437 U.S. 82, 101 (1978) (dissenting opinion) (Justices Brennan, White, Marshall, and Stevens).

[70] Thus, Justice Blackmun has enunciated positions recognizing a broad right of defendants much like the position of the latter three Justices, Crist v. Bretz, 437 U.S. 28, 38 (1978) (concurring), and he joined Justice Stevens' concurrence in Oregon v. Kennedy, 456 U.S. 667, 681 (1982), but he also joined the opinions in United States v. Scott, 437 U.S. 82 (1978), and Arizona v. Washington, 434 U.S. 497 (1978) (Justice Blackmun concurring only in the result).

[71] The rule traces back to United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). *See also* Kepner v. United States, 195 U.S. 100 (1904); Downum v. United States, 372 U.S. 734 (1963) (trial terminated just after jury sworn but before any testimony taken). In Crist v. Bretz, 437 U.S. 28 (1978), the Court held this standard of the attachment of jeopardy was "at the core" of the clause and it therefore binds the States. *But see* id. at 40 (Justice Powell dissenting). An accused is not put in jeopardy by preliminary examination and discharge by the examining magistrate, Collins v. Loisel, 262 U.S. 426 (1923), by an indictment which is quashed, Taylor v. United States, 207 U.S. 120, 127 (1907), or by arraignment and pleading to the indictment. Bassing v. Cady, 208 U.S. 386, 391–92 (1908). A defendant may be tried after preliminary proceedings that present no risk of final conviction. *E.g.*, Ludwig v. Massachusetts, 427 U.S. 618, 630–32 (1976) (conviction in prior summary proceeding does not foreclose trial in a court of general jurisdiction, where defendant has absolute right to demand a trial *de novo* and thus set aside the first conviction); Swisher v. Brady, 438 U.S. 204 (1978) (double jeopardy not violated by procedure under which masters hear evidence and make preliminary recommendations to juvenile court judge, who may confirm, modify, or remand).

[72] *Cf.* United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963). "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Arizona v. Washington, 434 U.S. 497, 503–05 (1978).

is that a defendant has a "valued right to have his trial completed by a particular tribunal."[73] The reason that the defendant's right is so "valued" is that he has a legitimate interest in completing the trial "once and for all" and "conclud[ing] his confrontation with society,"[74] so as to be spared the expense and ordeal of repeated trials, the anxiety and insecurity of having to live with the possibility of conviction, and the possibility that the prosecution may strengthen its case with each try as it learns more of the evidence and of the nature of the defense.[75] These reasons both inform the determination when jeopardy attaches and the evaluation of the permissibility of retrial depending upon the reason for a trial's premature termination.

A second trial may be permitted where a mistrial is the result of "manifest necessity,"[76] as when, for example, the jury cannot reach a verdict[77] or circumstances plainly prevent the continuation of the trial.[78] The question of whether there is double jeopardy becomes more difficult, however, when the doctrine of "manifest necessity" is called upon to justify a second trial following a mistrial granted by the trial judge because of some event within the prosecutor's control or because of prosecutorial misconduct or because of error or abuse of discretion by the judge himself. There must ordinarily be a balancing of the defendant's right in having the trial completed against the public interest in fair trials designed to end in just judgments.[79] Thus, when, after jeopardy attached, a mistrial was granted because of a defective indictment, the Court held that retrial was not barred; a trial judge "properly exercises his discretion" in cases in which an impartial verdict cannot be reached or in which a verdict on conviction would have to be reversed on appeal because of an obvious error. "If an error could make reversal on appeal a cer-

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[73] Wade v. Hunter, 336 U.S. 684, 689 (1949).

[74] United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion).

[75] Arizona v. Washington, 434 U.S. 497, 503–05 (1978); Crist v. Bretz, 437 U.S. 28, 35–36 (1978). *See* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 86–97.

[76] United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

[77] United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Logan v. United States, 144 U.S. 263 (1892). *See* Renico v. Lett, 559 U.S. ___, No. 09–338, slip op. (2010) (in a habeas review case, discussing the broad deference given to trial judge's decision to declare a mistrial because of jury deadlock). *See also*, Yeager v. United States, 557 U.S. ___, No. 08–67, slip op. at 7 (2009); Blueford v. Arkansas, 566 U.S. ___, No. 10–1320, slip op. (2012) (reprosecution for a greater offense allowed following jury deadlock on a lesser included offense).

[78] Simmons v. United States, 142 U.S. 148 (1891) (juror's impartiality became questionable during trial); Thompson v. United States, 155 U.S. 271 (1884) (discovery during trial that one of the jurors had served on the grand jury that had indicted defendant and was therefore disqualified); Wade v. Hunter, 336 U.S. 684 (1949) (court-martial discharged because enemy advancing on site).

[79] Illinois v. Somerville, 410 U.S. 458, 463 (1973).

tainty, it would not serve 'the ends of public justice' to require that the government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court."[80] On the other hand, when, after jeopardy attached, a prosecutor successfully moved for a mistrial because a key witness had inadvertently not been served and could not be found, the Court held a retrial barred, because the prosecutor knew prior to the selection and swearing of the jury that the witness was unavailable.[81] Although this case appeared to establish the principle that an error of the prosecutor or of the judge leading to a mistrial could not constitute a "manifest necessity" for terminating the trial, *Somerville* distinguished and limited *Downum* to situations in which the error lends itself to prosecutorial manipulation, in being the sort of instance that the prosecutor could use to abort a trial that was not proceeding successfully and obtain a new trial that would be to his advantage.[82]

Another kind of case arises when the prosecutor moves for mistrial because of prejudicial misconduct by the defense. In *Arizona v. Washington*,[83] defense counsel in his opening statement made prejudicial comments about the prosecutor's past conduct, and the prosecutor's motion for a mistrial was granted over defendant's objections. The Court ruled that retrial was not barred by double jeopardy. Granting that in a strict, literal sense, mistrial was not "necessary" because the trial judge could have given limiting instructions to the jury, the Court held that the highest degree of respect should be given to the trial judge's evaluation of the likelihood of the impairment of the impartiality of one or more jurors. As long as support for a mistrial order can be found in the trial record, no specific statement of "manifest necessity" need be made by the trial judge.[84]

Emphasis upon the trial judge's discretion has an impact upon the cases in which it is the judge's error, in granting *sua sponte* a mistrial or granting the prosecutor's motion. The cases are in doc-

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[80] 410 U.S. at 464.

[81] Downum v. United States, 372 U.S. 734 (1963).

[82] Illinois v. Somerville, 410 U.S. 458, 464–65, 468–69 (1973).

[83] 434 U.S. 497 (1978).

[84] "Manifest necessity" characterizes the burden the prosecutor must shoulder in justifying retrial. 434 U.S. at 505–06. But "necessity" cannot be interpreted literally; it means rather a "high degree" of necessity, and some instances, such as hung juries, easily meet that standard. Id. at 506–07. In a situation like that presented in this case, great deference must be paid to the trial judge's decision because he was in the best position to determine the extent of the possible bias, having observed the jury's response, and to respond by the course he deems best suited to deal with it. Id. at 510–14. Here, "the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. . . . [H]e exercised 'sound discretion.' . . . " Id. at 516.

trinal disarray. Thus, in *Gori v. United States*,[85] the Court permitted retrial of the defendant when the trial judge had, on his own motion and with no indication of the wishes of defense counsel, declared a mistrial because he thought the prosecutor's line of questioning was intended to expose the defendant's criminal record, which would have constituted prejudicial error. Although the Court thought that the judge's action was an abuse of discretion, it approved retrial on the grounds that the judge's decision had been taken for defendant's benefit. This rationale was disapproved in the next case, in which the trial judge discharged the jury erroneously and in abuse of his discretion, because he disbelieved the prosecutor's assurance that certain witnesses had been properly apprised of their constitutional rights.[86] Refusing to permit retrial, the Court observed that the "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to go to the first jury and perhaps obtain an acquittal] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."[87] The later cases appear to accept *Jorn* as an example of a case where the trial judge "acts irrationally or irresponsibly." But if the trial judge acts deliberately, giving prosecution and defense the opportunity to explain their positions, and according respect to defendant's interest in concluding the matter before the one jury, then he is entitled to deference. This approach perhaps rehabilitates the result if not the reasoning in *Gori* and maintains the result and much of the reasoning of *Jorn*.[88]

Of course, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error."[89] "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact."[90] In *United States v. Dinitz*,[91] the trial judge had excluded defendant's principal attor-

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[85] 367 U.S. 364 (1961). *See also* United States v. Tateo, 377 U.S. 463 (1964) (reprosecution permitted after the setting aside of a guilty plea found to be involuntary because of coercion by the trial judge).

[86] United States v. Jorn, 400 U.S. 470, 483 (1971).

[87] 400 U.S. at 485. The opinion of the Court was by a plurality of four, but two other Justices joined it after first arguing that jurisdiction was lacking to hear the government's appeal.

[88] Arizona v. Washington, 434 U.S. 497, 514, 515–16 (1978). *See also* Illinois v. Somerville, 410 U.S. 458, 462, 465–66, 469–71 (1973) (discussing *Gori* and *Jorn*.)

[89] United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion).

[90] United States v. Scott, 437 U.S. 82, 93 (1978).

[91] 424 U.S. 600 (1976). *See also* Lee v. United States, 432 U.S. 23 (1977) (defendant's motion to dismiss because the information was improperly drawn made after

ney for misbehavior and had then given defendant the option of recess while he appealed the exclusion, a mistrial, or continuation with an assistant defense counsel. Holding that the defendant could be retried after he chose a mistrial, the Court reasoned that, although the exclusion might have been in error, it was not done in bad faith to goad the defendant into requesting a mistrial or to prejudice his prospects for acquittal. The defendant's choice, even though difficult, to terminate the trial and go on to a new trial should be respected and a new trial not barred. To hold otherwise would necessitate requiring the defendant to shoulder the burden and anxiety of proceeding to a probable conviction followed by an appeal, which if successful would lead to a new trial, and neither the public interest nor the defendant's interests would thereby be served.

But the Court has also reserved the possibility that the defendant's motion might be necessitated by prosecutorial or judicial overreaching motivated by bad faith or undertaken to harass or prejudice, and in those cases retrial would be barred. It was unclear what prosecutorial or judicial misconduct would constitute such overreaching,[92] but, in *Oregon v. Kennedy*,[93] the Court adopted a narrow "intent" test, so that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Therefore, ordinarily, a defendant who moves for or acquiesces in a mistrial is bound by his decision and may be required to stand for retrial.

Reprosecution Following Acquittal

That a defendant may not be retried following an acquittal is "the most fundamental rule in the history of double jeopardy jurisprudence."[94] "[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high

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opening statement and renewed at close of evidence was functional equivalent of mistrial and when granted did not bar retrial, Court emphasizing that defendant by his timing brought about foreclosure of opportunity to stay before the same trial).

[92] *Compare* United States v. Dinitz, 424 U.S. 600, 611 (1976), *with* United States v. Tateo, 377 U.S. 463, 468 n.3 (1964).

[93] 456 U.S. 667, 676 (1982). The Court thought a broader standard requiring an evaluation of whether acts of the prosecutor or the judge prejudiced the defendant would be unmanageable and would be counterproductive because courts would be loath to grant motions for mistrials knowing that reprosecution would be barred. Id. at 676–77. The defendant had moved for mistrial after the prosecutor had asked a key witness a prejudicial question. Four Justices concurred, noting that the question did not constitute overreaching or harassment and objecting both to the Court's reaching the broader issue and to its narrowing the exception. Id. at 681.

[94] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.'"[95] Although, in other areas of double jeopardy doctrine, consideration is given to the public-safety interest in having a criminal trial proceed to an error-free conclusion, no such balancing of interests is permitted with respect to acquittals, "no matter how erroneous," no matter even if they were "egregiously erroneous."[96] Thus, an acquittal resting on the trial judge's misreading of the elements of an offense precludes further prosecution.[97]

The acquittal being final, there is no governmental appeal constitutionally possible from such a judgment. This was firmly established in *Kepner v. United States*,[98] which arose under a Philippines appeals system in which the appellate court could make an independent review of the record, set aside the trial judge's decision, and enter a judgment of conviction.[99] Previously, under the Due Process Clause, there was no barrier to state provision for prosecutorial appeals from acquittals.[100] But there are instances in which the trial judge will dismiss the indictment or information without intending to acquit or in circumstances in which retrial would not be barred, and the prosecution, of course, has an interest in seeking on appeal to have errors corrected. Until 1971, however, the law providing for federal appeals was extremely difficult to apply and insulated from review many purportedly erroneous legal rul-

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[95] United States v. Scott, 437 U.S. 82, 91 (1978) (quoting Green v. United States, 355 U.S. 184, 188 (1957)). For the conceptually related problem of trial for a "separate" offense arising out of the same "transaction," *see* discussion under "The 'Same Transaction' Problem," *infra*.

[96] Burks v. United States, 437 U.S. 1, 16 (1978); Fong Foo v. United States, 369 U.S. 141, 143 (1962). For evaluation of those interests of the defendant that might support the absolute rule of finality, and rejection of all such interests save the right of the jury to acquit against the evidence and the trial judge's ability to temper legislative rules with leniency, *see* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 122–37.

[97] Evans v. Michigan, 568 U.S. ___, No. 11–1327, slip op. (2013) (acquittal after judge ruled the prosecution failed to prove that a burned building was not a dwelling, but such proof was not legally required for the arson offense charged).

[98] 195 U.S. 100 (1904). The case interpreted not the constitutional provision but a statutory provision extending double jeopardy protection to the Philippines. The Court has described the case, however, as correctly stating constitutional principles. *See, e.g.*, United States v. Wilson, 420 U.S. 332, 346 n.15 (1975); United States v. DiFrancesco, 449 U.S. 117, 113 n.13 (1980).

[99] In dissent, Justice Holmes, joined by three other Justices, propounded a theory of "continuing jeopardy," so that until the case was finally concluded one way or another, through judgment of conviction or acquittal, and final appeal, there was no second jeopardy no matter how many times a defendant was tried. 195 U.S. at 134. The Court has numerous times rejected any concept of "continuing jeopardy." *E.g.*, Green v. United States, 355 U.S. 184, 192 (1957); United States v. Wilson, 420 U.S. 332, 351–53 (1975); Breed v. Jones, 421 U.S. 519, 533–35 (1975).

[100] Palko v. Connecticut, 302 U.S. 319 (1937). *Palko* is no longer viable. *Cf.* Greene v. Massey, 437 U.S. 19 (1978).

ings,[101] but in that year Congress enacted a new statute permitting appeals in all criminal cases in which indictments are dismissed, except in those cases in which the Double Jeopardy Clause prohibits further prosecution.[102] In part because of the new law, the Court has dealt in recent years with a large number of problems in this area.

Acquittal by Jury.—Little or no controversy accompanies the rule that once a jury has acquitted a defendant, government may not, through appeal of the verdict or institution of a new prosecution, place the defendant on trial again.[103] Thus, the Court early held that, when the results of a trial are set aside because the first indictment was invalid or for some reason the trial's results were voidable, a judgment of acquittal must nevertheless remain undisturbed.[104]

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[101] The Criminal Appeals Act of 1907, 34 Stat. 1246, was "a failure . . . , a most unruly child that has not improved with age." United States v. Sisson, 399 U.S. 267, 307 (1970). *See also* United States v. Oppenheimer, 242 U.S. 85 (1916); Fong Foo v. United States, 369 U.S. 141 (1962).

[102] Title III of the Omnibus Crime Control Act, Pub. L. 91–644, 84 Stat. 1890, 18 U.S.C. § 3731. Congress intended to remove all statutory barriers to governmental appeal and to allow appeals whenever the Constitution would permit, so that interpretation of the statute requires constitutional interpretation as well. United States v. Wilson, 420 U.S. 332, 337 (1974). *See* Sanabria v. United States, 437 U.S. 54, 69 n.23 (1978), and id. at 78 (Justice Stevens concurring).

[103] What constitutes a jury acquittal may occasionally be uncertain. In Blueford v. Arkansas, 566 U.S. ___, No. 10–1320, slip op. (2012), the defendant was charged with capital murder in an "acquittal-first" jurisdiction, in which the jury must unanimously agree that a defendant is not guilty of a greater offense before it may begin to consider a lesser included offense. After several hours of deliberations, the foreperson of the jury stated in open court that the jury was unanimously against conviction for capital murder and the lesser included offense of first degree murder, but was deadlocked on manslaughter, the next lesser included offense. After further deliberations, the judge declared a mistrial because of a hung jury. Six Justices of the Court subsequently held that the foreperson's statement on capital murder and first degree murder lacked the necessary finality of an acquittal, and found that Double Jeopardy did not bar a subsequent prosecution for those crimes. Three dissenting Justices held that Double Jeopardy required a partial verdict of acquittal on the greater offenses under the circumstances.

In Schiro v. Farley, 510 U.S. 222 (1994), the Court ruled that a jury's action in leaving the verdict sheet blank on all but one count did not amount to an acquittal on those counts, and that consequently conviction on the remaining count, alleged to be duplicative of one of the blank counts, could not constitute double jeopardy. In any event, the Court added, no successive prosecution violative of double jeopardy could result from an initial sentencing proceeding in the course of an initial prosecution.

[104] In United States v. Ball, 163 U.S. 662 (1896), three defendants were placed on trial, Ball was acquitted and the other two were convicted, the two appealed and obtained a reversal on the ground that the indictment had been defective, and all three were again tried and all three were convicted. Ball's conviction was set aside as violating the clause; the trial court's action was not void but only voidable, and Ball had taken no steps to void it while the government could not take such action. Similarly, in Benton v. Maryland, 395 U.S. 784 (1969), the defendant was convicted

Acquittal by the Trial Judge.—When a trial judge acquits a defendant, that action concludes the matter to the same extent that acquittal by jury verdict does.[105] There is no possibility of retrial for the same offense.[106] But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or whether it was a dismissal or some other action, which the prosecution may be able to appeal or the judge may be able to reconsider.[107] The question is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." [108] Thus, an appeal by the government was held barred in a case in which the deadlocked jury had been discharged, and the trial judge had granted the defendant's motion for a judgment of acquittal under the appropriate federal rule, explicitly based on the judgment that the government had not proved facts constituting the offense.[109] Even if, as happened in *Sanabria v. United States*,[110] the trial judge erroneously excludes evidence and then acquits on the basis that the remaining evidence is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.[111]

Some limited exceptions exist with respect to the finality of trial judge acquittal. First, because a primary purpose of the Due Process Clause is the prevention of successive trials and not of prosecution appeals *per se*, it is apparently the case that, if the trial judge permits the case to go to the jury, which convicts, and the judge thereafter enters a judgment of acquittal, even one founded upon

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of burglary but acquitted of larceny; the conviction was set aside on his appeal because the jury had been unconstitutionally chosen. He was again tried and convicted of both burglary and larceny, but the larceny conviction was held to violate the Double Jeopardy Clause. On the doctrine of "constructive acquittals" by conviction of a lesser included offense, *see* discussion *infra* under "Reprosecution After Reversal on Defendant's Appeal."

[105] United States v. Martin Linen Supply Co., 430 U.S. 564, 570–72 (1977); Sanabria v. United States, 437 U.S. 54, 63–65 (1978); Finch v. United States, 433 U.S. 676 (1977).

[106] In Fong Foo v. United States, 369 U.S. 141 (1962), the Court acknowledged that the trial judge's action in acquitting was "based upon an egregiously erroneous foundation," but it was nonetheless final and could not be reviewed. Id. at 143.

[107] As a general rule a state may prescribe that a judge's midtrial determination of the sufficiency of the prosecution's proof may be reconsidered. Smith v. Massachusetts, 543 U.S. 462 (2005) (Massachusetts had not done so, however, so the judge's midtrial acquittal on one of three counts became final for double jeopardy purposes when the prosecution rested its case).

[108] United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977).

[109] 430 U.S. at 570–76. *See also* United States v. Scott, 437 U.S. 82, 87–92 (1978); Smalis v. Pennsylvania, 476 U.S. 140 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

[110] 437 U.S. 54 (1978).

[111] *See also* Smith v. Massachusetts, 543 U.S. 462 (2005) (acquittal based on erroneous interpretation of precedent).

his belief that the evidence does not establish guilt, the prosecution may appeal, because the effect of a reversal would be not a new trial but reinstatement of the jury's verdict and the judgment thereon.[112] Second, if the trial judge enters or grants a motion of acquittal, even one based on the conclusion that the evidence is insufficient to convict, then the prosecution may appeal if jeopardy had not yet attached in accordance with the federal standard.[113]

Trial Court Rulings Terminating Trial Before Verdict.— If, after jeopardy attaches, a trial judge grants a motion for mistrial, ordinarily the defendant is subject to retrial;[114] if, after jeopardy attaches, but before a jury conviction occurs, the trial judge acquits, perhaps on the basis that the prosecution has presented insufficient evidence or that the defendant has proved a requisite defense such as insanity or entrapment, the defendant is not subject to retrial.[115] This is so even where the trial court's ruling on the sufficiency of the evidence is based on an erroneous interpretation of the statute defining the elements of the offense.[116] However, it may be that the trial judge will grant a motion to dismiss that is neither a mistrial nor an acquittal, but is instead a termination of the trial in defendant's favor based on some decision not relating to his factual guilt or innocence, such as prejudicial preindictment delay.[117] The prosecution may not simply begin a new trial but must seek first to appeal and overturn the dismissal, a course that was not open to federal prosecutors until enactment of the Omnibus Crime

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[112] In United States v. Wilson, 420 U.S. 332 (1975), following a jury verdict to convict, the trial judge granted defendant's motion to dismiss on the ground of prejudicial delay, not a judgment of acquittal; the Court permitted a government appeal because reversal would have resulted in reinstatement of the jury's verdict, not in a retrial. In United States v. Jenkins, 420 U.S. 358, 365 (1975), the Court assumed, on the basis of *Wilson*, that a trial judge's acquittal of a defendant following a jury conviction could be appealed by the government because, again, if the judge's decision were set aside there would be no further proceedings at trial. In overruling *Jenkins* in United States v. Scott, 437 U.S. 82 (1978), the Court noted the assumption and itself assumed that a judgment of acquittal bars appeal only when a second trial would be necessitated by reversal. Id. at 91 n.7.

[113] Serfass v. United States, 420 U.S. 377 (1975) (after request for jury trial but before attachment of jeopardy judge dismissed indictment because of evidentiary insufficiency; appeal allowed); United States v. Sanford, 429 U.S. 14 (1976) (judge granted mistrial after jury deadlock, then four months later dismissed indictment for insufficient evidence; appeal allowed, because granting mistrial had returned case to pretrial status).

[114] *See* "Reprosecution After Reversal on Defendant's Appeal," *supra*.

[115] *See* "Acquittal by the Trial Judge," *supra*.

[116] *See* Evans v. Michigan, 568 U.S. ___, No. 11–1327, slip op. (2013).

[117] United States v. Wilson, 420 U.S. 332 (1975) (preindictment delay); United States v. Jenkins, 420 U.S. 358 (1975) (determination of law based on facts adduced at trial; ambiguous whether judge's action was acquittal or dismissal); United States v. Scott, 437 U.S. 82 (1978) (preindictment delay).

Control Act in 1971.[118] That law has resulted in tentative and uncertain rulings with respect to when such dismissals may be appealed and further proceedings directed. In the first place, it is unclear in many instances whether a judge's ruling is a mistrial, a dismissal, or an acquittal.[119] In the second place, because the Justices have such differing views about the policies underlying the Double Jeopardy Clause, determinations of which dismissals preclude appeals and further proceedings may result from shifting coalitions and from revised perspectives. Thus, the Court first fixed the line between permissible and impermissible appeals at the point at which further proceedings would have had to take place in the trial court if the dismissal were reversed. If the only thing that had to be done was to enter a judgment on a guilty verdict after reversal, appeal was constitutional and permitted under the statute;[120] if further proceedings, such as continuation of the trial or some further factfinding, was necessary, appeal was not permitted.[121] Now, but by a close division of the Court, the determining factor is not whether further proceedings must be had but whether the action of the trial judge, whatever its label, correct or not, resolved some or all of the factual elements of the offense charged in defendant's favor, whether, that is, the court made some determination related to the defendant's factual guilt or innocence.[122] Such dismissals relating to guilt

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[118] *See* United States v. Scott, 437 U.S. 82, 84–86 (1978); United States v. Sisson, 399 U.S. 267, 291–96 (1970).

[119] *Cf.* Lee v. United States, 432 U.S. 23 (1977).

[120] United States v. Wilson, 420 U.S. 332 (1975) (after jury guilty verdict, trial judge dismissed indictment on grounds of preindictment delay; appeal permissible because upon reversal all trial judge had to do was enter judgment on the jury's verdict).

[121] United States v. Jenkins, 420 U.S. 358 (1975) (after presentation of evidence in bench trial, judge dismissed indictment; appeal impermissible because if dismissal was reversed there would have to be further proceedings in the trial court devoted to resolving factual issues going to elements of offense charged and resulting in supplemental findings).

[122] United States v. Scott, 437 U.S. 82 (1978) (at close of evidence, court dismissed indictment for preindictment delay; ruling did not go to determination of guilt or innocence, but, like a mistrial, permitted further proceedings that would go to factual resolution of guilt or innocence). The Court thought that double jeopardy policies were resolvable by balancing the defendant's interest in having the trial concluded in one proceeding against the government's right to one complete opportunity to convict those who have violated the law. The defendant chose to move to terminate the proceedings and, having made a voluntary choice, is bound to the consequences, including the obligation to continue in further proceedings. Id. at 95–101. The four dissenters would have followed *Jenkins*, and accused the Court of having adopted too restrictive a definition of acquittal. Their view is that the rule against retrials after acquittal does not, as the Court believed, "safeguard determination of innocence; rather, it is that a retrial following a final judgment for the accused necessarily threatens intolerable interference with the constitutional policy against multiple trials." Id. at 101, 104 (Justices Brennan, White, Marshall, and Stevens). They

or innocence are functional equivalents of acquittals, whereas all other dismissals are functional equivalents of mistrials.

Reprosecution Following Conviction

A basic purpose of the Double Jeopardy Clause is to protect a defendant "against a second prosecution for the same offense after conviction." [123] It is "settled" that "no man can be twice lawfully punished for the same offense." [124] Of course, the defendant's interest in finality, which informs much of double jeopardy jurisprudence, is quite attenuated following conviction, and he will most likely appeal, whereas the prosecution will ordinarily be content with its judgment.[125] The situation involving reprosecution ordinarily arises, therefore, only in the context of successful defense appeals and controversies over punishment.

Reprosecution After Reversal on Defendant's Appeal.—Generally, a defendant who is successful in having his conviction set aside on appeal may be tried again for the same offense, the assumption being made in the first case on the subject that, by appealing, a defendant has "waived" his objection to further prosecution by challenging the original conviction.[126] Although it has characterized the "waiver" theory as "totally unsound and indefensible," [127] the Court has been hesitant in formulating a new theory in maintaining the practice.[128]

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would, therefore, treat dismissals as functional equivalents of acquittals, whenever further proceedings would be required after reversals.

[123] North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[124] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

[125] A prosecutor dissatisfied with the punishment imposed upon the first conviction might seek another trial in order to obtain a greater sentence. *Cf.* Ciucci v. Illinois, 356 U.S. 571 (1958) (under Due Process Clause, Double Jeopardy Clause not then applying to states).

[126] United States v. Ball, 163 U.S. 662 (1896). The English rule precluded a new trial in these circumstances, and circuit Justice Story adopted that view. United States v. Gilbert, 25 Fed. Cas. 1287 (No. 15,204) (C.C.D.Mass. 1834). The history is briefly surveyed in Justice Frankfurter's dissent in Green v. United States, 355 U.S. 184, 200–05 (1957).

[127] Green v. United States, 355 U.S. 184, 197 (1957). The more recent cases continue to reject a "waiver" theory. *E.g.*, United States v. Dinitz, 424 U.S. 600, 609 n.11 (1976); United States v. Scott, 437 U.S. 82, 99 (1978).

[128] Justice Holmes, dissenting in Kepner v. United States, 195 U.S. 100, 134 (1904), rejected the "waiver" theory and propounded a theory of "continuing jeopardy," which also continues to be rejected. *See* discussion, *supra*. In some cases, a concept of "election" by the defendant has been suggested, United States v. Scott, 437 U.S. 82, 93 (1978); Jeffers v. United States, 432 U.S. 137, 152–54 (1977), but it is not clear how this formulation might differ from "waiver." Chief Justice Burger has suggested that "probably a more satisfactory explanation" for permissibility of retrial in this situation "lies in analysis of the respective interests involved," Breed v. Jones, 421 U.S. 519, 533–35 (1975), and a determination that on balance the interests of both prosecution and defense are well served by the rule. *See* United States v. Tateo, 377 U.S. 463, 466 (1964); Tibbs v. Florida, 457 U.S. 31, 39–40 (1982).

An exception to full application of the retrial rule exists, however, when defendant on trial for an offense is convicted of a lesser offense and succeeds in having that conviction set aside. Thus, in *Green v. United States*,[129] the defendant had been placed on trial for first degree murder but convicted of second degree murder; the Court held that, following reversal of that conviction, he could not be tried again for first degree murder, although he certainly could be for second degree murder, on the theory that the first verdict was an implicit acquittal of the first degree murder charge.[130] Even though the Court thought the jury's action in the first trial was clearly erroneous, the Double Jeopardy Clause required that the jury's implicit acquittal be respected.[131]

Still another exception arises out of appellate reversals grounded on evidentiary insufficiency. Thus, in *Burks v. United States*,[132] the appellate court set aside the defendant's conviction on the basis that the prosecution had failed to rebut defendant's proof of insanity. In directing that the defendant could not be retried, the Court observed that if the trial court "had so held in the first instance, as the reviewing court said it should have done, a judgment of acquittal would have been entered and, of course, petitioner could not be retried for the same offense. . . . [I]t should make no difference that the reviewing court, rather than the trial court, determined the evidence to be insufficient."[133] The policy underlying the clause of not allowing the prosecution to make repeated efforts to convict fore-

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[129] 355 U.S. 184 (1957).

[130] The decision necessarily overruled Trono v. United States, 199 U.S. 521 (1905), although the Court purported to distinguish the decision. Green v. United States, 355 U.S. 184, 194–97 (1957). *See also* Brantley v. Georgia, 217 U.S. 284 (1910) (no due process violation where defendant is convicted of higher offense on second trial).

[131] *See also* Price v. Georgia, 398 U.S. 323 (1970). The defendant was tried for murder and was convicted of involuntary manslaughter. He obtained a reversal, was again tried for murder, and again convicted of involuntary manslaughter. Acknowledging that, after reversal, Price could have been tried for involuntary manslaughter, the Court nonetheless reversed the second conviction because he had been subjected to the hazard of twice being tried for murder, in violation of the Double Jeopardy Clause, and the effect on the jury of the murder charge being pressed could have prejudiced him to the extent of the second conviction. *But cf.* Morris v. Mathews, 475 U.S. 237 (1986) (inadequate showing of prejudice resulting from reducing jeopardy-barred conviction for aggravated murder to non-jeopardy-barred conviction for first degree murder). "To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." Id. at 247.

[132] 437 U.S. 1 (1978).

[133] Id. at 10–11. *See also* Greene v. Massey, 437 U.S. 19 (1978) (remanding for determination whether appellate majority had reversed for insufficient evidence or whether some of the majority had based decision on trial error); Hudson v. Louisiana, 450 U.S. 40 (1981) (*Burks* applies where appellate court finds some but insufficient evidence adduced, not only where it finds no evidence). *Burks* was distinguished in Justices of Boston Mun. Court v. Lydon, 466 U.S. 294 (1984), which held that a defendant who had elected to undergo a bench trial with no appellate review

closes giving the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. On the other hand, if a reviewing court reverses a jury conviction because of its disagreement on the *weight* rather than the *sufficiency* of the evidence, retrial is permitted; the appellate court's decision does not mean that acquittal was the only proper course, hence the deference required for acquittals is not merited.[134] Also, the *Burks* rule does not bar reprosecution following a reversal based on erroneous admission of evidence, even if the remaining properly admitted evidence would be insufficient to convict.[135]

Sentence Increases.—The Double Jeopardy Clause protects against imposition of multiple punishment for the same offense.[136] The application of the principle leads, however, to a number of complexities. In a simple case, it was held that where a court inadvertently imposed both a fine and imprisonment for a crime for which the law authorized one or the other but not both, it could not, after the fine had been paid and the defendant had entered his short term of confinement, recall the defendant and change its judgment by sentencing him to imprisonment only.[137] But the Court has held that the imposition of a sentence does not from the moment of imposition have the finality that a judgment of acquittal has. Thus, it has long been recognized that in the same term of court and before the defendant has begun serving the sentence the court may recall him and increase his sentence.[138] Moreover, a defendant who is retried

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but with the right of trial *de novo* before a jury (and with appellate review available) could not bar trial *de novo* and reverse his bench trial conviction by asserting that the conviction had been based on insufficient evidence. The two-tiered system in effect gave the defendant two chances at acquittal; under those circumstances jeopardy was not terminated by completion of the first entirely optional stage.

[134] Tibbs v. Florida, 457 U.S. 31 (1982). The decision was 5-to-4, the dissent arguing that weight and insufficiency determinations should be given identical Double Jeopardy Clause treatment. Id. at 47 (Justices White, Brennan, Marshall, and Blackmun).

[135] Lockhart v. Nelson, 488 U.S. 33 (1988) (state may reprosecute under habitual offender statute even though evidence of a prior conviction was improperly admitted; at retrial, state may attempt to establish other prior convictions as to which no proof was offered at prior trial).

[136] *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 173 (1874); North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[137] *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874).

[138] Bozza v. United States, 330 U.S. 160 (1947). *See also* Pollard v. United States, 352 U.S. 354, 359–60 (1957) (imposition of prison sentence two years after court imposed an invalid sentence of probation approved). Dicta in some cases had cast doubt on the constitutionality of the practice. United States v. Benz, 282 U.S. 304, 307 (1931). However, United States v. DiFrancesco, 449 U.S. 117, 133–36, 138–39 (1980), upholding a statutory provision allowing the United States to appeal a sentence imposed on a "dangerous special offender," removes any doubt on that score. The Court there reserved decision on whether the government may appeal a sentence that the defendant has already begun to serve.

after he is successful in overturning his first conviction is not protected by the Double Jeopardy Clause against receiving a greater sentence upon his second conviction.[139] An exception exists with respect to capital punishment, the Court having held that government may not again seek the death penalty on retrial when on the first trial the jury had declined to impose a death sentence.[140]

Applying and modifying these principles, the Court narrowly approved the constitutionality of a statutory provision for sentencing of "dangerous special offenders," which authorized prosecution appeals of sentences and permitted the appellate court to affirm, reduce, or increase the sentence.[141] The Court held that the provision did not offend the Double Jeopardy Clause. Sentences had never carried the finality that attached to acquittal, and its precedents indicated to the Court that imposition of a sentence less than the maximum was in no sense an "acquittal" of the higher sentence. Appeal resulted in no further trial or other proceedings to which a defendant might be subjected, only the imposition of a new sentence. An increase in a sentence would not constitute multiple punishment, the Court continued, inasmuch as it would be within the allowable sentence and the defendant could have no legitimate expectation of finality in the sentence as first given because the statutory scheme alerted him to the possibility of increase. Similarly upheld as within the allowable range of punishment contemplated by the legislature was a remedy for invalid multiple punishments under consecutive sentences: a shorter felony conviction was vacated, and time served was credited to the life sentence imposed for felony-murder. Even though the first sentence had been commuted and

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[139] North Carolina v. Pearce, 395 U.S. 711, 719–21 (1969). *See also* Chaffin v. Stynchcombe, 412 U.S. 17, 23–24 (1973). The principle of implicit acquittal of an offense drawn from Green v. United States, 355 U.S. 184 (1957), does not similarly apply to create an implicit acquittal of a higher sentence. *Pearce* does hold that a defendant must be credited with the time served against his new sentence. 395 U.S. at 717–19.

[140] Bullington v. Missouri, 451 U.S. 430 (1981). Four Justices dissented. Id. at 447 (Justices Powell, White, Rehnquist, and Chief Justice Burger). The Court disapproved Stroud v. United States, 251 U.S. 15 (1919), although formally distinguishing it. *Bullington* was followed in Arizona v. Rumsey, 467 U.S. 203 (1984), also involving a separate sentencing proceeding in which a life imprisonment sentence amounted to an acquittal on imposition of the death penalty. *Rumsey* was decided by 7–2 vote, with only Justices White and Rehnquist dissenting. In Monge v. California, 524 U.S. 721 (1998), the Court refused to extend the "narrow" *Bullington* exception outside the area of capital punishment. *But see* Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (state may seek the death penalty in a retrial when defendant appealed following discharge of the sentencing jury under a statute authorizing discharge based on the court's "opinion that further deliberation would not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment").

[141] United States v. DiFrancesco, 449 U.S. 117 (1980). Four Justices dissented. Id. at 143, 152 (Justices Brennan, White, Marshall, and Stevens).

hence fully satisfied at the time the trial court revised the second sentence, the resulting punishment was "no greater than the legislature intended," hence there was no double jeopardy violation.[142]

The Court is also quite deferential to legislative classification of recidivism sentencing enhancement factors as relating only to sentencing and as not constituting elements of an "offense" that must be proved beyond a reasonable doubt. Ordinarily, therefore, sentence enhancements cannot be construed as additional punishment for the previous offense, and the Double Jeopardy Clause is not implicated. "Sentencing enhancements do not punish a defendant for crimes for which he was not convicted, but rather increase his sentence because of the manner in which he committed his crime of conviction." [143]

"For the Same Offence"

Sometimes as difficult as determining when a defendant has been placed in jeopardy is determining whether he was placed in jeopardy for the same offense. As noted previously, the same conduct may violate the laws of two different sovereigns, and a defendant may be proceeded against by both because each may have different interests to serve.[144] The same conduct may transgress two or more different statutes, because laws reach lesser and greater parts of one item of conduct, or may violate the same statute more than once, as when one robs several people in a group at the same time.

Legislative Discretion as to Multiple Sentences.—It frequently happens that one activity of a criminal nature will violate one or more laws or that one or more violations may be charged.[145]

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[142] Jones v. Thomas, 491 U.S. 376, 381–82 (1989).

[143] United States v. Watts, 519 U.S. 148, 154 (1997) (relying on Witte v. United States, 515 U.S. 389 (1995), and holding that a sentencing court may consider earlier conduct of which the defendant was acquitted, so long as that conduct is proved by a preponderance of the evidence). *See also* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (Congress's decision to treat recidivism as a sentencing factor does not violate due process); Monge v. California, 524 U.S. 721 (1998) (retrial is permissible following appellate holding of failure of proof relating to sentence enhancement). Justice Scalia, whose dissent in *Almendarez-Torres* argued that there was constitutional doubt over whether recidivism factors that increase a maximum sentence must be treated as a separate offense for double jeopardy purposes (523 U.S. at 248), answered that question affirmatively in his dissent in *Monge*. 524 U.S. 740–41.

[144] *See* discussion *supra* under "Development and Scope."

[145] There are essentially two kinds of situations here. There are "double-description" cases in which criminal law contains more than one prohibition for conduct arising out of a single transaction. *E.g.*, Gore v. United States, 357 U.S. 386, 392–93 (1958) (one sale of narcotics resulted in three separate counts: (1) sale of drugs not in pursuance of a written order, (2) sale of drugs not in the original stamped package, and (3) sale of drugs with knowledge that they had been unlawfully imported). And there are "unit-of-prosecution" cases in which the same conduct may

Although the question is not totally free of doubt, it appears that the Double Jeopardy Clause does not limit the legislative power to split a single transaction into separate crimes so as to give the prosecution a choice of charges that may be tried in one proceeding, thereby making multiple punishments possible for essentially one transaction.[146] "Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial." [147]

The clause does, however, create a rule of construction—a presumption against the judiciary imposing multiple punishments for the same transaction unless Congress has "spoken in language that is clear and definite" [148] to pronounce its intent that multiple punishments indeed be imposed. The commonly used test in determining whether Congress would have wanted to punish as separate offenses conduct occurring in the same transaction, absent otherwise clearly expressed intent, is the "same evidence" rule. The rule, announced in *Blockburger v. United States*,[149] "is that where the same act or transaction constitutes a violation of two distinct statutory

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violate the same statutory prohibition more than once. *E.g.*, Bell v. United States, 349 U.S. 81 (1955) (defendant who transported two women across state lines for an immoral purpose in one trip in same car indicted on two counts of violating Mann Act). *See* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 111–22.

[146] Albernaz v. United States, 450 U.S. 333, 343–44 (1981) (defendants convicted on separate counts of conspiracy to import marijuana and conspiracy to distribute marijuana, both charges relating to the same marijuana.) The concurrence objected that the clause does preclude multiple punishments for separate statutory offenses unless each requires proof of a fact that the others do not. Id. at 344. Because the case involved separate offenses that met this test, *Albernaz* strictly speaking is not a square holding and previous dicta is otherwise, but *Albernaz's* dicta is well-considered in view of the positions of at least four of its Justices who have objected to the dicta in other cases suggesting a constitutional restraint by the clause. Whalen v. United States, 445 U.S. 684, 695, 696, 699 (1980) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger).

[147] Missouri v. Hunter, 459 U.S. 359, 368–69 (1983) (separate offenses of "first degree robbery," defined to include robbery under threat of violence, and "armed criminal action"). Only Justices Marshall and Stevens dissented, arguing that the legislature should not be totally free to prescribe multiple punishment for the same conduct, and that the same rules should govern multiple prosecutions and multiple punishments.

[148] United States v. Universal C.I.T. Corp., 344 U.S. 218, 221–22 (1952).

[149] 284 U.S. 299, 304 (1932). This case itself was not a double jeopardy case, but it derived the rule from Gavieres v. United States, 220 U.S. 338, 342 (1911), which was a double jeopardy case. *See also* Carter v. McClaughry, 183 U.S. 365 (1902); Morgan v. Devine, 237 U.S. 632 (1915); Albrecht v. United States, 273 U.S. 1 (1927); Pinkerton v. United States, 328 U.S. 640 (1946); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Michener, 331 U.S. 789 (1947); Pereira v. United States, 347 U.S. 1 (1954); Callanan v. United States, 364 U.S. 587 (1961).

provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Thus, in *Gore v. United States*,[150] the Court held that defendant's one act of selling narcotics had violated three distinct criminal statutes, each of which required proof of a fact not required by the others; prosecuting him on all three counts in the same proceeding was therefore permissible.[151] So too, the same evidence rule does not upset the "established doctrine" that, for double jeopardy purposes, "a conspiracy to commit a crime is a separate offense from the crime itself," [152] or the related principle that Congress may prescribe that predicate offenses and "continuing criminal enterprise" are separate offenses.[153] On the other hand, in *Whalen v. United States*,[154] the Court determined that a defendant could not be separately punished for rape and for killing the same victim in the perpetration of the rape, because it is not the case that each statute requires proof of a fact that the other does not, and no indication existed in the statutes and the legislative history that Congress wanted the separate offenses punished.[155] In this as in other areas, a guilty plea ordinarily precludes collateral attack.[156]

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[150] 357 U.S. 386 (1958).

[151] *See also* Albernaz v. United States, 450 U.S. 333 (1981); Iannelli v. United States, 420 U.S. 770 (1975) (defendant convicted on two counts, one of the substantive offense, one of conspiracy to commit the substantive offense; defense raised variation of *Blockburger* test, Wharton's Rule requiring that one may not be punished for conspiracy to commit a crime when the nature of the crime necessitates participation of two or more persons for its commission; Court recognized Wharton's Rule as a double-jeopardy inspired presumption of legislative intent but held that congressional intent in this case was "clear and unmistakable" that both offenses be punished separately).

[152] United States v. Felix, 503 U.S. 378, 391 (1992). *But cf.* Rutledge v. United States, 517 U.S. 292 (1996) (21 U.S.C. § 846, prohibiting conspiracy to commit drug offenses, does not require proof of any fact that is not also a part of the continuing criminal enterprise offense under 21 U.S.C. § 848, so there are not two separate offenses).

[153] Garrett v. United States, 471 U.S. 773 (1985) ("continuing criminal enterprise" is a separate offense under the Comprehensive Drug Abuse Prevention and Control Act of 1970).

[154] 445 U.S. 684 (1980).

[155] The Court reasoned that a conviction for killing in the course of rape could not be had without providing all of the elements of the offense of rape. *See also* Jeffers v. United States, 432 U.S. 137 (1977) (no indication in legislative history Congress intended defendant to be prosecuted both for conspiring to distribute drugs and for distributing drugs in concert with five or more persons); Simpson v. United States, 435 U.S. 6 (1978) (defendant improperly prosecuted both for committing bank robbery with a firearm and for using a firearm to commit a felony); Bell v. United States, 349 U.S. 81 (1955) (simultaneous transportation of two women across state lines for immoral purposes one violation of Mann Act rather than two).

[156] United States v. Broce, 488 U.S. 563 (1989) (defendant who pled guilty to two separate conspiracy counts is barred from collateral attack alleging that in fact there was only one conspiracy and that double jeopardy applied).

Successive Prosecutions for "the Same Offense".—Successive prosecutions raise fundamental double jeopardy concerns extending beyond those raised by enhanced and multiple punishments. It is more burdensome for a defendant to face charges in separate proceedings, and if those proceedings are strung out over a lengthy period the defendant is forced to live in a continuing state of uncertainty. At the same time, multiple prosecutions allow the state to hone its trial strategies through successive attempts at conviction.[157] In *Brown v. Ohio*,[158] the Court, apparently for the first time, applied the same evidence test to bar successive prosecutions in state court for different statutory offenses involving the same conduct. The defendant had been convicted of "joyriding," defined as operating a motor vehicle without the owner's consent, and was then prosecuted and convicted of stealing the same automobile. Because the state courts had conceded that joyriding was a lesser included offense of auto theft, the Court observed that each offense required the same proof and for double jeopardy purposes met the *Blockburger* test. The second conviction was overturned.[159] Application of the same principles resulted in a holding that a prior conviction of failing to reduce speed to avoid an accident did not preclude a second trial for involuntary manslaughter, because failing to reduce speed was not a necessary element of the statutory offense of manslaughter, unless the prosecution in the second trial had to prove failing to reduce speed to establish this particular offense.[160] In 1990, the Court modified the *Brown* approach, stating that the appropriate focus is on same conduct rather than same evidence.[161] That interpretation held sway only three years, however, before being repudiated as "wrong

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[157] *See* Grady v. Corbin, 495 U.S. 508, 518–19 (1990).

[158] 432 U.S. 161 (1977). *Cf. In re* Nielsen, 131 U.S. 176 (1889) (prosecution of Mormon for adultery held impermissible following his conviction for cohabiting with more than one woman, even though second prosecution required proof of an additional fact—that he was married to another woman).

[159] *See also* Harris v. Oklahoma, 433 U.S. 682 (1977) (defendant who had been convicted of felony murder for participating in a store robbery with another person who shot a store clerk could not be prosecuted for robbing the store, since store robbery was a lesser-included crime in the offense of felony murder).

[160] Illinois v. Vitale, 447 U.S. 410 (1980).

[161] Grady v. Corbin, 495 U.S. 508 (1990) (holding that the state could not prosecute a traffic offender for negligent homicide because it would attempt to prove conduct for which the defendant had already been prosecuted—driving while intoxicated and failure to keep to the right of the median). A subsequent prosecution is barred, the Court explained, if the government, to establish an essential element of an offense, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Id. at 521.

in principle [and] unstable in application." [162] The *Brown* Court had noted some limitations applicable to its holding,[163] and more have emerged subsequently. Principles appropriate in the "classically simple" lesser-included-offense and related situations are not readily transposable to "multilayered conduct" governed by the law of conspiracy and continuing criminal enterprise, and it remains the law that "a substantive crime and a conspiracy to commit that crime are not the 'same offense' for double jeopardy purposes." [164] For double jeopardy purposes, a defendant is "punished . . . only for the offense of which [he] is convicted"; a later prosecution or later punishment is not barred simply because the underlying criminal activity has been considered at sentencing for a different offense.[165] Similarly, recidivism-based sentence enhancement does not constitute multiple punishment for the "same" prior offense, but instead is a stiffened penalty for the later crime.[166]

The "Same Transaction" Problem.—The same conduct may also give rise to multiple offenses in a way that would satisfy the *Blockburger* test if that conduct victimizes two or more individuals, and therefore constitutes a separate offense as to each of them. In *Hoag v. New Jersey*,[167] before the Double Jeopardy Clause was applied to the states, the Court found no due process problem in successive trials arising out of a tavern hold-up in which five customers were robbed. *Ashe v. Swenson*,[168] however, presented the Court with the *Hoag* fact situation directly under the Double Jeopardy

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[162] United States v. Dixon, 509 U.S. 688, 709 (1993) (applying *Blockburger* test to determine whether prosecution for a crime, following conviction for criminal contempt for violation of a court order prohibiting that crime, constitutes double jeopardy).

[163] The Court suggested that if the legislature had provided that joyriding is a separate offense for each day the vehicle is operated without the owner's consent, so that the two indictments each specifying a different date on which the offense occurred would have required different proof, the result might have been different, but this, of course, met the *Blockburger* problem. Brown v. Ohio, 432 U.S. 161, 169 n.8 (1977). The Court also suggested that an exception might be permitted where the State is unable to proceed on the more serious charge at the outset because the facts necessary to sustain that charge had not occurred or had not been discovered. Id. at 169 n.7. *See also* Jeffers v. United States, 432 U.S. 137, 150–54 (1977) (plurality opinion) (exception where defendant elects separate trials); Ohio v. Johnson, 467 U.S. 493 (1984) (trial court's acceptance of guilty plea to lesser included offense and dismissal of remaining charges over prosecution's objections does not bar subsequent prosecution on those "remaining" counts).

[164] United States v. Felix, 503 U.S. 378, 389 (1992). The fact that *Felix* constituted a "large exception" to *Grady* was one of the reasons the Court cited in overruling *Grady*. United States v. Dixon, 509 U.S. 688, 709–10 (1993).

[165] Witte v. United States, 515 U.S. 389 (1995) (consideration of defendant's alleged cocaine dealings in determining sentence for marijuana offenses does not bar subsequent prosecution on cocaine charges).

[166] Monge v. California, 524 U.S. 721, 728 (1998).

[167] 356 U.S. 464 (1958). *See also* Ciucci v. Illinois, 356 U.S. 571 (1958).

[168] 397 U.S. 436 (1970).

Clause. The defendant had been acquitted at trial of robbing one player in a poker game; the defense offered no testimony and did not contest evidence that a robbery had taken place and that each of the players had lost money. A second trial was held on a charge that the defendant had robbed a second of the seven poker players, and on the basis of stronger identification testimony the defendant was convicted. Reversing the conviction, the Court held that the doctrine of collateral estoppel [169] was a constitutional rule made applicable to the states through the Double Jeopardy Clause. Because the only basis upon which the jury could have acquitted the defendant at his first trial was a finding that he was not present at the robbery, hence was not one of the robbers, the state could not relitigate that issue; with that issue settled, there could be no conviction.[170] Several Justices would have gone further and required a compulsory joinder of all charges against a defendant growing out of a single criminal act, occurrence, episode, or transaction, except where a crime is not discovered until prosecution arising from the same transaction has begun or where the same jurisdiction does not have cognizance of all the crimes.[171] But the Court has "steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause." [172]

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[169] "'Collateral estoppel' is an awkward phrase . . . [which] means simply that when an issue of ultimate fact has once been determined by a final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443. First developed in civil litigation, the doctrine was applied in a criminal case in United States v. Oppenheimer, 242 U.S. 85 (1916). *See also* Sealfon v. United States, 332 U.S. 575 (1948). The term "collateral estoppel" has been replaced by "issue preclusion," which also includes the doctrine formerly known as "direct estoppel." Taylor v. Sturgell, 553 U.S. ___, No. 07–371, slip op. at 9, n.5 (2008), quoted in Bobby v. Bies, 556 U.S. ___, No. 08–598, slip op. at 2 n.1 (2009).

[170] Ashe v. Swenson, 397 U.S. 436, 466 (1970). *See also* Harris v. Washington, 404 U.S. 55 (1971); Turner v. Arkansas, 407 U.S. 366 (1972). *Cf.* Dowling v. United States, 493 U.S. 342 (1990), in which the Court concluded that the defendant's presence at an earlier crime for which he had been acquitted had not necessarily been decided in his acquittal. *Dowling* is distinguishable from *Ashe*, however, because in *Dowling* the evidence relating to the first conviction was not a necessary element of the second offense. In Bobby v. Bies, 556 U.S. ___, No. 08–598 (2009), the Court noted that "issue preclusion is a plea available to prevailing parties. The doctrine bars relitigation of determinations necessary to the ultimate outcome of a prior proceeding." Slip op. at 2–3. "In addition, even where the core requirements of issue preclusion are met, an exception to the general rule may apply when a 'change in [the] applicable legal context' intervenes." Slip op. at 8, quoting Restatement (Second) of Judgments, § 28, Comment c.

[171] Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Justices Brennan, Douglas, and Marshall concurring). Justices Brennan and Marshall adhered to their position in Brown v. Ohio, 432 U.S. 161, 170 (1977) (concurring); and Thompson v. Oklahoma, 429 U.S. 1053 (1977) (dissenting from denial of certiorari).

[172] Garrett v. United States, 471 U.S. 773, 790 (1985). Earlier, the approach had been rejected by Chief Justice Burger in Ashe v. Swenson, 397 U.S. 436, 468 (1970) (dissenting), by him and Justice Blackmun in Harris v. Washington, 404 U.S. 55, 57 (1971) (dissenting), and, perhaps, by Justice Rehnquist in Turner v. Arkansas, 407 U.S. 366, 368 (1972) (dissenting).

Yeager v. United States,[173] unlike *Ashe*, "entail[ed] a trial that included multiple counts rather than a trial for a single offense. And, while *Ashe* involved an acquittal for that single offense, this case [*Yeager*] involves an acquittal on some counts and a mistrial declared on others. The reasoning in *Ashe* is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on [some] counts was a nonevent and the acquittals on the [other] counts are entitled to the same effect as Ashe's acquittal." The lower court in *Yeager* had "reasoned that the hung counts must be considered to determine what issues the jury decided in the first trial. Viewed in isolation, the [lower] court explained, the acquittals . . . would preclude retrial because [of the facts that the jury would have had to have found in light of its acquittals]. Viewed alongside the hung counts, however, the acquittals appeared less decisive,"[174] because, if the jury had actually found the facts implied by its acquittals, then it would have acquitted on the hung counts as well. In other words, its having acquitted on some counts and not on others was logically inconsistent.[175] The Supreme Court, however, found that nothing should be inferred from the failure to acquit on some counts, because "there is no way to decipher what a hung count represents. . . . A host of reasons—sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few—could work alone or in tandem to cause a jury to hang. . . . Accordingly, we hold that the consideration of hung counts has no place in the issue-preclusion analysis."[176]

SELF-INCRIMINATION

Development and Scope

The source of the Self-Incrimination Clause was the maxim "*nemo tenetur seipsum accusare*," that "no man is bound to accuse himself." The maxim is but one aspect of two different systems of law enforcement which competed in England for acceptance; the accusatorial and the inquisitorial. In the accusatorial system, which predated the reign of Henry II but was expanded and extended by him, first the community and then the state by grand and petit juries proceeded against alleged wrongdoers through the examination of

[173] 557 U.S. ___, No. 08–67, slip op. at 9 (2009).
[174] 557 U.S. ___, No. 08–67, slip op. at 9–10.
[175] The Court drew an analogy between its finding that this logical inconsistency does not affect the preclusive force of the acquittals under the Double Jeopardy Clause, and Justice Holmes' holding, in Dunn v. United States, 284 U.S. 390, 393 (1932), "that a logical inconsistency between a guilty verdict and a verdict of acquittal does not impugn the validity of either verdict." 557 U.S. ___, No. 08–67, slip op. at 1.
[176] 557 U.S. ___, No. 08–67, slip op. at 10–11.

others, and in the early years through examination of the defendant as well. The inquisitorial system, which developed in the ecclesiastical courts, compelled the alleged wrongdoer to affirm his culpability through the use of the oath *ex officio*. Under the oath, an official had the power to make a person before him take an oath to tell the truth to the full extent of his knowledge as to all matters about which he would be questioned; before administration of the oath the person was not advised of the nature of the charges against him, or whether he was accused of crime, and was also not informed of the nature of the questions to be asked.[177]

The use of this oath in Star Chamber proceedings, especially to root out political heresies, combined with opposition to the ecclesiastical oath *ex officio*, led over a long period of time to general acceptance of the principle that a person could not be required to accuse himself under oath in any proceeding before an official tribunal seeking information looking to a criminal prosecution, or before a magistrate investigating an accusation against him with or without oath, or under oath in a court of equity or a court of common law.[178] The precedents in the colonies are few in number, but following the Revolution six states had embodied the privilege against self-incrimination in their constitutions,[179] and the privilege was one of those recommended by several state ratifying conventions for inclusion in a federal bill of rights.[180] Madison's version of the clause read "nor shall be compelled to be a witness against himself," but a House amendment inserted "in any criminal case" into the provision.[181]

The historical studies cited demonstrate that in England and the colonies the privilege was narrower than the interpretation now prevailing. Of course, constitutional guarantees often expand, or contract, over time as judges adapt underlying rules to new factual pat-

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[177] Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England*, in Essays in History and Political Theory in Honor of Charles Howard McIlwain 199 (C. Wittke ed., 1936).

[178] The traditional historical account is 8 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 2250 (J. McNaughton rev. 1961), but more recent historical studies have indicated that Dean Wigmore was too grudging of the privilege. Leonard Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1 (1949).

[179] 3 F. Thorpe, *The Federal and State Constitutions*, reprinted in H. Doc. No. 357, 59th Congress, 2d Sess. 1891 (1909) (Massachusetts); 4 id. at 2455 (New Hampshire); 5 id. at 2787 (North Carolina), 3038 (Pennsylvania); 6 id. at 3741 (Vermont); 7 id. at 3813 (Virginia).

[180] Amendments were recommended by an "Address" of a minority of the Pennsylvania convention after they had been voted down as a part of the ratification action, 2 Bernard Schwartz, The Bill of Rights: A Documentary History 628, 658, 664 (1971), and then the ratifying conventions of Massachusetts, South Carolina, New Hampshire, Virginia, and New York formally took this step.

[181] Id. at 753 (August 17, 1789).

terns and practices. The difficulty is that the Court has generally not articulated the objectives underlying the privilege, usually citing a "complex of values" when it has attempted to state the interests served.[182] Commonly mentioned in numerous cases was the assertion that the privilege was designed to protect the innocent and further the search for truth.[183]

It appears now, however, that the Court has rejected both of these as inapplicable and has settled upon the principle that the clause serves two interrelated interests: the preservation of an accusatorial system of criminal justice, which goes to the integrity of the judicial system, and the preservation of personal privacy from unwarranted governmental intrusion.[184] To protect these interests and to preserve these values, the privilege "is not to be interpreted literally." Rather, the "sole concern [of the privilege] is, as its name indicates, with the danger to a witness forced to give testimony lead-

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[182] Discussing the privilege in one case, the Court stated:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (internal citations omitted).

[183] *E.g.*, Ullmann v. United States, 350 U.S. 422, 426 (1956); Quinn v. United States, 349 U.S. 155, 162–63 (1955); Twining v. New Jersey, 211 U.S. 78, 91 (1908).

[184] In *Tehan v. United States ex rel. Shott*, the Court noted:

[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder[s] the entire load."

. . .

The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent . . . By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415, 416 (1966); *see also* California v. Byers, 402 U.S. 424, 448–58 (1971) (Harlan, J., concurring); Schmerber v. California, 384 U.S. 757, 760–65 (1966); Miranda v. Arizona, 384 U.S. 436, 460 (1966). For a critical view of the privilege, see Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

ing to the infliction of penalties affixed to the criminal acts." [185] Furthermore, "[t]he privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . . " [186]

The privilege against self-incrimination parries the general obligation to provide testimony under oath when called upon, but it also applies in police interrogations. In all cases, the privilege must be supported by a reasonable fear that a response will be incriminatory. The issue is a matter of law for a court to determine,[187] and therefore, with limited exceptions, one must claim the privilege to benefit from it.[188] Otherwise, silence in the face of questioning may be insufficient to invoke the privilege because it may not afford an adequate opportunity either to test whether information withheld falls within the privilege or to cure a violation through a grant of immunity.[189] A witness who fails to claim the privilege explicitly when an affirmative claim is required is deemed to have waived it, and waiver may be found where the witness has answered some preliminary questions but desires to stop at a certain point.[190] However, an assertion of innocence in conjunction with a claim of the privi-

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[185] *Ullmann*, 350 U.S. at 438–39.

[186] Hoffman v. United States, 341 U.S. 479, 486 (1951); *see also* Emspak v. United States, 349 U.S. 190 (1955); Blau v. United States, 340 U.S. 332 (1951); Blau v. United States, 340 U.S. 159 (1950).

[187] *E.g.*, Mason v. United States, 244 U.S. 362 (1917).

[188] The primary exceptions are for a criminal defendant not taking the stand and a suspect being subject to inherently coercive circumstances (*e.g.*, custodial interrogation). *See* Salinas v. Texas, 570 U.S. ___, No. 12–246, slip op. at 4–6 (2013) (plurality opinion).

[189] In *Salinas v. Texas*, 570 U.S. ___, No. 12–246, slip op. (2013), the defendant—Salinas—answered all questions during noncustodial questioning about a double murder, other than one about whether his shotgun would match shells recovered at the murder scene. He fell silent on this inquiry, but did not assert the privilege against self-incrimination. At closing argument at Salinas's murder trial, the prosecutor argued that this silence indicated guilt, and a majority of the Court found the comments constitutionally permissible. The Court affirmed the Texas Supreme Court's ruling that Salinas had failed to invoke his Fifth Amendment rights because he did not do so explicitly. Although no opinion drew a majority of Justices, in an opinion joined by Chief Justice Roberts and Justice Kennedy, Justice Alito observed that a defendant could choose to remain silent for numerous reasons other than avoiding self-incrimination. *Id.* at 9 (plurality opinion).

[190] Rogers v. United States, 340 U.S. 367 (1951); United States v. Monia, 317 U.S. 424 (1943). The "waiver" concept here has been pronounced "analytically [un-]sound," with the Court preferring to reserve the term "waiver" "for the process by which one affirmatively renounces the protection of the privilege." Garner v. United States, 424 U.S. 648, 654 n.9 (1976). Thus, the Court has settled upon the concept of "compulsion" as applied to "cases where disclosures are required in the face of claim of privilege." *Id.* "[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Id.* at 654. Similarly, the Court has enunciated the concept of "voluntariness" to be applied in situations where it is claimed that a

lege does not obviate the right of witnesses to invoke it, as their responses still may provide the government with evidence it may later seek to use against them.[191]

Although individuals must have reasonable cause to apprehend danger and cannot be the judge of the validity of their claims, a court that would deny a claim of the privilege must be "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the individual is mistaken, and that the answer[s] *cannot possibly* have such tendency to incriminate."[192] To reach a determination, furthermore, a trial judge may not require a witness to disclose so much of the danger as to render the privilege nugatory. As the Court observed:

> [I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.[193]

The privilege against self-incrimination is a personal one and cannot be used by or on behalf of any organization, such as a corporation. Thus, a corporation cannot object on self-incrimination grounds to a subpoena of its records and books or to the compelled testimony of those corporate agents who have been given personal immunity from criminal prosecution.[194] Nor may a corporate official with custody of corporate documents that incriminate him personally resist their compelled production on the assertion of his personal privilege.[195]

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particular factor denied the individual a "free choice to admit, to deny, or to refuse to answer." *Id.* at 654 n.9, 656–65.

[191] Ohio v. Reiner, 532 U.S. 17 (2001).

[192] Hoffman v. United States, 341 U.S. 479, 488 (1951) (quoting Temple v. Commonwealth, 75 Va. 892, 898 (1881)). For an application of these principles, see *Malloy v. Hogan*, 378 U.S. 1, 11–14 (1964), and *id.* at 33 (White, Stewart JJ., dissenting). Where the government is seeking to enforce an essentially noncriminal statutory scheme through compulsory disclosure, some Justices would apparently relax the *Hoffman* principles. *Cf.* California v. Byers, 402 U.S. 424 (1971) (plurality opinion).

[193] *Hoffman*, 341 U.S. at 486–87.

[194] United States v. White, 322 U.S. 694, 701 (1944); Baltimore & Ohio R.R. v. ICC, 221 U.S. 612 (1911); Hale v. Henkel, 201 U.S. 43, 69–70, 74–75 (1906).

[195] United States v. White, 322 U.S. 694, 699–700 (1944); Wilson v. United States, 221 U.S. 361, 384–385 (1911). But the government may make no evidentiary use of the act of production in proceeding individually against the corporate custodian. Braswell v. United States, 487 U.S. 99 (1988). *Cf.* George Campbell Painting Corp. v. Reid, 392 U.S. 286 (1968); United States v. Rylander, 460 U.S. 752 (1983) (witness who had failed to appeal production order and thus had burden in contempt proceeding to show inability to then produce records could not rely on privilege to shift this evidentiary burden).

A witness has traditionally been able to claim the privilege in any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or in a future criminal proceeding or when it might be exploited to uncover other evidence against him.[196] Incrimination is not complete once guilt has been adjudicated, and hence the privilege may be asserted during the sentencing phase of trial.[197] Conversely, there is no valid claim on the ground that the information sought can be used in proceedings which are not criminal in nature,[198] and there can be no valid claim if there is no criminal prosecution [199] The Court in recent years has also applied the privilege to situations, such as police interrogation of suspects, in which there is no *legal* compulsion to speak.[200]

What the privilege protects against is compulsion of "testimonial" disclosures. Thus, the clause is not offended by such nontestimonial compulsions as requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to model particular clothing, or to give samples of handwriting, fingerprints, or blood.[201] A person may be compelled to produce specific documents

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[196] Thus, not only may a defendant or a witness in a criminal trial, including a juvenile proceeding, *In re* Gault, 387 U.S. 1, 42–57 (1967), claim the privilege but so may a party or a witness in a civil court proceeding, McCarthy v. Arndstein, 266 U.S. 34 (1924), a potential defendant or any other witness before a grand jury, Reina v. United States, 364 U.S. 507 (1960); Counselman v. Hitchcock, 142 U.S. 547, 563 (1892), or a witness before a legislative inquiry, Watkins v. United States, 354 U.S. 178, 195–96 (1957); Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955), or before an administrative body. *In re* Groban, 352 U.S. 330, 333, 336–37, 345–46 (1957); ICC v. Brimson, 154 U.S. 447, 478–80 (1894).

[197] Estelle v. Smith, 451 U.S. 454, 462–63 (1981) ("We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned"); Mitchell v. United States, 526 U.S. 314 (1999) (non-capital sentencing).

[198] Allen v. Illinois, 478 U.S. 364 (1986) (declaration that person is "sexually dangerous" under Illinois law is not a criminal proceeding); Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984) (revocation of probation is not a criminal proceeding, hence "there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings"). In *Murphy*, the Court went on to explain that "a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's 'right to immunity as a result of his compelled testimony would not be at stake,' and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer . . . ." Id. (citations omitted).

[199] Chavez v. Martinez, 538 U.S. 760 (2003) (rejecting damages claim brought by suspect interrogated in hospital but not prosecuted).

[200] Miranda v. Arizona, 384 U.S. 436 (1966).

[201] Schmerber v. California, 384 U.S. 757, 764 (1966); United States v. Wade, 388 U.S. 218, 221–23 (1967); Holt v. United States, 218 U.S. 245, 252 (1910). In California v. Byers, 402 U.S. 424 (1971), four Justices believed that requiring any person involved in a traffic accident to stop and give his name and address did not

even though they contain incriminating information.[202] If, however, the existence of specific documents is not known to the government, and the act of production informs the government about the existence, custody, or authenticity of the documents, then the privilege is implicated.[203] Application of these principles resulted in a holding that the Independent Counsel could not base a prosecution on incriminating evidence identified and produced as the result of compliance with a broad subpoena for all information relating to the individual's income, employment, and professional relationships.[204]

The protection is against "compulsory" incrimination, and traditionally the Court has treated within the clause only those compul-

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involve testimonial compulsion and therefore the privilege was inapplicable, id. at 431–34 (Chief Justice Burger and Justices Stewart, White, and Blackmun), but Justice Harlan, id. at 434 (concurring), and Justices Black, Douglas, Brennan, and Marshall, id. at 459, 464 (dissenting), disagreed. In South Dakota v. Neville, 459 U.S. 553 (1983), the Court indicated as well that a state may compel a motorist suspected of drunk driving to submit to a blood alcohol test, and may also give the suspect a choice about whether to submit, but use his refusal to submit to the test as evidence against him. The Court rested its evidentiary ruling on the absence of coercion, preferring not to apply the sometimes difficult distinction between testimonial and physical evidence. In another case, involving roadside videotaping of a drunk driving suspect, the Court found that the slurred nature of the suspect's speech, as well as his answers to routine booking questions as to name, address, weight, height, eye color, date of birth, and current age, were not testimonial in nature. Pennsylvania v. Muniz, 496 U.S. 582 (1990). On the other hand, the suspect's answer to a request to identify the date of his sixth birthday was considered testimonial. Id. Two Justices challenged the interpretation limiting application to "testimonial" disclosures, claiming that the original understanding of the word "witness" was not limited to someone who gives testimony, but included someone who gives any kind of evidence. United States v. Hubbell, 530 U.S. 27, 49 (2000) (Justice Thomas, joined by Justice Scalia, concurring).

[202] Fisher v. United States, 425 U.S. 391 (1976). Compelling a taxpayer by subpoena to produce documents produced by his accountants from his own papers does not involve testimonial self-incrimination and is not barred by the privilege. "[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating." Id. at 408 (emphasis by Court). Even further removed from the protection of the privilege is seizure pursuant to a search warrant of business records in the handwriting of the defendant. Andresen v. Maryland, 427 U.S. 463 (1976). A court order compelling a target of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose records of any and all accounts over which he had a right of withdrawal is not testimonial in nature, since the factual assertions are required of the banks and not of the target. Doe v. United States, 487 U.S. 201 (1988).

[203] In United States v. Doe, 465 U.S. 605 (1984), the Court distinguished *Fisher*, upholding lower courts' findings that the act of producing tax records implicates the privilege because it would compel admission that the records exist, that they were in the taxpayer's possession, and that they are authentic. Similarly, a juvenile court's order to produce a child implicates the privilege, because the act of compliance "would amount to testimony regarding [the subject's] control over and possession of [the child]." Baltimore Dep't of Social Services v. Bouknight, 493 U.S. 549, 555 (1990).

[204] United States v. Hubbell, 530 U.S. 27 (2000).

sions which arise from legally enforceable obligations, culminating in imprisonment for refusal to testify or to produce documents.[205] The compulsion need not be imprisonment, but can also be termination of public employment[206] or disbarment of a lawyer[207] as a legal consequence of a refusal to make incriminating admissions. The degree of coercion may also prove decisive, the Court having ruled that moving a prisoner from a medium security unit to a maximum security unit was insufficient to compel him to incriminate himself in spite of the attendant loss of privileges and the harsher living conditions.[208] However, although it appears that prisoners[209] and probationers[210] have less protection than others do, the Court has not developed a clear doctrinal explanation to identify the differences between permissible and impermissible coercion.[211]

It has long been the rule that a defendant who takes the stand on his own behalf does so voluntarily, and cannot then claim the privilege to defeat cross-examination on matters reasonably related

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[205] *E.g.*, Marchetti v. United States, 390 U.S. 39 (1968) (criminal penalties attached to failure to register and make incriminating admissions); Malloy v. Hogan, 378 U.S. 1 (1964) (contempt citation on refusal to testify). *See also* South Dakota v. Neville, 459 U.S. 553 (1983) (no compulsion in introducing evidence of suspect's refusal to submit to blood alcohol test, since state could have forced suspect to take test and need not have offered him a choice); Selective Service System v. Minnesota PIRG, 468 U.S. 841 (1984) (no coercion in requirement that applicants for federal financial assistance for higher education reveal whether they have registered for draft).

[206] Garrity v. New Jersey, 385 U.S. 493 (1967); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968). *See also* Lefkowitz v. Turley, 414 U.S. 70 (1973), holding unconstitutional state statutes requiring the disqualification for five years of contractors doing business with the state if at any time they refused to waive immunity and answer questions respecting their transactions with the state. The state may require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant the privilege against self-incrimination. *See also* Lefkowitz v. Cunningham, 431 U.S. 801 (1977).

[207] Spevack v. Klein, 385 U.S. 511 (1967).

[208] McKune v. Lile, 536 U.S. 24 (2002). The transfer was mandated for refusal to participate in a sexual abuse treatment program that required revelation of sexual history and admission of responsibility. The plurality declared that rehabilitation programs are permissible if the adverse consequences for non-participation are "related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life." 536 U.S. at 38 (opinion of Justice Kennedy). Concurring Justice O'Connor stated her belief that the "minor" change in living conditions seemed "very unlikely to actually compel [the prisoner] to [participate]." Id. at 51.

[209] *See*, in addition to McKune v. Lile, Baxter v. Palmigiano, 425 U.S. 308 (1976) (adverse inference from inmate's silence at prison disciplinary hearing); and Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 286 (1998) (adverse inference from inmate's silence at clemency hearing).

[210] Minnesota v. Murphy, 465 U.S. 420 (1984) (the possibility of revocation of probation was not so coercive as to compel a probationer to provide incriminating answers to probation officer's questions).

[211] The Court in McKune v. Lile split 5-to-4, with no opinion of the Court.

to the subject matter of his direct examination,[212] and that such a defendant may be impeached by proof of prior convictions.[213] But, in *Griffin v. California*,[214] the Court refused to permit prosecutorial or judicial comment to the jury upon a defendant's refusal to take the stand on his own behalf, because such comment was a "penalty imposed by courts for exercising a constitutional privilege" and "[i]t cuts down on the privilege by making its assertion costly."[215] Prosecutors' comments violating the *Griffin* rule can nonetheless constitute harmless error.[216] Nor may a prosecutor impeach a defendant's trial testimony through use of the fact that upon his arrest and receipt of a *Miranda* warning he remained silent and did not give the police the exculpatory story he told at trial.[217] But where the defendant took the stand and testified, the Court permitted the

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[212] Brown v. Walker, 161 U.S. 591, 597–98 (1896); Fitzpatrick v. United States, 178 U.S. 304, 314–16 (1900); Brown v. United States, 356 U.S. 148 (1958). See also Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 286 (1998) (testimony at a clemency interview is voluntary, and cannot be compelled).

[213] Spencer v. Texas, 385 U.S. 554, 561 (1967); *cf.* Michelson v. United States, 335 U.S. 469 (1948).

[214] 380 U.S. 609, 614 (1965). The result had been achieved in federal court through statutory enactment. 18 U.S.C. § 3481. *See* Wilson v. United States, 149 U.S. 60 (1893). In Carter v. Kentucky, 450 U.S. 288 (1981), the Court held that the Self-Incrimination Clause required a state, upon defendant's request, to give a cautionary instruction to the jurors that they must disregard defendant's failure to testify and not draw any adverse inferences from it. This result, too, had been accomplished in the federal courts through statutory construction. Bruno v. United States, 308 U.S. 287 (1939). In Lakeside v. Oregon, 435 U.S. 333 (1978), the Court held that a court may give such an instruction, even over defendant's objection. Carter v. Kentucky was applied in James v. Kentucky, 466 U.S. 341 (1983) (request for jury "admonition" sufficient to invoke right to "instruction").

[215] Although the *Griffin* rule continues to apply when the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, it does not apply to a prosecutor's "fair response" to a defense counsel's allegation that the government had denied his client the opportunity to explain his actions. United States v. Robinson, 485 U.S. 25, 32 (1988).

[216] Chapman v. California, 386 U.S. 18 (1967); United States v. Hasting, 461 U.S. 499 (1983).

[217] Doyle v. Ohio, 426 U.S. 610 (1976). Post-arrest silence, the Court stated, is inherently ambiguous, and to permit use of the silence would be unfair since the *Miranda* warning told the defendant he could be silent. The same result had earlier been achieved under the Court's supervisory power over federal trials in United States v. Hale, 422 U.S. 171 (1975). The same principles apply to bar a prosecutor's use of *Miranda* silence as evidence of an arrestee's sanity. Wainwright v. Greenfield, 474 U.S. 284 (1986). In determining whether a state prisoner is entitled to federal *habeas corpus* relief because the prosecution violated due process by using his post-*Miranda* silence for impeachment purposes at trial, the proper standard for harmless-error review is that announced in Kotteakos v. United States, 328 U.S. 750, 776 (1946)—whether the due process error had substantial and injurious effect or influence in determining the jury's verdict—not the stricter "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18, 24 (1967), applicable on direct review. Brecht v. Abrahamson, 507 U.S. 619 (1993). *See also* Fry v. Pliler, 551 U.S. 112, 114 (2007) (the "substantial and injurious effect" standard is to be applied in federal *habeas* proceedings even "when the state appellate court failed to

impeachment use of his pre-arrest silence when that silence had in no way been officially encouraged, through a *Miranda* warning or otherwise.[218]

Further, the Court held inadmissible at the subsequent trial a defendant's testimony at a hearing to suppress evidence wrongfully seized, because use of the testimony would put the defendant to an impermissible choice between asserting his right to remain silent and invoking his right to be free of illegal searches and seizures.[219] The Court also proscribed the introduction at a second trial of the defendant's testimony at his first trial, given to rebut a confession which was subsequently held inadmissible, since the testimony was in effect "fruit of the poisonous tree," and had been "coerced" from the defendant through use of the confession.[220] Potentially most far-reaching was a holding that invalidated the penalty structure of a statute under which defendants could escape a possible death sentence by entering a guilty plea; the statute "needlessly encourage[d]" waivers of defendant's Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.[221]

Although this "needless encouragement" test assessed the nature of the choice required to be made by defendants against the strength of the governmental interest in the system requiring the choice, the Court soon developed another test stressing the voluntariness of the choice. A guilty plea entered by a defendant who correctly understands the consequences of the plea is voluntary unless coerced or obtained under false pretenses; moreover, there is no impermissible coercion where the defendant has the effective assistance of counsel.[222] The Court in an opinion by Justice Harlan then formulated still another test in holding that a defendant in a capital case in which the jury in one process decides both guilt and sentence could be put to a choice between remaining silent on guilt or admitting guilt and being able to put on evidence designed to mitigate the possible sentence. The pressure to take the stand in

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recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in Chapman v. California").

[218] Jenkins v. Anderson, 447 U.S. 231 (1980). *Cf.* Baxter v. Palmigiano, 425 U.S. 308 (1976) (prison disciplinary hearing may draw adverse inferences from inmate's assertion of privilege so long as this was not the sole basis of decision against him).

[219] Simmons v. United States, 390 U.S. 377 (1968). The rationale of the case was subsequently limited to Fourth Amendment grounds in McGautha v. California, 402 U.S. 183, 210–13 (1971).

[220] Harrison v. United States, 392 U.S. 219 (1968).

[221] Jackson v. United States, 390 U.S. 570, 583 (1968).

[222] Parker v. North Carolina, 397 U.S. 790 (1970); Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970). Parker and Brady entered guilty pleas to avoid the death penalty when it became clear that the prosecution had solid evidence of their guilt; Richardson pled guilty because of his fear that an allegedly coerced confession would be introduced into evidence.

response to the sentencing issue, said the Court, was not so great as to impair the policies underlying the Self-Incrimination Clause, policies described in this instance as proscription of coercion and of cruelty in putting the defendant to an undeniably "hard" choice.[223] Similarly, the Court held that requiring a defendant to give notice to the prosecution before trial of his intention to rely on an alibi defense and to give the names and addresses of witnesses who will support it does not violate the clause.[224] Nor does it violate a defendant's self-incrimination privilege to create a presumption upon the establishment of certain basic facts from which the jury may infer the defendant's guilt unless he rebuts the presumption.[225]

The obligation to testify is not relieved by this clause, if, regardless of whether incriminating answers are given, a prosecution is precluded,[226] or if the result of the answers is not incrimination,

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[223] McGautha v. California, 402 U.S. 183, 210–20 (1971). When the Court subsequently required bifurcated trials in capital cases, it was on the basis of the Eighth Amendment, and represented no withdrawal from the position described here. *Cf.* Corbitt v. New Jersey, 439 U.S. 212 (1978); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[224] Williams v. Florida, 399 U.S. 78, 80–86 (1970). The compulsion of choice, Justice White argued for the Court, proceeded from the strength of the state's case and not from the disclosure requirement. That is, the rule did not affect whether or not the defendant chose to make an alibi defense and to call witnesses, but merely required him to accelerate the timing. It appears, however, that in Brooks v. Tennessee, 406 U.S. 605 (1972), the Court used the "needless encouragement" test in striking down a state rule requiring the defendant to testify before any other defense witness or to forfeit the right to testify at all. In the Court's view, this impermissibly burdened the defendant's choice whether to testify or not. Another prosecution discovery effort was approved in United States v. Nobles, 422 U.S. 233 (1975), in which a defense investigator's notes of interviews with prosecution witnesses were ordered disclosed to the prosecutor for use in cross-examination of the investigator. The Court discerned no compulsion upon defendant to incriminate himself.

[225] "The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." Yee Hem v. United States, 268 U.S. 178, 185 (1925), quoted with approval in Turner v. United States, 396 U.S. 398, 418 n.35 (1970). Justices Black and Douglas dissented on self-incrimination grounds. Id. at 425. *See also* United States v. Gainey, 380 U.S. 63, 71, 74 (1965) (dissenting opinions). For due process limitations on such presumptions, *see* discussion under the Fourteenth Amendment, "Proof, Burden of Proof, and Presumptions," *infra*.

[226] Prosecution may be precluded by tender of immunity (see next topic for discussion of immunity), or by pardon, Brown v. Walker, 161 U.S. 591, 598–99 (1896). The effect of a mere tender of pardon by the President remains uncertain. *Cf.* Burdick v. United States, 236 U.S. 79 (1915) (acceptance necessary, and self-incrimination is possible in absence of acceptance); Biddle v. Perovich, 274 U.S. 480 (1927) (acceptance not necessary to validate commutation of death sentence to life imprisonment).

but rather harm to reputation or exposure to infamy or disgrace.[227] The clause does not prevent a public employer from discharging an employee who, in an investigation specifically and narrowly directed at the performance of the employee's official duties, refuses to cooperate and to provide the employer with the desired information on grounds of self-incrimination.[228] But it is unclear under what other circumstances a public employer may discharge an employee who has claimed his privilege before another investigating agency.[229]

Finally, the rules established by the clause and the judicial interpretations apply against the states to the same degree that they apply against the Federal Government,[230] and neither sovereign can compel discriminatory admissions that would incriminate the person in the other jurisdiction.[231] There is no "cooperative internation-

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[227] Brown v. Walker, 161 U.S. 591, 605–06 (1896); Ullmann v. United States, 350 U.S. 422, 430–31 (1956). Minorities in both cases had contended for a broader rule. *Walker*, 161 U.S. at 631 (Justice Field dissenting); *Ullmann*, 350 U.S. at 454 (Justice Douglas dissenting).

[228] Gardner v. Broderick, 392 U.S. 273, 278 (1968). Testimony compelled under such circumstances is, even in the absence of statutory immunity, barred from use in a subsequent criminal trial by force of the Fifth Amendment itself. Garrity v. New Jersey, 385 U.S. 493 (1967). However, unlike public employees, persons subject to professional licensing by government appear to be able to assert their privilege and retain their licenses. *Cf.* Spevack v. Klein, 385 U.S. 511 (1967) (lawyer may not be disbarred solely because he refused on self-incrimination grounds to testify at a disciplinary proceeding), *approved in* Gardner v. Broderick, 392 U.S. at 277–78. Justices Harlan, Clark, Stewart, and White dissented generally. 385 U.S. 500, 520, 530.

[229] *See* Slochower v. Board of Higher Education, 350 U.S. 551 (1956), *limited by* Lerner v. Casey, 357 U.S. 468 (1958), and Nelson v. County of Los Angeles, 362 U.S. 1 (1960), which were in turn apparently limited by *Garrity* and *Gardner*.

[230] Malloy v. Hogan, 378 U.S. 1 (1964) (overruling Twining v. New Jersey, 211 U.S. 78 (1908), and Adamson v. California, 332 U.S. 46 (1947)).

[231] Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), (overruling United States v. Murdock, 284 U.S. 141 (1931) (Federal Government could compel a witness to give testimony that might incriminate him under state law), Knapp v. Schweitzer, 357 U.S. 371 (1958) (state may compel a witness to give testimony that might incriminate him under federal law), and Feldman v. United States, 322 U.S. 487 (1944) (testimony compelled by a state may be introduced into evidence in the federal courts)). *Murphy* held that a state could compel testimony under a grant of immunity but that, because the state could not extend the immunity to federal courts, the Supreme Court would not permit the introduction of evidence into federal courts that had been compelled by a state or that had been discovered because of state compelled testimony. The result was apparently a constitutionally compelled one arising from the Fifth Amendment itself, 378 U.S. at 75–80, rather than one taken pursuant to the Court's supervisory power as Justice Harlan would have preferred. Id. at 80 (concurring). Congress has power to confer immunity in state courts as well as in federal in order to elicit information, Adams v. Maryland, 347 U.S. 179 (1954), but whether Congress must do so or whether the immunity would be conferred simply through the act of compelling the testimony *Murphy* did not say.

Whether testimony could be compelled by either the Federal Government or a state that could incriminate a witness in a foreign jurisdiction is unsettled. *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 480, 481 (1972) (reserving question), but an affirmative answer seems unlikely. *Cf. Murphy*, 378 U.S. at 58–63, 77.

alism" that parallels the cooperative federalism and cooperative prosecution on which application against states is premised, and consequently concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.[232]

The Power To Compel Testimony and Disclosure

Immunity.—"Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible [with the values of the Self-Incrimination Clause]. Rather they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime."[233] Apparently the first immunity statute was enacted by Parliament in 1710[234] and it was widely copied in the colonies. The first federal immunity statute was enacted in 1857, and immunized any person who testified before a congressional committee from prosecution for any matter "touching which" he had testified.[235]

Revised in 1862 so as merely to prevent the use of the congressional testimony at a subsequent prosecution of any congressional witness,[236] the statute was soon rendered unenforceable by the ruling in *Counselman v. Hitchcock*[237] that an analogous limited immunity statute was unconstitutional because it did not confer an immunity coextensive with the privilege it replaced. *Counselman* was ambiguous with regard to its grounds because it identified two faults in the statute: it did not proscribe "derivative" evidence[238] and it prohibited only future use of the compelled testimony.[239] The latter language accentuated a division between adherents of "transactional" immunity and of "use" immunity which has continued to the

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[232] United States v. Balsys, 524 U.S. 666 (1998).

[233] Kastigar v. United States, 406 U.S. 441, 445–46 (1972). It has been held that the Fifth Amendment itself precludes the use as criminal evidence of compelled admissions, Garrity v. New Jersey, 385 U.S. 493 (1967), but this case and dicta in others is unreconciled with the cases that find that one may "waive" though inadvertently the privilege and be required to testify and incriminate oneself. Rogers v. United States, 340 U.S. 367 (1951).

[234] 9 Anne, c. 14, 3–4 (1710). *See* Kastigar v. United States, 406 U.S. 441, 445 n.13 (1972).

[235] Ch. 19, 11 Stat. 155 (1857). There was an exception for perjury committed while testifying before Congress.

[236] Ch. 11, 12 Stat. 333 (1862).

[237] 142 U.S. 547 (1892). The statute struck down was ch. 13, 15 Stat. 37 (1868).

[238] Counselman v. Hitchcock, 142 U.S. 547, 564 (1892). *See also* id. at 586.

[239] 142 U.S. at 585–86.

present.[240] In any event, following *Counselman*, Congress enacted a statute that conferred transactional immunity as the price for being able to compel testimony,[241] and the Court sustained this law in a five-to-four decision.[242]

"The 1893 statute has become part of our constitutional fabric and has been included 'in substantially the same terms, in virtually all of the major regulatory enactments of the Federal Government.'"[243] So spoke Justice Frankfurter in 1956, broadly reaffirming *Brown v. Walker* and upholding the constitutionality of a federal immunity statute.[244] Because all but one of the immunity acts passed after *Brown v. Walker* were transactional immunity statutes,[245] the question of the constitutional sufficiency of use immunity did not arise, although dicta in cases dealing with immunity continued to assert the necessity of the former type of grant.[246] But, beginning in 1964, when it applied the Self-Incrimination Clause to the states,

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[240] "Transactional" immunity means that once a witness has been compelled to testify about an offense, he may never be prosecuted for that offense, no matter how much independent evidence might come to light; "use" immunity means that no testimony compelled to be given and no evidence derived from or obtained because of the compelled testimony may be used if the person is subsequently prosecuted on independent evidence for the offense.

[241] Ch. 83, 27 Stat. 443 (1893).

[242] Brown v. Walker, 161 U.S. 591 (1896). The majority reasoned that one was excused from testifying only if there could be legal detriment flowing from his act of testifying. If a statute of limitations had run or if a pardon had been issued with regard to a particular offense, a witness could not claim the privilege and refuse to testify, no matter how much other detriment, such as loss of reputation, would attach to his admissions. Therefore, because the statute acted as a pardon or amnesty and relieved the witness of all legal detriment, he must testify. The four dissenters contended essentially that the privilege protected against being compelled to incriminate oneself regardless of any subsequent prosecutorial effort, id. at 610, and that a witness was protected against infamy and disparagement as much as prosecution. Id. at 628.

[243] Ullmann v. United States, 350 U.S. 422, 438 (1956) (quoting Shapiro v. United States, 335 U.S. 1, 6 (1948)).

[244] "[The] sole concern [of the privilege] is . . . with the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to the criminal acts'. . . . Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases." 350 U.S. at 438–39. The internal quotation is from Boyd v. United States, 116 U.S. 616, 634 (1886).

[245] Kastigar v. United States, 406 U.S. 441, 457–58 (1972); Piccirillo v. New York, 400 U.S. 548, 571 (1971) (Justice Brennan dissenting). The exception was an immunity provision of the bankruptcy laws, 30 Stat. 548 (1898), 11 U.S.C. § 25(a)(10), repealed by 84 Stat. 931 (1970). The right of a bankrupt to insist on his privilege against self-incrimination as against this statute was recognized in McCarthy v. Arndstein, 266 U.S. 34, 42 (1924), "because the present statute fails to afford complete immunity from a prosecution." The statute also failed to prohibit the use of derivative evidence. Arndstein v. McCarthy, 254 U.S. 71 (1920).

[246] *E.g.*, Hale v. Henkel, 201 U.S. 43, 67 (1906); United States v. Monia, 317 U.S. 424, 425, 428 (1943); Smith v. United States, 337 U.S. 137, 141, 146 (1949); United States v. Murdock, 284 U.S. 141, 149 (1931); Adams v. Maryland, 347 U.S. 179, 182 (1954). In Ullmann v. United States, 350 U.S. 422, 436–37 (1956), Justice

the Court was faced with the problem that arose because a state could grant immunity only in its own courts and not in the courts of another state or of the United States.[247] On the other hand, to foreclose the states from compelling testimony because they could not immunize a witness in a subsequent "foreign" prosecution would severely limit state law enforcement efforts. Therefore, the Court emphasized the "use" restriction rationale of *Counselman* and announced that as a "constitutional rule, a state witness could not be compelled to incriminate himself under federal law unless federal authorities were precluded from using either his testimony or evidence derived from it," and thus formulated a use restriction to that effect.[248] Then, while refusing to adopt the course because of statutory interpretation reasons, the Court indicated that use restriction in a federal regulatory scheme requiring the reporting of incriminating information was "in principle an attractive and apparently practical resolution of the difficult problem before us," citing *Murphy* with apparent approval.[249]

Congress thereupon enacted a statute replacing all prior immunity statutes and adopting a use-immunity restriction only.[250] Soon tested, this statute was sustained in *Kastigar v. United States*.[251] "[P]rotection coextensive with the privilege is the degree of protection which the Constitution requires," wrote Justice Powell for the Court, "and is all that the Constitution requires. . . ."[252] "Transactional immunity, which accords full immunity from prosecution for

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Frankfurter described the holding of *Counselman* as relating to the absence of a prohibition on the use of derivative evidence.

[247] Malloy v. Hogan, 378 U.S. 1 (1964), extended the clause to the states. That Congress could immunize a federal witness from state prosecution and, of course, extend use immunity to state courts, was held in Adams v. Maryland, 347 U.S. 179 (1954), and had been recognized in Brown v. Walker, 161 U.S. 591 (1896).

[248] Murphy v. Waterfront Comm'n, 378 U.S. 52, 77–99 (1964). Concurring, Justices White and Stewart argued at length in support of the constitutional sufficiency of use immunity and the lack of a constitutional requirement of transactional immunity. Id. at 92. *See also* Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967), recognizing the propriety of compelling testimony with a use restriction attached.

[249] Marchetti v. United States, 390 U.S. 39, 58 (1968).

[250] Organized Crime Control Act of 1970, Pub. L. 91–452, § 201(a), 84 Stat. 922, 18 U.S.C. §§ 6002–6003. Justice Department officials have the authority under the Act to decide whether to seek immunity, and courts will not apply "constructive" use immunity absent compliance with the statute's procedures. United States v. Doe, 465 U.S. 605 (1984).

[251] 406 U.S. 441 (1972). A similar state statute was sustained in Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972).

[252] Kastigar v. United States, 406 U.S. 441, 459 (1972). *See also* United States v. Hubbell, 530 U.S. 27 (2000) (because the statute protects against derivative use of compelled testimony, a prosecution cannot be based on incriminating evidence revealed only as the result of compliance with an extremely broad subpoena).

the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts.' Immunity from the use of compelled testimony and evidence derived directly and indirectly therefrom affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." [253]

Required Records Doctrine.—Although the privilege is applicable to an individual's papers and effects,[254] it does not extend to corporate persons; hence corporate records, as has been noted, are subject to compelled production.[255] In fact, however, the Court has greatly narrowed the protection afforded in this area to natural persons by developing the "required records" doctrine. That is, it has held "that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'" [256] This exception developed out of, as Justice Frankfurter showed in dissent, the rule

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[253] 406 U.S. at 453. Joining Justice Powell in the opinion were Justices Stewart, White, and Blackmun, and Chief Justice Burger. Justices Douglas and Marshall dissented, contending that a ban on use could not be enforced even if a use ban was constitutionally adequate. Id. at 462, 467. Justices Brennan and Rehnquist did not participate but Justice Brennan's views that transactional immunity was required had been previously stated. Piccirillo v. New York, 400 U.S. 548, 552 (1971) (dissenting). *See also* New Jersey v. Portash, 440 U.S. 451 (1979) (prosecution use of defendant's immunized testimony to impeach him at trial violates Self-Incrimination Clause). Neither the clause nor the statute prevents the perjury prosecution of an immunized witness or the use of all his testimony to prove the commission of perjury. United States v. Apfelbaum, 445 U.S. 115 (1980). *See also* United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564 (1976). Because use immunity is limited, a witness granted use immunity for grand jury testimony may validly invoke his Fifth Amendment privilege in a civil deposition proceeding when asked whether he had "so testified" previously, the deposition testimony not being covered by the earlier immunity. Pillsbury Co. v. Conboy, 459 U.S. 248 (1983).

[254] Boyd v. United States, 116 U.S. 616 (1886). *But see* Fisher v. United States, 425 U.S. 391 (1976).

[255] *See* discussion, *supra*, under "Development and Scope."

[256] Shapiro v. United States, 335 U.S. 1, 33 (1948) (quoting Davis v. United States, 328 U.S. 582, 589–90 (1946), which quoted Wilson v. United States, 221 U.S. 361, 380 (1911)). Dicta in *Wilson* is the source of the required-records doctrine, the holding of the case being the familiar one that a corporate officer cannot claim the privilege against self-incrimination to refuse to surrender corporate records in his custody. *Cf.* Heike v. United States, 227 U.S. 131 (1913). *Davis* was a search and seizure

that documents which are part of the official records of government are wholly outside the scope of the privilege; public records are the property of government and are always accessible to inspection. Because government requires certain records to be kept to facilitate the regulation of the business being conducted, so the reasoning goes, the records become public at least to the degree that government could always scrutinize them without hindrance from the record-keeper. "If records merely because required to be kept by law *ipso facto* become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume." [257]

"It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself." [258] But the only limit that the Court suggested in *Shapiro* was that there must be "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator." [259] That there are limits established by the Self-Incrimination Clause itself rather than by a subject matter jurisdiction test is evident in the Court's consideration of reporting and disclosure requirements implicating but not directly involving the required-records doctrine.

Reporting and Disclosure.—The line of cases begins with *United States v. Sullivan*,[260] in which a unanimous Court held that the Fifth

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case and dealt with gasoline ration coupons which were government property even though in private possession. *See Shapiro*, 335 U.S. at 36, 56–70 (Justice Frankfurter dissenting).

[257] 335 U.S. at 51.

[258] 335 U.S. at 32.

[259] 335 U.S. at 32.

[260] 274 U.S. 259, 263, 264 (1927). *Sullivan* was reaffirmed in Garner v. United States, 424 U.S. 648 (1976), holding that a taxpayer's privilege against self-incrimination was not violated when he failed to claim his privilege on his tax returns, and instead gave incriminating information leading to conviction. One must assert one's privilege to alert the government to the possibility that it is seeking to obtain incriminating material. It is not coercion forbidden by the clause that upon a claim of the privilege the government could seek an indictment for failure to file,

Amendment did not privilege a bootlegger in not filing an income tax return because the filing would have disclosed the illegality in which he was engaged. "It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime," Justice Holmes stated for the Court.[261] However, "[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return . . . ." [262] Using its taxing power to reach gambling activities over which it might otherwise not have had jurisdiction,[263] Congress enacted a complicated statute imposing an annual occupational tax on gamblers and an excise tax on all their wages, and coupled the tax with an annual registration requirement under which each gambler must file with the IRS a declaration of his business with identification of his place of business and his employees and agents, filings which were made available to state and local law enforcement agencies. These requirements were upheld by the Court against self-incrimination challenges on the three grounds that (1) the privilege did not excuse a complete failure to file, (2) because the threshold decision to gamble was voluntary, the required disclosures were not compulsory, and (3) because registration required disclosure only of prospective conduct, the privilege, limited to past or present acts, did not apply.[264]

Constitutional limitations appeared, however, in *Albertson v. SACB*,[265] which struck down under the Self-Incrimination Clause an order pursuant to statute requiring registration by individual members of the Communist Party or associated organizations. "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any

since a valid claim of privilege cannot be the basis of a conviction. The taxpayer was not entitled to a judicial ruling on the validity of his claim and an opportunity to reconsider if the ruling went against him, regardless of whether a good-faith erroneous assertion of the privilege could subject him to prosecution, a question not resolved.

[261] 274 U.S. at 263–64.

[262] 274 U.S. at 263.

[263] The expansion of the commerce power would now obviate reliance on the taxing power.

[264] United States v. Kahriger, 345 U.S. 22 (1953); Lewis v. United States, 348 U.S. 419 (1955).

[265] 382 U.S. 70 (1965).

of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime." [266]

The gambling tax reporting scheme was next struck down by the Court.[267] Because of the pervasiveness of state laws prohibiting gambling, said Justice Harlan for the Court, "the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." [268] Overruling *Kahriger* and *Lewis*, the Court rejected its earlier rationales. Registering *per se* would have exposed a gambler to dangers of state prosecution, so *Sullivan* did not apply.[269] Any contention that the voluntary engagement in gambling "waived" the self-incrimination claim, because there is "no constitutional right to gamble," would nullify the privilege.[270] And the privilege was not governed by a "rigid chronological distinction" so that it protected only past or present conduct, but also reached future self-incrimination the danger of which is not speculative and insubstantial.[271] Significantly, then, Justice Harlan turned to distinguishing the statutory requirements here from the "required re-

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[266] 382 U.S. at 79. The decision was unanimous, with Justice White not participating. The same issue had been held not ripe for adjudication in Communist Party v. SACB, 367 U.S. 1, 105–10 (1961).

[267] Marchetti v. United States, 390 U.S. 39 (1968) (occupational tax); Grosso v. United States, 390 U.S. 62 (1968) (wagering excise tax). In Haynes v. United States, 390 U.S. 85 (1968), the Court struck down a requirement that one register a firearm that it was illegal to possess. The following Term on the same grounds the Court voided a statute prohibiting the possession of marijuana without having paid a transfer tax and registering. Leary v. United States, 395 U.S. 6 (1969); United States v. Covington, 395 U.S. 57 (1969). However, a statute was upheld which prohibited the sale of narcotics to a person who did not have a written order on a prescribed form, since the requirement caused the self-incrimination of the buyer but not the seller, the Court viewing the statute as actually a flat proscription on sale rather than a regulatory measure. Minor v. United States, 396 U.S. 87 (1969). The congressional response was reenactment of the requirements, coupled with use immunity. United States v. Freed, 401 U.S. 601 (1971).

[268] Marchetti v. United States, 390 U.S. 39, 48 (1968).

[269] "Every element of these requirements would have served to incriminate petitioners; to have required him to present his claim to Treasury officers would have obliged him 'to prove guilt to avoid admitting it.'" 390 U.S. at 50.

[270] "The question is not whether petitioner holds a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it." 390 U.S. at 51. *But cf.* California v. Byers, 402 U.S. 424, 434 (1971) (plurality opinion), in which it is suggested that because there is no "right" to leave the scene of an accident a requirement that a person involved in an accident stop and identify himself does not violate the Self-Incrimination Clause.

[271] Marchetti v. United States, 390 U.S. 39, 52–54 (1968). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination . . . . This principle does not permit the rigid chronological distinctions adopted in

cords" doctrine of *Shapiro*. "First, petitioner . . . was not . . . obliged to keep and preserve records 'of the same kind as he has customarily kept'; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony . . . . Second, whatever 'public aspects' there were to the records at issue in *Shapiro*, there are none to the information demanded from Marchetti. The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in 'an essentially noncriminal and regulatory area of inquiry' while those here are directed to a 'selective group inherently suspect of criminal activities.' . . . The United States' principal interest is evidently the collection of revenue, and not the punishment of gamblers, . . . but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*." [272]

Most recent in this line of cases is *California v. Byers*,[273] which indicates that the Court has yet to settle on an ascertainable standard for judging self-incrimination claims in cases where government is asserting an interest other than criminal law enforcement. *Byers* sustained the constitutionality of a statute which required the driver of any automobile involved in an accident to stop and give his name and address. The state court had held that a driver who reasonably believed that compliance with the statute would result in self-incrimination could refuse to comply. A plurality of the Court, however, determined that *Sullivan* and *Shapiro* applied and not the *Albertson-Marchetti* line of cases, because the purpose of the statute was to promote the satisfaction of civil liabilities resulting from automobile accidents and not criminal prosecutions, and because the statute was directed to all drivers and not to a group which was either "highly selective" or "inherently suspect of criminal activities." The combination of a noncriminal motive with the general char-

Kahriger and *Lewis*. We see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence." Id. at 53–54. *Cf.* United States v. Freed, 401 U.S. 601, 605–07 (1971).

[272] Marchetti v. United States, 390 U.S. 39, 57 (1968).

[273] 402 U.S. 424 (1971).

acter of the requirement made too slight for reliance the possibility of incrimination.[274] Justice Harlan concurred to make up the majority on the disposition of the case, disagreeing with the plurality's conclusion that the stop and identification requirement did not compel incrimination.[275] However, the Justice thought that, where there is no governmental purpose to enforce a criminal law and instead government is pursuing other legitimate regulatory interests, it is permissible to apply a balancing test between the government's interest and the individual's interest. When he balanced the interests protected by the Amendment—protection of privacy and maintenance of an accusatorial system—with the noncriminal purpose, the necessity for self-reporting as a means of securing information, and the nature of the disclosures required, Justice Harlan voted to sustain the statute.[276] *Byers* was applied in *Baltimore Dep't of Social Services v. Bouknight*[277] to uphold a juvenile court's order that the mother of a child under the court's supervision produce the child. Although in this case the mother was suspected of having abused or murdered her child, the order was justified out of concern for the child's safety—a "compelling reason[ ] unrelated to criminal law enforcement."[278] Moreover, because the mother had custody of her previously abused child only as a result of the juvenile court's order, the Court analogized to the required records cases to conclude that the mother had submitted to the requirements of the civil regulatory regime as the child's "custodian."

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[274] 402 U.S. at 427–31 (Chief Justice Burger and Justices Stewart, White, and Blackmun).

[275] "The California Supreme Court was surely correct in considering that the decisions of this Court have made it clear that invocation of the privilege is not limited to situations where the purpose of the inquiry is to get an incriminating answer. . . . [I]t must be recognized that a reading of our more recent cases . . . suggests the conclusion that the applicability of the privilege depends exclusively on a determination that, from the individual's point of view, there are 'real' and not 'imaginary' risks of self-incrimination in yielding to state compulsion. Thus, *Marchetti* and *Grosso* . . . start from an assumption of a non-prosecutorial governmental purpose in the decision to tax gambling revenue; those cases go on to apply what in another context I have called the 'real danger v. imaginary possibility standard' . . . . A judicial tribunal whose position with respect to the elaboration of constitutional doctrine is subordinate to that of this Court certainly cannot be faulted for reading these opinions as indicating that the 'inherently-suspect-class' factor is relevant only as an indicium of genuine incriminating risk as assessed from the individual's point of view." 402 U.S. at 437–38.

[276] 402 U.S. at 448–58. The four dissenters argued that it was unquestionable that Byers would have faced real risks of self-incrimination by compliance with the statute and that this risk was sufficient to invoke the privilege. Id. at 459, 464 (Justices Black, Douglas, Brennan, and Marshall).

[277] 493 U.S. 549 (1990).

[278] 493 U.S. at 561. By the same token, the Court concluded that the targeted group—persons who care for children pursuant to a juvenile court's custody order—is not a group "inherently suspect of criminal activities" in the *Albertson-Marchetti* sense.

Confessions: Police Interrogation, Due Process, and Self-Incrimination

The Common Law Rule.—By the latter part of the eighteenth century English and early American courts had developed a rule that coerced confessions were potentially excludable from admission at trial because they were testimonially untrustworthy.[279] The Supreme Court at times continued to ground exclusion of involuntary confessions on this common law foundation of unreliability without any mention of the constitutional bar against self-incrimination. Consider this dictum from an 1884 opinion: "[V]oluntary confession of guilt is among the most effectual proofs in the law, . . . [b]ut the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law."[280] Subsequent cases followed essentially the same line of thought.[281]

Then, language in the 1897 case of *Bram v. United States* opened the door to eventually extending the doctrinal basis for analyzing the admissibility of a confession beyond the common-law test that focused on voluntariness as an indicator of the confession's trustworthiness as evidence. "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"[282] However, though this approach[283] and the case itself were subsequently approved in sev-

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[279] 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823 (3d ed. 1940); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954–59 (1966).

[280] Hopt v. Utah, 110 U.S. 574, 584–85 (1884). Utah at this time was a territory and subject to direct federal judicial supervision.

[281] Pierce v. United States, 160 U.S. 335 (1896); Sparf and Hansen v. United States, 156 U.S. 51 (1895). In Wilson v. United States, 162 U.S. 613 (1896), failure to provide counsel or to warn the suspect of his right to remain silent was held to have no effect on the admissibility of a confession but was only to be considered in assessing its credibility.

[282] Bram v. United States, 168 U.S. 532, 542 (1897).

[283] Ziang Sun Wan v. United States, 266 U.S. 1, 14–15 (1924). This case first held that the circumstances of detention and interrogation were relevant and perhaps controlling on the question of admissibility of a confession.

eral cases,[284] the Court would still hold in 1912 that a confession should not be excluded merely because the authorities had not warned a suspect of his right to remain silent,[285] and more than once later opinions could doubt "whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy. . . ."[286] One reason for this was that the Self-Incrimination Clause had not yet been made applicable to the states, thereby requiring that the admissibility of confessions in state courts be determined under due process standards developed from common-law principles. It was only after the Court extended the Self-Incrimination Clause to the states that a divided Court reaffirmed and extended the 1897 *Bram* ruling and imposed on both federal and state trial courts new rules for admitting or excluding confessions and other admissions made to police during custodial interrogation.[287]

McNabb-Mallory Doctrine.—Perhaps one reason the Court did not squarely confront the application of the Self-Incrimination Clause to police interrogation and the admissibility of confessions in federal courts was that, in *McNabb v. United States*,[288] it promulgated a rule excluding confessions obtained after an "unnecessary delay" in presenting a suspect for arraignment after arrest.[289] This rule, developed pursuant to the Court's supervisory power over the

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[284] Burdeau v. McDowell, 256 U.S. 465, 475 (1921); Powers v. United States, 223 U.S. 303, 313 (1912); Shotwell Mfg. Co. v. United States, 371 U.S. 342, 347 (1963).

[285] Powers v. United States, 223 U.S. 303 (1912).

[286] United States v. Carignan, 342 U.S. 36, 41 (1951). *See also* McNabb v. United States, 318 U.S. 332, 346 (1943); Brown v. Mississippi, 297 U.S. 278, 285 (1936); Stein v. New York, 346 U.S. 156, 191 n.35 (1953).

[287] Miranda v. Arizona, 384 U.S. 436 (1966). According to Wigmore, "there never was any historical connection . . . between the constitutional [self-incrimination] clause and the [common law] confession-doctrine," 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823, at 250 n.5 (3d ed. 1940); *see also* vol. 8 id. at § 2266 (McNaughton rev. 1961). It appears that while the two rules did develop separately—the bar against self-incrimination deriving primarily from notions of liberty and fairness, proscriptions against involuntary confessions deriving primarily from notions of reliability—they did stem from some of the same considerations, and, in fact, the confession rule may be considered in important respects to be an off-shoot of the privilege against self-incrimination. *See* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 325–32, 495 n.43 (1968). *See also* Culombe v. Connecticut, 367 U.S. 568, 581–84, especially 583 n.25 (1961) (Justice Frankfurter announcing judgment of the Court).

[288] 318 U.S. 332 (1943). *See also* Anderson v. United States, 318 U.S. 350 (1943).

[289] In Upshaw v. United States, 335 U.S. 410 (1948), the Court rejected lower court interpretations that delay in arraignment was but one factor in determining the voluntariness of a confession, and held that a confession obtained after a thirty-hour delay was inadmissible *per se*. Mallory v. United States, 354 U.S. 449 (1957), held that any confession obtained during an unnecessary delay in arraignment was inadmissible. A confession obtained during a lawful delay before arraignment was admissible. United States v. Mitchell, 322 U.S. 65 (1944).

lower federal courts[290] and hence not applicable to the states,[291] was designed to implement the guarantees assured to a defendant by the Federal Rules of Criminal Procedure,[292] and was clearly informed with concern over incommunicado interrogation and coerced confessions.[293] Although the Court never attempted to specify a minimum time after which delay in presenting a suspect for arraignment could invalidate confessions, Congress in 1968 legislated to set a six-hour period for interrogation following arrest before the suspect must be presented.[294] In *Corley v. United States*,[295] the Court held that this legislation merely limited, and did not eliminate, *McNabb-Mallory's* exclusionary rule. Thus, confessions within six hours of arrest were admissible to the extent permitted by the statute and Rules of Evidence, whereas, "[i]f the confession occurred before presentment and beyond six hours . . . , the court must decide whether delaying that long was unreasonable or unnecessary under the *McNabb-Mallory* cases, and if it was, the confession is to be suppressed."[296]

State Confession Cases Before Miranda.—In its first encounter with a confession case arising from a state court, the Supreme Court set aside a conviction based solely on confessions extorted through repeated whippings with ropes and studded belts.[297] For

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[290] McNabb v. United States, 318 U.S. 332, 340 (1943); Upshaw v. United States, 335 U.S. 410, 414 n.2 (1948). Burns v. Wilson, 346 U.S. 137, 145 n.12 (1953), indicated that because the Court had no supervisory power over courts-martial, the rule did not apply in military courts.

[291] Gallegos v. Nebraska, 342 U.S. 55, 60, 63–64, 71–73 (1951); Stein v. New York, 346 U.S. 156, 187–88 (1953); Culombe v. Connecticut, 367 U.S. 568, 599–602 (1961) (Justice Frankfurter announcing judgment of the Court).

[292] Rule 5(a) requiring prompt arraignment was promulgated in 1946, but the Court in *McNabb* relied on predecessor statutes, some of which required prompt arraignment. *Cf.* Mallory v. United States, 354 U.S. 449, 451–54 (1957). Rule 5(b) requires that the magistrate at arraignment must inform the suspect of the charge against him, must warn him that what he says may be used against him, must tell him of his right to counsel and his right to remain silent, and must also provide for the terms of bail.

[293] McNabb v. United States, 318 U.S. 332, 343 (1943); Mallory v. United States, 354 U.S. 449, 452–53 (1957).

[294] The provision was part of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 210, 18 U.S.C. § 3501(c).

[295] 556 U.S. ___, No. 07–10441 (2009).

[296] 556 U.S. ___, No. 07–10441, slip op. at 18.

[297] Brown v. Mississippi, 297 U.S. 278 (1936). "[T]he question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter. . . . It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." Id. at 285, 286.

some 30 years thereafter the Court attempted through a consideration of the "totality of the circumstances" surrounding interrogation to determine whether a confession was "voluntary" and admissible or "coerced" and inadmissible. During this time, the Court was balancing, in Justice Frankfurter's explication, a view that police questioning of suspects was indispensable in solving many crimes, on the one hand, with the conviction that the interrogation process is not to be used to overreach persons who stand helpless before it.[298] "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."[299] Obviously, a court seeking to determine whether a confession was voluntary operated under a severe handicap, as the interrogation process was in secret with only police and the suspect witness to it, and as the concept of voluntariness referred to the defendant's mental condition.[300] Despite, then, a bountiful number of cases, binding precedents were few.

On the one hand, many of the early cases disclosed clear instances of coercion of a nature that the Court could little doubt produced involuntary confessions. Not only physical torture,[301] but other overtly coercive tactics as well were condemned. *Chambers v. Florida*[302] held that five days of prolonged questioning following arrests without warrants and incommunicado detention made the subsequent confessions involuntary. *Ashcraft v. Tennessee*[303] held inadmissible

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[298] Culombe v. Connecticut, 367 U.S. 568, 570–602 (1961) (announcing judgment of the Court).

[299] 367 U.S. at 602.

[300] "The inquiry whether, in a particular case, a confession was voluntarily or involuntarily made involves, at the least, a three-phased process. First, there is the business of finding the crude historical facts, the external 'phenomenological' occurrences and events surrounding the confession. Second, because the concept of 'voluntariness' is one which concerns a mental state, there is the imaginative recreation, largely inferential, of internal, 'psychological' fact. Third, there is the application to this psychological fact of standards for judgment informed by the larger legal conceptions ordinarily characterized as rules of law but which, also, comprehend both induction from, and anticipation of, factual circumstances." 367 U.S. at 603. *See Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 973–82 (1966).

[301] Brown v. Mississippi, 297 U.S. 278 (1936).

[302] 309 U.S. 227 (1940).

[303] 322 U.S. 143 (1944). Dissenting, Justices Jackson, Frankfurter, and Roberts protested that "interrogation *per se* is not, while violence *per se* is, an outlaw." A confession made after interrogation was not truly "voluntary" because all questioning is "inherently coercive," because it puts pressure upon a suspect to talk. Thus, in evaluating a confession made after interrogation, the Court must, they insisted,

a confession obtained near the end of a 36-hour period of practically continuous questioning, under powerful electric lights, by relays of officers, experienced investigators, and highly trained lawyers. Similarly, *Ward v. Texas*,[304] voided a conviction based on a confession obtained from a suspect who had been questioned continuously over the course of three days while being driven from county to county and told falsely of a danger of lynching. "Since *Chambers v. State of Florida*, . . . this Court has recognized that coercion can be mental as well as physical and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstrations were needed, that the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion.' A prolonged interrogation of the accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror." [305]

Although the Court would not hold that prolonged questioning by itself made a resultant confession involuntary,[306] it did increasingly find coercion present even in intermittent questioning over a period of days of incommunicado detention.[307] In *Stein v. New York*,[308] however, the Court affirmed convictions of experienced criminals who

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determine whether the suspect was in possession of his own will and self-control and not look alone to the length or intensity of the interrogation. They accused the majority of "read[ing] an indiscriminating hostility to mere interrogation into the Constitution" and preparing to bar all confessions made after questioning. Id. at 156. A possible result of the dissent was the decision in Lyons v. Oklahoma, 322 U.S. 596 (1944), which stressed deference to state-court factfinding in assessing the voluntariness of confessions.

[304] 316 U.S. 547 (1942). *See also* Canty v. Alabama, 309 U.S. 629 (1940); White v. Texas, 310 U.S. 530 (1940); Lomax v. Texas, 313 U.S. 544 (1941); Vernon v. Alabama, 313 U.S. 540 (1941).

[305] Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

[306] Lisenba v. California, 314 U.S. 219 (1941).

[307] Watts v. Indiana, 338 U.S. 49 (1949) (Suspect held incommunicado without arraignment for seven days without being advised of his rights. He was held in solitary confinement in a cell with no place to sleep but the floor and questioned each day except Sunday by relays of police officers for periods ranging in duration from three to nine-and-one-half hours); Turner v. Pennsylvania, 338 U.S. 62 (1949) (suspect held on suspicion for five days without arraignment and without being advised of his rights. He was questioned by relays of officers for periods briefer than in *Watts* during both days and nights); Harris v. South Carolina, 338 U.S. 68 (1949) (Suspect in murder case arrested in Tennessee on theft warrant, taken to South Carolina, and held incommunicado. He was questioned for three days for periods as long as 12 hours, not advised of his rights, not told of the murder charge, and denied access to friends and family while being told his mother might be arrested for theft). Justice Jackson dissented in the latter two cases, willing to hold that a confession obtained under lengthy and intensive interrogation should be admitted short of a showing of violence or threats of it and especially if the truthfulness of the confession may be corroborated by independent means. 338 U.S. at 57.

[308] 346 U.S. 156 (1953).

had confessed after twelve hours of intermittent questioning over a period of thirty-two hours of incommunicado detention. Although the questioning was less intensive than in the prior cases, Justice Jackson for the majority stressed that the correct approach was to balance "the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal."[309] By the time of the decision in *Haynes v. Washington*,[310] however, which held inadmissible a confession made by an experienced criminal because of the "unfair and inherently coercive context" in which the confession was made, it was clear that the Court often focused more on the nature of the coercion without regard to the individual characteristics of the suspect.[311] Nevertheless, the Court did continue to cite at times age and intelligence as demonstrating the susceptibility of the particular suspects to even mild coercion.[312]

The "totality of the circumstances" was looked to in determining admissibility. In some of the cases a single factor could be thought to stand out as indicating the involuntariness of the confession,[313]

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[309] 346 U.S. at 185.

[310] 373 U.S. 503 (1963) (confession obtained some 16 hours after arrest but interrogation over this period consumed little more than two hours; he was refused in his requests to call his wife and told that his cooperation was necessary before he could communicate with his family).

[311] 373 U.S. at 514. *See also* Spano v. New York, 360 U.S. 315 (1959). (After eight hours of almost continuous questioning, suspect was induced to confess by rookie policeman who was a childhood friend and who played on suspect's sympathies by falsely stating that his job as a policeman and the welfare of his family was at stake); Rogers v. Richmond, 365 U.S. 534 (1961) (suspect resisted questioning for six hours but yielded when officers threatened to bring his invalid wife to headquarters). More recent cases include Davis v. North Carolina, 384 U.S. 737 (1966) (escaped convict held incommunicado 16 days but periods of interrogation each day were about an hour each); Greenwald v. Wisconsin, 390 U.S. 519 (1968); Darwin v. Connecticut, 391 U.S. 346 (1968).

[312] Gallegos v. Colorado, 370 U.S. 49 (1962); Blackburn v. Alabama, 361 U.S. 199 (1960); Fikes v. Alabama, 352 U.S. 191 (1957); Payne v. Arkansas, 356 U.S. 560 (1958); Reck v. Pate, 367 U.S. 433 (1961); Culombe v. Connecticut, 367 U.S. 568 (1961). The suspect in Spano v. New York, 360 U.S. 315 (1959), was a 25-year-old foreigner with a history of emotional instability. The fact that the suspect was a woman was apparently significant in Lynumn v. Illinois, 372 U.S. 528 (1963), in which officers threatened to have her children taken from her and to have her taken off the welfare relief rolls.

But a suspect's mental state alone—even insanity—is insufficient to establish involuntariness absent some coercive police activity. Colorado v. Connelly, 479 U.S. 157 (1986).

[313] *E.g.*, Leyra v. Denno, 347 U.S. 556 (1954) (confession obtained by psychiatrist trained in hypnosis from a physically and emotionally exhausted suspect who had already been subjected to three days of interrogation); Townsend v. Sain, 372 U.S. 293 (1963) (suspect was administered drug with properties of "truth serum" to relieve withdrawal pains of narcotics addiction, although police probably were not aware of drug's side effects).

but in other cases the Court recited a number of contributing factors, including age, intelligence, incommunicado detention, denial of requested counsel, denial of access to friends, trickery, and other things, without seeming to rank any factor above the others.[314] Confessions induced through the exploitation of some illegal action, such as an illegal arrest[315] or an unlawful search and seizure,[316] were found inadmissible. Where police obtain a subsequent confession after obtaining one that is inadmissible as involuntary, the Court did not assume that the subsequent confession was similarly involuntary, but independently evaluated whether the coercive actions which produced the first continued to produce the later confession.[317]

From the Voluntariness Standard to Miranda.—Invocation by the Court of a self-incrimination standard for judging the fruits of police interrogation was no unheralded novelty in *Miranda v. Arizona*.[318] Though the historical basis of the rule excluding coerced and involuntary confessions, in both early state confession cases[319] and earlier cases from the lower federal courts,[320] was their untrustworthiness,[321] in *Lisenba v. California*,[322] Justice Roberts drew a distinction between the common law confession rule and the standard of due process. "[T]he fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false. . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." Over the next several years, while the Justices continued to use the terminology of voluntariness, the Court accepted at dif-

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[314] *E.g.*, Johnson v. New Jersey, 384 U.S. 719 (1966); Davis v. North Carolina, 384 U.S. 737 (1966); Ashdown v. Utah, 357 U.S. 426 (1958); Thomas v. Arizona, 356 U.S. 390 (1958).

[315] Wong Sun v. United States, 371 U.S. 471 (1963).

[316] Fahy v. Connecticut, 375 U.S. 85 (1963).

[317] United States v. Bayer, 331 U.S. 532 (1947); Lyons v. Oklahoma, 322 U.S. 596 (1944); Leyra v. Denno, 347 U.S. 556 (1954); Darwin v. Connecticut, 391 U.S. 346 (1968).

[318] 384 U.S. 436 (1966).

[319] Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); White v. Texas, 310 U.S. 530 (1940).

[320] Hopt v. Utah, 110 U.S. 574 (1884); Wilson v. United States, 162 U.S. 613 (1896).

[321] 3 J. Wigmore, A Treatise on the Anglo-American System of Evidence § 882, at 246 (3d ed. 1940).

[322] 314 U.S. 219, 236 (1941).

ferent times the different rationales of trustworthiness and constitutional fairness.[323]

Ultimately, however, those Justices who chose to ground the exclusionary rule on the latter consideration predominated, so that, in *Rogers v. Richmond*,[324] Justice Frankfurter spoke for six other Justices in writing: "Our decisions under that [Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of his own mouth." Nevertheless, Justice Frankfurter said in another case, "[n]o single litmus-paper test for constitutionally impermissible interrogation has been evolved."[325] Three years later, in *Malloy v. Hogan*,[326] in the process of applying the Self-Incrimination Clause to the states, Justice Brennan for the Court reinterpreted the line of cases since *Brown v. Mississippi*[327] to conclude that the Court had initially based its rulings on the common-law confession rationale, but that, beginning with *Lisenba v. California*,[328] a "federal standard" had been developed. The Court had engaged in a "shift [that] reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." Today, continued Justice

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[323] *Compare* Ashcraft v. Tennessee, 322 U.S. 143 (1944), *with* Lyons v. Oklahoma, 322 U.S. 596 (1944), *and* Malinski v. New York, 324 U.S. 401 (1945). In Watts v. Indiana, 338 U.S. 49 (1949), Harris v. South Carolina, 338 U.S. 68 (1949), and Turner v. Pennsylvania, 338 U.S. 62 (1949), five Justices followed the due process-fairness standard while four adhered to a trustworthiness rationale. *See* 338 U.S. at 57 (Justice Jackson concurring and dissenting). In Stein v. New York, 346 U.S. 156, 192 (1953), the trustworthiness rationale had secured the adherence of six Justices. The primary difference between the two standards is the admissibility under the trustworthiness standard of a coerced confession if its trustworthiness can be established, if, that is, it can be corroborated.

[324] 365 U.S. 534, 540–41 (1961). Similar expressions may be found in Spano v. New York, 360 U.S. 315 (1959), and Blackburn v. Alabama, 361 U.S. 199 (1960). *See also* Culombe v. Connecticut, 367 U.S. 568, 583 n.25 (1961), in which Justice Frankfurter, announcing the judgment of the Court, observed that "the conceptions underlying the rule excluding coerced confessions and the privilege again self-incrimination have become, to some extent, assimilated."

[325] Culombe v. Connecticut, 367 U.S. 568, 601 (1961). The same thought informs the options of the Court in Haynes v. Washington, 373 U.S. 503 (1963).

[326] 378 U.S. 1 (1964).

[327] 297 U.S. 278 (1936).

[328] 314 U.S. 219 (1941).

Brennan, "the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897," when *Bram v. United States* had announced that the Self-Incrimination Clause furnished the basis for admitting or excluding evidence in federal courts.[329]

One week after the decision in *Malloy v. Hogan*, the Court defined the rules of admissibility of confessions in different terms: although it continued to emphasize voluntariness, it did so in self-incrimination terms rather than in due process terms. In *Escobedo v. Illinois*,[330] it held inadmissible a confession obtained from a suspect in custody who repeatedly had requested and been refused an opportunity to consult with his retained counsel, who was at the police station seeking to gain access to his client.[331] Although *Escobedo* appeared in the main to be a Sixth Amendment right-to-counsel case, the Court at several points emphasized, in terms that clearly implicated self-incrimination considerations, that the suspect had not been warned of his constitutional rights.[332]

Miranda v. Arizona.—In *Miranda v. Arizona*, a custodial confession case decided two years after *Escobedo*, the Court deemphasized the Sixth Amendment holding of *Escobedo* and made the Fifth Amendment self-incrimination rule preeminent.[333] The core of the Court's prescriptive holding in *Miranda* is as follows: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demon-

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[329] Malloy v. Hogan, 378 U.S. 1, 6–7 (1964). Protesting that this was "*post facto* reasoning at best," Justice Harlan contended that the "majority is simply wrong" in asserting that any of the state confession cases represented anything like a self-incrimination basis for the conclusions advanced. Id. at 17–19. Bram v. United States, 168 U.S. 532 (1897), is discussed under "Confessions: Police Interrogation, Due Process, and Self-Incrimination," *supra*.

[330] 378 U.S. 478 (1964). Joining Justice Goldberg in the majority were Chief Justice Warren and Justices Black, Douglas, and Brennan. Justices Clark, Harlan, Stewart, and White dissented. Id. at 492, 493, 495.

[331] Previously, it had been held that a denial of a request to consult counsel was but one of the factors to be considered in assessing voluntariness. Crooker v. California, 357 U.S. 433 (1958); Cicenia v. Lagay, 357 U.S. 504 (1958). Chief Justice Warren and Justices Black, Douglas, and Brennan were prepared in these cases to impose a requirement of right to counsel *per se*. Post-indictment interrogation without the presence of counsel seemed doomed after Spano v. New York, 360 U.S. 315 (1959), and this was confirmed in Massiah v. United States, 377 U.S. 201 (1964). *See* discussion of "Custodial Interrogation" under Sixth Amendment, *infra*.

[332] Escobedo v. Illinois, 378 U.S. 478, 485, 491 (1964) (both pages containing assertions of the suspect's "absolute right to remain silent" in the context of police warnings prior to interrogation).

[333] 384 U.S. 436, 444–45 (1966). In Johnson v. New Jersey, 384 U.S. 719 (1966), the Court held that neither *Escobedo* nor *Miranda* was to be applied retroactively. In cases where trials commenced after the decisions were announced, the due process "totality of circumstances" test was to be the key. *Cf.* Davis v. North Carolina, 384 U.S. 737 (1966).

strates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."[334]

In the opinion of the *Miranda* Court, police interrogation as conceived and practiced was inherently coercive and the resulting intimidation, though informal and legally sanctionless, was contrary to the protection to be afforded in a system that convicted on the basis of evidence independently secured. In the Court's view, this premise underlaid the law in the federal courts since 1897, and the application of the Self-Incrimination Clause to the states in 1964 necessitated the application of the principle in state courts as well. Thereafter, state and local police interrogation practices need be structured to ensure that suspects not be stripped of the ability to make a free and rational choice between speaking and not speaking. The warnings and the provision of counsel were essential, the Court said, in custodial interrogations.[335] "In these cases [presently before the

[334] 384 U.S. at 444–445.

[335] Justices Clark, Harlan, Stewart, and White dissented, finding no historical support for the application of the clause to police interrogation and rejecting the policy considerations for the extension put forward by the majority. Miranda v. Arizona, 384 U.S. 436, 499, 504, 526 (1966). Justice White argued that while the Court's decision was not compelled or even strongly suggested by the Fifth Amendment, its history, and the judicial precedents, this did not preclude the Court from making new law and new public policy grounded in reason and experience, but he contended that the change made in *Miranda* was ill-conceived because it arose from a

Court],” said Chief Justice Warren, “we might not find the defendants’ statements to have been involuntary in traditional terms[, but o]ur concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest.” [336] It was thus not the application of the Self-Incrimination Clause to police interrogation in *Miranda* that constituted the major change from precedent but rather the prescriptive series of warnings and guarantees which the Court imposed as security for the observance of the privilege.

Although the Court’s decision rapidly became highly controversial and the source of much political agitation, including playing a prominent role in the 1968 presidential election, the Court has continued to adhere to it,[337] albeit not without considerable qualification. Nevertheless, the constitutional status of the *Miranda* warnings has remained clouded in uncertainty. Had the Court announced a constitutionally compelled rule, or merely a supervisory rule that could be superseded by statute? In 1968, Congress enacted a statute, codified at 18 U.S.C. § 3501, designed to set aside *Miranda* in the federal courts and to reinstate the traditional voluntariness test.[338] The statute lay unimplemented, for the most part, due to constitutional doubts about it. Meanwhile, the Court created exceptions to the *Miranda* warnings over the years, and referred to the warnings as “prophylactic” [339] and “not themselves rights protected by the Constitution.” [340] There were even hints that some Justices might be willing to overrule the decision.

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view of interrogation as inherently coercive and because the decision did not adequately protect society’s interest in detecting and punishing criminal behavior. Id. at 531–45.

[336] 384 U.S. at 457. For the continuing recognition of the difference between the traditional involuntariness test and the *Miranda* test, *see* Michigan v. Tucker, 417 U.S. 433, 443–46 (1974); Mincey v. Arizona, 437 U.S. 385, 396–402 (1978). The acknowledgment that the decision considerably expanded upon previous doctrine, even if the assimilation of self-incrimination values by the confession-exclusion rule be considered complete, was more clearly made a week after *Miranda* when, in denying retroactivity to that case and to *Escobedo*, the Court asserted that law enforcement officers had relied justifiably upon prior cases, “now no longer binding,” which treated the failure to warn a suspect of his rights or the failure to grant access to counsel as one of the factors to be considered. Johnson v. New Jersey, 384 U.S. 719, 731 (1966).

[337] *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Chief Justice Burger concurring) (“The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date.”)

[338] Pub. L. 90–351, § 701(a), 82 Stat. 210, 18 U.S.C. § 3501. See S. Rep. No. 1097, 90th Cong., 2d Sess. 37–53 (1968). An effort to enact a companion measure applicable to the state courts was defeated.

[339] New York v. Quarles, 467 U.S. 549, 653 (1984).

[340] Michigan v. Tucker, 417 U.S. 433, 444 (1974).

In *Dickerson v. United States*,[341] the Court addressed the foundational issue, finding that *Miranda* was a "constitutional decision" that could not be overturned by statute, and consequently that 18 U.S.C. § 3501, which provided for a less strict "voluntariness" standard for the admissibility of confessions, could not be sustained. Consistent application of *Miranda* warnings to state proceedings necessarily implied a constitutional base, the Court explained, since federal courts "hold no supervisory authority over state judicial proceedings."[342] Moreover, *Miranda* itself had purported to "give concrete constitutional guidance to law enforcement agencies and courts to follow."[343] The two dissenting Justices in *Dickerson* maintained that the majority's characterization of *Miranda* as providing concrete constitutional guidance fell short of holding that custodial interrogation not preceded by *Miranda* warnings was unconstitutional, a position with which the dissenters pointedly disagreed.[344] Eleven years after Dickerson, in the 2011 case *J.D.B. v. North Carolina*, the number of Justices asserting that *Miranda* was not a constitutional rule grew to four.[345] Also, that *Miranda* may be rooted in the Constitution does not, according to the Court, mean that the precise articulation of the warnings in it is "immutable."[346]

Beyond finding that *Miranda* has, at the least, "constitutional underpinnings," the *Dickerson* Court also rejected a request to overrule *Miranda*. "Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance," Chief Justice Rehnquist wrote for the seven-Justice majority, "the principles of *stare decisis* weigh heavily against overruling it now." There was no special justification for overruling the decision; subsequent cases had not undermined the decision's doctrinal underpinnings, but rather had "reaffirm[ed]" its "core ruling." Moreover, *Miranda* warnings had "become so embedded in routine police practice [that they] have become part of our national culture."[347]

As to the viability of *Miranda* claims in federal *habeas corpus* cases, the Court had suggested in 1974 that most claims could be

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[341] 530 U.S. 428 (2000).
[342] 530 U.S. at 438.
[343] 530 U.S. at 439 (quoting from *Miranda*, 384 U.S. at 441–42).
[344] 530 U.S. at 444 (Justices Scalia and Thomas dissenting).
[345] 564 U.S. ___, No. 09–11121, slip op. (2011) (Jusitces Alito, Scalia, Thomas and Chief Justice Roberts, dissenting).
[346] *See, e.g.*, Florida v. Powell, 559 U.S. ___, No. 08–1175, slip op. at 8, 12–13 (2010).
[347] 530 U.S. at 443.

disallowed,[348] but such a course was squarely rejected in 1993. The Court ruled in *Withrow v. Williams* that *Miranda* protects a fundamental trial right of the defendant, unlike the Fourth Amendment exclusionary rule addressed in *Stone v. Powell*,[349] and claimed violations of *Miranda* merited federal *habeas corpus* review because they relate to the correct ascertainment of guilt.[350] The purposes of the *Miranda* rule differed from the *Mapp v. Ohio*[351] exclusionary rule denied enforcement in *habeas* proceedings in *Stone*, the Court explained, because the primary purpose of *Mapp* was to deter future Fourth Amendment violations, a purpose that the Court claimed would only be marginally advanced by allowing collateral review.[352] A further consideration was that eliminating review of *Miranda* claims would not significantly reduce federal *habeas* review of state convictions, because most *Miranda* claims could be recast in terms of due process denials resulting from admission of involuntary confessions.[353]

In any event, the Court has established several lines of decisions interpreting key aspects of *Miranda*.

First, *Miranda* warnings must be given prior to "questioning initiated by law enforcement officers after a person has been taken *into custody* or otherwise deprived of his freedom of action in any significant way."[354] The cases have distilled "custody or other significant deprivation of action" into a two-part assessment under which restricting a person's movement is a necessary but not sufficient el-

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[348] In Michigan v. Tucker, 417 U.S. 433, 439 (1974), the Court had suggested a distinction between a constitutional violation and a violation of "the prophylactic rules developed to protect that right." The actual holding in *Tucker*, however, had turned on the fact that the interrogation had preceded the *Miranda* decision and that warnings—albeit not full *Miranda* warnings—had been given.

[349] 428 U.S. 465 (1976).

[350] 507 U.S. 680 (1993). Even though a state prisoner's *Miranda* claim may be considered in federal *habeas* review, the scope of federal *habeas* review is narrow. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state court judgment may be set aside on *habeas* review only if the judgment is found to be contrary to, or an unreasonable application of, clearly established Supreme Court precedent. By contrast, a federal court reviewing a state court judgment on direct review considers federal legal questions *de novo* and can overturn a state court holding based on its own independent assessment of federal legal issues. This difference in scope of review can be critical. *Compare* Yarborough v. Alvarado, 541 U.S. 652 (2004) (*habeas* petition denied because state court's refusal to take a juvenile's age into account in applying *Miranda* was not an unreasonable application of clearly established Supreme Court precedent), *with* J.D.B. v. North Carolina, 564 U.S. ___, No. 09–11121, slip op. (2011) (on the Court's *de novo* review of the age issue, state court's refusal to take a juvenile's age into account in applying *Miranda* held to be in error, and case remanded).

[351] 367 U.S. 643 (1961).

[352] 507 U.S. at 686–93.

[353] 507 U.S. at 693.

[354] Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added).

ement. Not all inhibitions of "free movement" trigger *Miranda*. Whether a person is "in custody" during questioning depends on the coercive pressure posed. The Court applies an objective, context-specific test of how intimidated a reasonable person in the suspect's shoes would feel to freely exercise his right against self-incrimination. A police officer's subjective and undisclosed view that a person being interrogated is a criminal suspect is not relevant for *Miranda* purposes, nor is the subjective view of the person being questioned.[355] The only refinement to this one-size-fits-all reasonable person test is consideration of age if the detainee is a juvenile.[356]

An ordinary traffic stop does not to amount to *Miranda* "custody."[357] Nor do all interrogations of prison inmates about previous outside conduct, even if the inmate is isolated from the general prison population for questioning.[358] This view on prison interrogations evidences the Court's continuing movement toward individualized analyses of *Miranda* issues based on particular circumstances and away from the more categorical decisions announced soon after *Miranda*. Still, some of the early decisions may retain vitality. One example is the 1969 decision in *Orozco v. Texas*, which held that question-

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[355] Stansbury v. California, 511 U.S. 318 (1994).

[356] J.D.B. v. North Carolina, 564 U.S. ___, No. 09–11121, slip op. (2011) (case remanded to evaluate whether a 13-year-old student questioned by a uniformed police officer and school administrators on school grounds was in custody).

[357] Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (roadside questioning of motorist stopped for traffic violation not custodial interrogation until "freedom of action is curtailed to a 'degree associated with formal arrest'"). Thus, "custody" for self-incrimination purposes under the Fifth Amendment does not necessarily cover all detentions that are "seizures" under the Fourth Amendment. Id.

[358] Howes v. Fields, 565 U.S. ___, No. 10–680, slip op. (2012) (taking a prisoner incarcerated for disorderly conduct aside for questioning about an unrelated child molestation incident held, 6–3, not to constitute custodial interrogation under the totality of the circumstances in the case), distinguishing Mathis v. United States, 391 U.S. 1 (1968) (questioning state prisoner about unrelated federal tax violation held to be custodial interrogation). While the *Howes* Court split 6–3 on whether a custodial interrogation had taken place for Fifth Amendment purposes, the case was before it on *habeas* review, which requires that a clearly established Supreme Court precedent mandates a contrary result. All the *Howes* Justices agreed that *Mathis* had not, for purposes of *habeas* review of a state case, "clearly established" that all private questioning of an inmate about previous, outside conduct was "custodial" *per se*. Rather, *Howes* explained that a broader assessment of all relevant factors in each case was necessary to establish coercive pressure amounting to "custody." *Cf.* Maryland v. Shatzer, 559 U.S. ___, No. 08–680, slip op. (2010) (extended release of interrogated inmate back into the general prison population broke "custody" for purposes of later questioning); *see also* Illinois v. Perkins, 496 U.S. 292 (1990) (inmate's conversation with an undercover agent does not create a coercive, police-dominated environment and does not implicate *Miranda* if the suspect does not know that he is conversing with a government agent).

ing a person upon his arrest in his home is custodial.[359] On the other hand, the fact that a suspect may be present in a police station does not necessarily mean, in the absence of further restrictions, that questioning is custodial,[360] and the fact that he is in his home or other familiar surroundings will ordinarily lead to a conclusion that the inquiry was noncustodial.[361] Also, if a person has been subjected to *Miranda* custody, that custody ends when he is free to resume his normal life activities after questioning.[362] Nevertheless, a break in custody may not end all *Miranda* implications for subsequent custodial interrogations.[363]

Second, *Miranda* warnings must precede custodial *interrogation*. It is not necessary under *Miranda* that the police squarely ask a question. The breadth of the interrogation concept is demonstrated in *Rhode Island v. Innis*.[364] There, police had apprehended the defendant as a murder suspect but had not found the weapon used. While he was being transported to police headquarters in a squad car, the defendant, who had been given the *Miranda* warnings and had asserted he wished to consult a lawyer before submitting to questioning, was not asked questions by the officers. However, the officers engaged in conversation among themselves, in which they indicated that a school for handicapped children was near the

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[359] 394 U.S. 324 (1969) (police entered suspect's bedroom at 4 a.m., told him he was under arrest, and questioned him; four of the eight Justices who took part in the case, including three dissenters, voiced concern about this "broadening" of *Miranda* beyond the police station).

[360] Oregon v. Mathiason, 429 U.S. 492 (1977) (suspect came voluntarily to police station to be questioned, he was not placed under arrest while there, and he was allowed to leave at end of interview, even though he was named by victim as culprit, questioning took place behind closed doors, and he was falsely informed his fingerprints had been found at scene of crime); Salinas v. Texas, 570 U.S. ___, No. 12–246, slip op. (2013) (plurality opinion) (voluntarily accompanying police to station for questioning). *Cf.* Stansbury v. California, 511 U.S. 318 (1994). *See also* Minnesota v. Murphy, 465 U.S. 420 (1984) (required reporting to probationary officer is not custodial situation); Yarborough v. Alvarado, 541 U.S. 652 (2004) (state court determination that teenager brought to police station by his parents was not "in custody" was not "unreasonable" for purposes of federal *habeas* review under the standards of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)).

[361] Beckwith v. United States, 425 U.S. 341 (1976) (IRS agents' interview with taxpayer in private residence was not a custodial interrogation, although inquiry had "focused" on him).

[362] This holds even in the case of convict who is released after interrogation back into the general population. Maryland v. Shatzer, 559 U.S. ___, No. 08–680, slip op. (2010).

[363] Edwards v. Arizona, 451 U.S. 477 (1981).

[364] 446 U.S. 291 (1980). A remarkably similar factual situation was presented in Brewer v. Williams, 430 U.S. 387 (1977), which was decided under the Sixth Amendment. In *Brewer*, and also in Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), the Court has had difficulty in expounding on what constitutes interrogation for Sixth Amendment counsel purposes. The *Innis* Court indicated that the definitions are not the same for each Amendment. 446 U.S. at 300 n.4.

crime scene and that they hoped the weapon was found before a child discovered it and was injured. The defendant then took them to the weapon's hiding place.

Unanimously rejecting a contention that *Miranda* would have been violated only by express questioning, the Court said: "We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." [365] A divided Court then concluded that the officers' conversation did not amount to a functional equivalent of questioning and that the evidence was admissible.[366]

A later divided Court applied *Innis* in *Arizona v. Mauro* [367] to hold that a suspect who had requested an attorney was not "interrogated" by bringing instead the suspect's wife, who also was a suspect, to speak with him in police presence. The majority emphasized that the suspect's wife had asked to speak with her husband, the meeting was therefore not a police-initiated ruse designed to elicit a response from the suspect, and in any event the meeting could not be characterized as an attempt by the police to use the coercive nature of confinement to extract a confession that would not be given in an unrestricted environment. The dissent argued that the police had exploited the wife's request to talk with her husband in a custodial setting to create a situation the police knew, or should reasonably have known, was reasonable likely to result in an incriminatory statement.

In *Estelle v. Smith*,[368] the Court held that a court-ordered jailhouse interview by a psychiatrist seeking to determine the defendant's competency to stand trial constituted "interrogation" with re-

[365] Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

[366] 446 U.S. at 302–04. Justices Marshall, Brennan, and Stevens dissented, id. at 305, 307. *See also* Illinois v. Perkins, 496 U.S. 292 (1990) (absence of coercive environment makes *Miranda* inapplicable to jail cell conversation between suspect and police undercover agent).

[367] 481 U.S. 520 (1987).

[368] 451 U.S. 454 (1981).

spect to testimony on issues guilt and punishment; the psychiatrist's conclusions about the defendant's dangerousness were inadmissible at the capital sentencing phase of the trial because the defendant had not been given his *Miranda* warnings prior to the interview. That the defendant had been questioned by a psychiatrist designated to conduct a neutral competency examination, rather than by a police officer, was "immaterial," the Court concluded, since the psychiatrist's testimony at the penalty phase changed his role from one of neutrality to that of an agent of the prosecution.[369] Other instances of questioning in less formal contexts in which the issues of custody and interrogation intertwine, *e.g.*, in on-the-street encounters, await explication by the Court.

Third, before a suspect in custody is interrogated, he must be given *full* warnings, or the *equivalent*, of his *rights. Miranda*, of course, required express warnings to be given to an in-custody suspect of his right to remain silent, that anything he said may be used as evidence against him, that he has a right to counsel, and that if he cannot afford counsel he is entitled to an appointed attorney.[370] The Court recognized that "other fully effective means" could be devised to convey the right to remain silent,[371] but it was firm that the prosecution was not permitted to show that an unwarned suspect knew of his rights in some manner.[372] Nevertheless, it is not necessary that the police give the warnings as a verbatim recital of the words in the *Miranda* opinion itself, so long as the words used "fully conveyed" to a defendant his rights.[373]

Fourth, once a warned suspect asserts his *right* to *silence* and requests *counsel*, the police must scrupulously respect his assertion of right. The *Miranda* Court strongly stated that once a warned suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must

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[369] 451 U.S. at 467.

[370] Miranda v. Arizona, 384 U.S. 436, 444 (1966). *See* id. at 469–73.

[371] 384 U.S. at 444.

[372] 384 U.S. at 469.

[373] California v. Prysock, 453 U.S. 355 (1981). Rephrased, the test is whether the warnings "*reasonably* conveyed" a suspect's rights, the Court adding that reviewing courts "need not examine *Miranda* warnings as if construing a will or defining the terms of an easement." Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (upholding warning that included possibly misleading statement that a lawyer would be appointed "if and when you go to court"). Even where warnings were not the "*clearest possible* formulation of *Miranda's* right-to-counsel advisement," the Court found them acceptable as "sufficiently comprehensive and comprehensible when given a commonsense reading." Florida v. Powell, 559 U.S. ___, No. 08–1175, slip op. at 12 (2010) (emphasis in original) (upholding warning of a right to talk to a lawyer before answering any questions, coupled with advice that the right could be invoked at any time during police questioning, as adequate to inform a suspect of his right to have a lawyer present during questioning).

cease." Further, if the suspect indicates he wishes the assistance of counsel during interrogation, questioning must cease until he has counsel.[374]

That said, the Court has issued a distinct line of cases on the right to counsel that has created practically a *per se* rule barring the police from continuing or from reinitiating interrogation with a suspect requesting counsel until counsel is present, save only that the suspect himself may initiate further proceedings. In *Edwards v. Arizona*,[375] initial questioning had ceased as soon as the suspect had requested counsel, and the suspect had been returned to his cell. Questioning had resumed the following day only after different police officers had confronted the suspect and again warned him of his rights; the suspect agreed to talk and thereafter incriminated himself. Nonetheless, the Court held, "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of this rights. We further hold that an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[376] The *Edwards* rule bars police-initiated questioning stemming from a separate investiga-

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[374] Miranda v. Arizona, 384 U.S. 436, 472, 473–74 (1966). While a request for a lawyer is a *per se* invocation of Fifth Amendment rights, a request for another advisor, such as a probation officer or family member, may be taken into account in determining whether a suspect has evidenced an intent to claim his right to remain silent. Fare v. Michael C., 442 U.S. 707 (1979) (juvenile who requested to see his probation officer, rather than counsel, found under the totality-of-the-circumstances to have not invoked a right to remain silent).

[375] 451 U.S. 477 (1981).

[376] 451 U.S. at 484–85. The decision was unanimous, but three concurrences objected to a special rule limiting waivers with respect to counsel to suspect-initiated further exchanges. Id. at 487, 488 (Chief Justice Burger and Justices Powell and Rehnquist). In Oregon v. Bradshaw, 462 U.S. 1039 (1983), the Court held, albeit without a majority of Justices in complete agreement as to rationale, that an accused who had initiated further conversations with police had knowingly and intelligently waived his right to have counsel present. So too, an accused who expressed a willingness to talk to police, but who refused to make a written statement without presence of counsel, was held to have waived his rights with respect to his oral statements. Connecticut v. Barrett, 479 U.S. 523 (1987).

In Minnick v. Mississippi, 498 U.S. 146 (1990), the Court interpreted *Edwards* to bar interrogation without counsel present of a suspect who had earlier consulted with an attorney on the accusation at issue. "[W]hen counsel is requested, interrogation must cease, and officials may not reinstate interrogation without counsel present, whether or not the accused has consulted with his attorney." Id. at 153.

The Court has held that *Edwards* should not be applied retroactively to a conviction that had become final, Solem v. Stumes, 465 U.S. 638 (1984), but that *Ed-*

tion as well as questioning relating to the crime for which the suspect was arrested.[377] It also applies to interrogation by officers of a different law enforcement authority.[378]

On the other hand, the *Edwards* rule requiring that a lawyer be provided to a suspect who had requested one in an earlier interrogation does not apply once there has been a meaningful break in custody. The Court in *Maryland v. Shatzer*[379] characterized the *Edwards* rule as a judicially prescribed precaution against using the coercive pressure of prolonged custody to badger a suspect who has previously requested counsel into talking without one. However, after a suspect has been released to resume his normal routine for a sufficient period to dissipate the coercive effects of custody, a period set at 14 days by the *Shatzer* Court, the rationale for solicitous treatment ceases. If the suspect is thereafter put into custody again, the options for questioning no longer are limited to suspect-initiated talks or providing counsel, but rather the police may issue new *Miranda* warnings and proceed accordingly.[380] Moreover, the *Edwards* rule has not been explicitly extended to other aspects of the *Miranda* warnings.[381]

Fifth, a properly warned suspect may *waive* his *Miranda* rights and submit to custodial interrogation. *Miranda* recognized that a suspect may voluntarily and knowingly give up his rights and respond to questioning, but the Court also cautioned that the prosecution bore a "heavy burden" to establish that a valid waiver had occurred.[382] The Court continued: "[a] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually ob-

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wards does apply to cases pending on appeal at the time it was decided. Shea v. Louisiana, 470 U.S. 51 (1985).

[377] Arizona v. Roberson, 486 U.S. 675 (1988). By contrast, the Sixth Amendment right to counsel is offense-specific, and does not bar questioning about a crime unrelated to the crime for which the suspect has been charged. *See* McNeil v. Wisconsin, 501 U.S. 171 (1991).

[378] Minnick v. Mississippi, 498 U.S. 146 (1990).

[379] 559 U.S. ___, No. 08–680, slip op. (2010).

[380] Id.

[381] For a pre-*Edwards* case on the right to remain silent, see Michigan v. Mosley, 423 U.S. 96 (1975) (suspect given *Miranda* warnings at questioning for robbery, requested cessation of interrogation, and police complied; some two hours later, a different policeman interrogated suspect about a murder, gave him a new *Miranda* warning, and suspect made incriminating admission; since police "scrupulously honored" suspect's request, admission valid).

[382] Miranda v. Arizona, 384 U.S. 436, 475 (1966). *See also* Tague v. Louisiana, 444 U.S. 469 (1980). A knowing and intelligent waiver need not be predicated on complete disclosure by police of the intended line of questioning, hence an accused's signed waiver following arrest for one crime is not invalidated by police having failed to inform him of intent to question him about another crime. Colorado v. Spring, 479 U.S. 564 (1987).

tained."[383] Subsequent cases indicated that determining whether a suspect has waived his *Miranda* rights is a fact-specific inquiry not easily susceptible to *per se* rules. According to these cases, resolution of the issue of waiver "must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'"[384] Under this line of cases, a waiver need not always be express, nor does *Miranda* impose a formalistic waiver procedure.[385]

In *Berghuis v. Thompkins*, citing the societal benefit of requiring an accused to invoke *Miranda* rights unambiguously, the Court refocused its *Miranda* waiver analysis to whether a suspect understood his rights.[386] There, a suspect refused to sign a waiver form, remained largely silent during the ensuing 2-hour and 45-minute interrogation, but then made an incriminating statement. The five-Justice majority found that the suspect had failed to invoke his right to remain silent and also implicitly had waived the right. According to the Court, though a statement following silence alone may not be adequate to show a waiver, the prosecution may show an implied waiver by demonstrating that a suspect understood the *Miranda* warnings given him and subsequently made an uncoerced statement.[387] Further, once a suspect has knowingly and voluntarily waived his *Miranda* rights, police officers may continue questioning until and unless the suspect clearly invokes them later.[388]

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[383] 384 U.S. at 475.

[384] North Carolina v. Butler, 441 U.S. 369, 374–75 (1979) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). In Oregon v. Elstad, 470 U.S. 298 (1985), the Court held that a confession following a *Miranda* warning is not necessarily tainted by an earlier confession obtained without a warning, as long as the earlier confession had been voluntary. *See* Bobby v. Dixon, 565 U.S. ___, No. 10–1540, slip op. (2012). *See also* Moran v. Burbine, 475 U.S. 412 (1986) (signed waivers following *Miranda* warnings not vitiated by police having kept from suspect information that attorney had been retained for him by a relative); Fare v. Michael C., 442 U.S. 707 (1979) (juvenile who consented to interrogation after his request to consult with his probation officer was denied found to have waived rights; totality-of-the-circumstances analysis held to apply). *Elstad* was distinguished in Missouri v. Seibert, 542 U.S. 600 (2004), however, when the failure to warn prior to the initial questioning was a deliberate attempt to circumvent *Miranda* by use of a two-step interrogation technique, and the police, prior to eliciting the statement for the second time, did not alert the suspect that the first statement was likely inadmissible.

[385] North Carolina v. Butler, 441 U.S. 369 (1979). In *Butler*, the defendant had refused to sign a waiver but agreed to talk with FBI agents nonetheless. On considering whether the defendant had thereby waived his right to counsel (his right to remain silent aside), the Court held that no express oral or written statement was required. Though the defendant was never directly responsive on his desire for counsel, the Court found that a waiver could be inferred from his actions and words.

[386] 560 U.S. ___, No. 08–1470, slip op. (2010).

[387] 560 U.S. ___, No. 08–1470, slip op. at 12–13 (2010).

[388] Davis v. United States, 512 U.S. 452 (1994) (suspect's statement that "maybe I should talk to a lawyer," uttered after *Miranda* waiver and after an hour and a

Sixth, the admissions of an unwarned or improperly warned suspect *may not be used* directly against him at trial, but the Court has permitted some use for other purposes, such as impeachment. A confession or other incriminating admissions obtained in violation of *Miranda* may not, of course, be introduced against him at trial for purposes of establishing guilt [389] or for determining the sentence, at least in bifurcated trials in capital cases.[390] On the other hand, the "fruits" of such an unwarned confession or admission may be used in some circumstances if the statement was voluntary.[391]

The Court, in opinions that bespeak a sense of necessity to narrowly construe *Miranda*, has broadened the permissible impeachment purposes for which unlawful confessions and admissions may be used.[392] Thus, in *Harris v. New York*,[393] the Court held that the prosecution could use statements, obtained in violation of *Miranda*, to impeach the defendant's testimony if he voluntarily took the stand and denied commission of the offense. Subsequently, in *Oregon v. Hass*,[394] the Court permitted impeachment use of a statement made by the defendant after police had ignored his request for counsel following his *Miranda* warning. Such impeachment material, however, must still meet the standard of voluntariness associated with

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half of questioning, did not constitute such a clear request for an attorney when, in response to a direct follow-up question, he said "no, I don't want a lawyer").

[389] Miranda v. Arizona, 384 U.S. 436, 479 (1966). *See also* Harrison v. United States, 392 U.S. 219 (1968) (rejecting as tainted the prosecution's use at the second trial of defendant's testimony at his first trial rebutting confessions obtained in violation of *McNabb-Mallory*).

[390] Estelle v. Smith, 451 U.S. 454 (1981). The Court has yet to consider the applicability of the ruling in a noncapital, nonbifurcated trial case.

[391] United States v. Patane, 542 U.S. 630 (2004) (allowing introduction of a pistol, described as a "nontestimonial fruit" of an unwarned statement). *See also* Michigan v. Tucker, 417 U.S. 433 (1974) (upholding use of a witness revealed by defendant's statement elicited without proper *Miranda* warning). Note too that confessions may be the poisonous fruit of other constitutional violations, such as illegal searches or arrests. *E.g.*, Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982).

[392] Under Walter v. United States, 347 U.S. 62 (1954), the defendant not only denied the offense of which he was accused (sale of drugs), but also asserted he had never dealt in drugs. The prosecution was permitted to impeach him concerning heroin seized illegally from his home two years before. The Court observed that the defendant could have denied the offense without making the "sweeping" assertions, as to which the government could impeach him.

[393] 401 U.S. 222 (1971). The defendant had denied only the commission of the offense. The Court observed that it was only "speculative" to think that impermissible police conduct would be encouraged by permitting such impeachment, a resort to deterrence analysis being contemporaneously used to ground the Fourth Amendment exclusionary rule, whereas the defendant's right to testify was the obligation to testify truthfully and the prosecution could impeach him for committing perjury. *See also* United States v. Havens, 446 U.S. 620 (1980) (Fourth Amendment).

[394] 420 U.S. 714 (1975). By contrast, a defendant may not be impeached by evidence of his silence after police have warned him of his right to remain silent. Doyle v. Ohio, 426 U.S. 610 (1976).

the pre-*Miranda* tests for the admission of confessions and statements.[395]

The Court has created a "public safety" exception to the *Miranda* warning requirement, but has refused to create another exception for misdemeanors and lesser offenses. In *New York v. Quarles*,[396] the Court held admissible a recently apprehended suspect's response in a public supermarket to the arresting officer's demand to know the location of a gun that the officer had reason to believe the suspect had just discarded or hidden in the supermarket. The Court, in an opinion by Justice Rehnquist,[397] declined to place officers in the "untenable position" of having to make instant decisions as to whether to proceed with *Miranda* warnings and thereby increase the risk to themselves or to the public or whether to dispense with the warnings and run the risk that resulting evidence will be excluded at trial. While acknowledging that the exception itself will "lessen the desirable clarity of the rule," the Court predicted that confusion would be slight: "[w]e think that police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." [398] No such compelling justification was offered for a *Miranda* exception for lesser offenses, however, and protecting the rule's "simplicity and clarity" counseled against creating one.[399] "[A] person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." [400]

The Operation of the Exclusionary Rule

Supreme Court Review.—The Court's review of the question of admissibility of confessions or other incriminating statements is designed to prevent the foreclosure of the very question to be decided by it, the issue of voluntariness under the due process standard, the issue of the giving of the requisite warnings and the subsequent waiver, if there is one, under the *Miranda* rule. Recurring to Justice Frankfurter's description of the inquiry as a "three-

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[395] *E.g.*, Mincey v. Arizona, 437 U.S. 385 (1978); New Jersey v. Portash, 440 U.S. 450 (1979).

[396] 467 U.S. 649 (1984).

[397] The Court's opinion was joined by Chief Justice Burger and by Justices White, Blackmun, and Powell. Justice O'Connor would have ruled inadmissible the suspect's response, but not the gun retrieved as a result of the response, and Justices Marshall, Brennan, and Stevens dissented.

[398] 467 U.S. at 658–59.

[399] Berkemer v. McCarty, 468 U.S. 420, 432 (1984).

[400] 468 U.S. at 434.

phased process" in due process cases at least,[401] it can be seen that the Court's self-imposed rules of restraint on review of lower-court factfinding greatly influenced the process. The finding of facts surrounding the issue of coercion—the length of detention, circumstances of interrogation, use of violence or of tricks and ruses, et cetera—is the proper function of the trial court which had the advantage of having the witnesses before it. "This means that all testimonial conflict is settled by the judgment of the state courts. Where they have made explicit findings of fact, those findings conclude us and form the basis of our review—with the one *caveat*, necessarily, that we are not to be bound by findings wholly lacking support in evidence."[402]

However, the conclusions of the lower courts as to how the accused reacted to the circumstances of his interrogation, and as to the legal significance of how he reacted, are subject to open review. "No more restricted scope of review would suffice adequately to protect federal constitutional rights. For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially—that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply be declining to draw inferences which the historical facts compel. Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate . . . that the state court's determination should control. But where, on the uncontested external happenings, coercive forces set in motion by state law enforcement officials are unmistakably in action; where these forces, under all the prevailing states of stress, are powerful enough to draw forth a confession; where, in fact, the confession does come forth and is claimed by the defendant to have been extorted from him; and where he has acted as a man would act who is subjected to such an extracting process—where this is all that appears in the record—a State judgment that the confession was voluntary cannot stand."[403] *Miranda*, of course, does away with the judgments about the effect of lack of warnings, and the third phase, the legal determination of the interaction of the first two phases, is determined solely by two factual determinations: whether the warnings were given and if so whether there was a valid waiver. Presumably, supported determinations of these two

[401] Culombe v. Connecticut, 367 U.S. 568, 603–06 (1961).

[402] 367 U.S. at 603. *See* Ashcraft v. Tennessee, 322 U.S. 143, 152–53 (1944); Lyons v. Oklahoma, 322 U.S. 596, 602–03 (1944); Watts v. Indiana, 338 U.S. 49, 50–52 (1949); Gallegos v. Nebraska, 342 U.S. 55, 60–62 (1951); Stein v. New York, 346 U.S. 156, 180–82 (1953); Payne v. Arkansas, 356 U.S. 560, 561–62 (1958).

[403] Culombe v. Connecticut, 367 U.S. 568, 605 (1961). *See* Watts v. Indiana, 338 U.S. 49, 51 (1949); Malinski v. New York, 324 U.S. 401, 404, 417 (1945).

facts by trial courts would preclude independent review by the Supreme Court. Yet, the Court has been clear that it may and will independently review the facts when the factfinding has such a substantial effect on constitutional rights.[404]

In *Withrow v. Williams*,[405] the Court held that the rule of *Stone v. Powell*,[406] precluding federal *habeas corpus* review of a state prisoner's claim that his conviction rests on evidence obtained through an unconstitutional search or seizure, does not extend to preclude federal *habeas* review of a state prisoner's claim that his conviction rests on statements obtained in violation of the safeguards mandated by *Miranda*.

Procedure in the Trial Courts.—The Court has placed constitutional limitations upon the procedures followed by trial courts for determining the admissibility of confessions and other incriminating admissions. Three procedures were developed over time to deal with the question of admissibility when involuntariness was claimed. By the orthodox method, the trial judge heard all the evidence on voluntariness in a separate and preliminary hearing, and if he found the confession involuntary the jury never received it, while if he found it voluntary the jury received it with the right to consider its weight and credibility, which consideration included the circumstances of its making. By the New York method, the judge first reviewed the confession under a standard leading to its exclusion only if he found it not possible that "reasonable men could differ over the [factual] inferences to be drawn" from it; otherwise, the jury would receive the confession with instructions to first determine its voluntariness and to consider it if it were voluntary and to disregard it if it were not. By the Massachusetts method, the trial judge himself determined the voluntariness question and if he found the confession involuntary the jury never received it; if he found it to have been voluntarily made he permitted the jury to receive it with instructions that the jurors should make their own independent determination of voluntariness.[407]

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[404] "In cases in which there is a claim of denial of rights under the Federal Constitution this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." Niemotko v. Maryland, 340 U.S. 268, 271 (1951); Time, Inc. v. Pape, 401 U.S. 279, 284 (1971), and cases cited therein.

[405] 507 U.S. 680 (1993).

[406] 428 U.S. 465 (1976). *See* discussion of Stone v. Powell under the Fourth Amendment, *infra*.

[407] Jackson v. Denno, 378 U.S. 368, 410–23 (1964) (appendix to opinion of Justice Black concurring in part and dissenting in part).

The New York method was upheld against constitutional attack in *Stein v. New York*,[408] but eleven years later a five-to-four decision in *Jackson v. Denno*,[409] found it inadequate to protect the due process rights of defendants. The procedure did not, the Court held, ensure a "reliable determination on the issue of voluntariness" and did not sufficiently guarantee that convictions would not be grounded on involuntary confessions. Because there was only a general jury verdict of guilty, it was impossible to determine whether the jury had first focused on the issue of voluntariness and then either had found the confession voluntary and considered it on the question of guilt or had found it involuntary, disregarded it, and reached a conclusion of guilt on wholly independent evidence. It was doubtful that a jury could appreciate the values served by the exclusion of involuntary confessions and put out of mind the content of the confession no matter what was determined with regard to its voluntariness. The rule was reiterated in *Sims v. Georgia*,[410] in which the Court voided a state practice permitting the judge to let the confession go to the jury for the ultimate decision on voluntariness, upon an initial determination merely that the prosecution had made out a prima facie case that the confession was voluntary. The Court has interposed no constitutional objection to use of either the orthodox or the Massachusetts method for determining admissibility.[411] It has held that the prosecution bears the burden of establishing voluntariness by a preponderance of the evidence, rejecting a contention that it should be determined only upon proof beyond a reasonable doubt,[412] or by clear and convincing evidence.[413]

DUE PROCESS

History and Scope

"It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as

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[408] 346 U.S. 156, 170–79 (1953). Significant to the Court's conclusion on this matter was the further conclusion of the majority that coerced confessions were inadmissible solely because of their unreliability; if their trustworthiness could be established the utilization of an involuntary confession violated no constitutional prohibition. This conception was contrary to earlier cases and was subsequently repudiated. *See* Jackson v. Denno, 378 U.S. 368, 383–87 (1964).

[409] 378 U.S. 368 (1964). On the sufficiency of state court determinations, *see* Swenson v. Stidham, 409 U.S. 224 (1972); La Vallee v. Della Rose, 410 U.S. 690 (1973).

[410] 385 U.S. 538 (1967).

[411] Jackson v. Denno, 378 U.S. 368 and n.8 (1964); Lego v. Twomey, 404 U.S. 477, 489–90 (1972) (rejecting contention that jury should be required to pass on voluntariness following judge's determination).

[412] Lego v. Twomey, 404 U.S. 477 (1972).

[413] Colorado v. Connelly, 479 U.S. 157 (1986).

to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just."[414] The content of due process is "a historical product"[415] that traces all the way back to chapter 39 of Magna Carta, in which King John promised that "[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[416] The phrase "due process of law" first appeared in a statutory rendition of this chapter in 1354. "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law."[417] Though Magna Carta was in essence the result of a struggle over interest between the King and his barons,[418] this particular clause over time transcended any such limitation of scope, and throughout the fourteenth century parliamentary interpretation expanded far beyond the intention of any of its drafters.[419] The understanding which the founders of the American constitutional system, and those who wrote the Due Process Clauses, brought to the subject they derived from Coke, who in his *Second Institutes* expounded the proposition that the term "by law of the land" was equivalent to "due process of law," which he in turn defined as "by due process of the common law," that is, "by the indictment or presentment of good and lawful men . . . or by

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[414] Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting). Due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[415] Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922).

[416] Text and commentary on this chapter may be found in W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 375–95 (Glasgow, 2d rev. ed. 1914). The chapter became chapter 29 in the Third Reissue of Henry III in 1225. Id. at 504, and see 139–59. As expanded, it read: "No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land." *See also* J. Holt, Magna Carta 226–29 (1965). The 1225 reissue also added to chapter 29 the language of chapter 40 of the original text: "To no one will we sell, to no one will we deny or delay right or justice." This 1225 reissue became the standard text thereafter.

[417] 28 Edw. III, c. 3. *See* F. Thompson, Magna Carta: Its Role in the Making of the English Constitution, 1300–1629, 86–97 (1948), recounting several statutory reconfirmations. Note that the limitation of "free man" had given way to the all-inclusive delineation.

[418] W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John (Glasgow, 2d rev. ed. 1914); J. Holt, Magna Carta (1965).

[419] F. Thompson, Magna Carta: Its Role in the Making of the English Constitution, 1300–1629 (1948).

writ original of the Common Law." [420] The significance of both terms was procedural, but there was in Coke's writings on chapter 29 a rudimentary concept of substantive restrictions, which did not develop in England because of parliamentary supremacy, but which was to flower in the United States.

The term "law of the land" was early the preferred expression in colonial charters and declarations of rights, which gave way to the term "due process of law," although some state constitutions continued to employ both terms. Whichever phraseology was used, the expression seems generally to have occurred in close association with precise safeguards of accused persons, but, as is true of the Fifth Amendment here under consideration, the provision also suggests some limitations on substance because of its association with the guarantee of just compensation upon the taking of private property for public use.[421]

Scope of the Guaranty.—Standing by itself, the phrase "due process" would seem to refer solely and simply to procedure, to process in court, and therefore to be so limited that "due process of law" would be what the legislative branch enacted it to be. But that is not the interpretation which has been placed on the term. "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." [422] All persons within the territory of the United States are entitled to its protection, including corporations,[423] aliens,[424] and presumptively citizens seeking readmission to the United States,[425] but States as such

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[420] Sir Edward Coke, Institutes of the Laws of England, Part II, 50–51 (1641). For a review of the influence of Magna Carta and Coke on the colonies and the new nation, *see*, *e.g.*, A. Howard, The Road from Runnymede: Magna Carta and Constitutionalism in America (1968).

[421] The 1776 Constitution of Maryland, for example, in its declaration of rights, used the language of Magna Carta including the "law of the land" phrase in a separate article, 3 F. Thorpe, The Federal and State Constitutions, H. Doc. No. 357, 59th Congress, 2d Sess. 1688 (1909), whereas Virginia used the clause in a section of guarantees of procedural rights in criminal cases. 7 id. at 3813. New York in its constitution of 1821 was the first state to pick up "due process of law" from the United States Constitution. 5 id. at 2648.

[422] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856). Webster had made the argument as counsel in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). *See also* Chief Justice Shaw's opinion in Jones v. Robbins, 74 Mass. (8 Gray) 329 (1857).

[423] *Sinking Fund Cases*, 99 U.S. 700, 719 (1879).

[424] Wong Wing v. United States, 163 U.S. 228, 238 (1896).

[425] United States v. Ju Toy, 198 U.S. 253, 263 (1905); *cf.* Quon Quon Poy v. Johnson, 273 U.S. 352 (1927).

are not so entitled.[426] It is effective in the District of Columbia[427] and in territories which are part of the United States,[428] but it does not apply of its own force to unincorporated territories.[429] Nor does it reach enemy alien belligerents tried by military tribunals outside the territorial jurisdiction of the United States.[430]

Early in our judicial history, a number of jurists attempted to formulate a theory of natural rights—natural justice, which would limit the power of government, especially with regard to the property rights of persons.[431] State courts were the arenas in which this struggle was carried out prior to the Civil War. Opposing the "vested rights" theory of protection of property were jurists who argued first, that the written constitution was the supreme law of the State and that judicial review could look only to that document in scrutinizing legislation and not to the "unwritten law" of "natural rights," and second, that the "police power" of government enabled legislatures to regulate the use and holding of property in the public interest, subject only to the specific prohibitions of the written constitution. The "vested rights" jurists thus found in the "law of the land" and the "due process" clauses of the state constitutions a restriction upon the substantive content of legislation, which prohibited, regardless of the matter of procedure, a certain kind or degree of exertion of legislative power altogether.[432] Thus, Chief Justice Taney was not innovating when, in the *Dred Scott* case, he pronounced, without elaboration, that one of the reasons that the Missouri Compromise was unconstitutional was that an act of Congress that deprived "a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."[433] Following the war, with the ratification of the Fourteenth Amendment's Due Process Clause, substantive due process interpretations were urged on the Supreme Court with regard to state legislation. First resisted, the arguments came in time to

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[426] South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966).

[427] Wight v. Davidson, 181 U.S. 371, 384 (1901).

[428] Lovato v. New Mexico, 242 U.S. 199, 201 (1916).

[429] Public Utility Comm'rs v. Ynchausti & Co., 251 U.S. 401, 406 (1920).

[430] Johnson v. Eisentrager, 339 U.S. 763 (1950); *In re* Yamashita, 327 U.S. 1 (1946). Justices Rutledge and Murphy in the latter case argued that the Due Process Clause applies to every human being, including enemy belligerents.

[431] *Compare* the remarks of Justices Chase and Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388–89, 398–99 (1798).

[432] The full account is related in E. Corwin, Liberty Against Government ch. 3 (1948). The pathbreaking decision of the era was Wynhamer v. The People, 13 N.Y. 378 (1856).

[433] Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857).

be accepted, and they imposed upon both federal and state legislation a firm judicial hand that was not to be removed until the crisis of the 1930s, and that today in non-economic legislation continues to be reasserted.

"It may prevent confusion, and relieve from repetition, if we point out that some of our cases arose under the provisions of the Fifth and others under those of the Fourteenth Amendment to the Constitution of the United States. Although the language of those Amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper."[434] The most obvious difference between the two Due Process Clauses is that the Fifth Amendment clause as it binds the Federal Government coexists with other express provisions in the Bill of Rights guaranteeing fair procedure and non-arbitrary action, such as jury trials, grand jury indictments, and nonexcessive bail and fines, as well as just compensation, whereas the Fourteenth Amendment clause as it binds the states has been held to contain implicitly not only the standards of fairness and justness found within the Fifth Amendment's clause but also to contain many guarantees that are expressly set out in the Bill of Rights. In that sense, the two clauses are not the same thing, but, insofar as they impose such implicit requirements of fair trials, fair hearings, and the like, which exist separately from, though they are informed by, express constitutional guarantees, the interpretation of the two clauses is substantially, if not wholly, the same. Save for areas in which the particularly national character of the Federal Government requires separate treatment, this book's discussion of the meaning of due process is largely reserved for the section on the Fourteenth Amendment. Finally, some Fourteenth Amendment interpretations have been carried back to broaden interpretations of the Fifth Amendment's Due Process Clause, such as, for example, the development of equal protection standards as an aspect of Fifth Amendment due process.

Procedural Due Process

In 1855, the Court first attempted to assess its standards for judging what was due process. At issue was the constitutionality of summary proceedings under a distress warrant to levy on the lands of a government debtor. The Court first ascertained that Congress was not free to make any process "due process." "To what principles, then, are we to resort to ascertain whether this process, en-

[434] French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901).

acted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." A survey of history disclosed that the law in England seemed always to have contained a summary method, not unlike the law in question, for recovering debts owed the Crown. Therefore, "[t]ested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law. . . ." [435]

This formal approach to the meaning of due process could obviously have limited both Congress and the state legislatures in the development of procedures unknown to English law. But when California's abandonment of indictment by grand jury was challenged, the Court refused to be limited by the fact that such proceeding was the English practice and that Coke had indicated that it was a proceeding required as "the law of the land." The Court in *Murray's Lessee* meant "that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law." To hold that only historical, traditional procedures can constitute due process, the Court said, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." [436] Therefore, the Court concluded, due process "must be held to guarantee not particular forms of procedures, but the very substance of individual rights to life, liberty, and property." The Due Process Clause prescribed "the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . . It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves

[435] Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276–77, 280 (1856). The Court took a similar approach in Fourteenth Amendment due process interpretation in Davidson v. City of New Orleans, 96 U.S. 97 (1878), and Munn v. Illinois, 94 U.S. 113 (1877).

[436] Hurtado v. California, 110 U.S. 516, 528–29 (1884).

these principles of liberty and justice, must be held to be due process of law."[437]

Generally.—The phrase "due process of law" does not necessarily imply a proceeding in a court or a plenary suit and trial by jury in every case where personal or property rights are involved.[438] "In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts."[439] What is unfair in one situation may be fair in another.[440] "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment."[441]

Administrative Proceedings: A Fair Hearing.—With respect to action taken by administrative agencies, the Court has held that the demands of due process do not require a hearing at the initial stage, or at any particular point in the proceeding, so long as a hearing is held before the final order becomes effective.[442] In *Bowles v. Willingham*,[443] the Court sustained orders fixing maximum rents issued without a hearing at any stage, saying "where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires." But where, after consideration of charges brought against an employer by a complaining union, the National Labor Relations Board undertook to void an agreement between an employer and another independent union, the latter was entitled to notice and an opportunity to participate in the proceedings.[444] Although a taxpayer must be afforded a fair oppor-

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[437] 110 U.S. at 532, 535, 537. This flexible approach has been followed by the Court. *E.g.*, Twining v. New Jersey, 211 U.S. 78 (1908); Powell v. Alabama, 287 U.S. 45 (1932); Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934).

[438] Davidson v. City of New Orleans, 96 U.S. 97, 102 (1878); Public Clearing House v. Coyne, 194 U.S. 497, 508 (1904).

[439] *Ex parte* Wall, 107 U.S. 265, 289 (1883).

[440] *Compare* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), *with* Ng Fung Ho v. White, 259 U.S. 276 (1922).

[441] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Justice Frankfurter concurring).

[442] Opp Cotton Mills v. Administrator, 312 U.S. 126, 152, 153 (1941).

[443] 321 U.S. 503, 521 (1944).

[444] Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

tunity for a hearing in connection with the collection of taxes,[445] collection by distraint of personal property is lawful if the taxpayer is allowed a hearing thereafter.[446]

When the Constitution requires a hearing, it requires a fair one, held before a tribunal that meets currently prevailing standards of impartiality.[447] A party must be given an opportunity not only to present evidence, but also to know the claims of the opposing party and to meet them. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon the proposal before the final command is issued.[448] But a variance between the charges and findings will not invalidate administrative proceedings where the record shows that at no time during the hearing was there any misunderstanding as to the basis of the complaint.[449] The mere admission of evidence that would be inadmissible in judicial proceedings does not vitiate the order of an administrative agency.[450] A provision that such a body shall not be controlled by rules of evidence does not, however, justify orders without a foundation in evidence having ra-

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[445] Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907); Lipke v. Lederer, 259 U.S. 557 (1922).

[446] Phillips v. Commissioner, 283 U.S. 589 (1931). *Cf.* Springer v. United States, 102 U.S. 586, 593 (1881); Passavant v. United States, 148 U.S. 214 (1893). The collection of taxes is, however, very nearly a wholly unique area. *See* Perez v. Ledesma, 401 U.S. 82, 127 n.17 (1971) (Justice Brennan concurring in part and dissenting in part). On the limitations on private prejudgment collection, *see* Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

[447] Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950). *But see* Arnett v. Kennedy, 416 U.S. 134, 170 n.5 (Justice Powell), 196–99 (Justice White) (1974) (hearing before probably partial officer at pretermination stage).

[448] Margan v. United States, 304 U.S. 1, 18–19 (1938). The Court has experienced some difficulty with application of this principle to administrative hearings and subsequent review in selective service cases. *Compare* Gonzales v. United States, 348 U.S. 407 (1955) (conscientious objector contesting his classification before appeals board must be furnished copy of recommendation submitted by Department of Justice; only by being appraised of the arguments and conclusions upon which recommendations were based would he be enabled to present his case effectively), *with* United States v. Nugent, 346 U.S. 1 (1953) (in auxiliary hearing that culminated in a Justice Department report and recommendation, it is sufficient that registrant be provided with resume of adverse evidence in FBI report because the "imperative needs of mobilization and national vigilance" mandate a minimum of "litigious interruption"), *and* Gonzales v. United States, 364 U.S. 59 (1960) (five-to-four decision finding no due process violation when petitioner (1) at departmental proceedings was not permitted to rebut statements attributed to him by his local board, because the statements were in his file and he had opportunity to rebut both before hearing officer and appeal board, nor (2) at trial was denied access to hearing officer's notes and report, because he failed to show any need and did have Department recommendations).

[449] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 349–50 (1938).

[450] Western Chem. Co. v. United States, 271 U.S. 268 (1926). *See also* United States v. Abilene & So. Ry., 265 U.S. 274, 288 (1924).

tional probative force. Hearsay may be received in an administrative hearing and may constitute by itself substantial evidence in support of an agency determination, provided that there are present factors which assure the underlying reliability and probative value of the evidence and, at least in the case at hand, where the claimant before the agency had the opportunity to subpoena the witnesses and cross-examine them with regard to the evidence.[451] Although the Court has recognized that in some circumstances a "fair hearing" implies a right to oral argument,[452] it has refused to lay down a general rule that would cover all cases.[453]

In the light of the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command, and applicable Navy regulations that confirm this authority, together with a stipulation in the contract between a restaurant concessionaire and the Naval Gun Factory forbidding employment on the premises of any person not meeting security requirements, due process was not denied by the summary exclusion on security grounds of the concessionaire's cook, without hearing or advice as to the basis for the exclusion. The Fifth Amendment does not require a trial-type hearing in every conceivable case of governmental impairment of private interest.[454] Because the Civil Rights Commission acts solely as an investigative and fact-finding agency and makes

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[451] Richardson v. Perales, 402 U.S. 389 (1971).

[452] Londoner v. Denver, 210 U.S. 373 (1908).

[453] FCC v. WJR, 337 U.S. 265, 274–77 (1949). *See also* Inland Empire Council v. Millis, 325 U.S. 697, 710 (1945). *See* Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C §§ 1001–1011. *Cf.* Link v. Wabash R.R., 370 U.S. 626, 637, 646 (1962), in which the majority rejected Justice Black's dissenting thesis that the dismissal with prejudice of a damage suit without notice to the client and grounded upon the dilatory tactics of his attorney, and the latter's failure to appear at a pre-trial conference, amounted to a taking of property without due process of law.

[454] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961). Four dissenters, Justices Brennan, Black, Douglas, and Chief Justice Warren, emphasized the inconsistency between the Court's acknowledgment that the cook had a right not to have her entry badge taken away for arbitrary reasons, and its rejection of her right to be told in detail the reasons for such action. The case has subsequently been cited as involving an "extraordinary situation." Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Goldberg v. Kelly, 397 U.S. 254, 264 n.10 (1970).

Manifesting a disposition to adjudicate on non-constitutional grounds dismissals of employees under the Federal Loyalty Program, the Court, in Peters v. Hobby, 349 U.S. 331 (1955), invalidated, as in excess of its delegated authority, a finding of reasonable doubt as to the loyalty of the petitioner by a Loyalty Review Board which, on its own initiative, reopened his case after he had twice been cleared by his Agency Loyalty Board, and arrived at its conclusion on the basis of adverse information not offered under oath and supplied by informants, not all of whom were known to the Review Board and none of whom was disclosed to petitioner for cross-examination by him. The Board was found not to possess any power to review on its own initiative. Concurring, Justices Douglas and Black condemned as irreconcilable with due process and fair play the use of faceless informers whom the petitioner is unable to confront and cross-examine.

no adjudications, the Court, in *Hannah v. Larche*,[455] upheld supplementary rules of procedure adopted by the Commission, independently of statutory authorization, under which state electoral officials and others accused of discrimination and summoned to appear at its hearings, are not apprised of the identity of their accusers, and witnesses, including the former, are not accorded a right to confront and cross-examine witnesses or accusers testifying at such hearings. Such procedural rights, the Court maintained, have not been granted by grand juries, congressional committees, or administrative agencies conducting purely fact-finding investigations in no way determining private rights.

In Cole v. Young, 351 U.S. 536 (1956), also decided on the basis of statutory interpretation, there is an intimation that grave due process issues would be raised by the application to federal employees, not occupying sensitive positions, of a measure which authorized, in the interest of national security, summary suspensions and unreviewable dismissals of allegedly disloyal employees by agency heads. In Service v. Dulles, 354 U.S. 363 (1957), and Vitarelli v. Seaton, 359 U.S. 535 (1959), the Court nullified dismissals for security reasons by invoking an established rule of administrative law to the effect that an administrator must comply with procedures outlined in applicable agency regulations, notwithstanding that such regulations conform to more rigorous substantive and procedural standards than are required by Congress or that the agency action is discretionary in nature. In both of the last cited decisions, dismissals of employees as security risks were set aside by reason of the failure of the employing agency to conform the dismissal to its established security regulations. *See* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

Again avoiding constitutional issues, the Court, in Greene v. McElroy, 360 U.S. 474 (1959), invalidated the security clearance procedure required of defense contractors by the Defense Department as being unauthorized either by law or presidential order. However, the Court suggested that it would condemn, on grounds of denial of due process, any enactment or Executive Order which sanctioned a comparable department security clearance program, under which a defense contractor's employee could have his security clearance revoked without a hearing at which he had the right to confront and cross-examine witnesses. Justices Frankfurter, Harlan, and Whittaker concurred without passing on the validity of such procedure, if authorized. Justice Clark dissented. *See also* the dissenting opinions of Justices Douglas and Black in Beard v. Stahr, 370 U.S. 41, 43 (1962), and in Williams v. Zuckert, 371 U.S. 531, 533 (1963).

[455] 363 U.S. 420, 493, 499 (1960). Justices Douglas and Black dissented on the ground that when the Commission summons a person accused of violating a federal election law with a view to ascertaining whether the accusation may be sustained, it acts in lieu of a grand jury or a committing magistrate, and therefore should be obligated to afford witnesses the procedural protection herein denied. Congress subsequently amended the law to require that any person who is defamed, degraded, or incriminated by evidence or testimony presented to the Commission be afforded the opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses requested by him, before the Commission can make public such evidence or testimony. Further, any such person, before the evidence or testimony is released, must be afforded an opportunity to appear publicly to state his side and to file verified statements with the Commission which it must release with any report or other document containing defaming, degrading, or incriminating evidence or testimony. Pub. L. 91–521, § 4, 84 Stat. 1357 (1970), 42 U.S.C. § 1975a(e). *Cf.* Jenkins v. McKeithen, 395 U.S. 411 (1969).

Aliens: Entry and Deportation.—The Court has frequently said that Congress exercises "sovereign" or "plenary" power over the substance of immigration law, and this power is at its greatest when it comes to exclusion of aliens.[456] To aliens who have never been naturalized or acquired any domicile or residence in the United States, the decision of an executive or administrative officer, acting within powers expressly conferred by Congress, with regard to whether or not they shall be permitted to enter the country, is due process of law.[457] Because the status of a resident alien returning from abroad is equivalent to that of an entering alien, his exclusion by the Attorney General without a hearing, on the basis of secret, undisclosed information, also is deemed consistent with due process.[458] The complete authority of Congress in the matter of admission of aliens justifies delegation of power to executive officers to enforce the exclusion of aliens afflicted with contagious diseases by imposing upon the owner of the vessel bringing any such alien into the country a money penalty, collectible before and as a condition of the grant of clearance.[459] If the person seeking admission claims American citizenship, the decision of the Secretary of Labor may be made final, but it must be made after a fair hearing, however summary, and must find adequate support in the evidence. A decision based upon a record from which relevant and probative evidence has been omitted is not a fair hearing.[460] Where the statute made the decision of an immigration inspector final unless an appeal was taken to the Secretary of the Treasury, a person who failed to take such

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[456] *See* discussion under Art. I, § 8, cl. 4, The Power of Congress to Exclude Aliens.

[457] United States v. Ju Toy, 198 U.S. 253, 263 (1905). *See also* The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86 (1903). *Cf.* United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[458] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). The long continued detention on Ellis Island of a non-deportable alien does not change his status or give rise to any right of judicial review. In dissent, Justices Black and Douglas maintained that the protracted confinement on Ellis Island without a hearing could not be reconciled with due process. Also dissenting, Justices Frankfurter and Jackson contended that when indefinite commitment on Ellis Island becomes the means of enforcing exclusion, due process requires that a hearing precede such deprivation of liberty.

Cf. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953), in which the Court, after acknowledging that resident aliens held for deportation are entitled to procedural due process, ruled that as a matter of law the Attorney General must accord notice of the charges and a hearing to a resident alien seaman who is sought to be "expelled" upon his return from a voyage overseas. *Knauff* was distinguished on the ground that the seaman's status was not that of an entrant, but rather that of a resident alien. *See also* Leng May Ma v. Barber, 357 U.S. 185 (1958).

[459] Oceanic Navigation Co. v. Stranahan, 214 U.S. 320 (1909).

[460] Kwock Jan Fat v. White, 253 U.S. 454, 457 (1920). *See also* Chin Yow v. United States, 208 U.S. 8 (1908).

an appeal did not, by an allegation of citizenship, acquire a right to a judicial hearing on *habeas corpus*.[461]

In certain cases, the exclusion of an alien has been seen to implicate the rights of U.S. citizens.[462] These cases have often been decided by the lower courts and involve U.S. citizens' First Amendment rights, which the Supreme Court appeared to recognize in its 1972 decision in *Kleindienst v. Mandel*.[463] However, U.S. citizens have also asserted that the exclusion of an alien has impinged upon the citizen's due process rights.[464] In *Kerry v. Din*, five Justices agreed that denying an immigrant visa to the husband of a U.S. citizen on the grounds that he was inadmissible under a provision of federal immigration law (which pertains to "terrorist activities"), without further explanation, did not violate the due process rights of the U.S. citizen spouse.[465] These Justices differed in their reasoning, though. A three-Justice plurality found that none of the various "interests" asserted by the U.S. citizen wife constituted a protected liberty interest for purposes of the Due Process Clause.[466] For this reason, the plurality rejected the wife's argument that, insofar as enforcement of the law affected her enjoyment of an "implied fundamental liberty," the government must provide her "a full battery of procedural-due-process protections," including stating the spe-

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[461] United States v. Sing Tuck, 194 U.S. 161 (1904). *See also* Quon Quon Poy v. Johnson, 273 U.S. 352, 358 (1927).

[462] *See* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) (apparently recognizing that citizens' First Amendment rights were affected by the denial of a nonimmigrant visa to a Marxist journalist who had been invited to speak in the United States); Kerry v. Din, 576 U.S. ___, No. 13–1402, slip op. (2015) (plurality and concurring opinions, taken together, suggesting that at least a majority of the Court accepts that *Kleindienst* allows U.S. citizens to challenge visa denials that affect other rights beyond their First Amendment rights).

[463] *See, e.g.,* Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 117 (2d Cir. 2009) ("The Supreme Court has recognized a First Amendment right to 'hear, speak, and debate with' a visa applicant."); Adams v. Baker, 909 F.2d 643, 647 n.3 (1st Cir. 1990) ("[I]t is important to recognize that the only issue which may be addressed by this court is the possibility of impairment of United States citizens' First Amendment rights through the exclusion of the alien."); Abourezk v. Reagan, 785 F.2d 1043, 1063 n.1 (D.C. Cir. 1986) (noting that the government defendants had "concede[d] that the Supreme Court has already implicitly decided the issue of whether plaintiffs who wish to meet with excluded aliens have standing to raise a constitutional (first amendment) claim") (Bork, J., dissenting).

[464] *See, e.g.*, Bustamante v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008).

[465] 576 U.S. ___, No. 13–1402, slip op. (2015).

[466] *Id.* at 5–6 (Scalia, J., joined by Roberts, C.J. & Thomas, J.) (plurality opinion). According to the plurality, the U.S. citizen spouse's alleged interests had been variously formulated as a "liberty interest in her marriage"; a "right of association with one's spouse"; a "liberty interest in being reunited with certain blood relatives"; and the "liberty interest of a U.S. citizen under the Due Process Clause to be free from arbitrary restrictions on his right to live with his spouse." *Id.* at 7. The plurality also expressly noted that no fundamental right to marriage, as such, had been infringed, because "the Federal Government has not attempted to forbid a marriage." *Id.* (contrasting the case at hand with Loving v. Virginia, 388 U.S. 1 (1967)).

cific grounds on which her husband's visa had been denied.[467] A two-Justice concurrence did not reach the question of whether the U.S. citizen wife had asserted a protected liberty interest, but instead concluded that the consular officials' citation of a particular statutory ground for inadmissibility as the basis for denying the visa application satisfied due process under *Kleindienst*, which requires only that the government state a "facially legitimate and *bona fide* reason" for the denial.[468]

Procedural due process rights are more in evidence when it comes to deportation or other proceedings brought against aliens already within the country. Deportation proceedings are not criminal prosecutions within the meaning of the Bill of Rights.[469] The authority to deport is drawn from the power of Congress to regulate the entrance of aliens and impose conditions upon their continued liberty to reside within the United States. Findings of fact reached by executive officers after a fair, though summary, deportation hearing may be made conclusive.[470] In *Wong Yang Sung v. McGrath*,[471] how-

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[467] *Id.* at 6. The plurality took issue with the dissenting Justices' view that procedural due process rights attach to liberty interests that are not created by nonconstitutional law, such as a statute, but are "sufficiently important" so as to "flow 'implicit[ly]' from the design, object, and nature of the Due Process Clause." *Id.* at 11. According to the plurality, this view is a "novel" one that is inconsistent with the Court's established methodology for identifying fundamental rights that are subject to protection under the Due Process Clause. *Id*. at 12.

[468] *Id.* at 3 (Kennedy, J., concurring, joined by Alito, J.).

[469] Harisiades v. Shaughnessy, 342 U.S. 580 (1952). But this fact does not mean that a person may be deported on the basis of judgment reached on the civil standard of proof, that is, by a preponderance of the evidence. Rather, the Court has held, a deportation order may only be entered if it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. Woodby v. INS, 385 U.S. 276 (1966). *Woodby*, and similar rulings, were the result of statutory interpretation and were not constitutionally compelled. Vance v. Terrazas, 444 U.S. 252, 266–67 (1980).

[470] Zakonaite v. Wolf, 226 U.S. 272 (1912). *See* Jay v. Boyd, 351 U.S. 345 (1956), in which the Court emphasized that suspension of deportation is not a matter of right, but of grace, like probation or parole, and, accordingly, an alien is not entitled to a hearing that contemplates full disclosure of the considerations (information of a confidential nature pertaining to national security) that induced administrative officers to deny suspension. In four dissenting opinions, Chief Justice Warren, together with Justices Black, Frankfurter, and Douglas, found irreconcilable with a fair hearing and due process the delegation by the Attorney General of his discretion to an inferior officer and the vesting of the latter with power to deny a suspension on the basis of undisclosed evidence that may constitute no more than uncorroborated hearsay.

[471] 339 U.S. 33 (1950). *See also* Kimm v. Rosenberg, 363 U.S. 405, 408, 410, 415 (1960), in which the Court ruled that when, at a hearing on his petition for suspension of a deportation order, an alien invoked the Fifth Amendment in response to questions as to Communist Party membership and contended that the burden of proving such affiliation was on the government, it was incumbent on the alien to supply the information, as the government had no statutory discretion to suspend deportation of a Communist. Justices Douglas, Black, Brennan, and Chief Justice Warren dissented on the ground that exercise of the privilege is a neutral act, sup-

ever, the Court intimated that a hearing before a tribunal that did not meet the standards of impartiality embodied in the Administrative Procedure Act[472] might not satisfy the requirements of due process of law. To avoid such constitutional doubts, the Court construed the law to disqualify immigration inspectors as presiding officers in deportation proceedings. Except in time of war, deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process that may be corrected on *habeas corpus*.[473] In contrast with the decision in *United States v. Ju Toy*[474] that a person seeking entrance to the United States was not entitled to a judicial hearing on his claim of citizenship, a person arrested and held for deportation is entitled to his day in court if he denies that he is an alien.[475] Because aliens within the United States are protected to some extent by due process, Congress must give "clear indication" of an intent to authorize *indefinite* detention of illegal aliens, and probably must also cite "special justification," as, for example, for "suspected terrorists."[476] In *Demore v. Kim*,[477] however, the Court indicated that its holding in *Zadvydas* was quite limited. Upholding detention of permanent resident aliens without bond pending a determination of removability, the Court reaffirmed Congress's broad powers over aliens. "[W]hen the government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."[478] A closely divided Court earlier ruled that, in time of war, the deportation of an

porting neither innocence nor guilt and may not be used as evidence of dubious character. Justice Brennan also thought the government was requiring the alien to prove non-membership when no one had intimated that he was a Communist.

[472] 5 U.S.C. §§ 551 *et seq*.

[473] Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927). *See also* Mahler v. Eby, 264 U.S. 32, 41 (1924). Although, in Heikkila v. Barber, 345 U.S. 229 (1953), the Court held that a deportation order under the Immigration Act of 1917 might be challenged only by habeas corpus, in Shaughnessy v. Pedreiro, 349 U.S. 48 (1955), it established that, under the Immigration Act of 1952, 8 U.S.C. § 1101, the validity of a deportation order also may be contested in an action for declaratory judgment and injunctive relief. Also, a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order has been denied. United States v. Mendoza-Lopez, 481 U.S. 828 (1987).

[474] 198 U.S. 253 (1905).

[475] Ng Fung Ho v. White, 259 U.S. 276, 281 (1922).

[476] Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001) (construing a statute so as to avoid a "serious constitutional problem," id. at 699, and recognizing a "presumptively reasonable" detention period of six months for removable aliens).

[477] 538 U.S. 510 (2003). The goal of detention in *Zadvydas* had been found to be "no longer practically attainable," and detention therefore "no longer [bore] a reasonable relation to the purpose for which the individual was committed." 538 U.S. at 527.

[478] 538 U.S. at 528. There was disagreement among the Justices as to whether existing procedures afforded the alien an opportunity for individualized determination of danger to society and risk of flight.

enemy alien may be ordered summarily by executive action; due process of law does not require the courts to determine the sufficiency of any hearing that is gratuitously afforded to the alien.[479]

Judicial Review of Administrative or Military Proceedings.—To the extent that constitutional rights are involved, due process of law imports a judicial review of the action of administrative or executive officers. This proposition is undisputed so far as questions of law are concerned, but the extent to which the courts should and will go in reviewing determinations of fact has been a highly controversial issue. In *St. Joseph Stock Yards Co. v. United States*,[480] the Court held that, upon review of an order of the Secretary of Agriculture establishing maximum rates for services rendered by a stockyard company, due process required that the court exercise its independent judgment upon the facts to determine whether the rates were confiscatory.[481] Subsequent cases sustaining rate orders of the Federal Power Commission have not dealt explicitly with this point.[482] The Court has said simply that a person assailing such an order "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." [483]

There has been a division on the Court with regard to what extent, if at all, proceedings before military tribunals should be reviewed by the courts for the purpose of determining compliance with the Due Process Clause. In *In re Yamashita*,[484] the majority denied a petition for certiorari and petitions for writs of *habeas corpus* to review the conviction of a Japanese war criminal by a military commission sitting in the Philippine Islands. It held that, because the military commission, in admitting evidence to which objection had been made, had not violated any act of Congress, a treaty, or a military command defining its authority, its ruling on evidence and on the mode of conducting the proceedings were not reviewable by the courts. And, in *Johnson v. Eisentrager*,[485] the Court overruled a lower court decision that, in reliance upon the dissenting opinion in *Yamashita*, had held that the Due Process Clause required that the

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[479] Ludecke v. Watkins, 335 U.S. 160 (1948). Three of the four dissenting Justices, Douglas, Murphy, and Rutledge, argued that even an enemy alien could not be deported without a fair hearing.

[480] 298 U.S. 38 (1936).

[481] 298 U.S. at 51–54. Justices Brandeis, Stone, and Cardozo, although concurring in the result, took exception to this proposition.

[482] FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944); FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1941).

[483] FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944).

[484] 327 U.S. 1 (1946).

[485] 339 U.S. 763 (1950). Justices Douglas, Black, and Burton dissented.

legality of the conviction of enemy alien belligerents by military tribunals should be tested by the writ of *habeas corpus*.

Failure of the Executive Branch to provide for any type of proceeding for prisoners alleged to be "enemy combatants," whether in a military tribunal or a federal court, was at issue in *Hamdi v. Rumsfeld*.[486] During a military action in Afghanistan,[487] a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had authority to hold such an "enemy combatant" while providing him with limited recourse to the federal courts. The Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan.[488] However, the Court ruled that the government may not detain the petitioner indefinitely for purposes of interrogation, but must give him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision-maker, and must be allowed to consult an attorney.[489]

Without dissent, in *Hiatt v. Brown*,[490] the Court reversed the judgment of a lower court that had discharged a prisoner serving a sentence imposed by a court-martial because of errors that had deprived the prisoner of due process of law. The Court held that the court below had erred in extending its review, for the purpose of determining compliance with the Due Process Clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain conviction,

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[486] 542 U.S. 507 (2004).

[487] In response to the September 11, 2001 terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force," Pub. L. 107–40, which served as the basis for military action against the Taliban government of Afghanistan and the al Qaeda forces that were harbored there.

[488] There was no opinion of the Court in *Hamdi*. Rather, a plurality opinion, authored by Justice O'Connor (joined by Chief Justice Rehnquist, Justice Kennedy and Justice Breyer) relied on the "Authorization for Use of Military Force" passed by Congress to support the detention. Justice Thomas also found that the Executive Branch had the power to detain the petitioner, but he based his conclusion on Article II of the Constitution.

[489] 542 U.S. at 533, 539 (2004). Although only a plurality of the Court voted for both continued detention of the petitioner and for providing these due process rights, four other Justices would have extended due process at least this far. Justice Souter, joined by Justice Ginsberg, while rejecting the argument that Congress had authorized such detention, agreed with the plurality as to the requirement of providing minimal due process. Id. at 553 (concurring in part, dissenting in part, and concurring in judgement). Justice Scalia, joined by Justice Stevens, denied that such congressional authorization was possible without a suspension of the writ of *habeas corpus*, and thus would have required a criminal prosecution of the petitioner. Id. at 554 (dissenting).

[490] 339 U.S. 103 (1950).

the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel. In summary, Justice Clark wrote: "In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."[491] Similarly, in *Burns v. Wilson*,[492] the Court denied a petition for the writ to review a conviction by a military tribunal on the Island of Guam in which the petitioners asserted that their imprisonment resulted from proceedings that violated their constitutional rights. Four Justices, with whom Justice Minton concurred, maintained that judicial review is limited to determining whether the military tribunal, or court-martial, had given fair consideration to each of petitioners' allegations, and does not embrace an opportunity "to prove de novo" what petitioners had "failed to prove in the military courts." According to Justice Minton, however, if the military court had jurisdiction, its action is not reviewable.

Substantive Due Process

Justice Harlan, dissenting in *Poe v. Ullman*,[493] observed that one view of due process, "ably and insistently argued . . . , sought to limit the provision to a guarantee of procedural fairness." But, he continued, due process "in the consistent view of this Court has ever been a broader concept . . . . Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . . Thus the guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'"

Discrimination.— Literally speaking, the Fifth Amendment, unlike the Fourteenth Amendment, "contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress."[494] Nevertheless, "Equal protection analysis in the

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[491] 339 U.S. at 111.

[492] 346 U.S. 137 (1953).

[493] 367 U.S. 497, 540, 541 (1961). The internal quotation is from Hurtado v. California, 110 U.S. 516, 532 (1884). Development of substantive due process is briefly noted above under "Scope of the Guaranty" and is treated more extensively under the Fourteenth Amendment.

[494] Detroit Bank v. United States, 317 U.S. 329, 337 (1943); Helvering v. Lerner Stores Corp., 314 U.S. 463, 468 (1941).

Fifth Amendment area is the same as that under the Fourteenth Amendment."[495] Even before the Court reached this position, it had assumed that "discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."[496] The theory that was to prevail seems first to have been enunciated by Chief Justice Taft, who observed that the Due Process and Equal Protection Clauses are "associated" and that "[i]t may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . . [Due process] tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law."[497] Thus, in *Bolling v. Sharpe*,[498] a companion case to *Brown v. Board of Education*,[499] the Court held that segregation of pupils in the public schools of the District of Columbia violated the Due Process Clause. "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental ob-

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[495] Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 214–18 (1995).

[496] Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937). *See also* Currin v. Wallace, 306 U.S. 1, 13–14 (1939).

[497] Truax v. Corrigan, 257 U.S. 312, 331 (1921). *See also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[498] 347 U.S. 497, 499–500 (1954).

[499] 347 U.S. 483 (1954). With respect to race discrimination, the Court had earlier utilized its supervisory authority over the lower federal courts and its power to construe statutes to reach results it might have based on the Equal Protection Clause if the cases had come from the states. *E.g.*, Hurd v. Hodge, 334 U.S. 24 (1948); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Railroad Trainmen v. Howard, 343 U.S. 768 (1952). *See also* Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

jective and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause."

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

In subsequent cases, the Court has applied its Fourteenth Amendment jurisprudence to federal legislation that contained classifications based on sex[500] and illegitimacy,[501] and that set standards of eligibility for food stamps.[502] However, almost all legislation involves some degree of classification among particular categories of persons, things, or events, and, just as the Equal Protection Clause itself does not outlaw "reasonable" classifications, neither is the Due Process Clause any more intolerant of the great variety of social and economic legislation typically containing what must be arbitrary line-drawing.[503] Thus, for example, the Court has sustained a law imposing greater punishment for an offense involving rights of property of the United States than for a like offense involving the rights of property of a private person.[504] A veterans law that extended certain educational benefits to all veterans who had served "on active duty" and thereby excluded conscientious objectors from eligibility was held to be sustainable, its being rational for Congress to have determined that the disruption caused by military service was qualitatively and quantitatively different from that caused by alternative service, and for Congress to have so provided to make military service more attractive.[505]

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[500] Frontiero v. Richardson, 411 U.S. 677 (1973); Califano v. Goldfarb, 430 U.S. 199 (1977). *But see* Rostker v. Goldberg, 453 U.S. 57 (1981); Califano v. Jobst, 434 U.S. 47 (1977).

[501] *Compare* Jiminez v. Weinberger, 417 U.S. 628 (1974), *with* Mathews v. Lucas, 427 U.S. 495 (1976).

[502] Department of Agriculture v. Murry, 413 U.S. 508 (1973). *See also* Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

[503] Richardson v. Belcher, 404 U.S. 78, 81 (1971); FCC v. Beach Communications, 508 U.S. 307 (1993) (exemption from cable TV regulation of facilities that serve only dwelling units under common ownership); Lyng v. Castillo, 477 U.S. 635 (1986) (Food Stamp Act limitation of benefits to households of related persons who prepare meals together). With respect to courts and criminal legislation, *see* Hurtado v. United States, 410 U.S. 578 (1973); Marshall v. United States, 414 U.S. 417 (1974); United States v. MacCollom, 426 U.S. 317 (1976).

[504] Hill v. United States ex rel. Weiner, 300 U.S. 105, 109 (1937). *See also* District of Columbia v. Brooke, 214 U.S. 138 (1909); Panama R.R. v. Johnson, 264 U.S. 375 (1924); Detroit Bank v. United States, 317 U.S. 329 (1943).

[505] Johnson v. Robison, 415 U.S. 361 (1974). *See also* Schlesinger v. Ballard, 419 U.S. 498 (1975) (military law that classified men more adversely than women deemed rational because it had the effect of compensating for prior discrimination against women). Wayte v. United States, 470 U.S. 598 (1985) (selective prosecution of per-

"The federal sovereign, like the States, must govern impartially. . . . [B]ut . . . there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." [506] The paramount federal power over immigration and naturalization is the principal example, although there are undoubtedly others, of the national government's being able to classify upon some grounds—alienage, naturally, but also other suspect and quasi-suspect categories as well—that would result in invalidation were a state to enact them. The instances may be relatively few, but they do exist.

Congressional Police Measures.—Numerous regulations of a police nature, imposed under powers specifically granted to the Federal Government, have been sustained over objections based on the Due Process Clause. Congress may require the owner of a vessel entering United States ports, and on which alien seamen are afflicted with specified diseases, to bear the expense of hospitalizing such persons.[507] It may prohibit the transportation in interstate commerce of filled milk [508] or the importation of convict-made goods into any state where their receipt, possession, or sale is a violation of local law.[509] It may require employers to bargain collectively with representatives of their employees chosen in a manner prescribed by law, to reinstate employees discharged in violation of law, and to permit use of a company-owned hall for union meetings.[510] Subject to First Amendment considerations, Congress may regulate the

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sons who turned themselves in or were reported by others as having failed to register for the draft does not deny equal protection, there being no showing that these men were selected for prosecution because of their protest activities).

[506] Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). Thus, the power over immigration and aliens permitted federal discrimination on the basis of alienage, *Hampton*, *supra* (employment restrictions like those previously voided when imposed by states), durational residency, Mathews v. Diaz, 426 U.S. 67 (1976) (similar rules imposed by states previously voided), and illegitimacy, Fiallo v. Bell, 430 U.S. 787 (1977) (similar rules by states would be voided). Racial preferences and discriminations in immigration have had a long history, *e.g.*, *The Chinese Exclusion Case*, 130 U.S. 581 (1889), and the power continues today, *e.g.*, Dunn v. INS, 499 F.2d 856, 858 (9th Cir. 1974), *cert. denied*, 419 U.S. 1106 (1975); Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980), although Congress has removed most such classifications from the statute books.

[507] United States v. New York S.S. Co., 269 U.S. 304 (1925).

[508] United States v. Carolene Products Co., 304 U.S. 144 (1938); Carolene Products Co. v. United States, 323 U.S. 18 (1944).

[509] Kentucky Whip & Collar Co. v. Illinois Cent. R.R., 299 U.S. 334 (1937).

[510] *E.g.*, Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956); NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

postal service to deny its facilities to persons who would use them for purposes contrary to public policy.[511]

Congressional Regulation of Public Utilities.—Inasmuch as Congress, in giving federal agencies jurisdiction over various public utilities, usually has prescribed standards substantially identical with those by which the Supreme Court has tested the validity of state action, the review of agency orders seldom has turned on constitutional issues. In two cases, however, maximum rates prescribed by the Secretary of Agriculture for stockyard companies were sustained only after detailed consideration of numerous items excluded from the rate base or from operating expenses, apparently on the assumption that error with respect to any such item would render the rates confiscatory and void.[512] A few years later, in *FPC v. Hope Natural Gas Co.*,[513] the Court adopted an entirely different approach. It held that the validity of the Commission's order depended upon whether the impact or total effect of the order is just and reasonable, rather than upon the method of computing the rate base. Rates that enable a company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed cannot be condemned as unjust and unreasonable even though they might produce only a meager return in a rate base computed by the "present fair value" method.

Orders prescribing the form and contents of accounts kept by public utility companies,[514] and statutes requiring a private carrier to furnish the Interstate Commerce Commission with information for valuing its property,[515] have been sustained against the objection that they were arbitrary and invalid. An order of the Secretary of Commerce directed to a single common carrier by water requiring it to file a summary of its books and records pertaining to its rates was also held not to violate the Fifth Amendment.[516]

Congressional Regulation of Railroads.—Legislation and administrative orders pertaining to railroads have been challenged repeatedly under the Due Process Clause, but seldom with success.

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[511] *Ex parte* Jackson, 96 U.S. 727 (1878); Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

[512] St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Denver Union Stock Yards Co. v. United States, 304 U.S. 470 (1938).

[513] 320 U.S. 591 (1944). The result of this case had been foreshadowed by the opinion of Justice Stone in FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942), to the effect that the Commission was not bound to use any single formula or combination of formulas in determining rates.

[514] A. T. & T. Co. v. United States, 299 U.S. 232 (1936); United States v. Ne w York Tel. Co., 326 U.S. 638 (1946); Northwestern Co. v. FPC, 321 U.S. 119 (1944).

[515] Valvoline Oil Co. v. United States, 308 U.S. 141 (1939); Champlin Rfg. Co. v. United States, 329 U.S. 29 (1946).

[516] Isbrandtsen-Moller Co. v. United States, 300 U.S. 146 (1937).

Orders of the Interstate Commerce Commission establishing through routes and joint rates have been sustained,[517] as has the Commission's division of joint rates to give a weaker group of carriers a greater share of such rates where the proportion allotted to the stronger group was adequate to avoid confiscation.[518] The recapture of one-half of the earnings of railroads in excess of a fair net operating income, such recaptured earnings to be available as a revolving fund for loans to weaker roads, was held valid on the ground that any carrier earning an excess held it as trustee.[519] An order enjoining certain steam railroads from discriminating against an electric railroad by denying it reciprocal switching privileges did not violate the Fifth Amendment even through its practical effect was to admit the electric road to a part of the business being adequately handled by the steam roads.[520] Similarly, the fact that a rule concerning the allotment of coal cars operated to restrict the use of private cars did not amount to a taking of property.[521] Railroad companies were not denied due process of law by a statute forbidding them to transport in interstate commerce commodities that they manufactured, mined, or produced.[522] An order approving a lease of one railroad by another, upon condition that displaced employees of the lessor should receive partial compensation for the loss suffered by reason of the lease,[523] is consonant with due process of law. A law prohibiting the issuance of free passes was held constitutional even as applied to abolish rights created by a prior agreement by which the carrier bound itself to issue such passes annually for life, in settlement of a claim for personal injuries.[524] A non-arbitrary Interstate Commerce Commission order establishing a non-compensatory rate for carriage of certain commodities does not violate the Due Process or Just Compensation Clauses as long as it serves the public interest and the rates as a whole yield just compensation.[525]

Occasionally, however, regulatory action has been held invalid under the Due Process Clause. An order issued by the Interstate Commerce Commission relieving short line railroads from the obligation to pay the usual fixed sum per day rental for cars used on foreign roads for a space of two days was held to be arbitrary and

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[517] St. Louis S.W. Ry. v. United States, 245 U.S. 136, 143 (1917).
[518] *New England Divisions Case*, 261 U.S. 184 (1923).
[519] Dayton-Goose Creek Ry. v. United States, 263 U.S. 456, 481, 483 (1924).
[520] Chicago, I. & L. Ry. v. United States, 270 U.S. 287 (1926). *Cf.* Seaboard Air Line Ry. v. United States, 254 U.S. 57 (1920).
[521] *Assigned Car Cases*, 274 U.S. 564, 575 (1927).
[522] United States v. Delaware & Hudson Co., 213 U.S. 366, 405, 411, 415 (1909).
[523] United States v. Lowden, 308 U.S. 225 (1939).
[524] Louisville & Nashville R.R. v. Mottley, 219 U.S. 467 (1911).
[525] Baltimore & Ohio R.R. v. United States, 345 U.S. 146 (1953).

invalid.[526] A retirement act that made eligible for pensions all persons who had been in the service of any railroad within one year prior to the adoption of the law, counted past unconnected service of an employee toward the requirement for a pension even if the employee had contributed nothing to the pension fund, and treated all carriers as a single employer and pooled their assets, without regard to their individual obligations, was held unconstitutional.[527]

Taxation.—In laying taxes, the Federal Government is less narrowly restricted by the Fifth Amendment than are the states by the Fourteenth. The Federal Government may tax property belonging to its citizens, even if such property is never situated within the jurisdiction of the United States,[528] and it may tax the income of a citizen resident abroad, which is derived from property located at his residence.[529] The difference is explained by the fact that protection of the Federal Government follows the citizen wherever he goes, whereas the benefits of state government accrue only to persons and property within the state's borders. The Supreme Court has said that, in the absence of an equal protection clause, "a claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment. . . ."[530] It has sustained, over charges of unfair differentiation between persons, a graduated income tax,[531] a higher tax on oleomargarine than on butter,[532] an excise tax on "puts" but not on "call,"[533] a tax on the income of business operated by corporations but not on similar enterprises carried on by individuals,[534] an income tax on foreign corporations, based on their income from sources within the United States, while domestic corporations were taxed on income from all sources,[535] a tax on foreign-built but not upon domestic yachts,[536] a tax on employers of eight or more persons, with exemptions for agricultural labor and domestic service,[537] a gift tax law embodying a plan of graduations and exemptions under which donors of the same

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[526] Chicago, R.I. & P. Ry. v. United States, 284 U.S. 80 (1931).

[527] Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935). *But cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976).

[528] United States v. Bennett, 232 U.S. 299, 307 (1914).

[529] Cook v. Tait, 265 U.S. 47 (1924).

[530] Helvering v. Lerner Stores Co., 314 U.S. 463, 468 (1941). *But see* discussion of "Discrimination" *supra*.

[531] Brushaber v. Union Pac. R.R, 240 U.S. 1, 24 (1916).

[532] McCray v. United States, 195 U.S. 27, 61 (1904).

[533] Treat v. White, 181 U.S. 264 (1901).

[534] Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

[535] National Paper Co. v. Bowers, 266 U.S. 373 (1924).

[536] Billings v. United States, 232 U.S. 261, 282 (1914).

[537] Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

amount might be liable for different sums,[538] an Alaska statute imposing license taxes only on nonresident fisherman,[539] an act that taxed the manufacture of oil and fertilizer from herring at a higher rate than similar processing of other fish or fish offal,[540] an excess profits tax that defined "invested capital" with reference to the original cost of the property rather than to its present value,[541] an undistributed profits tax in the computation of which special credits were allowed to certain taxpayers,[542] an estate tax upon the estate of a deceased spouse in respect of the moiety of the surviving spouse where the effect of the dissolution of the community is to enhance the value of the survivor's moiety,[543] and a tax on nonprofit mutual insurers, even though such insurers organized before a certain date were exempt, as there was a rational basis for the discrimination.[544]

Retroactive Taxes.—It has been customary from the beginning for Congress to give some retroactive effect to its tax laws, usually making them effective from the beginning of the tax year or from the date of introduction of the bill that became the law.[545] Application of an income tax statute to the entire calendar year in which enactment took place has never, barring some peculiar circumstance, been deemed to deny due process.[546] "Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute."[547] A special income tax on profits realized by the sale of silver, retroactive for 35 days, which was ap-

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[538] Bromley v. McCaughn, 280 U.S. 124 (1929).

[539] Haavik v. Alaska Packers Ass'n, 263 U.S. 510 (1924).

[540] Alaska Fish Co. v. Smith, 255 U.S. 44 (1921).

[541] LaBelle Iron Works v. United States, 256 U.S. 377 (1921).

[542] Helvering v. Northwest Steel Mills, 311 U.S. 46 (1940).

[543] Fernandez v. Wiener, 326 U.S. 340 (1945); *cf.* Coolidge v. Long, 282 U.S. 582 (1931).

[544] United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970) (per curiam).

[545] United States v. Darusmont, 449 U.S. 292, 296–97 (1981).

[546] Stockdale v. Insurance Companies, 87 U.S. (20 Wall.) 323, 331, 332 (1874); Brushaber v. Union Pac. R.R., 240 U.S. 1, 20 (1916); Cooper v. United States, 280 U.S. 409, 411 (1930); Milliken v. United States, 283 U.S. 15, 21 (1931); Reinecke v. Smith, 289 U.S. 172, 175 (1933); United States v. Hudson, 299 U.S. 498, 500–01 (1937); Welch v. Henry, 305 U.S. 134, 146, 148–50 (1938); Fernandez v. Wiener, 326 U.S. 340, 355 (1945); United States v. Darusmont, 449 U.S. 292, 297 (1981).

[547] Welch v. Henry, 305 U.S. 134, 146–47 (1938).

proximately the period during which the silver purchase bill was before Congress, was held valid.[548] An income tax law, made retroactive to the beginning of the calendar year in which it was adopted, was found constitutional as applied to the gain from the sale, shortly before its enactment, of property received as a gift during the year.[549] Retroactive assessment of penalties for fraud or negligence,[550] or of an additional tax on the income of a corporation used to avoid a surtax on its shareholder,[551] does not deprive the taxpayer of property without due process of law.

An additional excise tax imposed upon property still held for sale, after one excise tax had been paid by a previous owner, does not violate the Due Process Clause.[552] Similarly upheld were a transfer tax measured in part by the value of property held jointly by a husband and wife, including that which comes to the joint tenancy as a gift from the decedent spouse[553] and the inclusion in the gross income of the settlor of income accruing to a revocable trust during any period when the settlor had power to revoke or modify it.[554]

Although the Court during the 1920s struck down gift taxes imposed retroactively upon gifts that were made and completely vested before the enactment of the taxing statute,[555] those decisions have recently been distinguished, and their precedential value limited.[556] In *United States v. Carlton*, the Court declared that "[t]he due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive

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[548] United States v. Hudson, 299 U.S. 498 (1937). *See also* Stockdale v. Insurance Companies, 87 U.S. (20 Wall.) 323, 331, 341 (1874); Brushaber v. Union Pac. R.R., 240 U.S. 1, 20 (1916); Lynch v. Hornby, 247 U.S. 339, 343 (1918).

[549] Cooper v. United States, 280 U.S. 409 (1930); *see also* Reinecke v. Smith, 289 U.S. 172 (1933).

[550] Helvering v. Mitchell, 303 U.S. 391 (1938).

[551] Helvering v. National Grocery Co., 304 U.S. 282 (1938).

[552] Patton v. Brady, 184 U.S. 608 (1902).

[553] Tyler v. United States, 281 U.S. 497 (1930); United States v. Jacobs, 306 U.S. 363 (1939).

[554] Reinecke v. Smith, 289 U.S. 172 (1933).

[555] Untermyer v. Anderson, 276 U.S. 440 (1928); Blodgett v. Holden, 275 U.S. 142 (1927), modified, 276 U.S. 594 (1928); Nichols v. Coolidge, 274 U.S. 531 (1927). *See also* Heiner v. Donnan, 285 U.S. 312 (1932) (invalidating as arbitrary and capricious a conclusive presumption that gifts made within two years of death were made in contemplation of death).

[556] *Untermyer* was distinguished in United States v. Hemme, 476 U.S. 558, 568 (1986), upholding retroactive application of unified estate and gift taxation to a taxpayer as to whom the overall impact was minimal and not oppressive. All three cases were distinguished in United States v. Carlton, 512 U.S. 26, 30 (1994), as having been "decided during an era characterized by exacting review of economic legislation under an approach that 'has long since been discarded.'" The Court noted further that *Untermyer* and *Blodgett* had been limited to situations involving creation of a wholly new tax, and that *Nichols* had involved a retroactivity period of 12 years. Id.

economic legislation"—retroactive application of legislation must be shown to be "'justified by a rational legislative purpose.'" [557] Applying that principle, the Court upheld retroactive application of a 1987 amendment limiting application of a federal estate tax deduction originally enacted in 1986. Congress's purpose was "neither illegitimate nor arbitrary," the Court noted, since Congress had acted "to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss." Also, "Congress acted promptly and established only a modest period of retroactivity." The fact that the taxpayer had transferred stock in reliance on the original enactment was not dispositive, since "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." [558]

Deprivation of Property: Retroactive Legislation.—Federal regulation of future action, based upon rights previously acquired by the person regulated, is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not ordinarily condemn it. The imposition upon coal mine operators, and ultimately coal consumers, of the liability of compensating former employees, who had terminated work in the industry before passage of the law, for black lung disabilities contracted in the course of their work, was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who had profited from the fruits of their labor.[559] Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, *i.e.*, that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law; therefore, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster. The Court has applied *Turner Elkhorn* in upholding retroactive application of pension plan termination provisions to cover the period of congressional consideration, declaring that the test for retroactive application of legislation adjusting economic burdens is merely whether "the retroactive

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[557] 512 U.S. 26, 30, 31 (1994) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16–17 (1976)). These principles apply to estate and gift taxes as well as to income taxes, the Court added. 512 U.S. at 34.

[558] 512 U.S. at 33.

[559] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976). *But see* id. at 38 (Justice Powell concurring) (questioning application of retroactive cost-spreading).

application . . . is itself justified by a rational legislative purpose." [560]

Rent regulations were sustained as applied to prevent execution of a judgment of eviction rendered by a state court before the enabling legislation was passed.[561] For the reason that "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end," no vested right to use housing, built with the aid of FHA mortgage insurance for transient purposes, was acquired by one obtaining insurance under an earlier section of the National Housing Act, which, though silent in this regard, was contemporaneously construed as barring rental to transients, and was later modified by an amendment that expressly excluded such use.[562] An order by an Area Rent Director reducing an unapproved rental and requiring the landlord to refund the excess previously collected, was held, with one dissenting vote, not to be the type of retroactivity which is condemned by law.[563] The application of a statute providing for tobacco marketing quotas, to a crop planted prior to its enactment, was held not to deprive the producers of property without due process of law, because it operated not upon production, but upon the marketing of the product after the act was passed.[564]

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[560] Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984). *Accord*, United States v. Sperry Corp., 493 U.S. 52, 65 (1989) (upholding imposition of user fee on claimants paid by Iran-United States Claims Tribunal prior to enactment of fee statute). Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 636–41 (1993) (imposition of multiemployer pension plan withdrawal liability on an employer is not irrational, even though none of its employees had earned vested benefits by the time of withdrawal). In Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), the challenge was to a statutory requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that had placed its mining operations in a wholly owned subsidiary three decades earlier, before labor agreements included an express promise of lifetime benefits. In a fractured opinion, the justices ruled 5–4 that the scheme's severe retroactive effect offended the Constitution, though differing on the governing clause. Four of the majority justices based the judgment solely on takings law, while opining that "there is a question" whether the statute violated due process as well. The remaining majority justice, and the four dissenters, viewed substantive due process as the sole appropriate framework for resolving the case, but disagreed on whether a violation had occurred.

[561] Fleming v. Rhodes, 331 U.S. 100, 107 (1947).

[562] FHA v. The Darlington, Inc., 358 U.S. 84, 89–91, 92–93 (1958). Dissenting, Justices Harlan, Frankfurter, and Whittaker maintained that under the Due Process Clause the United States, in its contractual relations, is bound by the same rules as private individuals unless the action taken falls within the general federal regulatory power.

[563] Woods v. Stone, 333 U.S. 472 (1948).

[564] Mulford v. Smith, 307 U.S. 38 (1939). An increase in the penalty for production of wheat in excess of quota was valid as applied retroactively to wheat already planted, where Congress concurrently authorized a substantial increase in the amount

In the exercise of its comprehensive powers over revenue, finance, and currency, Congress may make Treasury notes legal tender in payment of debts previously contracted[565] and may invalidate provisions in private contracts calling for payment in gold coin,[566] but rights against the United States arising out of contract are more strongly protected by the Due Process Clause. Hence, a law purporting to abrogate a clause in government bonds calling for payment in gold coin was invalid,[567] and a statute abrogating contracts of war risk insurance was held unconstitutional as applied to outstanding policies.[568]

The Due Process Clause has been successfully invoked to defeat retroactive invasion or destruction of property rights in a few cases. A revocation by the Secretary of the Interior of previous approval of plats and papers showing that a railroad was entitled to land under a grant was held void as an attempt to deprive the company of its property without due process of law.[569] The exception of the period of federal control from the time limit set by law upon claims against carriers for damages caused by misrouting of goods, was read as prospective only because the limitation was an integral part of the liability, not merely a matter of remedy, and would violate the Fifth Amendment if retroactive.[570]

Bankruptcy Legislation.—In acting pursuant to its power to enact uniform bankruptcy legislation, Congress has regularly authorized retrospective impairment of contractual obligations,[571] but the Due Process Clause (by itself or infused with takings principles) constitutes a limitation upon Congress's power to deprive persons of more secure forms of property, such as the rights secured creditors

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of the loan that might be made to cooperating farmers upon stored "farm marketing excess wheat." Wickard v. Filburn, 317 U.S. 111, 133 (1942).

[565] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 551 (1871).

[566] Norman v. Baltimore & O R.R., 294 U.S. 240 (1935).

[567] Perry v. United States, 294 U.S. 330 (1935).

[568] Lynch v. United States, 292 U.S. 571 (1934). *See also* De La Rama S.S. Co. v. United States, 344 U.S. 386 (1953). Notice that these kinds of cases are precisely the ones that would be condemned under the Contract Clause, even under the relaxed scrutiny now employed, if the action were taken by a state. *E.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1 (1977). "Less searching standards" are imposed by the Due Process Clauses than by the Contract Clause. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 733 (1984). Also, statutory reservation of the right to amend an agreement can defuse most such constitutional issues. Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) (amendment of Social Security Act to prevent termination by state when termination notice already filed). The Court has addressed similar issues under breach of contract theory. United States v. Winstar Corp., 518 U.S. 839 (1996).

[569] Noble v. Union River Logging R.R., 147 U.S. 165 (1893).

[570] Danzer Co. v. Gulf R.R., 268 U.S. 633 (1925).

[571] *E.g.*, Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902); Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry., 294 U.S. 648, 673–75 (1935).

have to obtain repayment of a debt. The Court had long followed a rule of construction favoring prospective-only application of bankruptcy laws, absent a clear showing of congressional intent,[572] but it was not until 1935 that the Court actually held unconstitutional a retrospective law. Struck down by the Court was the Frazier-Lemke Act, which by its terms applied only retrospectively, and which authorized a court to stay proceedings for the foreclosure of a mortgage for five years, the debtor to remain in possession at a reasonable rental, with the option of purchasing the property at its appraised value at the end of the stay. The Act offended the Fifth Amendment, the Court held, because it deprived the creditor of substantial property rights acquired prior to the passage of the act.[573] However, a modified law, under which the stay was subject to termination by the court and which continued the right of the creditor to have the property sold to pay the debt, was sustained.[574]

The sale of collateral under the terms of a contract may be enjoined without violating the Due Process Clause, if such sale would hinder the preparation or consummation of a proposed railroad reorganization, provided the injunction does no more than delay the enforcement of the contract.[575] A provision that claims resulting from rejection of an unexpired lease should be treated as on a parity with provable debts, but limited to an amount equal to three years rent, was held not to amount to a taking of property without due process of law, since it provided a new and more certain remedy for a limited amount, in lieu of an existing remedy inefficient and uncertain in result.[576] A right of redemption allowed by state law upon foreclosure of a mortgage was unavailing to defeat a plan for reorganization of a debtor corporation where the trial court found that the claims of junior lienholders had no value.[577]

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[572] Holt v. Henley, 232 U.S. 637, 639–40 (1914). *See also* Auffm'ordt v. Rasin, 102 U.S. 620, 622 (1881).

[573] Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

[574] Wright v. Vinton Branch, 300 U.S. 440 (1937). The relatively small modifications that the Court accepted as making the difference in validity, and the fact that subsequently the Court interpreted the statute so as to make smaller the modifications, John Hancock Mut. Life Ins. Co. v. Bartels, 308 U.S. 180, 184 & n.3 (1939); Wright v. Union Central Ins. Co., 311 U.S. 273, 278–79 (1940), has created differences of opinion with respect to whether *Radford* remains sound law. *Cf.* Helvering v. Griffiths, 318 U.S. 371, 400–01 & n.52 (1943) (suggesting *Radford* might not have survived *Vinton Branch*).

[575] Continental Illinois Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry., 294 U.S. 648 (1935).

[576] Kuchner v. Irving Trust Co., 299 U.S. 445 (1937).

[577] *In re* 620 Church Street Corp., 299 U.S. 24 (1936). In the context of Congress's plan to save major railroad systems, *see Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

Right to Sue the Government.—A right to sue the government on a contract is a privilege, not a property right protected by the Constitution.[578] The right to sue for recovery of taxes paid may be conditioned upon an appeal to the Commissioner and his refusal to refund.[579] There was no denial of due process when Congress took away the right to sue for recovery of taxes, where the claim for recovery was without substantial equity, having arisen from the mistake of administrative officials in allowing the statute of limitations to run before collecting a tax.[580] The denial to taxpayers of the right to sue for refund of processing and floor stock taxes collected under a law subsequently held unconstitutional, and the substitution of a new administrative procedure for the recovery of such sums, was held valid.[581] Congress may cut off the right to recover taxes illegally collected by ratifying their imposition and collection, where it could lawfully have authorized such exactions prior to their collection.[582]

Congressional Power to Abolish Common Law Judicial Actions.—Similarly, it is clearly settled that "[a] person has no property, no vested interest, in any rule of the common law."[583] It follows, therefore, that Congress in its discretion may abolish common-law actions, replacing them with other judicial actions or with administrative remedies at its discretion. There is slight intimation in some of the cases that if Congress does abolish a common law action it *must* either duplicate the recovery or provide a reasonable substitute remedy.[584] Such a holding seems only remotely likely,[585] but some difficulties may be experienced with respect to legislation that retrospectively affects rights to sue, such as shortening or lengthening statutes of limitation, and the like, although these have typically arisen in state contexts. In one decision, the Court sustained an award of additional compensation under the Longshoremen's and

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[578] Lynch v. United States, 292 U.S. 571, 581 (1934).

[579] Dodge v. Osborn, 240 U.S. 118 (1916).

[580] Graham & Foster v. Goodcell, 282 U.S. 409 (1931).

[581] Anniston Mfg. Co. v. Davis, 301 U.S. 337 (1937).

[582] United States v. Heinszen & Co., 206 U.S. 370, 386 (1907).

[583] *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912). *See also* Silver v. Silver, 280 U.S. 117, 122 (1929) (a state case).

[584] The intimation stems from New York Cent. R.R. v. White, 243 U.S. 188 (1917) (a state case, involving the constitutionality of a workmen's compensation law). While denying any person's vested interest in the continuation of any particular right to sue, id. at 198, the Court did seem twice to suggest that abolition without a reasonable substitute would raise due process problems. Id. at 201. In Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 87–92 (1978), it noticed the contention but passed it by because the law at issue was a reasonable substitute.

[585] It is more likely with respect to congressional provision of a statutory substitute for a cause of action arising directly out of a constitutional guarantee. *E.g.*, Carlson v. Green, 446 U.S. 14, 18–23 (1980).

Harbor Workers' Compensation Act, made pursuant to a private act of Congress passed after expiration of the period for review of the original award, directing the Commission to review the case and issue a new order, the challenge being made by the employer and insurer.[586]

Deprivation of Liberty: Economic Legislation.—The proscription of deprivation of liberty without due process, insofar as substantive due process was involved, was long restricted to invocation against legislation deemed to abridge liberty of contract.[587] The two leading cases invalidating federal legislation, however, have both been overruled, as the Court adopted a very restrained standard of review of economic legislation.[588] The Court's hands-off policy with regard to reviewing economic legislation is quite pronounced.[589]

NATIONAL EMINENT DOMAIN POWER

Overview

"The Fifth Amendment to the Constitution says 'nor shall private property be taken for public use, without just compensation.' This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power."[590] Eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty."[591] In the early years of the nation the federal power of eminent domain lay dormant as to property outside the District of Columbia,[592] and it was not until 1876 that its existence was recognized by the Supreme Court. In *Kohl v. United States*[593] any doubts were laid to rest, as the Court affirmed that the power was as necessary to the existence of the National Government as it was to the exis-

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[586] Paramino Co. v. Marshall, 309 U.S. 370 (1940).

[587] *See* "Liberty of Contract" heading under Fourteenth Amendment, *infra*.

[588] Adair v. United States, 208 U.S. 161 (1908), overruled in substance by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[589] *E.g.*, United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Schweiker v. Wilson, 450 U.S. 221 (1981).

[590] United States v. Carmack, 329 U.S. 230, 241–42 (1946). The same is true of "just compensation" clauses in state constitutions. Boom Co. v. Patterson, 98 U.S. 403, 406 (1879). For in-depth analysis of the eminent domain power, *see* 1 NICHOLS ON EMINENT DOMAIN (Julius L. Sackman, 2006).

[591] *Boom Co.*, 98 U.S. at 406.

[592] Prior to this time, the Federal Government pursued condemnation proceedings in state courts and commonly relied on state law. Kohl v. United States, 91 U.S. 367, 373 (1876); United States v. Jones, 109 U.S. 513 (1883). The general statutory authority for federal condemnation proceedings in federal courts was not enacted until 1888. Act of Aug. 1, 1888, ch. 728, 25 Stat. 357. *See* 1 NICHOLS ON EMINENT DOMAIN § 1.24[5] (Julius L. Sackman, 2006).

[593] 91 U.S. 367 (1876).

tence of any state. The federal power of eminent domain is, of course, limited by the grants of power in the Constitution, so that property may only be taken for the effectuation of a granted power,[594] but once this is conceded the ambit of national powers is so wide-ranging that vast numbers of objects may be effected.[595] This prerogative of the National Government can neither be enlarged nor diminished by a state.[596] Whenever lands in a state are needed for a public purpose, Congress may authorize that they be taken, either by proceedings in the courts of the state, with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the state.[597]

"Prior to the adoption of the Fourteenth Amendment," the power of eminent domain of state governments "was unrestrained by any federal authority."[598] The Just Compensation Clause of the Fifth Amendment did not apply to the states,[599] and at first the contention that the Due Process Clause of the Fourteenth Amendment afforded property owners the same measure of protection against the states as the Fifth Amendment did against the Federal Government was rejected.[600] However, within a decade the Court rejected the opposing argument that the amount of compensation to be awarded in a state eminent domain case is solely a matter of local law. On the contrary, the Court ruled, although a state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation. . . . The mere form of the proceed-

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[594] United States v. Gettysburg Electric Ry., 160 U.S. 668, 679 (1896).

[595] *E.g.*, California v. Central Pacific Railroad, 127 U.S. 1, 39 (1888) (highways); Luxton v. North River Bridge Co., 153 U.S. 525 (1894) (interstate bridges); Cherokee Nation v. Southern Kansas Ry, 135 U.S. 641 (1890) (railroads); Albert Hanson Lumber Co. v. United States, 261 U.S. 581 (1923) (canal); Ashwander v. TVA, 297 U.S. 288 (1936) (hydroelectric power). "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." Berman v. Parker, 348 U.S. 26, 33 (1954).

[596] Kohl v. United States, 91 U.S. 367 374 (1876).

[597] Chappell v. United States, 160 U.S. 499, 510 (1896). The fact that land included in a federal reservoir project is owned by a state, or that its taking may impair the state's tax revenue, or that the reservoir will obliterate part of the state's boundary and interfere with the state's own project for water development and conservation, constitutes no barrier to the condemnation of the land by the United States. Oklahoma ex rel. Phillips v. Atkinson Co., 313 U.S. 508 (1941). So too, land held in trust and used by a city for public purposes may be condemned. United States v. Carmack, 329 U.S. 230 (1946).

[598] Green v. Frazier, 253 U.S. 233, 238 (1920).

[599] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[600] Davidson v. City of New Orleans, 96 U.S. 97 (1878). The Court attached most weight to the fact that both due process and just compensation were guaranteed in the Fifth Amendment while only due process was contained in the Fourteenth, and refused to equate the missing term with the present one.

ing instituted against the owner . . . cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."[601] Although the guarantees of just compensation flow from two different sources, the standards used by the Court in dealing with the issues appear to be identical, and both federal and state cases will be dealt with herein without expressly continuing to recognize the two different bases for the rulings.

The power of eminent domain is inherent in government and may be exercised only through legislation or legislative delegation. Although such delegation is usually to another governmental body, it may also be to private corporations, such as public utilities, railroad companies, or bridge companies, when they are promoting a valid public purpose.[602]

Public Use

Explicit in the Just Compensation Clause is the requirement that the taking of private property be for a public use; one cannot be deprived of his property for any reason other than a public use, even with compensation.[603] The question whether a particular intended use is a public use is clearly a judicial one,[604] but the Court has always insisted on a high degree of judicial deference to the legislative determination.[605] "The role of the judiciary in determining whether that power is being exercised for a public use is an extremely narrow one."[606] When it is state action being challenged under the Fourteenth Amendment, there is the additional factor of the Court's willingness to defer to the highest court of the state in resolving such an issue.[607] As early as 1908, the Court was obligated to admit that, notwithstanding its retention of the power of

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[601] Chicago B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 233, 236–37 (1897). *See also* Sweet v. Rechel, 159 U.S. 380, 398 (1895).

[602] Noble v. Oklahoma City, 297 U.S. 481 (1936); Luxton v. North River Bridge Co., 153 U.S. 525 (1895). One of the earliest examples of such delegation is Curtiss v. Georgetown & Alexandria Turnpike Co., 10 U.S. (6 Cr.) 233 (1810).

[603] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–59 (1896); Cole v. La Grange, 113 U.S. 1, 6 (1885).

[604] "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." City of Cincinnati v. Vester, 281 U.S. 439, 444 (1930).

[605] Kelo v. City of New London, 545 U.S. 469, 482 (2005). The taking need only be "rationally related to a conceivable public purpose." Id. at 490 (Justice Kennedy concurring).

[606] Berman v. Parker, 348 U.S. 26, 32 (1954) (federal eminent domain power in District of Columbia).

[607] Green v. Frazier, 253 U.S. 283, 240 (1920); City of Cincinnati v. Vester, 281 U.S. 439, 446 (1930). *See also* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (appeals court erred in applying more stringent standard to action of state legislature).

judicial review, "[n]o case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses . . . ."[608] However, in a 1946 case involving federal eminent domain power, the Court cast considerable doubt upon the power of courts to review the issue of public use. "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."[609] There is some suggestion that "the scope of the judicial power to determine what is a 'public use'" may be different as between Fifth and Fourteenth Amendment cases, with greater power in the latter type of cases than in the former,[610] but it may well be that the case simply stands for the necessity for great judicial restraint.[611] Once it is admitted or determined that the taking is for a public use and is within the granted authority, the necessity or expediency of the particular taking is exclusively in the legislature or the body to which the legislature has delegated the decision, and is not subject to judicial review.[612]

At an earlier time, the factor of judicial review would have been vastly more important than it is now, inasmuch as the prevailing judicial view was that the term "public use" was synonymous with "use by the public" and that if there was no duty upon the taker to permit the public as of right to use or enjoy the property taken, the taking was invalid. But this view was rejected some time ago.[613] The modern conception of public use equates it with the police power in the furtherance of the public interest. No definition of the reach or limits of the power is possible, the Court has said, because such "definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . Public

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[608] Hairston v. Danville & Western Ry., 208 U.S. 598, 607 (1908). An act of condemnation was voided as not for a public use in Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896), but the Court read the state court opinion as acknowledging this fact, thus not bringing it within the literal content of this statement.

[609] United States ex rel. TVA v. Welch, 327 U.S. 546, 551–52 (1946). Justices Reed and Frankfurter and Chief Justice Stone disagreed with this view. Id. at 555, 557 (concurring).

[610] 327 U.S. at 552.

[611] So it seems to have been considered in Berman v. Parker, 348 U.S. 26, 32 (1954).

[612] Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923); Bragg v. Weaver, 251 U.S. 57, 58 (1919); Berman v. Parker, 348 U.S. 26, 33 (1954). "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in federal courts." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984).

[613] Clark v. Nash, 198 U.S. 361 (1905); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916).

safety, public health, morality, peace and quiet, law and order—these are some of the . . . traditional application[s] of the police power . . . .” Effectuation of these matters being within the authority of the legislature, the power to achieve them through the exercise of eminent domain is established. “For the power of eminent domain is merely the means to the end.”[614] Subsequently, the Court put forward an added indicium of “public use”: whether the government purpose could be validly achieved by tax or user fee.[615] Traditionally, eminent domain has been used to facilitate transportation, the supplying of water, and the like,[616] but the use of the power to establish public parks, to preserve places of historic interest, and to promote beautification has substantial precedent.[617]

The Supreme Court has also approved generally the widespread use of the power of eminent domain by federal and state governments in conjunction with private companies to facilitate urban renewal, destruction of slums, erection of low-cost housing in

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[614] Berman v. Parker, 348 U.S. 26, 32, 33 (1954).

[615] Brown v. Legal Found. of Washington, 538 U.S. 216, 232 (2003). *But see* id. at 242 n.2 (Justice Scalia dissenting).

[616] *E.g.*, Kohl v. United States, 91 U.S. 367 (1876) (public buildings); Chicago M. & S.P. Ry. v. City of Minneapolis, 232 U.S. 430 (1914) (canal); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897) (condemnation of privately owned water supply system formerly furnishing water to municipality under contract); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916) (land, water, and water rights condemned for production of electric power by public utility); Dohany v. Rogers, 281 U.S. 362 (1930) (land taken for purpose of exchange with a railroad company for a portion of its right-of-way required for widening a highway); Delaware, L. & W.R.R. v. Town of Morristown, 276 U.S. 182 (1928) (establishment by a municipality of a public hack stand upon driveway maintained by railroad upon its own terminal grounds to afford ingress and egress to its patrons); Clark v. Nash, 198 U.S. 361 (1905) (right-of-way across neighbor’s land to enlarge irrigation ditch for water without which land would remain valueless); Strickley v. Highland Boy Mining Co., 200 U.S. 527 (1906) (right of way across a placer mining claim for aerial bucket line). In Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896), however, the Court held that it was an invalid use when a State attempted to compel, on payment of compensation, a railroad, which had permitted the erection of two grain elevators by private citizens on its right-of-way, to grant upon like terms a location to another group of farmers to erect a third grain elevator for their own benefit.

[617] *E.g.*, Shoemaker v. United States, 147 U.S. 282 (1893) (establishment of public park in District of Columbia); Rindge Co. v. Los Angeles County, 262 U.S. 700 (1923) (scenic highway); Brown v. United States, 263 U.S. 78 (1923) (condemnation of property near town flooded by establishment of reservoir in order to locate a new townsite, even though there might be some surplus lots to be sold); United States v. Gettysburg Electric Ry., 160 U.S. 668 (1896), and Roe v. Kansas ex rel. Smith, 278 U.S. 191 (1929) (historic sites). When time is deemed to be of the essence, Congress takes land directly by statute, authorizing procedures by which owners of appropriated land may obtain just compensation. *See*, *e.g.*, Pub. L. 90–545, § 3, 82 Stat. 931 (1968), 16 U.S.C. § 79(c) (taking land for creation of Redwood National Park); Pub. L. 93–444, 88 Stat. 1304 (1974) (taking lands for addition to Piscataway Park, Maryland); Pub. L. 100–647, § 10002 (1988) (taking lands for addition to Manassas National Battlefield Park).

place of deteriorated housing, and the promotion of aesthetic values as well as economic ones. In *Berman v. Parker*,[618] a unanimous Court observed: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." For "public use," then, it may well be that "public interest" or "public welfare" is the more correct phrase.[619] *Berman* was applied in *Hawaii Housing Auth. v. Midkiff*,[620] upholding the Hawaii Land Reform Act as a "rational" effort to "correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly." Direct transfer of land from lessors to lessees was permissible, the Court held, there being no requirement "that government possess and use property at some point during a taking." [621] "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers," the Court concluded.[622]

The expansive interpretation of public use in eminent domain cases may have reached its outer limit in *Kelo v. City of New London*.[623] There, a five-justice majority upheld as a public use the private-to-private transfer of land for purposes of economic development, at least in the context of a well-considered, areawide redevelopment plan adopted by a municipality to invigorate a depressed economy. The Court saw no principled way to distinguish economic development from the economic purposes endorsed in *Berman* and *Midkiff*, and stressed the importance of judicial deference to the legislative judgment as to public needs. At the same time, the Court cautioned that private-to-private condemnations of individual properties, not part of an "integrated development plan . . . raise a sus-

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[618] 348 U.S. 26, 32–33 (1954) (citations omitted). Rejecting the argument that the project was illegal because it involved the turning over of condemned property to private associations for redevelopment, the Court said: "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude." Id. at 33–34 (citations omitted).

[619] Most recently, the Court equated public use with "public purpose." Kelo v. City of New London, 545 U.S. 469, 480 (2005).

[620] 467 U.S. 229, 243 (1984).

[621] 467 U.S. at 243.

[622] 467 U.S. at 240. *See also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) (required data disclosure by pesticide registrants, primarily for benefit of later registrants, has a "conceivable public character").

[623] 545 U.S. 469 (2005).

picion that a private purpose [is] afoot."[624] A vigorous four-justice dissent countered that localities will always be able to manufacture a plausible public purpose, so that the majority opinion leaves the vast majority of private parcels subject to condemnation when a higher-valued use is desired.[625] Backing off from the Court's past endorsements in *Berman* and *Midkiff* of a public use/police power equation, the dissenters referred to the "errant language" of these decisions, which was "unnecessary" to their holdings.[626]

Just Compensation

"When . . . [the] power [of eminent domain] is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."[627] The Fifth Amendment's guarantee "that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[628]

The just compensation required by the Constitution is that which constitutes "a full and perfect equivalent for the property taken."[629]

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[624] 545 U.S. at 487.

[625] Written by Justice O'Connor, and joined by Justices Scalia and Thomas, and Chief Justice Rehnquist.

[626] 545 U.S. at 501.

[627] Backus v. Fort Street Union Depot Co., 169 U.S. 557, 573, 575 (1898).

[628] Armstrong v. United States, 364 U.S. 40, 49 (1960). "The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." United States v. Cors, 337 U.S. 325, 332 (1949). There is no constitutional prohibition against confiscation of enemy property, but aliens not so denominated are entitled to the protection of this clause. *Compare* United States v. Chemical Foundation, 272 U.S. 1, 11 (1926) *and* Stoehr v. Wallace, 255 U.S. 239 (1921), *with* Silesian-American Corp. v. Clark, 332 U.S. 469 (1947), Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931), *and* Guessefeldt v. McGrath, 342 U.S. 308, 318 (1952). Takings Clause protections for such aliens may be invoked, however, only "when they have come within the territory of the United States and developed substantial connections with this country." United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990).

[629] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). The owner's loss, not the taker's gain, is the measure of such compensation. Brown v. Legal Found. of Washington, 538 U.S. 216, 236 (2003); United States ex rel. TVA v. Powelson, 319 U.S. 266, 281 (1943); United States v. Miller, 317 U.S. 369, 375 (1943). The value of the property to the government for its particular use is not a criterion. United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); United States v. Twin City Power Co., 350 U.S. 222 (1956). Attorneys' fees and expenses are not embraced in the concept. Dohany v. Rogers, 281 U.S. 362 (1930).

Applying the owner's-loss standard, the Court addressed a state program requiring lawyers to deposit client funds that cannot earn net interest in a pooled account generating interest for indigent legal aid. *Brown*, 538 U.S. at 237. Assuming a taking of the client's interest, his pecuniary loss is nonetheless zero; hence, the just compensation required is likewise. *Brown* is in tension with the Court's earlier treat-

Originally the Court required that the equivalent be in money, not in kind,[630] but more recently has cast some doubt on this assertion.[631] Just compensation is measured "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future, . . . [but] 'mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded.'"[632] The general standard thus is the market value of the property, *i.e.*, what a willing buyer would pay a willing seller.[633] If fair market value does not exist or cannot be calculated, resort must be had to other data which will yield a fair compensation.[634] However, the Court is resistant to alternative standards, having repudiated reliance on the cost of substitute facilities.[635] Just compensation is especially difficult to compute in wartime, when enormous disruptions in supply and governmentally imposed price ceilings totally skew market conditions. Holding that the reasons which underlie the rule of market value when a free market exists apply as well where value is measured by a government-fixed ceiling price, the Court permitted owners of cured pork and black pepper to recover only the ceiling price for the commodities, despite findings by the Court of Claims that the replacement cost of the meat exceeded its ceiling price and that the pepper had a "retention value" in excess of that price.[636] By a five-to-four decision, the Court ruled that the government was not obliged to pay the present market value

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ment of a similar state program, where it recognized value in the possession, control, and disposition of the interest. Phillips v. Washington Legal Found., 524 U.S. 156, 170 (1998).

[630] Van Horne's Lessee v. Dorrance, *2 U.S. (2 Dall.) 304, 315 (C.C. Pa. 1795)*; United States v. Miller, 317 U.S. 369, 373 (1943).

[631] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150–51 (1974).

[632] Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 250 (1897); McGovern v. City of New York, 229 U.S. 363, 372 (1913). *See also* Boom Co. v. Patterson, 98 U.S. 403 (1879); McCandless v. United States, 298 U.S. 342 (1936).

[633] United States v. Miller, 317 U.S. 369, 374 (1943); United States ex rel. TVA v. Powelson, 319 U.S. 266, 275 (1943). *See also* United States v. New River Collieries Co., 262 U.S. 341 (1923); Olson v. United States, 292 U.S. 264 (1934); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). Exclusion of the value of improvements made by the government under a lease was held constitutional. Old Dominion Land Co. v. United States, 269 U.S. 55 (1925).

[634] United States v. Miller, 317 U.S. 369, 374 (1943).

[635] United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (condemnation of church-run camp); United States v. 50 Acres of Land, 469 U.S. 24 (1984) (condemnation of city-owned landfill). In both cases the Court determined that market value was ascertainable.

[636] United States v. Felin & Co., 334 U.S. 624 (1948); United States v. Commodities Trading Corp., 339 U.S. 121 (1950). *See also* Vogelstein & Co. v. United States, 262 U.S. 337 (1923).

of a tug when the value had been greatly enhanced as a consequence of the government's wartime needs.[637]

Illustrative of the difficulties in applying the fair market standard of just compensation are two cases decided by five-to-four votes, one in which compensation was awarded and one in which it was denied. Held entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the remainder of the term of the lease was a company that, while its lease had no renewal option, had occupied the land for nearly 50 years and had every expectancy of continued occupancy under a new lease. Just compensation, the Court said, required taking into account the possibility that the lease would be renewed, inasmuch as a willing buyer and a willing seller would certainly have placed a value on the possibility.[638] However, when the Federal Government condemned privately owned grazing land of a rancher who had leased adjacent federally owned grazing land, it was held that the compensation owed need not include the value attributable to the proximity to the federal land. The result would have been different if the adjacent grazing land had been privately owned, but the general rule is that government need not pay for value that it itself creates.[639]

Interest.—Ordinarily, property is taken under a condemnation suit upon the payment of the money award by the condemner, and no interest accrues.[640] If, however, the property is taken in fact before payment is made, just compensation includes an increment which, to avoid use of the term "interest," the Court has called "an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."[641] If the owner and the government enter into a contract which stipulates the purchase price for lands to be taken, with no provision for interest, the Fifth Amendment is

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[637] United States v. Cors, 337 U.S. 325 (1949). *See also* United States v. Toronto Navigation Co., 338 U.S. 396 (1949).

[638] Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973). The dissent argued that since upon expiration of the lease only salvage value of the improvements could be claimed by the lessee, just compensation should be limited to that salvage value. Id. at 480.

[639] United States v. Fuller, 409 U.S. 488 (1973). The dissent argued that the principle denying compensation for governmentally created value should apply only when the government was in fact acting in the use of its own property; here the government was acting only as a condemnor. Id. at 494.

[640] Danforth v. United States, 308 U.S. 271, 284 (1939); Kirby Forest Industries v. United States, 467 U.S. 1 (1984) (no interest due in straight condemnation action for period between filing of notice of *lis pendens* and date of taking).

[641] United States v. Klamath Indians, 304 U.S. 119, 123 (1938); Jacobs v. United States, 290 U.S. 13, 17 (1933); Kirby Forest Industries v. United States, 467 U.S. 1 (1984) (substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment).

inapplicable and the landowner cannot recover interest even though payment of the purchase price is delayed.[642] Where property of a citizen has been mistakenly seized by the government and it is converted into money which is invested, the owner is entitled in recovering compensation to an allowance for the use of his property.[643]

Rights for Which Compensation Must Be Made.—If real property is condemned the market value of that property must be paid to the owner. But there are many kinds of property and many uses of property which cause problems in computing just compensation. It is not only the full fee simple interest in land that is compensable "property,"[644] but also such lesser interests as easements[645] and leaseholds. If only a portion of a tract is taken, the owner's compensation includes any element of value arising out of the relation of the part taken to the entire tract.[646] On the other hand, if the taking has in fact benefitted the owner, the benefit may be set off against the value of the land condemned,[647] although any supposed benefit which the owner may receive in common with all from the public use to which the property is appropriated may not be set off.[648] When certain lands were condemned for park purposes, with resulting benefits set off against the value of the property taken, the subsequent erection of a fire station on the property instead was held not to have deprived the owner of any part of his just compensation.[649]

The Court has also held that the government has a "categorical duty to pay just compensation" when it physically takes personal property, just as when it takes real property.[650] In *Horne v. Depart-*

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[642] Albrecht v. United States, 329 U.S. 599 (1947).

[643] Henkels v. Sutherland, 271 U.S. 298 (1926); *see also* Phelps v. United States, 274 U.S. 341 (1927).

[644] United States v. General Motors Corp., 323 U.S. 373 (1945).

[645] United States v. Welch, 217 U.S. 333 (1910).

[646] Bauman v. Ross, 167 U.S. 548 (1897); Sharp v. United States, 191 U.S. 341, 351–52, 354 (1903). Where the taking of a strip of land across a farm closed a private right-of-way, an allowance was properly made for the value of the easement. United States v. Welch, 217 U.S. 333 (1910).

[647] Bauman v. Ross, 167 U.S. 548 (1897).

[648] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

[649] Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932).

[650] *See* Horne v. Dep't of Agric., 576 U.S. ___, No. 14–275, slip op. at 5 (2015). In deciding this case, the Court presumably intended to leave intact established exceptions when the government seizes personal property (e.g., confiscation of adulterated drugs). *See, e.g.*, Bennis v. Michigan, 516 U.S. 442, 452 (1996) ("Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has

ment of Agriculture, the Court held that a raisin marketing order issued under a Depression-era statute requiring raisin growers to reserve a percentage of their total crop for the federal government to dispose of in its discretion constituted "a clear physical taking" because, even though the scheme was intended to benefit the growers by maintaining stable markets for raisins, the "[a]ctual raisins are transferred from the growers to the Government." [651] The Court further held the government could not avoid paying just compensation for this physical taking by providing for the return to the raisin growers of any net proceeds from the government's sale of the reserve raisins.[652] The majority also rejected the government's argument that the reserve requirement was not a physical taking because raisin growers voluntarily participated in the raisin market.[653] In so doing, the Court noted that selling produce in interstate commerce is not a "special government benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection." [654] In addition, the Court determined that the value of the raisins for takings purposes was their fair market value, with

already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.").

[651] *Horne*, slip op. at 8.

[652] *Id.* at 9–12.

[653] The government's argument might have carried more weight had the marketing order been viewed as a regulatory taking. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321–22 (2002) ("The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property."); Bowles v. Willingham, 321 U.S. 503, 519 (1944) (rent control cannot be a taking of premises if "[t]here is no requirement that the apartments be used for purposes which bring them under the [rent control] Act").

[654] *Horne*, slip op. at 13. Here, the Court expressly rejected the argument that the raisin growers could avoid the physical taking of their property by growing different crops, or making different uses of their grapes, by quoting its earlier decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982) ("[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."). The Court also distinguished the raisin reserve provisions from the requirement that companies manufacturing pesticides, fungicides, and rodenticides disclose trade secrets in order to sell those products at issue in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). It did so because the manufacturers in *Ruckelshaus* were seen to have taken part in a "voluntary exchange" of information that included their trade secrets, recognized as property under the Takings Clause, in exchange for a "valuable Government benefit" in the form of a license to sell dangerous chemicals. No such government benefit was seen to be involved with the raisin growers because they were making "basic and familiar uses" of their property.

no deduction for the offsetting benefits of the overall statutory scheme, which is intended to maintain stable markets for raisins.[655]

Interests in intangible as well as tangible property are subject to protection under the Taking Clause. Thus compensation must be paid for the taking of contract rights,[656] patent rights,[657] and trade secrets.[658] So too, the franchise of a private corporation is property that cannot be taken for public use without compensation. Upon condemnation of a lock and dam belonging to a navigation company, the government was required to pay for the franchise to take tolls as well as for the tangible property.[659] The frustration of a private contract by the requisitioning of the entire output of a steel manufacturer is not a taking for which compensation is required,[660] but government requisitioning from a power company of all the electric power which could be produced by use of the water diverted through its intake canal, thereby cutting off the supply of a lessee which had a right, amounting to a corporeal hereditament under state law, to draw a portion of that water, entitles the lessee to compensation for the rights taken.[661] When, upon default of a ship-builder, the Government, pursuant to contract with him, took title to uncompleted boats, the material men, whose liens under state laws had attached when they supplied the shipbuilder, had a compensable interest equal to whatever value these liens had when the government "took" or destroyed them in perfecting its title.[662] As a general matter, there is no property interest in the continuation of a rule of law.[663] And, even though state participation in the social security system was originally voluntary, a state had no property interest in its right to withdraw from the program when Congress had expressly reserved the right to amend the law and the agreement with the state.[664] Similarly, there is no right to the continuation of governmental welfare benefits.[665]

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[655] *Horne*, slip op. at 14–16.

[656] Lynch v. United States, 292 U.S. 571, 579 (1934); Omnia Commercial Corp. v. United States, 261 U.S. 502, 508 (1923).

[657] James v. Campbell, 104 U.S. 356, 358 (1882). *See also* Hollister v. Benedict Mfg. Co., 113 U.S. 59, 67 (1885).

[658] Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

[659] Monongahela Navigation Co. v. United States, 148 U.S. 312, 345 (1983).

[660] Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

[661] International Paper Co. v. United States, 282 U.S. 399 (1931).

[662] Armstrong v. United States, 364 U.S. 40, 50 (1960).

[663] Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n.32 (1978).

[664] Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986).

[665] "Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level." Bowen v. Gilliard, 483 U.S. 587, 604 (1987).

Consequential Damages.—The Fifth Amendment requires compensation for the taking of "property," hence does not require payment for losses or expenses incurred by property owners or tenants incidental to or as a consequence of the taking of real property, if they are not reflected in the market value of the property taken.[666] "Whatever of property the citizen has the government may take. When it takes the property, that is, the fee, the lease, whatever, he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress."[667] An exception to the general principle has been established by the Court where only a temporary occupancy is assumed; then the taking body must pay the value which a hypothetical long-term tenant in possession would require when leasing to a temporary occupier requiring his removal, including in the market value of the interest the reasonable cost of moving out the personal property stored in the premises, the cost of storage of goods against their sale, and the cost of returning the property to the premises.[668] Another exception to the general rule occurs with a partial taking, in which the government takes less than the entire parcel of land and leaves the owner with a portion of what he had before; in such a case compensation includes any diminished value of the remaining portion ("severance damages") as well as the value of the taken portion.[669]

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[666] Mitchell v. United States, 267 U.S. 341 (1925); United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943); United States v. Petty Motor Co., 327 U.S. 372 (1946). For consideration of the problem of fair compensation in government-supervised bankruptcy reorganization proceedings, *see New Haven Inclusion Cases*, 399 U.S. 392, 489–95 (1970).

[667] United States v. General Motors Corp., 323 U.S. 373, 382 (1945).

[668] United States v. General Motors Corp., 323 U.S. 373 (1945). In Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), the Government seized the tenant's plant for the duration of the war, which turned out to be less than the full duration of the lease, and, having no other means of serving its customers, the laundry suspended business for the period of military occupancy; the Court narrowly held that the government must compensate for the loss in value of the business attributable to the destruction of its "trade routes," that is, for the loss of customers built up over the years and for the continued hold of the laundry upon their patronage. *See also* United States v. Pewee Coal Co., 341 U.S. 114 (1951) (in temporary seizure, Government must compensate for losses attributable to increased wage payments by the Government).

[669] United States v. Miller, 317 U.S. 369, 375–76 (1943). "On the other hand," the Court added, "if the taking has in fact benefitted the remainder, the benefit may be set off against the value of the land taken." Id.

Enforcement of Right to Compensation.—The nature and character of the tribunal to determine compensation is in the discretion of the legislature, and may be a regular court, a special legislative court, a commission, or an administrative body.[670] Proceedings to condemn land for the benefit of the United States are brought in the federal district court for the district in which the land is located.[671] The estimate of just compensation is not required to be made by a jury but may be made by a judge or entrusted to a commission or other body.[672] Federal courts may appoint a commission in condemnation actions to resolve the compensation issue.[673] If a body other than a court is designated to determine just compensation, its decision must be subject to judicial review,[674] although the scope of review may be limited by the legislature.[675] When the judgment of a state court with regard to the amount of compensation is questioned, the Court's review is restricted. "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."[676] "[T]here must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally."[677] Unless, by its rulings of law, the state court prevented a complainant from obtaining substantially any compensation, its findings as to the amount of damages will not be overturned on appeal, even though as a con-

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[670] United States v. Jones, 109 U.S. 513 (1883); Bragg v. Weaver, 251 U.S. 57 (1919).

[671] 28 U.S.C. § 1403. On the other hand, inverse condemnation actions (claims that the United States has taken property without compensation) are governed by the Tucker Act, 28 U.S.C. § 1491(a)(1), which vests the Court of Federal Claims (formerly the Claims Court) with jurisdiction over claims against the United States "founded . . . upon the Constitution." *See* Eastern Enterprises v. Apfel, 524 U.S. 498, 520 (1998). Inverse condemnation claims against the United States not in excess of $10,000 may also be heard in federal district court under the "Little Tucker Act." 28 U.S.C. § 1346(a)(2).

[672] Bauman v. Ross, 167 U.S. 548 (1897). Even when a jury is provided to determine the amount of compensation, it is the rule at least in federal court that the trial judge is to instruct the jury with regard to the criteria and this includes determination of "all issues" other than the precise issue of the amount of compensation, so that the judge decides those matters relating to what is computed in making the calculation. United States v. Reynolds, 397 U.S. 14 (1970).

[673] Rule 71A(h), Fed. R. Civ. P. These commissions have the same powers as a court-appointed master.

[674] Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

[675] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897). In federal courts, reports of Rule 71A commissions are to be accepted by the court unless "clearly erroneous." Fed. R. Civ. P. 53(e)(2).

[676] Backus v. Fort Street Union Depot Co., 169 U.S. 557, 569 (1898).

[677] McGovern v. City of New York, 229 U.S. 363, 370–71 (1913).

sequence of error therein the property owner received less than he was entitled to.[678]

When Property Is Taken

The issue whether one's property has been "taken" with the consequent requirement of just compensation can hardly arise when government institutes condemnation proceedings directed to it. Where, however, physical damage results to property because of government action, or where regulatory action limits activity on the property or otherwise deprives it of value,[679] whether there has been a taking in the Fifth Amendment sense becomes critical.

Government Activity Not Directed at the Property.—The older cases proceeded on the basis that the requirement of just compensation for property taken for public use referred only to "direct appropriation, and not to consequential injuries resulting from the exercise of lawful power."[680] Accordingly, a variety of consequential injuries were held not to constitute takings: damage to abutting property resulting from the authorization of a railroad to erect tracts, sheds, and fences over a street;[681] similar deprivations, lessening the circulation of light and air and impairing access to premises, resulting from the erection of an elevated viaduct over a street, or resulting from the changing of a grade in the street.[682] Nor was government held liable for the extra expense which the property owner must obligate in order to ward off the consequence of the governmental action, such as the expenses incurred by a railroad in planking an area condemned for a crossing, constructing gates, and posting gatemen,[683] or by a landowner in raising the height of

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[678] 229 U.S. at 371. *See also* Provo Bench Canal Co. v. Tanner, 239 U.S. 323 (1915); Appleby v. City of Buffalo, 221 U.S. 524 (1911).

[679] The Court has not yet determined whether the actions of a court may give rise to a taking. In Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, Justice Scalia, joined by three other Justices, recognized that a court could effect a taking through a decision that contravened established property law. 560 U.S. ___, No. 08–1151, slip op. (2010). Justice Kennedy and Justice Breyer, each joined by one other Justice, wrote concurring opinions finding that the case at hand did not require the Court to determine whether, or when, a judicial decision on the rights of a property owner can violate the Takings Clause. Though all eight participating Justices agreed on the result in *Stop the Beach Renourishment, Inc*, the viability and dimensions of a judicial takings doctrine thus remains unresolved.

[680] *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871). The Fifth Amendment "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals," the Court explained.

[681] Meyer v. City of Richmond, 172 U.S. 82 (1898).

[682] Sauer v. City of New York, 206 U.S. 536 (1907). *But see* the litigation in the state courts cited by Justice Cardozo in Roberts v. City of New York, 295 U.S. 264, 278–82 (1935).

[683] Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

the dikes around his land to prevent their partial flooding consequent to private construction of a dam under public licensing.temple v. c [684]

But the Court also decided long ago that land can be "taken" in the constitutional sense by physical invasion or occupation by the government, as occurs when the government floods land permanently or recurrently.[685] A later formulation was that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." [686] It was thus held that the government had imposed a servitude for which it must compensate the owner on land adjoining its fort when it repeatedly fired the guns at the fort across the land and had established a fire control service there.[687] In two major cases, the Court held that the lessees or operators of airports were required to compensate the owners of adjacent land when the noise, glare, and fear of injury occasioned by the low altitude overflights during takeoffs and landings made the land unfit for the use to which the owners had applied it.[688] Eventually, the term "inverse condemnation" came to be used to refer to such cases where the government has not instituted formal condemnation proceedings, but instead the property owner has sued for just compensation, claiming that governmental action or regulation has "taken" his property.[689]

Navigable Waters.—The repeated holdings that riparian ownership is subject to the power of Congress to regulate commerce constitute an important reservation to the developing law of liability

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[684] Manigault v. Springs, 199 U.S. 473 (1905).

[685] Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1872). Recurrent, temporary floodings are not categorically exempt from Takings Clause liability. Ark. Game & Fishing Comm'n v. United States, 568 U.S. ___, No. 11–597, slip op. (2012) (downstream timber damage caused by changes in seasonal water release rates from government dam).

[686] United States v. Dickinson, 331 U.S. 745, 748 (1947).

[687] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922). *Cf.* Portsmouth Harbor Land & Hotel Co. v. United States, 250 U.S. 1 (1919); Peabody v. United States, 231 U.S. 530 (1913).

[688] United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962). A corporation chartered by Congress to construct a tunnel and operate railway trains therein was held liable for damages in a suit by one whose property was so injured by smoke and gas forced from the tunnel as to amount to a taking. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

[689] "The phrase 'inverse condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity." San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Justice Brennan dissenting). *See also* United States v. Clarke, 445 U.S. 253, 257 (1980); Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980).

in the taking area. When damage results consequentially from an improvement to a river's navigable capacity, or from an improvement on a nonnavigable river designed to affect navigability elsewhere, it is generally not a taking of property but merely an exercise of a servitude to which the property is always subject.[690] This exception does not apply to lands above the ordinary high-water mark of a stream,[691] hence is inapplicable to the damage the government may do to such "fast lands" by causing overflows, by erosion, and otherwise, consequent on erection of dams or other improvements.[692] And, when previously nonnavigable waters are made navigable by private investment, government may not, without paying compensation, simply assert a navigation servitude and direct the property owners to afford public access.[693]

Regulatory Takings.—Although it is established that government may take private property, with compensation, to promote the public interest, that interest also may be served by regulation of property use pursuant to the police power, and for years there was broad dicta that no one may claim damages that result from a police regulation designed to secure the common welfare, especially in the area of health and safety.[694] "What distinguishes eminent domain from the police power is that the former involves the *taking* of property because of its need for the public use while the latter involves the *regulation* of such property to prevent the use thereof in a manner that is detrimental to the public interest."[695] But regulation may deprive an owner of most or all beneficial use of his property and may destroy the values of the property for the purposes to which it is suited.[696] The older cases flatly denied the possibility of

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[690] Gibson v. United States, 166 U.S. 269 (1897); Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Appalachian Power Co., 311 U.S. 377 (1940); United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Rands, 389 U.S. 121 (1967).

[691] United States v. Virginia Elec. & Power Co., 365 U.S. 624, 628 (1961).

[692] United States v. Lynah, 188 U.S. 445 (1903); United States v. Cress, 243 U.S. 316 (1917); Jacobs v. United States, 290 U.S. 13 (1933); United States v. Dickinson, 331 U.S. 745 (1947); United States v. Kansas City Ins. Co., 339 U.S. 799 (1950); United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961).

[693] Kaiser Aetna v. United States, 444 U.S. 164 (1979); Vaughn v. Vermillion Corp., 444 U.S. 206 (1979).

[694] Mugler v. Kansas, 123 U.S. 623, 668–69 (1887). *See also The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 255 (1897); Omnia Commercial Co. v. United States, 261 U.S. 502 (1923); Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935).

[695] 1 Nichols on Eminent Domain § 1.42 (Julius L. Sackman, 2006).

[696] *E.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ordinance upheld restricting owner of brick factory from continuing his use after residential growth surrounding factory made use noxious, even though value of property was reduced by more

compensation for this diminution of property values,[697] but the Court in 1922 established as a general principle that "if regulation goes too far it will be recognized as a taking."[698]

In *Mahon*, Justice Holmes, for the Court, over Justice Brandeis' vigorous dissent, held unconstitutional a state statute prohibiting subsurface mining in regions where it presented a danger of subsidence for homeowners. The homeowners had purchased by deeds that reserved to the coal companies ownership of subsurface mining rights and that held the companies harmless for damage caused by subsurface mining operations. The statute thus gave the homeowners more than they had been able to obtain through contracting, and at the same time deprived the coal companies of the entire value of their subsurface estates. The Court observed that "[f]or practical purposes, the right to coal consists in the right to mine," and that the statute, by making it "commercially impracticable to mine certain coal," had essentially "the same effect for constitutional purposes as appropriating or destroying it."[699] The regulation, therefore, in precluding the companies from exercising any mining rights whatever, went "too far."[700] However, when presented 65 years later with a very similar restriction on coal mining, the Court upheld it, pointing out that, unlike its predecessor, the newer law identified important public interests.[701]

The Court had been early concerned with the imposition upon one or a few individuals of the costs of furthering the public interest.[702] But it was with respect to zoning, in the context of substan-

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than 90%); Miller v. Schoene, 276 U.S. 272 (1928) (no compensation due owner's loss of red cedar trees ordered destroyed because they were infected with rust that threatened contamination of neighboring apple orchards: preferment of public interest in saving cash crop to property interest in ornamental trees was rational).

[697] Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (ban on manufacture of liquor greatly devalued plaintiff's plant and machinery; no taking possible simply because of legislation deeming a use injurious to public health and welfare).

[698] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). *See also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (a regulation that deprives a property owner of *all* beneficial use of his property requires compensation, unless the owner's proposed use is one prohibited by background principles of property or nuisance law existing at the time the property was acquired).

[699] 260 U.S. at 414–15.

[700] 260 U.S. at 415. In dissent, Justice Brandeis argued that a restriction imposed to abridge the owner's exercise of his rights in order to prohibit a noxious use or to protect the public health and safety simply could not be a taking, because the owner retained his interest and his possession. Id. at 416.

[701] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[702] Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) (government may not require railroad at its own expense to separate the grade of a railroad track from that of an interstate highway). *See also* Panhandle Co. v. Highway Comm'n, 294 U.S. 613 (1935); Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953), *and compare* the Court's two decisions in Georgia Ry. & Electric Co. v. City of Decatur, 295 U.S. 165 (1935), *and* 297 U.S. 620 (1936).

tive due process, that the Court first experienced some difficulty in this regard. The Court's first zoning case involved a real estate company's challenge to a comprehensive municipal zoning ordinance, alleging that the ordinance prevented development of its land for industrial purposes and thereby reduced its value from $10,000 an acre to $2,500 an acre.[703] Acknowledging that zoning was of recent origin, the Court observed that it must find its justification in the police power and be evaluated by the constitutional standards applied to exercises of the police power. After considering traditional nuisance law, the Court determined that the public interest was served by segregation of incompatible land uses and the ordinance was thus valid on its face; whether its application to diminish property values in any particular case was also valid would depend, the Court said, upon a finding that it was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[704] A few years later the Court, again relying on due process rather than taking law, did invalidate the application of a zoning ordinance to a tract of land, finding that the tract would be rendered nearly worthless and that to exempt the tract would impair no substantial municipal interest.[705] But then the Court withdrew from the land-use scene until the 1970s, giving little attention to states and their municipalities as they developed more comprehensive zoning techniques.[706]

As governmental regulation of property has expanded over the years—in terms of zoning and other land use controls, environmental regulations, and the like—the Court never developed, as it admitted, a "set formula to determine where regulation ends and taking begins."[707] Rather, as one commentator remarked, its decisions constitute a "crazy quilt pattern" of judgments.[708] Nonetheless, the Court has now formulated general principles that guide many of its decisions in the area.

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[703] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[704] 272 U.S. at 395. *See also* Zahn v. Board of Pub. Works, 274 U.S. 325 (1927).

[705] Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[706] Initially, the Court's return to the land-use area involved substantive due process, not takings. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (sustaining single-family zoning as applied to group of college students sharing a house); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (voiding single-family zoning so strictly construed as to bar a grandmother from living with two grandchildren of different children). *See also* City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976).

[707] Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The phrase appeared first in Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

[708] Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, SUP. CT. REV. 63 (1962). For an effort to ground takings jurisprudence in its philosophical precepts, *see* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165 (1967).

In *Penn Central Transportation Co. v. City of New York*,[709] the Court, while cautioning that regulatory takings cases require "essentially ad hoc, factual inquiries," nonetheless laid out general guidance for determining whether a regulatory taking has occurred. "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations. So too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." [710]

At issue in *Penn Central* was the City's landmarks preservation law, as applied to deny approval to construct a 53-story office building atop Grand Central Terminal. The Court upheld the landmarks law against Penn Central's takings claim through application of the principles set forth above. The economic impact on Penn Central was considered: the Company could still make a "reasonable return" on its investment by continuing to use the facility as a rail terminal with office rentals and concessions, and the City specifically permitted owners of landmark sites to transfer to other sites the right to develop those sites beyond the otherwise permissible zoning restrictions, a valuable right that mitigated the burden otherwise to be suffered by the owner. As for the character of the governmental regulation, the Court found the landmarks law to be an economic regulation rather than a governmental appropriation of property, the preservation of historic sites being a permissible goal and one that served the public interest.[711]

Justice Holmes began his analysis in *Mahon* with the observation that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law," [712] and *Penn Central's* economic impact standard also leaves ample room for recognition of this principle. Thus, the Court can easily hold that a mere permit requirement does not amount to a taking,[713] nor does a simple recordation

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[709] 438 U.S. 104 (1978). Justices Rehnquist and Stevens and Chief Justice Burger dissented. Id. at 138.

[710] 438 U.S. at 124 (citations omitted).

[711] 438 U.S. at 124–28, 135–38.

[712] 260 U.S. at 413.

[713] United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (requirement that permit be obtained for filling privately-owned wetlands is not a taking, although permit denial resulting in prevention of economically viable use of land may be).

requirement.[714] The tests become more useful, however, when compliance with regulation becomes more onerous.

Several times the Court has relied on the concept of "distinct [or, in most later cases, 'reasonable'] investment-backed expectations" first introduced in *Penn Central*. In *Ruckelshaus v. Monsanto Co.*,[715] the Court used the concept to determine whether a taking had resulted from the government's disclosure of trade secret information submitted with applications for pesticide registrations. Disclosure of data that had been submitted from 1972 to 1978, a period when the statute guaranteed confidentiality and thus "formed the basis of a distinct investment-backed expectation," would have destroyed the property value of the trade secret and constituted a taking.[716] Following 1978 amendments setting forth conditions of data disclosure, however, applicants voluntarily submitting data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality.[717] Relying less heavily on the concept but rejecting an assertion that reasonable investment backed-expectations had been upset, the Court in *Connolly v. Pension Benefit Guaranty Corp.*[718] upheld retroactive imposition of liability for pension plan withdrawal on the basis that employers had at least constructive notice that Congress might buttress the legislative scheme to accomplish its legislative aim that employees receive promised benefits. However, where a statute imposes severe and "substantially disproportionate" retroactive liability based on conduct several decades earlier, on parties that could not have anticipated the liability, a taking (or violation of due process) may occur. On this rationale, the Court in *Eastern Enterprises v. Apfel*[719] struck down the Coal Miner Retiree Health Ben-

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[714] Texaco v. Short, 454 U.S. 516 (1982) (state statute deeming mineral claims lapsed upon failure of putative owners to take prescribed steps is not a taking); United States v. Locke, 471 U.S. 84 (1985) (reasonable regulation of recordation of mining claim is not a taking).

[715] 467 U.S. 986 (1984).

[716] 467 U.S. at 1011.

[717] 467 U.S. at 1006–07. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, the Trade Secrets Act merely protecting against "unauthorized" disclosure. Id. at 1008–10.

[718] 475 U.S. 211 (1986). *Accord*, Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602, 645–46 (1993). In addition, *see* Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) (involving frustration of "expectancies" developed through improvements to private land and governmental approval of permits), and PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (characterizing and distinguishing *Kaiser Aetna* as involving interference with "reasonable investment backed expectations").

[719] 524 U.S. 498 (1998). The split doctrinal basis of *Eastern Enterprises* undercuts its precedent value, and that of *Connolly* and *Concrete Pipe*, for takings law. A majority of the justices (one supporting the judgment and four dissenters) found sub-

efit Act's requirement that companies formerly engaged in mining pay miner retiree health benefits, as applied to a company that spun off its mining operation in 1965 before collective bargaining agreements included an express promise of lifetime benefits.

On the other hand, a federal ban on the sale of artifacts made from eagle feathers was sustained as applied to the existing inventory of a commercial dealer in such artifacts, the Court not directly addressing the ban's obvious interference with investment-backed expectations.[720] The Court merely noted that the ban served a substantial public purpose in protecting the eagle from extinction, that the owner still had viable economic uses for his holdings, such as displaying them in a museum and charging admission, and that he still had the value of possession.[721]

The Court has made plain that, in applying the economic impact and investment-backed expectations factors of *Penn Central*, courts are to compare what the property owner has lost through the challenged government action with what the owner retains. Discharging this mandate requires a court to define the extent of plaintiff's property—the "parcel as a whole"—that sets the scope of analysis. The Supreme Court holds that takings law "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[722] But, although this apparently means that one may not exclude acreage from the relevant parcel solely to isolate the regulated portion, there are numerous arguments for excluding acreage (purchased by plaintiff at a different time, in different zoning status, etc.) that the Court has not addressed. And roiling the waters are persistent expressions of concern by the conservative justices, often in dicta, about

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stantive due process, not takings law, to provide the analytical framework where, as in *Eastern Enterprises*, the gravamen of the complaint is the unfairness and irrationality of the statute, rather than its economic impact.

[720] Andrus v. Allard, 444 U.S. 51 (1979).

[721] Similarly, the Court in *Goldblatt* had pointed out that the record contained no indication that the mining prohibition would reduce the value of the property in question. 369 U.S. at 594. *Contrast* Hodel v. Irving, 481 U.S. 704 (1987), where the Court found insufficient justification for a complete abrogation of the right to pass on to heirs interests in certain fractionated property. Note as well the differing views expressed in *Irving* as to whether that case limits Andrus v. Allard to its facts. Id. at 718 (Justice Brennan concurring, 719 (Justice Scalia concurring). *See also* the suggestion in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027–28 (1992), that *Allard* may rest on a distinction between permissible regulation of personal property, on the one hand, and real property, on the other.

[722] *Penn Central*, 438 U.S. at 130. The identical principle was reaffirmed in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987); Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 644 (1993); and *Tahoe-Sierra* Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 (2002).

the possible unfairness of an absolute parcel-as-a-whole rule.[723] Most recently, however, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,[724] a six-justice majority including Justices Kennedy and O'Connor offered a ringing endorsement of relevant-parcel doctrine. *Tahoe-Sierra* affirmed the established spatial (court must consider the entire relevant tract) and functional (court must consider plaintiff's full bundle of rights) dimensions of the doctrine,[725] and added a temporal one (court must consider the entire time span of plaintiff's property interest). Invoking this temporal dimension, the Court held that temporary land-use development moratoria do not effect a total elimination of use, since use and value return in the period following the moratorium's expiration. Thus, such moratoria are to be tested under the ad hoc, multifactor *Penn Central* test, rather than the *per se* approach to "total takings" discussed further on.

In the course of its opinion in *Penn Central* the Court rejected the principle that no compensation is required when regulation bans a noxious or harmful effect of land use.[726] The principle, it had been contended, followed from several earlier cases, including *Goldblatt v. Town of Hempstead*.[727] In that case, after the town had expanded around an excavation used by a company for mining sand and gravel, the town enacted an ordinance that in effect terminated further mining at the site. Declaring that no compensation was owed, the Court stated that "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by

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[723] *See*, *e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) ("answer . . . may lie in how the owner's reasonable expectations have been shaped by the State's law of property"). Justice Kennedy provided extended dicta in his majority opinion in Palazzolo v. Rhode Island, referring to this "difficult, persisting question" and noting that "we have at times expressed discomfort with the logic of this rule." 533 U.S. 606, 631 (2001).

[724] 535 U.S. 302 (2002).

[725] The spatial dimension is illustrated by the takings analysis in *Penn Central*, declining to segment Grand Central Terminal from the air rights over it. Functional parcel as a whole—refusing to segment one "stick" in the "bundle" of rights—was applied in Andrus v. Allard, 444 U.S. 51, 65–66 (1979), holding that denial of the right to sell Indian artifacts was not a taking in light of rights in the artifacts that were retained.

[726] The dissent was based upon this test. *Penn Central*, 438 U.S. at 144–46.

[727] 369 U.S. 590 (1962). Hadacheck v. Sebastian, 239 U.S. 394 (1915), and, perhaps, Miller v. Schoene, 276 U.S. 272 (1928), also fall under this heading, although *Schoene* may also be assigned to the public peril line of cases.

the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests." [728] In *Penn Central*, however, the Court denied that there was any such test and that prior cases had turned on the concept. "These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property." [729] More recently, in *Lucas v. South Carolina Coastal Council*,[730] the Court explained "noxious use" analysis as merely an early characterization of police power measures that do not require compensation. "[N]oxious use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation." [731]

Penn Central is not the only guide to when an inverse condemnation has occurred; other criteria have emerged from other cases before and after *Penn Central*. The Court has long recognized a *per se* takings rule for certain physical invasions: when government permanently [732] occupies property (or authorizes someone else to do so), the action constitutes a taking regardless of the public interests served or the extent of damage to the parcel as a whole.[733] The modern case dealt with a law that required landlords to permit a cable television company to install its cable facilities upon their buildings; although the equipment occupied only about 1½ cubic feet of space

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[728] 369 U.S. at 593 (quoting Mugler v. Kansas, 123 U.S. 623, 668–69 (1887)). The Court posited a two-part test. First, the interests of the public required the interference, and, second, the means were reasonably necessary for the accomplishment of the purpose and were not unduly oppressive of the individual. 369 U.S. at 595. The test was derived from Lawton v. Steele, 152 U.S. 133, 137 (1894) (holding that state officers properly destroyed fish nets that were banned by state law in order to preserve certain fisheries from extinction).

[729] *Penn Central*, 438 U.S. at 133–34 n.30.

[730] 505 U.S. 1003 (1992).

[731] 505 U.S. at 1026. The *Penn Central* majority also rejected the dissent's contention, 438 U.S. at 147–50, that regulation of property use constitutes a taking unless it spreads its distribution of benefits and burdens broadly so that each person burdened has at the same time the enjoyment of the benefit of the restraint upon his neighbors. The Court deemed it immaterial that the landmarks law has a more severe impact on some landowners than on others: "Legislation designed to promote the general welfare commonly burdens some more than others." Id. at 133–34.

[732] By contrast, the *per se* rule is inapplicable to *temporary* physical occupations of land. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428, 434 (1982); PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980).

[733] The rule emerged from cases involving flooding of lands and erection of poles for telegraph lines, *e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872); City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893); Western Union Tel. Co. v. Pennsylvania R.R., 195 U.S. 540 (1904).

on the exterior of each building and had only a *de minimis* economic impact, a divided Court held that the regulation authorized a permanent physical occupation of the property and thus constituted a taking.[734] Recently, the Court sharpened further the distinction between regulatory takings and permanent physical occupations by declaring it "inappropriate" to use case law from either realm as controlling precedent in the other.[735] Physical invasions falling short of permanent physical occupations remain subject to *Penn Central*.

A second *per se* taking rule is of more recent vintage. Land use controls constitute takings, the Court stated in *Agins v. City of Tiburon*, if they do not "substantially advance legitimate governmental interests," or if they deny a property owner "economically viable use of his land."[736] This second *Agins* criterion creates a categorical rule: when, with respect to the parcel as a whole, the landowner "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[737] The only exceptions, the Court explained in *Lucas*, are for those restrictions that come with the property as title encumbrances or other legally enforceable limitations. Regulations "so severe" as to prohibit all economically beneficial use of land "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the re-

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[734] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). *Loretto* was distinguished in FCC v. Florida Power Corp., 480 U.S. 245 (1987); regulation of the rates that utilities may charge cable companies for pole attachments does not constitute a taking in the absence of any requirement that utilities allow attachment and acquiesce in physical occupation of their property. *See also* Yee v. City of Escondido, 503 U.S. 519 (1992) (no physical occupation was occasioned by regulations in effect preventing mobile home park owners from setting rents or determining who their tenants would be; owners could still determine whether their land would be used for a trailer park and could evict tenants in order to change the use of their land).

[735] *Tahoe-Sierra*, 535 U.S. at 323. *Tahoe-Sierra's* sharp physical-regulatory dichotomy is hard to reconcile with dicta in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005), to the effect that the *Penn Central* regulatory takings test, like the physical occupations rule of *Loretto*, "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

[736] 447 U.S. 255, 260 (1980).

[737] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original). The *Agins/Lucas* total deprivation rule does not create an all-or-nothing situation, since "the landowner whose deprivation is one step short of complete" may still be able to recover through application of the *Penn Central* economic impact and "distinct [or reasonable] investment-backed expectations" criteria. Id. at 1019 n.8 (1992). *See also Palazzolo*, 533 U.S. at 632.

sult that could have been achieved in the courts—by adjacent land owners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate [public] nuisances . . . , or otherwise."[738] Thus, while there is no broad "noxious use" exception separating police power regulations from takings, there is a narrower "background principles" exception based on the law of nuisance and unspecified "property law" principles.

Together with the investment-backed expectations factor of *Penn Central*, background principles were viewed by many lower courts as supporting a "notice rule" under which a taking claim was absolutely barred if based on a restriction imposed under a regulatory regime predating plaintiff's acquisition of the property. In *Palazzolo v. Rhode Island*,[739] the Court forcefully rejected the absolute version of the notice rule, regardless of rationale. Under such a rule, it said, "[a] State would be allowed, in effect, to put an expiration date on the Takings Clause."[740] Whether any role is left for preacquisition regulation in the takings analysis, however, the Court's majority opinion did not say, leaving the issue to dueling concurrences from Justice O'Connor (prior regulation remains a factor) and Justice Scalia (prior regulation is irrelevant). Less than a year later, Justice O'Connor's concurrence carried the day in extended dicta in *Tahoe-Sierra*,[741] though the decision failed to elucidate the factors affecting the weighting to be accorded the pre-existing regime.

The "or otherwise" reference, the Court explained in *Lucas*,[742] was principally directed to cases holding that in times of great public peril, such as war, spreading municipal fires, and the like, property may be taken and destroyed without necessitating compensation. Thus, in *United States v. Caltex, Inc.*,[743] the owners of property destroyed by retreating United States armies in Manila during World War II were held not entitled to compensation, and in *United States v. Central Eureka Mining Co.*,[744] the Court held that a federal order suspending the operations of a nonessential gold mine for the duration of the war in order to redistribute the miners, unaccompa-

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[738] 505 U.S. at 1029.
[739] 533 U.S. 606 (2001).
[740] 533 U.S. at 627.
[741] 535 U.S. at 335.
[742] 505 U.S. at 1029 n.16.
[743] 344 U.S. 149 (1952). In dissent, Justices Black and Douglas advocated the applicability of a test formulated by Justice Brandeis in Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 429 (1935), a regulation case, to the effect that "when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."
[744] 357 U.S. 155 (1958).

nied by governmental possession and use or a forced sale of the facility, was not a taking entitling the owner to compensation for loss of profits. Finally, the Court held that when federal troops occupied several buildings during a riot in order to dislodge rioters and looters who had already invaded the buildings, the action was taken as much for the owners' benefit as for the general public benefit and the owners must bear the costs of the damage inflicted on the buildings subsequent to the occupation.[745]

The first prong of the *Agins* test,[746] asking whether land use controls "substantially advance legitimate governmental interests," has now been erased from takings jurisprudence, after a quarter-century run. The proper concern of regulatory takings law, said *Lingle v. Chevron U.S.A. Inc.*,[747] is the magnitude, character, and distribution of the burdens that a regulation imposes on property rights. In "stark contrast," the "substantially advances" test addresses the means-end efficacy of a regulation, more in the nature of a due process inquiry.[748] As such, it is not a valid takings test.

A third type of inverse condemnation, in addition to regulatory and physical takings, is the exaction taking. A two-part test has emerged. The first part debuted in *Nollan v. California Coastal Commission*,[749] and holds that in order not to be a taking, an exaction condition on a development permit approval (requiring, for example, that a portion of a tract to be subdivided be dedicated for public roads)[750] must substantially advance a purpose related to the underlying permit. There must, in short, be an "essential nexus" between the two; otherwise the condition is "an out-and-out plan of

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[745] National Bd. of YMCA v. United States, 395 U.S. 85 (1969). "An undertaking by the government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect." United States v. Sponenbarger, 308 U.S. 256, 265 (1939).

[746] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[747] 544 U.S. 528 (2005).

[748] 544 U.S. at 542.

[749] 483 U.S. 825 (1987).

[750] A third type of inverse condemnation, in addition to regulatory and *Nollan*, also applies to exactions imposed as conditions precedent to permit approval. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. ___, No. 11–1447 (2013). To the argument that nothing is "taken" when a permit is denied for failure to agree to a condition precedent, the Court stated that what is at stake is not whether a taking has occurred, but whether the right not to have property taken without just compensation has been burdened impermissibly. *Id.* at 10. The Court in *Koontz* did not discuss what remedies might be available to a plaintiff who refuses to accept certain demanding conditions precedent and thereby is refused a permit.

extortion."[751] The second part of the exaction-takings test, announced in *Dolan v. City of Tigard*[752] specifies that the condition, to not be a taking, must be related to the proposed development not only in nature, per *Nollan*, but also in degree. Government must establish a "rough proportionality" between the burden imposed by such conditions on the property owner, and the impact of the property owner's proposed development on the community—at least in the context of adjudicated (rather than legislated) conditions.

Nollan and *Dolan* occasioned considerable debate over the breadth of what became known as the "heightened scrutiny" test. The stakes were plainly high in that the test, where it applies, lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the government. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[753] the Court unanimously confined the *Dolan* rough proportionality test, and, by implication, the *Nollan* nexus test, to the exaction context that gave rise to those cases. Still unclear, however, is whether the Court meant to place outside *Dolan* exactions of a purely monetary nature, in contrast with the physically invasive dedication conditions involved in *Nollan* and *Dolan*.[754] The Court clarified this uncertainty in *Koontz v. St. Johns River Water Management District* by holding that monetary exactions imposed under land use permitting were subject to essential nexus/rough proportionality analysis.[755]

The announcement following *Penn Central* of the above *per se* rules in *Loretto* (physical occupations), *Agins* and *Lucas* (total elimination of economic use), and *Nollan/Dolan* (exaction conditions) prompted speculation that the Court was replacing its ad hoc *Penn Central* approach with a more categorical takings jurisprudence. Such speculation was put to rest, however, by three decisions from 2001 to 2005 expressing distaste for categorical regulatory takings analy-

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[751] 483 U.S. at 837. Justice Scalia, author of the Court's opinion in *Nollan*, amplified his views in a concurring and dissenting opinion in Pennell v. City of San Jose, 485 U.S. 1 (1988), explaining that "common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the proposed property use would otherwise be the cause of" the social evil (*e.g.*, congestion) that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that "should be borne by the public as a whole." 485 U.S. at 20, 22.

[752] 512 U.S. 374 (1994).

[753] 526 U.S. 687 (1999).

[754] A strong hint that monetary exactions are indeed outside *Nollan/Dolan* was provided in Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546 (2005), explaining that these decisions were grounded on the doctrine of unconstitutional conditions as applied to *easement* conditions that would have been *per se physical* takings if condemned directly.

[755] 570 U.S. ___, No. 11–1447 (2013).

sis. These decisions endorse *Penn Central* as the dominant mode of analysis for inverse condemnation claims, confining the Court's *per se* rules to the "relatively narrow" physical occupation and total wipeout circumstances, and the "special context" of exactions.[756]

Following the *Penn Central* decision, the Court grappled with the issue of the appropriate remedy property owners should pursue in objecting to land use regulations.[757] The remedy question arises because there are two possible constitutional objections to be made to regulations that go "too far" in reducing the value of property or which do not substantially advance a legitimate governmental interest. The regulation may be invalidated as a denial of due process, or may be deemed a taking requiring compensation, at least for the period in which the regulation was in effect. The Court finally resolved the issue in *First English Evangelical Lutheran Church v. County of Los Angeles*, holding that when land use regulation is held to be a taking, compensation is due for the period of implementation prior to the holding.[758] The Court recognized that, even though government may elect in such circumstances to discontinue regulation and thereby avoid compensation for a permanent property deprivation, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[759] Outside the land-use context, however, the Court has now recognized a limited number of situations where invalidation, rather than compensation, remains the appropriate takings remedy.[760]

The process of describing general criteria to guide resolution of regulatory taking claims, begun in *Penn Central*, has reduced to some

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[756] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (2005). The other two decisions are Palazzolo v. Rhode Island, 533 U.S. 606 (2001), and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

[757] *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980) (issue not reached because property owners challenging development density restrictions had not submitted a development plan); Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 293–97 (1981), and Hodel v. Indiana, 452 U.S. 314, 333–36 (1981) (rejecting facial taking challenges to federal strip mining law).

[758] 482 U.S. 304 (1987). The decision was 6–3, Chief Justice Rehnquist's opinion of the Court being joined by Justices Brennan, White, Marshall, Powell, and Scalia, and Justice Stevens' dissent being joined in part by Justices Blackmun and O'Connor. The position the Court adopted had been advocated by Justice Brennan in a dissenting opinion in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636 (1981) (dissenting from Court's holding that state court decision was not "final judgment" under 28 U.S.C. § 1257).

[759] 482 U.S. at 321.

[760] Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (statute imposing generalized monetary liability); Babbitt v. Youpee, 519 U.S. 234 (1997) (amended statutory requirement that small fractional interests in allotted Indian lands escheat to tribe, rather than pass on to heirs); Hodel v. Irving, 481 U.S. 704 (1987) (pre-amendment version of escheat statute).

extent the ad hoc character of takings law. It is nonetheless true that not all cases fit neatly into the categories delimited to date, and that still other cases that might be so categorized are explained in different terms by the Court. The overriding objective, the Court frequently reminds us, is to vitalize the Takings Clause's protection against government "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [761] Thus a taking may be found if the effect of regulation is enrichment of the government itself rather than adjustment of the benefits and burdens of economic life in promotion of the public good.[762] Similarly, the Court looks askance at governmental efforts to secure public benefits at a landowner's expense—"government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions." [763]

On the other side of the coin, the nature as well as the extent of property interests affected by governmental regulation sometimes takes on importance. Some strands are more important than others. The right to exclude others from one's land is so basic to ownership that extinguishment of this right ordinarily constitutes a taking.[764] Similarly valued is the right to pass on property to one's heirs.[765]

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[761] Armstrong v. United States, 364 U.S. 40, 49 (1960). For other incantations of this fairness principle, *see Penn Central*, 438 U.S. at 123–24; and Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 322, 333–42–89 (2002).

[762] Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) (government retained the interest derived from funds it required to be deposited with the clerk of the county court as a precondition to certain suits; the interest earned was not reasonably related to the costs of using the courts, since a separate statute required payment for the clerk's services). By contrast, a charge for governmental services "not so clearly excessive as to belie [its] purported character as [a] user fee" does not qualify as a taking. United States v. Sperry Corp., 493 U.S. 52, 62 (1989).

[763] Penn Central Transp. Co. v. New York City, 438 U.S. 104, 128 (1978). In addition to the cases cited there, *see also* Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (viewed as governmental effort to turn private pond into "public aquatic park"); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) ("extortion" of beachfront easement for public as permit condition unrelated to purpose of permit).

[764] Nollan v. California Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (physical occupation occurs with public easement that eliminates right to exclude others); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (imposition of navigation servitude requiring public access to a privately-owned pond was a taking under the circumstances; owner's commercially valuable right to exclude others was taken, and requirement amounted to "an actual physical invasion"). *But see* PruneYard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (requiring shopping center to permit individuals to exercise free expression rights on property onto which public had been invited was not destructive of right to exclude others or "so essential to the use or economic value of [the] property" as to constitute a taking).

[765] Hodel v. Irving, 481 U.S. 704 (1987) (complete abrogation of the right to pass on to heirs fractionated interests in lands constitutes a taking), Babbitt v. Youpee, 519 U.S. 234 (1997) (same result based on "severe" restriction of the right).

Failure to incur administrative (and judicial) delays can result in dismissal of an as-applied taking claim based on ripeness doctrine, an area of takings law that the Court has developed extensively since *Penn Central*. In the leading decision of *Williamson County Regional Planning Commission v. Hamilton Bank*,[766] the Court announced the canonical two-part ripeness test for takings actions brought in federal court. First, for an as-applied challenge, the property owner must obtain from the regulating agency a "final, definitive position" regarding how it will apply its regulation to the owner's land. Second, when suing a state or municipality, the owner must exhaust any possibilities for obtaining compensation from the state or its courts before coming to federal court. Thus, the claim in *Williamson County* was found unripe because the plaintiff had failed to seek a variance (first prong of test), and had not sought compensation from the state courts in question even though they recognized inverse condemnation claims (second prong). Similarly, in *MacDonald, Sommer & Frates v. County of Yolo*,[767] a final decision was found lacking where the landowner had been denied approval for one subdivision plan calling for intense development, but that denial had not foreclosed the possibility that a scaled-down (though still economic) version would be approved. In a somewhat different context, a taking challenge to a municipal rent control ordinance was considered "premature" in the absence of evidence that a tenant hardship provision had ever been applied to reduce what would otherwise be considered a reasonable rent increase.[768] Beginning with *Lucas* in 1992, however, the Court's ripeness determinations have displayed an impatience with formalistic reliance on the "final decision" rule, while nonetheless explicitly reaffirming it. In *Palazzolo v. Rhode Island*,[769] for example, the Court saw no point in requiring the landowner to apply for approval of a scaled-down development of his wetland, since the regulations at issue made plain that no development at all would be permitted there. "[O]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."[770]

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[766] 473 U.S. 172 (1985).
[767] 477 U.S. 340 (1986).
[768] Pennell v. City of San Jose, 485 U.S. 1 (1988).
[769] 533 U.S. 606 (2001).
[770] 533 U.S. at 620. *See also* Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) (taking claim ripe despite plaintiff's not having applied for sale of her transferrable development rights, because no discretion remains to agency and value of such rights is a simple issue of fact).

Facial challenges dispense with the *Williamson County* final decision prerequisite, though at great risk to the plaintiff in that, without pursuing administrative remedies, a claimant often lacks evidence that a statute has the requisite economic impact on his or her property.[771]

The requirement that state remedies be exhausted before bringing a federal taking claim to federal court has occasioned countless dismissals of takings claims brought initially in federal court, while at the same time posing a bar under doctrines of preclusion to filing first in state court, per *Williamson County*, then relitigating in federal court. The effect in many cases is to keep federal takings claims out of federal court entirely—a consequence the plaintiffs' bar has long argued could not have been intended by the Court. In *San Remo Hotel, L.P. v. City and County of San Francisco*,[772] the Court unanimously declined to create an exception to the federal full faith and credit statute[773] that would allow relitigation of federal takings claims in federal court. Nor, said the Court, may an *England* reservation of the federal taking claim in state court[774] be used to require a federal court to review the reserved claim, regardless of what issues the state court may have decided. While concurring in the judgment, four justices asserted that the state-exhaustion prong of *Williamson County* "may have been mistaken."[775]

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[771] *See*, *e.g.*, Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 295–97 (1981) (facial challenge to surface mining law rejected); United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985) (mere permit requirement does not itself take property); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493–502 (1987) (facial challenge to anti-subsidence mining law rejected).

[772] 545 U.S. 323 (2005).

[773] 28 U.S.C. § 1738. The statute commands that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . ." The statute has been held to encompass the doctrines of claim and issue preclusion.

[774] *See* England v. Louisiana Bd. of Medical Examiners, 375 U.S. 411 (1964).

[775] *San Remo Hotel*, 545 U.S. at 348 (Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas).

SIXTH AMENDMENT

RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

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RIGHTS OF ACCUSED IN CRIMINAL PROSECUTIONS

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

CRIMINAL PROSECUTIONS

Coverage

Like with other provisions of the Bill of Rights, the application of the Sixth Amendment evolved. In considering a bill of rights in August 1789, the House of Representatives adopted a proposal to guarantee a right to a jury trial in state prosecutions,[1] but the Senate rejected the proposal, and the 1869 case of *Twitchell v. Commonwealth* ended any doubt that the states were beyond the direct reach of the Sixth Amendment.[2] The reach of the Amendment thus being then confined to federal courts, questions arose as to its application in federally established courts not located within a state. The Court found that criminal prosecutions in the District of Columbia[3] and in incorporated territories[4] must conform to the Amendment, but those in the unincorporated territories need not.[5] Under the *Consular* cases, of which the leading case is *In re Ross*, the Court at one time held that the Sixth Amendment reached only citizens and others within the United States or brought to the United States

[1] 1 ANNALS OF CONGRESS 755 (August 17, 1789).

[2] 74 U.S. (7 Wall.) 321, 325–27 (1869).

[3] Callan v. Wilson, 127 U.S. 540 (1888).

[4] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879). *See also* Lovato v. New Mexico, 242 U.S. 199 (1916).

[5] Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922); Dorr v. United States, 195 U.S. 138 (1904). These holdings are, of course, merely one element of the doctrine of the *Insular Cases*, De Lima v. Bidwell, 182 U.S. 1 (1901); and Downes v. Bidwell, 182 U.S. 244 (1901), concerned with the "Constitution and the Advance of the Flag," *supra*. *Cf.* Rassmussen v. United States, 197 U.S. 516 (1905).

for trial, and not to citizens residing or temporarily sojourning abroad.[6] *Reid v. Covert* made this holding inapplicable to proceedings abroad by United States authorities against American civilians.[7] Further, though not applicable to the states by the Amendment's terms, the Court has come to protect all the rights guaranteed in the Sixth Amendment against state abridgment through the Due Process Clause of the Fourteenth Amendment.[8]

The Sixth Amendment applies in criminal prosecutions. Only those acts that Congress has forbidden, with penalties for disobedience of its command, are crimes.[9] Actions to recover penalties imposed by act of Congress generally but not invariably have been held not to be criminal prosecutions,[10] nor are deportation proceedings,[11], nor appeals or post-conviction applications for collateral relief,[12] but contempt proceedings, which at one time were not considered criminal prosecutions, are now considered to be criminal prosecutions for purposes of the Amendment.[13]

RIGHT TO A SPEEDY AND PUBLIC TRIAL

Speedy Trial

Source and Rationale.—The Magna Carta declared "[w]ee shall not . . . deny or delay Justice and right, neither the end, which is

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[6] *In re* Ross, 140 U.S. 453 (1891) (holding that a United States citizen has no right to a jury in a trial before a United States consul abroad for a crime committed within a foreign nation).

[7] 354 U.S. 1 (1957) (holding that civilian dependents of members of the Armed Forces overseas could not constitutionally be tried by court-martial in time of peace for capital offenses committed abroad). Four Justices, Black, Douglas, Brennan, and Chief Justice Warren, disapproved *Ross* as "resting . . . on a fundamental misconception" that the Constitution did not limit the actions of the United States Government against United States citizens abroad, id. at 5–6, 10–12, and evinced some doubt with regard to the *Insular Cases* as well. Id. at 12–14. Justices Frankfurter and Harlan, concurring, would not accept these strictures, but were content to limit *Ross* to its particular factual situation and to distinguish the *Insular Cases*. Id. at 41, 65. *Cf.* Middendorf v. Henry, 425 U.S. 25, 33–42 (1976) (declining to decide whether there is a right to counsel in a court-martial, but ruling that the summary court-martial involved in the case was not a "criminal prosecution" within the meaning of the Amendment).

[8] Citation is made in the sections dealing with each provision.

[9] United States v. Hudson & Goodwin, 11 U.S. (7 Cr.) 32 (1812); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816); United States v. Britton, 108 U.S. 199, 206 (1883); United States v. Eaton, 144 U.S. 677, 687 (1892).

[10] Oceanic Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. United States, 213 U.S. 103 (1909); United States v. Regan, 232 U.S. 37 (1914).

[11] United States ex rel. Turner v. Williams, 194 U.S. 279, 289 (1904); Zakonaite v. Wolf, 226 U.S. 272 (1912).

[12] *Cf.* Evitts v. Lucey, 469 U.S. 387 (1985) (right to counsel on criminal appeal a matter determined under due process analysis).

[13] *Compare In re* Debs, 158 U.S. 564 (1895), *with* Bloom v. Illinois, 391 U.S. 194 (1968).

Justice, nor the meane, whereby we may attaine to the end, and that is the law."[14] Much the same language was incorporated into the Virginia Declaration of Rights of 1776[15] and from there into the Sixth Amendment. The right to a speedy trial is a right of an accused, but it serves the interests of defendants and society alike. The provision is "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself."[16] But on the other hand, "there is a societal interest in providing a speedy trial which exists separate from and at times in opposition to the interests of the accused." Persons in jail must be supported at considerable public expense and often families must be assisted as well. Persons free in the community after arrest may commit other crimes, lengthy intervals between arrest and trial may promote "bail jumping," and growing backlogs of cases may motivate plea bargaining that does not always match society's expectations for justice. And delay may retard the deterrent and rehabilitative effects of the criminal law.[17]

Application and Scope.—"The history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." So finding, the Supreme Court held in the 1967 case of *Klopfer v. North Carolina* that the right to a speedy trial is one of those "fundamental" liberties that the Due Process Clause of the Fourteenth Amendment makes applicable to the states.[18] But beyond its widespread applicability in state and federal prosecutions are questions of when the right attaches and detaches, when it is violated, and how violations may be remedied.

The timeline between the commission of a crime and its trial may include an extended period for gathering evidence and decid-

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[14] Ch. 40 of the 1215 Magna Carta, a portion of ch. 29 of the 1225 reissue, translated and quoted by E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (Garland 1979 facsimile of 1642 ed.). *See also* Klopfer v. North Carolina, 386 U.S. 213, 223–24 (1967). The *Klopfer* Court cites an even earlier reference to a right to a speedy trial, dating from 1166. Id. at 223.

[15] 7 F. Thorpe, *The Federal and State Constitutions* H. DOC. NO. 357, 59TH CONGRESS, 2D SESS. 8, 3813 (1909).

[16] United States v. Ewell, 383 U.S. 116, 120 (1966). *See also* Klopfer v. North Carolina, 386 U.S. 213, 221–22 (1967); Smith v. Hooey, 393 U.S. 374, 377–379 (1969); Dickey v. Florida, 389 U.S. 30, 37–38 (1970).

[17] Barker v. Wingo, 407 U.S. 514, 519 (1972); Dickey v. Florida, 398 U.S. 30, 42 (1970) (Justice Brennan concurring). The Speedy Trial Act of 1974, Pub. L. 93–619, 88 Stat. 2076, 18 U.S.C. §§ 3161–74, codified the law with respect to the right, intending "to give effect to the sixth amendment right to a speedy trial." S. REP. NO. 1021, 93d Congress, 2d Sess. 1 (1974).

[18] Klopfer v. North Carolina, 386 U.S. 213, 226 (1967).

ing to commence a prosecution. Prejudice that may result from delays between discovering a crime and completing its investigation, or between discovering sufficient evidence to proceed against a suspect and instituting proceedings, is guarded against primarily by statutes of limitation, which represent a legislative judgment with regard to permissible periods of delay.[19] The protection afforded by the speedy trial guarantee of the Sixth Amendment "is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." [20] Nevertheless, invocation of the right need not always await indictment, information, or other formal charge but can begin with the actual restraints imposed by arrest if those restraints precede the formal preferring of charges.[21] In two cases involving both detention and formal charges, the Court held that the speedy trial guarantee had been violated by states that brought criminal charges against persons who were already incarcerated in prisons of other jurisdictions when the states that brought the criminal charges had ignored the defendants' requests to be given prompt trials and had made no effort through requests to the prison authorities of the other jurisdictions to obtain custody of the prisoners for purposes of trial.[22] But an individual's speedy trial rights can be at issue even when he is not subject to detention and it is uncertain whether the government will ever pursue further prosecution. Thus, a state prac-

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[19] United States v. Marion, 404 U.S. 307, 322–23 (1971). *Cf.* United States v. Toussie, 397 U.S. 112, 114–15 (1970). In some circumstances, pre-accusation delay could constitute a due process violation but not a speedy trial problem. If prejudice results to a defendant because of the government's delay, a court should balance the degree of prejudice against the reasons for delay given by the prosecution. *Marion*, 404 U.S. at 324; United States v. Lovasco, 431 U.S. 783 (1977); United States v. MacDonald, 456 U.S. 1, 8 (1982).

[20] United States v. Marion, 404 U.S. 307, 313 (1971). Justices Douglas, Brennan, and Marshall disagreed, arguing that the "right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pretrial indictment delays as it is to post-indictment delays," but concurring because they did not think the guarantee violated under the facts of the case. Id. at 328. In United States v. MacDonald, 456 U.S. 1 (1982), the Court held the clause was not implicated by the action of the United States when, in May of 1970, it proceeded with a charge of murder against defendant under military law but dismissed the charge in October of that year, and he was discharged in December. In June of 1972, the investigation was reopened, but a grand jury was not convened until August of 1974, and MacDonald was not indicted until January of 1975. The period between dismissal of the first charge and the later indictment had none of the characteristics which called for application of the speedy trial clause. Only the period between arrest and indictment must be considered in evaluating a speedy trial claim. *Marion* and *MacDonald* were applied in United States v. Loud Hawk, 474 U.S. 302 (1986), holding the speedy trial guarantee inapplicable to the period during which the government appealed dismissal of an indictment, since during that time the suspect had not been subject to bail or otherwise restrained.

[21] United States v. Marion, 404 U.S. 307, 320, 321 (1971).

[22] Smith v. Hooey, 393 U.S. 374 (1969); Dickey v. Florida, 398 U.S. 30 (1970).

tice permitting a prosecutor to take *nolle prosequi* with leave, which discharged an indicted defendant from custody but left him subject at any time thereafter to prosecution at the discretion of the prosecutor, was condemned as violating the guarantee of a speedy trial.[23]

The Court has, however, distinguished the concluding phase of a criminal prosecution—or the period between conviction and sentencing—from earlier phases involving (1) the investigation to determine whether to arrest a suspect and bring charges and (2) the period between when charges are brought and when the defendant is convicted upon trial or a guilty plea.[24] In *Betterman v. Montana*, the Court held that the constitutional guarantee of a speedy trial "detaches" once the defendant is convicted and, thus, does not protect against delays in sentencing.[25] The Court reached this conclusion, in part, by analogizing the speedy trial right to other protections that cease to apply upon conviction.[26] The *Betterman* Court's conclusion was also based on originalist reasoning, noting that when the Sixth Amendment was adopted, the term "accused" implied a status preceding conviction, while the term "trial" connoted a discrete event that would be followed by sentencing.[27] Practical considerations also informed the Court's conclusion. In particular, the *Betterman* Court raised concerns about the potential "windfall" that defendants would enjoy if the standard remedy for speedy trial violations—namely, dismissal of the charges—were to be applied after conviction.[28] Finally, the Court, relying on the federal government's and states' practices in implementing the speedy trial guarantee, observed that the federal Speedy Trial Act and "numerous state analogs" impose precise time limits for charging and trial, but are silent with respect to sentencing, suggesting that historical practice was consistent with the Court's interpretation of the scope of the Speedy Trial Clause.[29] At the same time, the Court did not view the reliance on plea agreements, instead of trials, in the contemporary criminal justice system as requiring a different outcome, noting that there are other protections against excessive delays in sen-

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[23] Klopfer v. North Carolina, 386 U.S. 213 (1967) (the statute of limitations had been tolled by the indictment). In Pollard v. United States, 352 U.S. 354 (1957), the majority assumed and the dissent asserted that sentence is part of the trial and that too lengthy or unjustified a delay in imposing sentence could run afoul of this guarantee.

[24] Betterman v. Montana, 578 U.S. ___, No. 14–1457, slip op. at 3 (2016).

[25] *Id.* at 1, 3.

[26] *Id.* at 4 (noting, for example, that proof beyond a reasonable doubt is required for conviction, but sentencing factors need only be proved by a preponderance of the evidence).

[27] *Id.* at 4–5.

[28] *Id.* at 6–7.

[29] *Id.* at 7–8.

tencing available to defendants, including the Due Process Clause and Federal Rule of Criminal Procure 32(b)(1).[30]

When the Right is Denied.—"The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."[31] No length of time is *per se* too long to pass scrutiny under this guarantee,[32] but neither does the defendant have to show actual prejudice by delay.[33] The Court, rather, has adopted an ad hoc balancing approach. "We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[34]

The fact of delay triggers an inquiry and is dependent on the circumstances of the case. Reasons for delay will vary. A deliberate delay for advantage will weigh heavily, whereas the absence of a witness would justify an appropriate delay, and such factors as crowded dockets and negligence will fall between these other factors.[35] It is the duty of the prosecution to bring a defendant to trial, and the

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[30] *Id.* at 8–10 (noting, among other things that the Due Process Clause serves as a "backstop against exorbitant delay"). The majority in *Betterman* did not address how a due process claim for an allegedly excessive delay in sentencing should be analyzed.

[31] Beavers v. Haubert, 198 U.S. 77, 87 (1905) (holding that the guarantee could not be invoked by a defendant first indicted in one district to prevent removal to another district where he had also been indicted). A determination that a defendant has been denied his right to a speedy trial results in a decision to dismiss the indictment or to reverse a conviction in order that the indictment be dismissed. Strunk v. United States, 412 U.S. 434 (1973). A trial court denial of a motion to dismiss on speedy trial grounds is not an appealable order under the "collateral order" exception to the finality rule. One must raise the issue on appeal from a conviction. United States v. MacDonald, 435 U.S. 850 (1977).

[32] *Cf.* Pollard v. United States, 352 U.S. 354 (1957); United States v. Ewell, 383 U.S. 116 (1966). *See* United States v. Provoo, 350 U.S. 857 (1955), *aff'g* 17 F.R.D. 183 (D. Md. 1955).

[33] United States v. Marion, 404 U.S. 307, 320 (1971); Barker v. Wingo, 407 U.S. 514, 536 (1972) (Justice White concurring).

[34] Barker v. Wingo, 407 U.S. 514, 530 (1972). For the federal courts, Congress under the Speedy Trial Act of 1974 imposed strict time deadlines, replacing the *Barker* factors.

[35] Barker v. Wingo, 407 U.S. 514, 531 (1972). Delays caused by the prosecution's interlocutory appeal will be judged by the *Barker* factors, of which the second—the reason for the appeal—is the most important. United States v. Loud Hawk, 474 U.S. 302 (1986) (no denial of speedy trial, since prosecution's position on appeal was strong, and there was no showing of bad faith or dilatory purpose). If the interlocutory appeal is taken by the defendant, he must "bear the heavy burden of showing an unreasonable delay caused by the prosecution [or] wholly unjustifiable delay by the appellate court" in order to win dismissal on speedy trial grounds. Id. at 316.

failure of the defendant to demand the right is not to be construed as a waiver of the right.[36] Yet, the defendant's acquiescence in delay when it works to his advantage should be considered against his later assertion that he was denied the guarantee, while the defendant's responsibility for the delay would preclude a claim altogether. A delay caused by assigned counsel should generally be attributed to the defendant, not to the state. However, "[d]elay resulting from a systemic 'breakdown in the public defender system' could be charged to the State." [37] Finally, a court should look to the possible prejudices and disadvantages suffered by a defendant during a delay.[38]

Public Trial

"The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the letter de cachet. All of these institutions obviously symbolized a menace to liberty. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." [39]

The Supreme Court has cited many civic and process-related purposes served by open trials: they help to ensure the criminal defendant a fair and accurate adjudication of guilt or innocence; they provide a public demonstration of fairness; they discourage perjury, the misconduct of participants, and decisions based on secret bias or partiality. Open trials educate the public about the criminal justice system, give legitimacy to it, and have the prophylactic effect of enabling the public to see justice done.[40] Though the Sixth Amendment expressly grants the accused a right to a public trial,[41] the

[36] Barker v. Wingo, 407 U.S. at 528. *See generally* id. at 523–29. Waiver is "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and it is not to be presumed but must appear from the record to have been intelligently and understandingly made. Carnley v. Cochran, 369 U.S. 506, 516 (1962).

[37] Vermont v. Brillon, 129 S. Ct. 1283, 1292 (2009) (citation omitted).

[38] Barker v. Wingo, 407 U.S. 514, 532 (1972).

[39] *In re* Oliver, 333 U.S. 257, 268–70 (1948) (citations omitted). Other panegyrics to the value of openness, accompanied with much historical detail, are Gannett Co. v. DePasquale, 443 U.S. 368, 406, 411–33 (1979) (Justice Blackmun concurring in part and dissenting in part); Richmond Newspapers v. Virginia, 448 U.S. 555, 564–73 (1980) (plurality opinion of Chief Justice Burger); id. at 589–97 (Justice Brennan concurring); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603–07 (1982).

[40] Richmond Newspapers v. Virginia, 448 U.S. 555, 569–73 (1980) (plurality opinion of Chief Justice Burger); id. at 593–97 (Justice Brennan concurring).

[41] Estes v. Texas, 381 U.S. 532, 538–39 (1965).

Court has found the right to be so fundamental to the fairness of the adversary system that it is independently protected against state deprivation by the Due Process Clause of the Fourteenth Amendment.[42] The First Amendment right of public access to court proceedings also weighs in favor of openness.[43]

The Court has borrowed from First Amendment cases in protecting the right to a public trial under the Sixth Amendment. Closure of trials or pretrial proceedings over the objection of the accused may be justified only if the state can show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[44] In *Waller v. Georgia*,[45] the Court held that an accused's Sixth Amendment rights had been violated by closure of all 7 days of a suppression hearing in order to protect persons whose phone conversations had been taped, when less than 2½ hours of the hearing had been devoted to playing the tapes. The need for openness at suppression hearings "may be particularly strong," the Court indicated, because the conduct of police and prosecutor is often at issue.[46] Relying on *Waller* and First Amendment precedent, the Court similarly held that an accused's Sixth Amendment right to a public trial had been violated when a trial court closed jury selection proceedings without having first explored alternatives to closure on its own initiative.[47]

The Sixth Amendment right to a public trial and the First Amendment right to public access both presume that opening criminal proceedings helps ensure their fairness, but there are circumstances in which an accused might consider openness and its attendant publicity to be unfairly prejudicial. In this regard, the Sixth Amendment right of an accused to a public trial does not carry with it a right to a private trial. Rather, it is the accused's broader right to a fair trial and the government's interest in orderly judicial admin-

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[42] *In re* Oliver, 333 U.S. 257 (1948); Levine v. United States, 362 U.S. 610 (1960). Both cases were contempt proceedings which were not then "criminal prosecutions" to which the Sixth Amendment applied (for the modern rule *see* Bloom v. Illinois, 391 U.S. 194 (1968)), so that the cases were wholly due process holdings. *Cf.* Richmond Newspapers v. Virginia, 448 U.S. 555, 591 n.16 (1980) (Justice Brennan concurring).

[43] The Court found a qualified First Amendment right for the public to attend criminal trials in Richmond Newspapers v. Virginia. 448 U.S. 555 (1980) (opinion of Chief Justice Burger); id. at 582 (Justice Stevens concurring); id. at 584 (Justice Brennan concurring); id. at 598 (Justice Stewart concurring); id. at 601 (Justice Blackmun concurring). *See* First Amendment, "Government and the Conduct of Trials," *supra*.

[44] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) (Press-Enterprise I).

[45] 467 U.S. 39 (1984).

[46] Waller v. Georgia, 467 U.S. 39, 47 (1984) (indicating that the *Press-Enterprise I* standard governs such 6th Amendment cases).

[47] Presley v. Georgia, 558 U.S. ___, No. 09–5270, slip op. (2010) (per curiam).

istration that are weighed in the balance against the public's First Amendment right to access.

The Court has no preset constitutional priorities in resolving these conflicts. Still, certain factors are evident in the Court's analysis, including whether restrictions on access are complete or partial, permanent or time-limited, or imposed with or without full consideration of alternatives. When the complete closure of the record of a normally open proceeding is sought, the accused faces a formidable burden. Thus, in *Press-Enterprise Co. v. Superior Court* the Court reversed state closure of a preliminary hearing in a notorious murder trial, a closure signed off on by the defendant, prosecution, and trial judge: "If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[48] In the earlier decision of *Gannett Co. v. DePasquale*, by contrast, the Court upheld a temporary denial of public access to the transcript of a hearing to suppress evidence, emphasizing that the Sixth Amendment guarantee to a public trial is primarily a personal right of the defendant, not an embodiment of a common law right to open proceedings in favor of the public,[49] and further finding that any First Amendment right to access that might have existed was outweighed by the circumstances of the case.[50] Other cases disfavoring open access have involved press coverage that was found to be so inflammatory or disruptive as to undermine the basic integrity, orderliness, and reliability of the trial process.[51] Nevertheless, a First Amendment right to public access has found firmer footing over time, and the Court is reluctant to recognize any *per se* rules to wall off criminal proceedings, preferring in-

[48] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986) (Press-Enterprise II).

[49] *See* Estes v. Texas, 381 U.S. 532, 538–39 (1965).

[50] 443 U.S. 368 (1979). Cf. Nixon v. Warner Communications, 435 U.S. 589, 610 (1978).

[51] Estes v. Texas, 381 U.S. 532 (1965); *see also* Sheppard v. Maxwell, 384 U.S. 333 (1966). *Compare* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (prior restraint on pretrial publicity held unconstitutional). *Estes* found that live television coverage of criminal trials was an inherent violation of due process, requiring no specific showing of actual prejudice. This holding was overturned in Chandler v. Florida. 449 U.S. 560 (1981)

stead that any restrictions be premised on particularized findings by the trial judge and an exploration of less restrictive options.[52]

RIGHT TO TRIAL BY IMPARTIAL JURY

Jury Trial

By the time the United States Constitution and the Bill of Rights were drafted and ratified, the institution of trial by jury was almost universally revered, so revered that its history had been traced back to Magna Carta.[53] The jury began in the form of a grand or presentment jury with the role of inquest and was started by Frankish conquerors to discover the King's rights. Henry II regularized this type of proceeding to establish royal control over the machinery of justice, first in civil trials and then in criminal trials. Trial by petit jury was not employed at least until the reign of Henry III, in which the jury was first essentially a body of witnesses, called for their knowledge of the case; not until the reign of Henry VI did it become the trier of evidence. It was during the seventeenth century that the jury emerged as a safeguard for the criminally accused.[54] Thus, in the eighteenth century, Blackstone could commemorate the institution as part of a "strong and two-fold barrier . . . between the liberties of the people and the prerogative of the crown" because "the truth of every accusation . . . . [must] be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion."[55] The right was guaranteed in the constitutions of the original 13 states, was guaranteed in the body of the Constitution[56] and in the Sixth Amendment, and the constitution of every state entering the Union thereafter in one form or another protected the right to jury trial in criminal cases.[57] "Those who emigrated to this country from England brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around

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[52] Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Chandler v. Florida, 449 U.S. 560 (1981); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[53] Historians no longer accept this attribution. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249, 265 (1892), and the Court has noted this. Duncan v. Louisiana, 391 U.S. 145, 151 n.16 (1968).

[54] W. FORSYTH, HISTORY OF TRIAL BY JURY (1852).

[55] W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349–350 (T. Cooley, 4th ed. 1896). The other of the "two-fold barrier" was, of course, indictment by grand jury.

[56] In Art. III, § 2.

[57] Duncan v. Louisiana, 391 U.S. 145, 153 (1968).

and interposed barriers on every side against the approaches of arbitrary power.'" [58]

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]he jury trial provisions . . . reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." [59]

Because "a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants," the Sixth Amendment provision is binding on the states through the Due Process Clause of the Fourteenth Amendment.[60] But, as it cannot be said that every criminal trial or any particular trial that is held without a jury is unfair,[61] a defendant may waive the right and go to trial before a judge alone.[62]

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[58] Thompson v. Utah, 170 U.S. 343, 349–50 (1898), quoting 3 J. Story, Commentaries on the Constitution of the United States 1773 (1833).

[59] Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968). At other times the function of accurate factfinding has been emphasized. *E.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971). Although federal judges may comment upon the evidence, the right to a jury trial means that the judge must make clear to the jurors that such remarks are advisory only and that the jury is the final determiner of all factual questions. Quercia v. United States, 289 U.S. 466 (1933).

[60] Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968).

[61] 391 U.S. at 159. Thus, state trials conducted before *Duncan* was decided were held to be valid still. DeStefano v. Woods, 392 U.S. 631 (1968).

[62] Patton v. United States, 281 U.S. 276 (1930). As with other waivers, this one must be by the express and intelligent consent of the defendant. A waiver of jury trial must also be with the consent of the prosecution and the sanction of the court. A refusal by either the prosecution or the court to defendant's request for consent to waive denies him no right since he then gets what the Constitution guarantees, a jury trial. Singer v. United States, 380 U.S. 24 (1965). It may be a violation of defendant's rights to structure the trial process so as effectively to encourage him "need-

The Attributes and Function of the Jury.—It was previously the Court's position that the right to a jury trial meant "a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted."[63] It had therefore been held that this included trial by a jury of 12 persons[64] who must reach a unanimous verdict[65] and that the jury trial must be held during the first court proceeding and not *de novo* at the first appellate stage.[66] However, as it extended the guarantee to the states, the Court indicated that at least some of these standards were open to re-examination,[67] and in subsequent cases it has done so. In *Williams v. Florida*,[68] the Court held that the fixing of jury size at 12 was "a historical accident" that, although firmly established when the Sixth Amendment was proposed and ratified, was not required as an attribute of the jury system, either as a matter of common-law background[69] or by any ascertainment of the intent of the framers.[70] Being bound neither by history nor

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lessly" to waive or to penalize the decision to go to the jury, but the standards here are unclear. *Compare* United States v. Jackson, 390 U.S. 570 (1968), *with* Brady v. United States, 397 U.S. 742 (1970), *and* McMann v. Richardson, 397 U.S. 759 (1970), and *see also* State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1971), *cert. denied*, 408 U.S. 942 (1972).

[63] Patton v. United States, 281 U.S. 276, 288 (1930).

[64] Thompson v. Utah, 170 U.S. 343 (1898). Dicta in other cases was to the same effect. Maxwell v. Dow, 176 U.S. 581, 586 (1900); Rassmussen v. United States, 197 U.S. 516, 519 (1905); Patton v. United States, 281 U.S. 276, 288 (1930).

[65] Andres v. United States, 333 U.S. 740 (1948). *See* dicta in Maxwell v. Dow, 176 U.S. 581, 586 (1900); Patton v. United States, 281 U.S. 276, 288 (1930).

[66] Callan v. Wilson, 127 U.S. 540 (1888). Preserving *Callan*, as being based on Article II, § 2, as well as on the Sixth Amendment and being based on a more burdensome procedure, the Court in Ludwig v. Massachusetts, 427 U.S. 618 (1976), approved a state two-tier system under which persons accused of certain crimes must be tried in the first instance in the lower tier without a jury and if convicted may appeal to the second tier for a trial de novo by jury. Applying a due process standard, the Court, in an opinion by Justice Blackmun, found that neither the imposition of additional financial costs upon a defendant, nor the imposition of increased psychological and physical hardships of two trials, nor the potential of a harsher sentence on the second trial impermissibly burdened the right to a jury trial. Justices Stevens, Brennan, Stewart, and Marshall dissented. Id. at 632. *See also* North v. Russell, 427 U.S. 328 (1976).

[67] Duncan v. Louisiana, 391 U.S. 145, 158 n.30 (1968); DeStefano v. Woods, 392 U.S. 631, 632–33 (1968).

[68] 399 U.S. 78 (1970). Justice Marshall would have required juries of 12 in both federal and state courts, id. at 116, while Justice Harlan contended that the Sixth Amendment required juries of 12, although his view of the due process standard was that the requirement was not imposed on the states. Id. at 117.

[69] The development of 12 as the jury size is traced in *Williams*, 399 U.S. at 86–92.

[70] 399 U.S. at 92–99. Although the historical materials were scanty, the Court thought it more likely than not that the framers of the Bill of Rights did not intend to incorporate into the word "jury" all its common-law attributes. This conclusion was drawn from the extended dispute between House and Senate over inclusion of

framers' intent, the Court thought the "relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." The size of the jury, the Court continued, bore no discernable relationship to the purposes of jury trial—the prevention of oppression and the reliability of factfinding. Furthermore, there was little reason to believe that any great advantage accrued to the defendant by having a jury composed of 12 rather than six, which was the number at issue in the case, or that the larger number appreciably increased the variety of viewpoints on the jury. A jury should be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility that a cross-section of the community will be represented on it, but the Court did not speculate whether there was a minimum permissible size and it recognized the propriety of conditioning jury size on the seriousness of the offense.[71]

When the unanimity rule was reconsidered, the division of the Justices was such that different results were reached for state and federal courts.[72] Applying the same type of analysis as that used in *Williams*, four Justices acknowledged that unanimity was a common-law rule but observed for the reasons reviewed in *Williams* that it seemed more likely than not that the framers of the Sixth Amendment had not intended to preserve the requirement within the term "jury." Therefore, the Justices undertook a functional analysis of the jury and could not discern that the requirement of unanimity materially affected the role of the jury as a barrier against oppression and as a guarantee of a commonsense judgment of laymen. The Justices also determined that the unanimity requirement is not implicated in the constitutional requirement of proof beyond a reasonable doubt, and is not necessary to preserve the feature of the requisite

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a "vicinage" requirement in the clause, which was a common law attribute, and the elimination of language attaching to jury trials their "accustomed requisites." *But see* id. at 123 n.9 (Justice Harlan).

[71] 399 U.S. at 99–103. In Ballew v. Georgia, 435 U.S. 223 (1978), the Court unanimously, but with varying expressions of opinion, held that conviction by a unanimous five-person jury in a trial for a nonpetty offense deprived an accused of his right to trial by jury. Although readily admitting that the line between six and five members is not easy to justify, the Justices believed that reducing a jury to five persons in nonpetty cases raised substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six.

[72] Apodaca v. Oregon, 406 U.S. 404 (1972), involved a trial held after decision in Duncan v. Louisiana, 391 U.S. 145 (1968), and thus concerned whether the Sixth Amendment itself required jury unanimity, while Johnson v. Louisiana, 406 U.S. 356 (1972), involved a pre-*Duncan* trial and thus raised the question whether due process required jury unanimity. *Johnson* held, five-to-four, that the due process requirement of proof of guilt beyond a reasonable doubt was not violated by a conviction on a nine-to-three jury vote in a case in which punishment was necessarily at hard labor.

cross-section representation on the jury.[73] Four dissenting Justices thought that omitting the unanimity requirement would undermine the reasonable doubt standard, would permit a majority of jurors simply to ignore those interpreting the facts differently, and would permit oppression of dissenting minorities.[74] Justice Powell, on the other hand, thought that unanimity was mandated in federal trials by history and precedent and that it should not be departed from; however, because it was the Due Process Clause of the Fourteenth Amendment that imposed the basic jury-trial requirement on the states, he did not believe that it was necessary to impose all the attributes of a federal jury on the states. He therefore concurred in permitting less-than-unanimous verdicts in state courts.[75]

Certain functions of the jury are likely to remain consistent between the federal and state court systems. For instance, the requirement that a jury find a defendant guilty beyond a reasonable doubt, which had already been established under the Due Process Clause,[76] has been held to be a standard mandated by the Sixth Amendment.[77] The Court further held that the Fifth Amendment's Due Process Clause and the Sixth Amendment require that a jury find a defendant guilty of every element of the crime with which he is charged, including questions of mixed law and fact.[78] Thus, a district court presiding over a case of providing false statements to a federal agency in violation of 18 U.S.C. § 1001 erred when it took the issue of the "materiality" of the false statement away from the jury.[79] Later, however, the Court backed off from this latter ruling, holding that failure to submit the issue of materiality to the jury in a tax fraud case can constitute harmless error.[80] Subsequently, the Court held that, just as failing to prove materiality to the jury beyond a reasonable doubt can be harmless error, so can failing to prove a sentencing factor to the jury beyond a reasonable doubt.

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[73] Apodaca v. Oregon, 406 U.S. 404 (1972) (Justices White, Blackmun, and Rehnquist, and Chief Justice Burger). Justice Blackmun indicated a doubt that any closer division than nine-to-three in jury decisions would be permissible. Id. at 365.

[74] 406 U.S. at 414, and Johnson v. Louisiana, 406 U.S. 356, 380, 395, 397, 399 (1972) (Justices Douglas, Brennan, Stewart, and Marshall).

[75] 406 U.S. at 366. Burch v. Louisiana, 441 U.S. 130 (1979), however, held that conviction by a non-unanimous six-person jury in a state criminal trial for a nonpetty offense, under a provision permitting conviction by five out of six jurors, violated the right of the accused to trial by jury. Acknowledging that the issue was "close" and that no bright line illuminated the boundary between permissible and impermissible, the Court thought the near-uniform practice throughout the Nation of requiring unanimity in six-member juries required nullification of the state policy. *See also* Brown v. Louisiana, 447 U.S. 323 (1980) (holding *Burch* retroactive).

[76] *See In re* Winship, 397 U.S. 358, 364 (1970).

[77] Sullivan v. Louisiana, 508 U.S. 275 (1993).

[78] United States v. Gaudin, 515 U.S. 506 (1995).

[79] 515 U.S. at 523.

[80] Neder v. United States, 527 U.S. 1 (1999).

"Assigning this distinction constitutional significance cannot be reconciled with our recognition in *Apprendi* that elements and sentencing factors must be treated the same for Sixth Amendment purposes." [81]

When the Jury Trial Guarantee Applies.—The Sixth Amendment is phrased in terms of "all criminal prosecutions," but the Court has always excluded petty offenses from the guarantee to a jury trial in federal courts, defining the line between petty and serious offenses either by the maximum punishment available [82] or by the nature of the offense.[83] This line has been adhered to in the application of the Sixth Amendment to the states,[84] and the Court has now held "that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." [85] A defendant who is prosecuted in a single proceeding for multiple petty offenses, however, does not have a constitutional right to a jury trial, even if the aggregate of sentences authorized for the offense exceeds six months.[86]

The Court has also made some changes in the meaning of the term "criminal proceeding." Previously, the term had been applied only to situations in which a person has been accused of an offense by information or presentment.[87] Thus, a civil action to collect statutory penalties and punitive damages, because not technically criminal, has been held not to implicate the right to jury trial.[88] Subse-

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[81] Washington v. Recuenco, 548 U.S. 212, 220 (2006). *Apprendi* is discussed in the next section.

[82] District of Columbia v. Clawans, 300 U.S. 617 (1937); Schick v. United States, 195 U.S. 65 (1904); Callan v. Wilson, 127 U.S. 540 (1888).

[83] District of Columbia v. Colts, 282 U.S. 63 (1930).

[84] Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968).

[85] Baldwin v. New York, 399 U.S. 66, 69 (1970). Justices Black and Douglas would have required a jury trial in all criminal proceedings in which the sanction imposed bears the indicia of criminal punishment. Id. at 74 (concurring); Cheff v. Schnackenberg, 384 U.S. 373, 384, 386 (1966) (dissenting). Chief Justice Burger and Justices Harlan and Stewart objected to setting this limitation at six months for the States, preferring to give them greater leeway. *Baldwin*, 399 U.S. at 76; Williams v. Florida, 399 U.S. 78, 117, 143 (1970) (dissenting). No jury trial was required when the trial judge suspended sentence and placed defendant on probation for three years. Frank v. United States, 395 U.S. 147 (1969). There is a presumption that offenses carrying a maximum imprisonment of six months or less are "petty," although it is possible that such an offense could be pushed into the "serious" category if the legislature tacks on onerous penalties not involving incarceration. No jury trial is required, however, when the maximum sentence is six months in jail, a fine not to exceed $1,000, a 90-day driver's license suspension, and attendance at an alcohol abuse education course. Blanton v. City of North Las Vegas, 489 U.S. 538, 542–44 (1989).

[86] Lewis v. United States, 518 U.S. 322 (1996).

[87] United States v. Zucker, 161 U.S. 475, 481 (1896).

[88] 161 U.S. at 481. *See also* Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909); Hepner v. United States, 213 U.S. 103 (1909).

quently, however, the Court focused its analysis on the character of the sanction to be imposed, holding that punitive sanctions may not be imposed without adhering to the guarantees of the Fifth and Sixth Amendments.[89] There is, however, no constitutional right to a jury trial in juvenile proceedings, at least in state systems and probably in the federal system as well.[90]

In a long line of cases, the Court had held that no constitutional right to jury trial existed in trials of criminal contempt.[91] In *Bloom v. Illinois*,[92] however, the Court announced that "[o]ur deliberations have convinced us . . . that serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution . . . and that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial." The Court has consistently held, however, that a jury is not required for purposes of determining whether a defendant is insane or mentally retarded and consequently not eligible for the death penalty.[93]

Within the context of a criminal trial, what factual issues are submitted to the jury was traditionally determined by whether the fact to be established is an element of a crime or instead is a sentencing factor.[94] Under this approach, the right to a jury had ex-

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[89] Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). The statute at issue in *Mendoza-Martinez* automatically divested an American of citizenship for departing or remaining outside the United States to evade military service. A later line of cases, beginning in 1967, held that the Fourteenth Amendment broadly barred Congress from involuntarily expatriating any citizen who was born in the United States.

[90] McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[91] *E.g.*, Green v. United States, 356 U.S. 165, 183–87 (1958), and cases cited; United States v. Burnett, 376 U.S. 681, 692–700 (1964), and cases cited. A Court plurality in Cheff v. Schnackenberg, 384 U.S. 373 (1966), held, asserting the Court's supervisory power over the lower federal courts, that criminal contempt sentences in excess of six months imprisonment could not be imposed without a jury trial or adequate waiver.

[92] 391 U.S. 194, 198 (1968). Justices Harlan and Stewart dissented. Id. at 215. As in other cases, the Court drew the line between serious and petty offenses at six months, but because, unlike other offenses, no maximum punishments are usually provided for contempts it indicated the actual penalty imposed should be looked to. Id. at 211. *See also* Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968). The distinction between criminal and civil contempt may be somewhat more elusive. International Union, UMW v. Bagwell, 512 U.S. 821 (1994) (fines levied on the union were criminal in nature where the conduct did not occur in the court's presence, the court's injunction required compliance with an entire code of conduct, and the fines assessed were not compensatory).

[93] Ford v. Wainwright, 477 U.S. 399, 416–417 (1986); Atkins v. Virginia, 536 U.S. 304, 317 (2002); Schriro v. Smith, 546 U.S. 6, 7 (2005). *See* Eighth Amendment, "Limitations on Capital Punishment: Diminished Capacity," *infra*.

[94] In Washington v. Recuenco, however, the Court held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element [of a crime] to the jury, is not structural error," entitling the defendant to automatic reversal, but can be harmless error. 548 U.S. 212, 222 (2006).

tended to the finding of all facts establishing the elements of a crime, but sentencing factors could be evaluated by a judge.[95] Evaluating the issue primarily under the Fourteenth Amendment's Due Process Clause, the Court initially deferred to Congress and the states on this issue, allowing them broad leeway in determining which facts are elements of a crime and which are sentencing factors.[96]

Breaking with this tradition, however, the Court in *Apprendi v. New Jersey* held that a sentencing factor cannot be used to increase the maximum penalty imposed for the underlying crime.[97] "The relevant inquiry is one not of form, but of effect."[98] Apprendi had been convicted of a crime punishable by imprisonment for no more than ten years, but had been sentenced to 12 years based on a judge's findings, by a preponderance of the evidence, that enhancement grounds existed under the state's hate crimes law. "[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum," the Court concluded, "must be submitted to a jury, and proved beyond a reasonable doubt."[99] The one exception *Apprendi* recognized was for sentencing enhancements based on recidivism.[100] In *Alleyne v. United States*, the Court extended Apprendi

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[95] In James v. United States, 550 U.S. 192 (2007), the Court found no Sixth Amendment issue raised when it considered "the *elements of the offense* . . . without inquiring into the specific conduct of this particular offender." Id. at 202 (emphasis in original). The question before the Court was whether, under federal law, attempted burglary, as defined by Florida law, "presents a serious potential risk of physical injury to another" and therefore constitutes a "violent felony," subjecting the defendant to a longer sentence. Id. at 196. In answering this question, the Court employed the "categorical approach" of looking only to the statutory definition and not considering the "particular facts disclosed by the record of conviction." Id. at 202. Thus, "the Court [was] engaging in statutory interpretation, not judicial factfinding," and "[s]uch analysis raises no Sixth Amendment issue." Id. at 214.

[96] For instance, the Court held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence. McMillan v. Pennsylvania, 477 U.S. 79 (1986). After resolving the issue under the Due Process Clause, the Court dismissed the Sixth Amendment jury trial claim as "merit[ing] little discussion." Id. at 93. For more on the due process issue, see the discussion in "Proof, Burden of Proof, and Presumptions," *infra*.

[97] 530 U.S. 466, 490 (2000).

[98] 530 U.S. at 494. "[M]erely because the state legislature placed its hate crime sentence enhancer within the sentencing provisions of the criminal code does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." Id. at 495 (internal quotation omitted).

[99] 530 U.S. at 490.

[100] 530 U.S. at 490. Enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, and a judge may find the existence of previous valid convictions even if the result is a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States is subject to a maximum sentence of two years, but upon proof of a felony record, is subject to a maximum of twenty years). *Almendarez-Torres* was cited with approval on this point in James v. United States, 550 U.S. 192, 214 n.8 (2007) ("prior convictions need not be treated as an element of the of-

to require "that any fact that increases the mandatory minimum [sentence] . . . must be submitted to the jury." [101]

Apprendi's importance soon became evident as the Court applied its reasoning in other situations to strike down state or federal laws on Sixth Amendment grounds.[102] In *Ring v. Arizona*, the Court applied *Apprendi* to invalidate an Arizona law that authorized imposition of the death penalty only if the judge made a factual determination as to the existence of any of several aggravating factors.[103] Although Arizona had required that the judge's findings as to aggravating factors be made beyond a reasonable doubt, and not merely by a preponderance of the evidence, the Court held that the findings must be made by a jury.[104] Similarly, in *Hurst v. Florida*, the Court applied *Apprendi*, as well as the precedent of *Ring*, to invalidate a Florida statute authorizing a "hybrid" proceeding in which the "jury renders an advisory verdict[,] but the judge makes the ultimate sentencing determination[.]" [105] According to the Court, such proceedings run afoul of the Sixth Amendment because the judge,

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fense for Sixth Amendment purposes"). *See also* Parke v. Raley, 506 U.S. 20 (1992) (if the prosecutor has the burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging its validity).

[101] 570 U.S. ___, No. 11–9335, slip op. at 1–2 (2013) (overruling Harris v. United States, 536 U.S. 545 (2002)).

[102] *Apprendi* has influenced the Court's ruling on matters of statutory interpretation. For example, in *Mathis v. United States*, 579 U.S. ___, No. 15–6092, slip op. (2016), a plurality of the Court concluded that the "elements based approach" to interpreting the Armed Career Criminal Act (ACCA)—wherein a judge is prohibited from inquiring into the specific conduct of a particular offender's previous acts in determining whether a sentence enhancement applies—is necessitated by *Apprendi's* holding that generally only a jury, and not a judge, may find facts that increase a maximum penalty. *Id.* at 10; *see also id.* at 1 (Kennedy, J., concurring) (joining the five-Justice majority opinion, but expressing a "reservation" about the majority's reliance on *Apprendi*, "as that case was incorrect, and . . . does not compel the elements based approach."); Descamps v. United States, 570 U.S. ___, No. 11–9540, slip op. at 14 (2013) (noting the "serious Sixth Amendment concerns" that would arise if the element-centric, categorical approach was not adopted with regard to interpreting the ACCA).

[103] 536 U.S. 584 (2002).

[104] "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' . . . the Sixth Amendment requires that they be found by a jury." *Id.* at 509 (quoting *Apprendi*, 530 U.S. at 494 n.19). The Court rejected Arizona's request that it recognize an exception for capital sentencing in order not to interfere with elaborate sentencing procedures designed to comply with the Eighth Amendment. *Id.* at 605–07.

[105] 577 U.S. ___ , No. 14–7505, slip op. at 1–2 (2016) (quoting *Ring*, 536 U.S. at 584 n.6) (quotation marks omitted). In so doing, the Court expressly overruled its earlier decisions in *Spaziano v. Florida*, 468 U.S. 447, 459 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989) (per curiam), which had approved of Florida's "hybrid" proceedings on the grounds that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by a jury." *Id.* at 9 (quoting *Hildwin*, 490 U.S. at 640–41). Both of these decisions had been issued prior to *Ring*.

not the jury, makes the findings of fact that result in the imposition of the death penalty.[106]

In *Blakely v. Washington*,[107] the Court applied *Apprendi* to cast doubt on types of widely adopted reform measures that were intended to foster more consistent sentencing practices. Blakely, who pled guilty to an offense for which the "standard range" under the Washington State's sentencing law was 49 to 53 months, was sentenced to 90 months based on the judge's determination—not derived from facts admitted in the guilty plea—that the offense had been committed with "deliberate cruelty," a basis for an "upward departure" under the statute. The 90-month sentence conformed to statutory limits, but the Court made "clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." [108]

Then, in *United States v. Booker*,[109] the Court held that the same principles limit sentences that courts may impose under the federal Sentencing Guidelines.[110] As the Court restated the principle in *Booker*, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." [111] Attempts to distinguish *Blakely* were rejected. The Court concluded that the fact that the Guidelines were developed by the Sentencing Commission rather than by Congress "lacks constitu-

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[106] *Id.* at 6.

[107] 542 U.S. 296 (2004).

[108] 542 U.S. at 303–304 (italics in original; citations omitted). In Southern Union Co. v. United States, 567 U.S. ___, No. 11–94, slip op. (2012), the Court cited this passage in *Blakely* as a springboard to its conclusion that the *Apprendi* line of cases apply in imposing criminal fines. The maximum fine that could be imposed in *Southern Union Co.* was pegged to the number of days a violation continued, but the jury was not asked to determine the duration of the violation. The Court saw no "principled basis" for treating criminal fines differently from imprisonment or capital punishment. In all these cases, the Sixth Amendment guards against "judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow."

[109] 543 U.S. 220 (2005).

[110] Under the Sentencing Reform Act of 1984, the United States Sentencing Commission adopted binding Sentencing Guidelines, and courts were required to impose sentences within the narrow, defined ranges. A judge could depart from the applicable Guideline only upon finding in writing that an aggravating or mitigating factor was present that had not adequately been considered by the Commission. *See* Mistretta v. United States, 488 U.S. 361 (1989).

[111] 543 U.S. at 244.

tional significance." [112] Instead, the Guidelines were suspect in application because, on the one hand, they curtailed the role of jury factfinding in determining the upper range of a sentence and, on the other hand, they mandated sentences from which a court could depart only in a limited number of cases and after separately finding the existence of factors not presented to the jury.[113] The mandatory nature of the Guidelines was also important to the Court's formulation of a remedy.[114] Rather than engrafting a jury trial requirement onto the Sentencing Reform Act, under which the Guidelines were adopted, the Court instead invalidated two of its provisions, one making application of the Guidelines mandatory, and, concomitantly, one requiring *de novo* review for appeals of departures from the mandatory Guidelines, and held that the remainder of the Act could remain intact.[115] As the Court explained, this remedy "makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." [116]

In *Cunningham v. California*,[117] the Court addressed whether California's determinate state sentencing law, yet another style of legislative effort intended to regularize criminal sentencing, survived the *Booker-Blakely* line of cases. That law, and its implementing rules, required that the trial judge in the case sentence the defendant to 12 years in prison unless the judge found one or more additional "circumstances in aggravation," in which case the sentence would be 16 years. Aggravating circumstances could include specific factual findings made by a judge under a "preponderance of the evidence" standard in apparent violation of *Booker* and *Blakely.* The court was also free to consider "additional criteria reasonably

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[112] 543 U.S. at 237. Relying on Mistretta v. United States, 488 U.S. 361 (1989), the Court also rejected a separation-of-powers argument. Id. at 754–55.

[113] 543 U.S. at 233–35.

[114] There were two distinct opinions of the Court in *Booker*. The first, authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg (the same Justices who comprised the five-Justice *Blakely* majority), applied *Blakely* to find a Sixth Amendment violation; the other, authored by Justice Breyer, and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg (the *Blakely* dissenters joined by Justice Ginsburg), set forth the remedy.

[115] 543 U.S. at 259. Consistent with the role it envisioned for a sentencing judge, the Court substituted a "reasonableness" standard for the statutory *de novo* appellate review standard that it struck down. 543 U.S. at 262.

[116] 543 U.S. at 245–246 (statutory citations omitted). Although not addressed in the *Booker* ruling, a provision of the Sentencing Guidelines that limits district courts from departing from the Guidelines during resentencing (the previous sentence having been vacated) on grounds other than those considered during for the first sentencing, was subsequently struck down as conflicting with the now-advisory nature of the Guidelines. Pepper v. United States, 562 U.S. ___, No. 09–6822, slip op. (2011).

[117] 549 U.S. 270 (2007).

related to the decision being made." [118] The state argued that this latter provision conformed the California sentencing scheme to *Booker*, which contemplated that judges retain discretion to select a specific sentence within a statutory range, subject to appellate review to determine "reasonableness." The Court rejected this argument, finding that the scheme impermissibly allocated sole authority to judges to find the facts that permitted imposition of a higher alternative sentence.[119]

The Court, however, has refused to extend *Apprendi* to a judge's decision to impose sentences for discrete crimes consecutively rather than concurrently.[120] The Court explained that, when a defendant has been convicted of multiple offenses, each involving discrete sentencing prescriptions, the states apply various rules regarding whether a judge may impose the sentences consecutively or concurrently.[121] The Court held that "twin considerations—historical practice and respect for state sovereignty—counsel against extending *Apprendi*'s rule" to preclude judicial fact-finding in this situation, as well.[122]

In *Rita v. United States*, the Court upheld the application, by federal courts of appeals, of the presumption "that a sentence imposed within a properly calculated United States Sentencing Guidelines range is a reasonable sentence." [123] Even if the presumption "increases the likelihood that the judge, not the jury, will find 'sentencing facts,'" the Court wrote, it "does not violate the Sixth Amendment. This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not

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[118] 549 U.S. at 278–79, quoting California Rule 4.408(a).

[119] 549 U.S. at 279–80. "The reasonableness requirement that *Booker* anticipated for the federal system operates *within* the Sixth Amendment constraints delineated in our precedent, not as a substitute for those constraints." 549 U.S. at 292–93.

[120] Oregon v. Ice, 555 U.S. 160 (2009).

[121] Most states follow the common-law tradition of giving judges unfettered discretion over the matter, while some states presume that sentences will run consecutively but allow judges to order concurrent sentences upon finding cause to do so. "It is undisputed," the Court noted, "that States may proceed on [either of these] two tracks without transgressing the Sixth Amendment." *Id.* at 163.

[122] *Id.* at 168. The Court also noted other decisions judges make that are likely to evade the strictures of *Apprendi*, including determining the length of supervised release, attendance at drug rehabilitation programs, terms of community service, and imposition of fines and orders of restitution. *Id.* at 171–72.

[123] 551 U.S. 338, 341 (2007). The Court emphasized that it was upholding "an *appellate* court presumption. Given our explanation in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review. . . . [T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." Id. at 351, quoted in part in Nelson v. United States, 129 S. Ct. 891 (2009) (per curiam), where the Court added, "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable." Id. at 892 (emphasis in original).

determined by a jury and to increase the sentence in consequence. Nor do they prohibit the sentencing judge from taking account of the Sentencing Commission's factual findings or recommended sentences. . . . The Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede). . . . A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the judge to impose that sentence. Still less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone." [124]

In *United States v. Gall*,[125] the Court held that, "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." [126] The Court rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range," and also rejected "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." These approaches, the Court said, "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range." [127]

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[124] 551 U.S. at 352, 353 (emphasis in original). The Court added: "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness. . . . [A]ppellate courts may not presume that every variance from the advisory Guidelines is unreasonable. . . . Several courts of appeals have also rejected a presumption of unreasonableness. . . . However, a number of circuits adhere to the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance." Id. at 354–55.

[125] 128 S. Ct. 586 (2007) (upholding a sentence of probation where the Guidelines had recommended imprisonment).

[126] 128 S. Ct. at 591. "As explained in *Rita* and *Gall*, district courts must treat the Guidelines as the 'starting point and the initial benchmark.'" Kimbrough v. United States, 128 S. Ct. 558 (2007) (upholding lower-than-Guidelines sentence for trafficker in crack cocaine, where sentence "is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses"). A district court judge may determine "that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing." *Kimbrough*, 128 S. Ct. at 564.

[127] 128 S. Ct. at 595. Justice Alito, dissenting, wrote, "we should not forget [that] . . . *Booker* and its antecedents are based on the Sixth Amendment right to trial by jury. . . . It is telling that the rules set out in the Court's opinion in the present case have nothing to do with juries or factfinding and, indeed, that not one of the facts that bears on petitioner's sentence is disputed. What is at issue, instead, is the allocation of the authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing. The yawning gap be-

Subsequently, in *Spears v. United States*,[128] the Court, emphasizing that the Guidelines "are advisory only," clarified "that district courts are entitled to reject and vary categorically from the . . . Guidelines based on a policy disagreement with those Guidelines." [129] In *Spears*, a district court had given a defendant a sentence significantly below the Guidelines for distribution of crack cocaine, noting that the Guidelines required 100 times more powder cocaine than crack cocaine to trigger a particular sentencing range. The Supreme Court held that, if a sentencing court believes "that the 100-to-1 ratio embodied in the sentencing guidelines for the treatment of crack cocaine versus powder cocaine creates 'an unwarranted disparity within the meaning of [18 U.S.C.] § 3553(a),'" then it may vary downward from the Guidelines even when the particular defendant "presents no special mitigating circumstances" to justify a lower sentence.[130]

The *Booker* line of cases addresses the role of the Sentencing Guidelines in imposing and reviewing individual sentences. *Booker*, however, did not overturn the Sentencing Reform Act in its entirety, nor did it abolish the Guidelines themselves. One set of provisions left intact directed the Sentencing Commission to review the Guidelines periodically, authorized it to reduce the Guidelines range for individual offenses and make the reduced ranges retroactive, but also generally foreclosed a court from then reducing a sentence previously imposed to one less than the minimum contained in the amended Guideline range. In *Dillon v. United States*,[131] the Court distinguished this sentence modification process from a sentencing or resentencing, and upheld mandatory limits on judicial reductions of sentences under it.

Impartial Jury

The requirement of an impartial jury is secured not only by the Sixth Amendment, which is as applicable to the states as to the Federal Government,[132] but also by the Due Process and Equal Protection Clauses of the Fourteenth Amendment,[133] and perhaps by

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tween the Sixth Amendment and the Court's opinion should be enough to show that the *Blakely-Booker* line of cases has gone astray." Id. at 605 (Alito, J., dissenting).

[128] 129 S. Ct. 840 (2009) (per curiam).

[129] 129 S. Ct. at 842, 843–44.

[130] 129 S. Ct. at 842.

[131] Dillon v. United States, 560 U.S. ___, No. 09–6338, slip op. (2010).

[132] Irvin v. Dowd, 366 U.S. 717 (1961); Turner v. Louisiana, 379 U.S. 466 (1965); Parker v. Gladden, 385 U.S. 363 (1966); Witherspoon v. Illinois, 391 U.S. 510 (1968); Gonzales v. Beto, 405 U.S. 1052 (1972).

[133] Thus, it violates the Equal Protection Clause to exclude African-Americans from grand and petit juries, Strauder v. West Virginia, 100 U.S. 303 (1880); Alexander v. Louisiana, 405 U.S. 625 (1972), whether defendant is or is not an African-

the Due Process Clause of the Fifth Amendment. In addition, the Court's has directed its supervisory power over the federal system to the issue.[134] Even before the Court extended the right to a jury trial to state courts, it was firmly established that, if a state chose to provide juries, the juries had to be impartial.[135]

Impartiality is a two-fold requirement. First, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[136] This requirement applies only to jury panels or venires from which petit juries are chosen, and not to the composition of the petit juries themselves.[137] "In order to establish a *prima facie* violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[138] Further, once a plaintiff demon-

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American, Peters v. Kiff, 407 U.S. 493 (1972), and exclusion of potential jurors because of their national ancestry is unconstitutional, at least where defendant is of that ancestry as well, Hernandez v. Texas, 347 U.S. 475 (1954); Castaneda v. Partida, 430 U.S. 482 (1977).

[134] In the exercise of its supervisory power over the federal courts, the Court has permitted any defendant to challenge the arbitrary exclusion from jury service of his own or any other class. Glasser v. United States, 315 U.S. 60, 83–87 (1942); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); Ballard v. United States, 329 U.S. 187 (1946). In Taylor v. Louisiana, 419 U.S. 522 (1975), and Duren v. Missouri, 439 U.S. 357 (1979), male defendants were permitted to challenge the exclusion of women as a Sixth Amendment violation.

[135] Turner v. Louisiana, 379 U.S. 466 (1965).

[136] Taylor v. Louisiana, 419 U.S. 522, 528 (1975). *See also* Williams v. Florida, 399 U.S. 78, 100 (1970); Brown v. Allen, 344 U.S. 443, 474 (1953). In Fay v. New York, 332 U.S. 261 (1947), and Moore v. New York, 333 U.S. 565 (1948), the Court in 5-to-4 decisions upheld state use of "blue ribbon" juries from which particular groups, such as laborers and women, had been excluded. With the extension of the jury trial provision and its fair cross section requirement to the States, the opinions in these cases must be considered tenuous, but the Court has reiterated that defendants are not entitled to a jury of any particular composition. *Taylor*, 419 U.S. at 538. Congress has implemented the constitutional requirement by statute in federal courts by the Federal Jury Selection and Service Act of 1968, Pub. L. 90–274, 82 Stat. 53, 28 U.S.C. §§ 1861 *et seq*.

[137] Lockhart v. McCree, 476 U.S. 162 (1986). "We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." 476 U.S. at 173. The explanation is that the fair cross-section requirement "is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)." Holland v. Illinois, 493 U.S. 474, 480 (1990) (emphasis original).

[138] Duren v. Missouri, 439 U.S. 357, 364 (1979). To show that underrepresentation resulted from systematic exclusion requires rigorous evidence beyond merely pointing to a single factor or a host of factors that might have caused fewer mem-

strates a *prima facie* violation, the defendant faces a formidable burden: the jury selection process may be sustained under the Sixth Amendment only if those aspects of the process that result in the disproportionate exclusion of a distinctive group, such as exemption criteria, "manifestly and primarily" advance a "significant state interest."[139] Thus, in one case the Court voided a selection system under which no woman would be called for jury duty unless she had previously filed a written declaration of her desire to be subject to service, and, in another it invalidated a state selection system granting women who so requested an automatic exemption from jury service.[140]

Second, there must be assurance that the jurors chosen are unbiased, i.e., willing to decide the case on the basis of the evidence presented. The Court has held that in the absence of an actual showing of bias, a defendant in the District of Columbia is not denied an impartial jury when he is tried before a jury composed primarily of government employees.[141] A violation of a defendant's right to an impartial jury does occur, however, when the jury or any of its members is subjected to pressure or influence which could impair freedom of action; the trial judge should conduct a hearing in which the defense participates to determine whether impartiality has been undermined.[142] Exposure of the jury to possibly prejudicial material and disorderly courtroom activities may deny impartiality and must be inquired into.[143] Private communications, contact, or tam-

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bers of a distinct group to have been included. Berghuis v. Smith, 559 U.S. ___, No. 08–1402, slip op. (2010).

[139] 439 U.S. at 367–68.

[140] Taylor v. Louisiana, 419 U.S. 522 (1975); Duren v. Missouri, 439 U.S. 357 (1979).

[141] Frazier v. United States, 335 U.S. 497 (1948); Dennis v. United States, 339 U.S. 162 (1950). On common-law grounds, the Court in Crawford v. United States, 212 U.S. 183 (1909), disqualified such employees, but a statute removing the disqualification because of the increasing difficulty in finding jurors in the District of Columbia was sustained in United States v. Wood, 299 U.S. 123 (1936).

[142] Remmer v. United States, 350 U.S. 377 (1956) (attempted bribe of a juror reported by him to authorities); Smith v. Phillips, 455 U.S. 209 (1982) (during trial one of the jurors had been actively seeking employment in the District Attorney's office).

[143] *E.g.*, Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966). Exposure of the jurors to knowledge about the defendant's prior criminal record and activities is not alone sufficient to establish a presumption of reversible prejudice, but on *voir dire* jurors should be questioned about their ability to judge impartially. Murphy v. Florida, 421 U.S. 794 (1975). The Court indicated that under the same circumstances in a federal trial it would have overturned the conviction pursuant to its supervisory power. Id. at 797–98, citing Marshall v. United States, 360 U.S. 310 (1959). Essentially, the defendant must make a showing of prejudice into which the court may then inquire. Chandler v. Florida, 449 U.S. 560, 575, 581 (1981); Smith v. Phillips, 455 U.S. 209, 215–18 (1982); Patton v. Yount, 467 U.S. 1025 (1984).

pering with a jury, or the creation of circumstances raising the dangers thereof, is not to be condoned.[144] When the locality of the trial has been saturated with publicity about a defendant, so that it is unlikely that he can obtain a disinterested jury, he is constitutionally entitled to a change of venue.[145] It is undeniably a violation of due process to subject a defendant to trial in an atmosphere of mob or threatened mob domination.[146]

Because it is too much to expect that jurors can remain uninfluenced by evidence they receive even though they are instructed to use it for only a limited purpose and to disregard it for other purposes, the Court will not permit a confession to be submitted to the jury without a prior determination by the trial judge that it is admissible. A defendant is denied due process, therefore, if he is convicted by a jury that has been instructed to first determine the voluntariness of a confession and then to disregard the confession if it is found to be inadmissible.[147] Similarly invalid is a jury instruction in a joint trial to consider a confession only with regard to the defendant against whom it is admissible, and to disregard that confession as against a co-defendant which it implicates.[148]

In *Witherspoon v. Illinois*,[149] the Court held that the exclusion in capital cases of jurors conscientiously scrupled about capital punishment, without inquiring whether they could consider the imposition of the death penalty in the appropriate case, violated a defendant's constitutional right to an impartial jury. "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus

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[144] Remmer v. United States, 347 U.S. 227 (1954). *See* Turner v. Louisiana, 379 U.S. 466 (1965) (placing jury in charge of two deputy sheriffs who were principal prosecution witnesses at defendant's jury trial denied him his right to an impartial jury); Parker v. Gladden, 385 U.S. 363 (1966) (influence on jury by prejudiced bailiff). *Cf.* Gonzales v. Beto, 405 U.S. 1052 (1972).

[145] Irvin v. Dowd, 366 U.S. 717 (1961) (felony); Rideau v. Louisiana, 373 U.S. 723 (1963) (felony); Groppi v. Wisconsin, 400 U.S. 505 (1971) (misdemeanor). Important factors to be considered, however, include the size and characteristics of the community in which the crime occurred; whether the publicity was blatantly prejudicial; the time elapsed between the publicity and the trial; and whether the jurors' verdict supported the theory of prejudice. Skilling v. U.S., No. 08–1394, slip op. at 16–18 (June 24, 2010).

[146] Frank v. Mangum, 237 U.S. 309 (1915); Irvin v. Dowd, 366 U.S. 717 (1961); Sheppard v. Maxwell, 384 U.S. 333 (1966).

[147] Jackson v. Denno, 378 U.S. 368 (1964) (overruling Stein v. New York, 346 U.S. 156 (1953)).

[148] Bruton v. United States, 391 U.S. 123 (1968) (overruling Delli Paoli v. United States, 352 U.S. 232 (1957)). The rule applies to the states. Roberts v. Russell, 392 U.S. 293 (1968). *But see* Nelson v. O'Neil, 402 U.S. 622 (1971) (co-defendant's out-of-court statement is admissible against defendant if co-defendant takes the stand and denies having made the statement).

[149] 391 U.S. 510 (1968).

obey the oath he takes as a juror." [150] A jury, the Court wrote, must "express the conscience of the community on the ultimate question of life or death," and the automatic exclusion of all with generalized objections to the death penalty "stacked the deck" and made of the jury a tribunal "organized to return a verdict of death." [151] A court may not refuse a defendant's request to examine potential jurors to determine whether they would vote automatically to impose the death penalty; general questions about fairness and willingness to follow the law are inadequate.[152]

In *Wainwright v. Witt*, the Court held that the proper standard for exclusion is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" [153] Thus, to be excluded, a juror need not indicate that he would "automatic[ally]" vote against the death penalty, nor need his "bias be proved with 'unmistakable clarity.'" [154] Instead, a juror may be excused for cause "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." [155] Persons properly excludable under *Witherspoon* may also be excluded from the guilt/innocence phase of a bifurcated capital trial.[156] It had been argued that to exclude such persons from the guilt/innocence phase would result in a jury somewhat more predisposed to convict, and that this would deny the defendant a jury chosen from a fair cross-section. The Court rejected this argument, concluding that "it is simply not possible to define jury impartiality . . . by reference to some hypothetical mix of individual viewpoints." [157] Moreover, the state has "an entirely proper interest in

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[150] 391 U.S. at 519.

[151] 391 U.S. at 519, 521, 523. The Court thought the problem went only to the issue of the sentence imposed and saw no evidence that a jury from which death-scrupled persons had been excluded was more prone to convict than were juries on which such person sat. *Cf.* Bumper v. North Carolina, 391 U.S. 543, 545 (1968). *Witherspoon* was given added significance when, in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), the Court held mandatory death sentences unconstitutional and ruled that the jury as a representative of community mores must make the determination as guided by legislative standards. *See also* Adams v. Texas, 448 U.S. 38 (1980) (holding *Witherspoon* applicable to bifurcated capital sentencing procedures and voiding a statute permitting exclusion of any juror unable to swear that the existence of the death penalty would not affect his deliberations on any issue of fact).

[152] Morgan v. Illinois, 504 U.S. 719 (1992).

[153] 469 U.S. 412, 424 (1985), quoting Adams v. Texas, 448 U.S. 38, 45 (1980).

[154] 469 U.S. at 424. *Accord*, Darden v. Wainwright, 477 U.S. 168 (appropriateness of exclusion should be determined by context, including excluded juror's understanding based on previous questioning of other jurors).

[155] *See Witt*, 469 U.S. at 425–26.

[156] Lockhart v. McCree, 476 U.S. 162 (1986).

[157] 476 U.S. at 183.

obtaining a single jury that could impartially decide all of the issues in [a] case," and need not select separate panels and duplicate evidence for the two distinct but interrelated functions.[158] For the same reasons, there is no violation of the right to an impartial jury if a defendant for whom capital charges have been dropped is tried, along with a codefendant still facing capital charges, before a "death qualified" jury.[159]

In *Uttecht v. Brown*,[160] the Court summed up four principles that it derived from *Witherspoon* and *Witt*: "First a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts." [161] If there is ambiguity in a prospective juror's statement, a court is "entitled to resolve it in favor of the State." [162]

Exclusion of one juror qualified under *Witherspoon* constitutes reversible error, and the exclusion may not be subjected to harmless error analysis.[163] However, a court's error in refusing to dismiss for cause a prospective juror prejudiced in favor of the death penalty does not deprive a defendant of his right to trial by an im-

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[158] 476 U.S. at 180.

[159] Buchanan v. Kentucky, 483 U.S. 402 (1987).

[160] 551 U.S. 1 (2007).

[161] 551 U.S. at 9 (citations omitted). In *Uttecht*, the Court reasoned that deference was owed to trial courts because the lower court is in a "superior position to determine the demeanor and qualifications of a potential juror." *See id.* at 22. In *White v. Wheeler*, the Court recognized that a trial judge's decision to excuse a prospective juror in a death penalty case was entitled to deference even when the judge does not make the decision to excuse the juror contemporaneously with jury selection (*voir dire*). *See* 577 U.S. ___, No. 14–1372, slip op. at 7–8 (2015) (per curiam). The Court explained that the deference due under *Uttecht* to a trial judge's decision was not limited to the judge's evaluation of a juror's demeanor, but extended to a trial judge's consideration of "the substance of a juror's response." *See id.* at 8. When a trial judge "chooses to reflect and deliberate" over the record regarding whether to excuse a juror for a day following the questioning of the prospective juror, that judge's decision should be "commended" and is entitled to substantial deference. *See id.* at 8.

[162] *See Uttecht*, 551 U.S. at 7 (internal citations omitted).

[163] Gray v. Mississippi, 481 U.S. 648 (1987).

partial jury if he is able to exclude the juror through exercise of a peremptory challenge.[164] The relevant inquiry is "on the jurors who ultimately sat," the Court declared, rejecting as overly broad the assertion in *Gray* that the focus instead should be on "'whether the composition of the jury panel as a whole could have been affected by the trial court's error.'" [165]

It is the function of the *voir dire* to give the defense and the prosecution the opportunity to inquire into, or have the trial judge inquire into, possible grounds of bias or prejudice that potential jurors may have, and to acquaint the parties with the potential jurors.[166] It is good ground for challenge for cause that a juror has formed an opinion on the issue to be tried, but not every opinion which a juror may entertain necessarily disqualifies him. The judge must determine whether the nature and strength of the opinion raise a presumption against impartiality.[167] It suffices for the judge to question potential jurors about their ability to put aside what they had heard or read about the case, listen to the evidence with an open mind, and render an impartial verdict; the judge's refusal to go further and question jurors about the contents of news reports to which they had been exposed did not violate the Sixth Amendment.[168]

Under some circumstances, it may be constitutionally required that questions specifically directed to the existence of racial bias must be asked. Thus, in a situation in which defendant, a black man, alleged that he was being prosecuted on false charges because of his civil rights activities in an atmosphere perhaps open to racial appeals, prospective jurors must be asked about their racial prejudice, if any.[169] A similar rule applies in some capital trials, where the risk of racial prejudice "is especially serious in light of the complete finality of the death sentence." A defendant accused of an interracial capital offense is entitled to have prospective jurors informed of the victim's race and questioned as to racial bias.[170] But in circumstances not suggesting a significant likelihood of racial prejudice infecting a trial, as when the facts are merely that the defendant is black and the victim white, the Constitution is sat-

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[164] Ross v. Oklahoma, 487 U.S. 81 (1987). The same rule applies in the federal setting. United States v. Martinez-Salazar, 528 U.S. 304 (2000).

[165] 487 U.S. at 86, 87.

[166] Lewis v. United States, 146 U.S. 370 (1892); Pointer v. United States, 151 U.S. 396 (1894).

[167] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879). *See* Witherspoon v. Illinois, 391 U.S. 510, 513–15, 522 n.21 (1968).

[168] Mu'Min v. Virginia, 500 U.S. 415 (1991).

[169] Ham v. South Carolina, 409 U.S. 524 (1973).

[170] Turner v. Murray, 476 U.S. 28 (1986). The quotation is from a section of Justice White's opinion not adopted as the opinion of the Court. Id. at 35.

isfied by a more generalized but thorough inquiry into the impartiality of the veniremen.[171]

Although government is not constitutionally obligated to allow peremptory challenges,[172] typically a system of peremptory challenges has existed in criminal trials, in which both prosecution and defense may, without stating any reason, excuse a certain number of prospective jurors.[173] Although, in *Swain v. Alabama*,[174] the Court held that a prosecutor's purposeful exclusion of members of a specific racial group from the jury would violate the Equal Protection Clause, it posited so difficult a standard of proof that defendants could seldom succeed. The *Swain* standard of proof was relaxed in *Batson v. Kentucky*,[175] with the result that a defendant may establish an equal protection violation resulting from a prosecutor's use of peremptory challenges to systematically exclude blacks from the jury.[176] A violation can occur whether or not the defendant and the excluded jurors are of the same race.[177] Racially discriminatory use of peremptory challenges does not, however, constitute a violation of the Sixth Amendment, the Court ruled in *Holland v. Illinois*.[178] The Sixth Amendment "no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other generalized characteristics."[179] To rule

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[171] Ristaino v. Ross, 424 U.S. 589 (1976). The Court noted that under its supervisory power it would require a federal court faced with the same circumstances to propound appropriate questions to identify racial prejudice if requested by the defendant. Id. at 597 n.9. *See* Aldridge v. United States, 283 U.S. 308 (1931). *But see* Rosales-Lopez v. United States, 451 U.S. 182 (1981), in which the trial judge refused a defense request to inquire about possible bias against Mexicans. A plurality apparently adopted a rule that, all else being equal, the judge should necessarily inquire about racial or ethnic prejudice only in cases of violent crimes in which the defendant and victim are members of different racial or ethnic groups, id. at 192, a rule rejected by two concurring Justices. Id. at 194. Three dissenting Justices thought the judge must always ask when defendant so requested. Id. at 195.

[172] "This Court has long recognized that peremptory challenges are not of federal constitutional dimension." Rivera v. Illinois, 129 S. Ct. 1446, 1450 (2009) (internal quotation marks omitted) (state trial court's erroneous denial of a defendant's peremptory challenge does not warrant reversal of conviction if all seated jurors were qualified and unbiased).

[173] *Cf.* Stilson v. United States, 250 U.S. 583, 586 (1919), holding that it is no violation of the guarantee to limit the number of peremptory challenges to each defendant in a multi-party trial.

[174] 380 U.S. 202 (1965).

[175] 476 U.S. 79 (1986).

[176] *See* Fourteenth Amendment discussion of "Equal Protection and Race," *infra*.

[177] Powers v. Ohio, 499 U.S. 400 (1991) (defendant has standing to raise equal protection rights of excluded juror of different race).

[178] 493 U.S. 474 (1990). *But see* Trevino v. Texas, 503 U.S. 562 (1992) (claim of Sixth Amendment violation resulting from racially discriminatory use of peremptory challenges treated as sufficient to raise equal protection claim under *Swain* and *Batson*).

[179] 493 U.S. at 487.

otherwise, the Court reasoned, "would cripple the device of peremptory challenge" and thereby undermine the Amendment's goal of "impartiality with respect to both contestants." [180]

The restraint on racially discriminatory use of peremptory challenges is now a two-way street. The Court ruled in 1992 that a criminal defendant's use of peremptory challenges to exclude jurors on the basis of race constitutes "state action" in violation of the Equal Protection Clause.[181] Disputing the contention that this limitation would undermine "the contribution of the peremptory challenge to the administration of justice," the Court nonetheless asserted that such a result would in any event be "too high" a price to pay. "It is an affront to justice to argue that a fair trail includes the right to discriminate against a group of citizens based upon their race." [182] It followed, therefore, that the limitation on peremptory challenges does not violate a defendant's right to an impartial jury. Although a defendant has "the right to an impartial jury that can view him without racial animus," this means that "there should be a mechanism for removing those [jurors] who would be incapable of confronting and suppressing their racism," not that the defendant may remove jurors on the basis of race or racial stereotypes.[183]

PLACE OF TRIAL: JURY OF THE VICINAGE

Article III, § 2 requires that federal criminal cases be tried by jury in the state and district in which the offense was committed,[184] but much criticism arose over the absence of any guarantee that the jury be drawn from the "vicinage" or neighborhood of the crime.[185] Madison's efforts to write into the Bill of Rights an ex-

[180] 493 U.S. at 484. As a consequence, a defendant who uses a peremptory challenge to correct the court's error in denying a for-cause challenge may have no Sixth Amendment cause of action. Peremptory challenges "are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Ross v. Oklahoma, 487 U.S. 81, 88 (1987). Similarly, there is no due process violation, at least where state statutory law requires use of peremptory challenges to cure erroneous refusals by the court to excuse jurors for cause. "It is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise." Id.

[181] Georgia v. McCollum, 505 U.S. 42 (1992).

[182] 505 U.S. at 57.

[183] 505 U.S. at 58.

[184] "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed."

[185] "Vicinage" means neighborhood, and "vicinage of the jury" means jury of the neighborhood or, in medieval England, jury of the County. 4 W. Blackstone, Commentaries on the Laws of England *350–351 (T. Cooley, 4th ed. 1899). *See* 3 J. Story, Commentaries on the Constitution of the United States 1775–85 (1833).

press vicinage provision were rebuffed by the Senate, and the present language was adopted as a compromise.[186] The provisions limit the Federal Government only.[187]

An accused cannot be tried in one district under an indictment showing that the offense was committed in another;[188] the place where the offense is charged to have been committed determines the place of trial.[189] Thus, a defendant cannot be tried in Missouri for money-laundering if the charged offenses occurred in Florida and there was no evidence that the defendant had been involved with the receipt or transportation of the proceeds from Missouri.[190] In a prosecution for conspiracy, the accused may be tried in any state and district where an overt act was performed.[191] Where a United States Senator was indicted for agreeing to receive compensation for services to be rendered in a proceeding before a government department, and it appeared that a tentative arrangement for such services was made in Illinois and confirmed in St. Louis, the defendant was properly tried in St. Louis, although he was not physically present in Missouri when notice of ratification was dispatched.[192] The offense of obtaining transportation of property in interstate commerce at less than the carrier's published rates,[193] or the sending of excluded matter through the mails,[194] may be made triable in any district through which the forbidden transportation is conducted. By virtue of a presumption that a letter is delivered in the district to which it is addressed, the offense of scheming to defraud a corporation by mail was held to have been committed in that district although the letter was posted elsewhere.[195] The Constitution does not require any preliminary hearing before issuance of a warrant for removal of an accused to the court having jurisdiction of the charge.[196] The assignment of a district judge from one district to another, conformably to statute, does not create a new judicial district whose boundaries are undefined nor subject the ac-

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[186] The controversy is conveniently summarized in Williams v. Florida, 399 U.S. 78, 92–96 (1970).

[187] Nashville, C. & St. L. R.R. v. Alabama, 128 U.S. 96 (1888).

[188] Salinger v. Loisel, 265 U.S. 224 (1924).

[189] Beavers v. Henkel, 194 U.S. 73, 83 (1904). For some more recent controversies about the place of the commission of the offense, *see* United States v. Cores, 356 U.S. 405 (1958), and Johnston v. United States, 351 U.S. 215 (1956).

[190] United States v. Cabrales, 524 U.S. 1 (1998).

[191] Brown v. Elliott, 225 U.S. 392 (1912); Hyde v. United States, 225 U.S. 347 (1912); Haas v. Henkel, 216 U.S. 462 (1910).

[192] Burton v. United States, 202 U.S. 344 (1906).

[193] Armour Packing Co. v. United States, 209 U.S. 56 (1908).

[194] United States v. Johnson, 323 U.S. 273, 274 (1944).

[195] Hagner v. United States, 285 U.S. 427, 429 (1932).

[196] United States ex rel. Hughes v. Gault, 271 U.S. 142 (1926). *Cf.* Tinsley v. Treat, 205 U.S. 20 (1907); Beavers v. Henkel, 194 U.S. 73, 84 (1904).

cused to trial in a district not established when the offense with which he is charged was committed.[197] For offenses against federal laws not committed within any state, Congress has the sole power to prescribe the place of trial; such an offense is not local and may be tried at such place as Congress may designate.[198] The place of trial may be designated by statute after the offense has been committed.[199]

NOTICE OF ACCUSATION

The constitutional right to be informed of the nature and cause of the accusation entitles the defendant to insist that the indictment apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution on the same charge.[200] No indictment is sufficient if it does not allege all of the ingredients that constitute the crime. Where the language of a statute is, according to the natural import of the words, fully descriptive of the offense, it is sufficient if the indictment follows the statutory phraseology,[201] but where the elements of the crime have to be ascertained by reference to the common law or to other statutes, it is not sufficient to set forth the offense in the words of the statute. The facts necessary to bring the case within the statutory definition must also be alleged.[202] If an offense cannot be accurately and clearly described without an allegation that the accused is not within an exception contained in the statutes, an indictment that does not contain such allegation is defective.[203] Despite the omission of obscene particulars, an indictment in general language is good if the unlawful conduct is described so as reasonably to inform the accused of the nature of the charge sought to be established against him.[204] The Constitution does not require the government to furnish a copy of the indictment to an accused.[205] The right to notice of accusation is

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[197] Lamar v. United States, 241 U.S. 103 (1916).

[198] Jones v. United States, 137 U.S. 202, 211 (1890); United States v. Dawson, 56 U.S. (15 How.) 467, 488 (1853).

[199] Cook v. United States, 138 U.S. 157, 182 (1891). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 250–54 (1940); United States v. Johnson, 323 U.S. 273 (1944).

[200] United States v. Cruikshank, 92 U.S. 542, 544, 558 (1876); United States v. Simmons, 96 U.S. 360 (1878); Bartell v. United States, 227 U.S. 427 (1913); Burton v. United States, 202 U.S. 344 (1906).

[201] Potter v. United States, 155 U.S. 438, 444 (1894).

[202] United States v. Carll, 105 U.S. 611 (1882).

[203] United States v. Cook, 84 U.S. (17 Wall.) 168, 174 (1872).

[204] Rosen v. United States, 161 U.S. 29, 40 (1896).

[205] United States v. Van Duzee, 140 U.S. 169, 173 (1891).

so fundamental a part of procedural due process that the states are required to observe it.[206]

CONFRONTATION

"The primary object of the [Confrontation Clause is] to prevent depositions of *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."[207] The right of confrontation is "[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union."[208] Before 1965, when the Court held the right to be protected against state abridgment,[209] it had little need to clarify the relationship between the right of confrontation and the hearsay rule,[210] because it could control the admission of hearsay through exercise of its supervisory powers over the inferior federal courts.[211]

On the basis of the Confrontation Clause, the Court had concluded that evidence given at a preliminary hearing could not be used at the trial if the absence of the witness was attributable to the negligence of the prosecution,[212] but that if a witness' absence had been procured by the defendant, testimony given at a previous trial on a different indictment could be used at the subsequent trial.[213]

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[206] *In re* Oliver, 333 U.S. 257, 273 (1948); Cole v. Arkansas, 333 U.S. 196, 201 (1948); Rabe v. Washington, 405 U.S. 313 (1972).

[207] Mattox v. United States, 156 U.S. 237, 242–43 (1895).

[208] Kirby v. United States, 174 U.S. 47, 55, 56 (1899). *Cf.* Pointer v. Texas, 380 U.S. 400, 404–05 (1965). The right may be waived but it must be a knowing, intelligent waiver uncoerced from defendant. Brookhart v. Janis, 384 U.S. 1 (1966).

[209] Pointer v. Texas, 380 U.S. 400 (1965) (overruling West v. Louisiana, 194 U.S. 258 (1904)); *see also* Stein v. New York, 346 U.S. 156, 195–96 (1953).

[210] Hearsay is the prior out-of-court statements of a person, offered affirmatively for the truth of the matters asserted, presented at trial either orally by another person or in writing. Hickory v. United States, 151 U.S. 303, 309 (1894); Southern Ry. v. Gray, 241 U.S. 333, 337 (1916); Bridges v. Wixon, 326 U.S. 135 (1945).

[211] Thus, although it had concluded that the co-conspirator exception to the hearsay rule was consistent with the Confrontation Clause, Delaney v. United States, 263 U.S. 586, 590 (1924), the Court's formulation of the exception and its limitations was pursuant to its supervisory powers. Lutwak v. United States, 344 U.S. 604 (1953); Krulewitch v. United States, 336 U.S. 440 (1949).

[212] Motes v. United States, 178 U.S. 458 (1900).

[213] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1879).

The Court had also recognized the admissibility of dying declarations [214] and of testimony given at a former trial by a witness since deceased.[215] The prosecution was not permitted to use a judgment of conviction against other defendants on charges of theft in order to prove that the property found in the possession of the defendant now on trial was stolen.[216] A prosecutor, however, may comment on a defendant's presence at trial, and call attention to the defendant's opportunity to tailor his or her testimony to comport with that of previous witnesses.[217]

For years the Court has struggled with the relationship between hearsay rules and the Confrontation Clause. In a series of decisions beginning in 1965, the Court seemed to equate the Confrontation Clause with the hearsay rule, positing that a major purpose of the clause was "to give the defendant charged with crime an opportunity to cross-examine the witnesses against him," unless one of the hearsay exceptions applies.[218] Thus, in *Pointer v. Texas*,[219] the complaining witness had testified at a preliminary hearing at which he was not cross-examined and the defendant was not represented by counsel, and by the time of trial, the witness had moved to another state and the prosecutor made no effort to obtain his return. Offering the preliminary hearing testimony violated the de-

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[214] Kirby v. United States, 174 U.S. 47, 61 (1899); Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

[215] Mattox v. United States, 156 U.S. 237, 240 (1895).

[216] Kirby v. United States, 174 U.S. 47 (1899), and Dowdell v. United States, 221 U.S. 325 (1911), recognized the inapplicability of the clause to the admission of documentary evidence to establish collateral facts, admissible under the common law, to permit certification as an additional record to the appellate court of the events of the trial.

[217] Portuondo v. Agard, 529 U.S. 61 (2000).

[218] Pointer v. Texas, 380 U.S. 400, 406–07 (1965); Douglas v. Alabama, 380 U.S. 415, 418 (1965). "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." Barber v. Page, 390 U.S. 719, 725 (1968). Unjustified limitation of the defendant's right to cross-examine witnesses presented against him at trial may constitute a confrontation clause violation, Smith v. Illinois, 390 U.S. 129 (1968), or a denial of due process, Alford v. United States, 282 U.S. 687 (1931); and *In re* Oliver, 333 U.S. 257 (1948).

[219] 380 U.S. 400 (1965). Justices Harlan and Stewart concurred on due process grounds, rejecting the "incorporation" holding. Id. at 408, 409. *See also* Barber v. Page, 390 U.S. 719 (1968), in which the Court refused to permit the state to use the preliminary hearing testimony of a witness in a federal prison in another state at the time of trial. The Court acknowledged the hearsay exception permitting the use of such evidence when a witness was unavailable but refused to find him "unavailable" when the state had made no effort to procure him; and Mancusi v. Stubbs, 408 U.S. 204 (1972), in which the Court permitted the state to assume the unavailability of a witness then living in Sweden, and to use the transcript of the witness' testimony at a former trial.

fendant's right of confrontation. In *Douglas v. Alabama*,[220] the prosecution called as a witness the defendant's alleged accomplice, and when the accomplice refused to testify, pleading his privilege against self-incrimination, the prosecutor read to him to "refresh" his memory a confession in which he implicated the defendant. Because the defendant could not cross-examine the accomplice with regard to the truth of the confession, the Court held that the Confrontation Clause had been violated. In *Bruton v. United States*,[221] the use at a joint trial of a confession made by one of the defendants was held to violate the confrontation rights of the other defendant who was implicated by it because he could not cross-examine the codefendant.[222]

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[220] 380 U.S. 415 (1965). *See also* Smith v. Illinois, 390 U.S. 129 (1968) (Confrontation Clause was violated by allowing an informer as to identify himself by alias and to conceal his true name and address because the defense could not effectively cross-examine); Davis v. Alaska, 415 U.S. 308 (1974) (state law prohibiting disclosure of the identity of juvenile offenders could not be applied to preclude cross-examination of a witness about his juvenile record when the object was to allege possible bias on the part of the witness). *Cf.* Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Nobles, 422 U.S. 233, 240–41 (1975).

[221] 391 U.S. 123 (1968). The Court in this case equated confrontation with the hearsay rule, first emphasizing "that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence", id. at 128 n.3, and then observing that "[t]he reason for excluding this evidence as an *evidentiary* matter also requires its exclusion as a *constitutional* matter." Id. at 136 n.12 (emphasis by Court). *Bruton* was applied retroactively in a state case in Roberts v. Russell, 392 U.S. 293 (1968). Where, however, the codefendant takes the stand in his own defense, denies making the alleged out-of-court statement implicating defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has not been denied his right of confrontation under *Bruton*. Nelson v. O'Neil, 402 U.S. 622 (1971). In two cases, violations of the rule in *Bruton* have been held to be "harmless error" in the light of the overwhelming amount of legally admitted evidence supporting conviction. Harrington v. California, 395 U.S. 250 (1969); Schneble v. Florida, 405 U.S. 427 (1972). *Bruton* was held inapplicable, however, when the nontestifying codefendant's confession was redacted to omit any reference to the defendant, and was circumstantially incriminating only as the result of other evidence properly introduced. Richardson v. Marsh, 481 U.S. 200 (1987). *Bruton* was held applicable, however, where a blank space or the word "deleted" is substituted for the defendant's name in a co-defendant's confession, making such confession incriminating of the defendant on its face. Gray v. Maryland, 523 U.S. 185 (1998).

[222] In Parker v. Randolph, 442 U.S. 62 (1979), the Court was evenly divided on the question whether interlocking confessions may be admitted without violating the clause. Four Justices held that admission of such confessions is proper, even though neither defendant testifies, if the judge gives the jury a limiting instruction. Four Justices held that a harmless error analysis should be applied, although they then divided over its meaning in this case. The former approach was rejected in favor of the latter in Cruz v. New York, 481 U.S. 186 (1987). The appropriate focus is on reliability, the Court indicated, and "the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him (assuming the 'unavailability' of the codefendant) despite the lack of opportunity for cross-examination." 481 U.S. at 193–94.

The Court continues to view as "presumptively unreliable accomplices' confessions that incriminate defendants." [223]

Then, in 1970, the Court refused to equate the Confrontation Clause with hearsay rules. "While . . . hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." [224] In holding admissible a statement made to police during custodial interrogation, the Court explained that "[T]he Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." [225]

The Court favored a hearsay exception over a cross-examination requirement in *Dutton v. Evans*,[226] upholding the use as substantive evidence at trial of a statement made by a witness whom the prosecution could have produced but did not.[227] Presentation of a

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[223] Lee v. Illinois, 476 U.S. 530, 541 (1986); Lilly v. Virginia, 527 U.S. 116, 132 (1999).

[224] California v. Green, 399 U.S. 149, 155–56 (1970) (citations omitted) (holding statement admissible because the witness was present at trial and could have been cross-examined then). *See also* Dutton v. Evans, 400 U.S. 74, 80–86 (1970) (plurality opinion by Justice Stewart). *Compare* id. at 94–95 (Justice Harlan concurring), *with* id. at 105 n.7 (Justice Marshall dissenting).

[225] California v. Green, 399 U.S. at 164. Justice Brennan dissented. Id. at 189. *See also* Nelson v. O'Neil, 402 U.S. 622 (1971). "The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination." Delaware v. Fensterer, 474 U.S. 15, 21–22 (1985) (per curiam) (expert witness testified as to conclusion, but could not remember basis for conclusion). *See also* United States v. Owens, 484 U.S. 554 (1988) (testimony as to a previous, out-of-court identification statement is not barred by witness' inability, due to memory loss, to explain the basis for his identification).

[226] 400 U.S. 74 (1970).

[227] The statement was made by an alleged co-conspirator of the defendant and was admissible under the co-conspirator exception to the hearsay rule.

statement by a witness who is under oath, in the presence of the jury, and subject to cross-examination by the defendant is only one way of complying with the Confrontation Clause, four Justices concluded. Thus, at least in the absence of prosecutorial misconduct or negligence and where the evidence is not "crucial" or "devastating," these Justices found that the Confrontation Clause could be satisfied if "the trier of fact [has] a satisfactory basis for evaluating the truth of the [hearsay] statement." The reliability of a statement was to be ascertained in each case by an inquiry into the likelihood that cross-examination of the declarant at trial could successfully call into question the declaration's apparent meaning or the declarant's sincerity, perception, or memory.[228]

In *Ohio v. Roberts*,[229] a Court majority adopted a reliability test for satisfying the confrontation requirement through use of a statement by an unavailable witness.[230] Over the course of 24 years, *Roberts* was applied, narrowed,[231] and finally overruled in *Crawford v.*

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[228] 400 U.S. at 86–89. The quoted phrase is at 89, (quoting California v. Green, 399 U.S. 149, 161 (1970)). Justice Harlan concurred to carry the case, on the view that (1) the Confrontation Clause requires only that any testimony actually given at trial must be subject to cross-examination, but (2) in the absence of countervailing circumstances introduction of prior recorded testimony—"trial by affidavit"—would violate the clause. Id. at 93, 95, 97. Justices Marshall, Black, Douglas, and Brennan dissented, id. at 100, arguing for adoption of a rule that: "The incriminatory extrajudicial statement of an alleged accomplice is so inherently prejudicial that it cannot be introduced unless there is an opportunity to cross-examine the declarant, whether or not his statement falls within a genuine exception to the hearsay rule." Id. at 110–11. The Clause protects defendants against use of substantive evidence against them, but does not bar rebuttal of the defendant's own testimony. Tennessee v. Street, 471 U.S. 409 (1985) (use of accomplice's confession not to establish facts as to defendant's participation in the crime, but instead to support officer's rebuttal of defendant's testimony as to circumstances of defendant's confession; presence of officer assured right of cross-examination).

[229] 448 U.S. 56 (1980). The witness was absent from home and her parents testified they did not know where she was or how to get in touch with her. The state's sole effort to locate her was to deliver a series of subpoenas to her parents' home. Over the objection of three dissenters, the Court held this to be an adequate basis to demonstrate her unavailability. Id. at 74–77.

[230] "[O]nce a witness is shown to be unavailable . . . , the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" 448 U.S. at 65 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107 (1934)). The Court indicated that reliability could be inferred without more if the evidence falls within a firmly rooted hearsay exception.

[231] Applying *Roberts*, the Court held that the fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability, since the confessions diverged on the critical issues of the respective roles of the two defendants. Lee v. Illinois, 476 U.S. 530 (1986). *Roberts* was narrowed in United States v. Inadi, 475 U.S. 387 (1986), which held that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators' out-of-court statements. See also White v. Illinois, 502 U.S. 346, 357 (1992) (holding admissible "evidence embraced within such firmly rooted exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment"); and Idaho v. Wright, 497 U.S. 805, 822–23 (1990) (in-

Washington.[232] The Court in *Crawford* rejected reliance on "particularized guarantees of trustworthiness" as inconsistent with the requirements of the Confrontation Clause. The Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination."[233] Reliability is an "amorphous" concept that is "manipulable," and the *Roberts* test had been applied "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude."[234] "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."[235]

Crawford represented a decisive turning point by clearly stating the basic principles to be used in Confrontation Clause analysis. "Testimonial evidence" may be admitted against a criminal defendant only if the declarant is available for cross-examination at trial, or, if the declarant is unavailable (and the government has made reasonable efforts to procure his presence), the defendant has had a prior opportunity to cross-examine as to the content of the statement.[236] What statements are "testimonial"? In *Crawford*, the Court wrote: "Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial material, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[237] The Court added that it would "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" but, "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."[238]

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sufficient evidence of trustworthiness of statements made by child sex crime victim to her pediatrician; statements were admitted under a "residual" hearsay exception rather than under a firmly rooted exception).

[232] 541 U.S. 36 (2004).

[233] 541 U.S. at 60–61.

[234] 541 U.S. at 63.

[235] 541 U.S. at 68–69.

[236] 541 U.S. at 54, 59.

[237] 541 U.S. at 51–2 (internal quotation marks and citations omitted), quoted with approval in Melendez-Diaz v. Massachusetts, 557 U.S. ___, No. 07–591, slip op. at 3–4 (2009).

[238] 541 U.S. at 68.

The Court subsequently concluded that "little more than the application of our holding in *Crawford v. Washington*" was needed to find that "affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine" were subject to the right of confrontation. The Court found that the analysts were required to testify in person even though state law declared their affidavits "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed."[239] Further, where such testimony is required, the prosecution may not use a "surrogate" witness who, although familiar with the mechanics of forensic testing, had not signed the certification or personally performed or observed the performance of the test. Such a surrogate could not speak to concerns about the integrity of testing procedures or to questions about the performance of the certifying analyst.[240] A year after this apparently straightforward holding in *Bullcoming v. New Mexico*, however, the Court's guidance on trial consideration of forensic reports was clouded by *Williams v. Illinois*.[241] In *Williams*, an expert witness (not a surrogate witness from the testing lab) testified that a DNA profile she had prepared from the defendant's blood matched a DNA profile reported by an outside lab from a swab of a rape victim. A four-Justice plurality held that the expert incorporated the lab's report in her testimony in a way not intended to prove that the outside lab had in fact tested a swab from a particular rape victim and come up with the defendant's DNA profile, but rather in a way solely intended to establish a basis for the expert's opinion that two DNA profiles matched. Four dissenters vigorously asserted the contrary, finding that the outside lab's report served the purpose of incriminating the defendant directly because it identified the rape victim as the source of the material the lab profiled. The expert's testimony effectively was used to connect the defendant with a named individual and not just his DNA profile with a DNA sample obtained from some unnamed source. Accordingly, the dissent asserted the Confrontation Clause required that the defendant have an opportunity to examine the lab technicians responsible for the report. The ninth Justice in the case, Justice Thomas, agreed the report was directly incriminating because the expert expressly used it to link her profile of the defendant's DNA to the rape victim. Nevertheless, Justice Thomas concurred in judgment of the plurality,

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[239] Melendez-Diaz v. Massachusetts, 557 U.S. ___, No. 07–591, slip op. at 23, 1, 2 (2009).

[240] Bullcoming v. New Mexico, 564 U.S. ___, No. 09–10876, slip op. at 12 (2011).

[241] 567 U.S. ___, No. 10–8505, slip op. (2012).

reprising his opinion stated in earlier cases [242] that the Confrontation Clause covers only formalized statements of a solemnity that the uncertified lab report in this case lacked.

Generally, the only exceptions to the right of confrontation that the Court has acknowledged are the two that existed under common law at the time of the founding: "declarations made by a speaker who was both on the brink of death and aware that he was dying," and "statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant." [243] The second of these exceptions applies "only when the defendant engaged in conduct *designed* to prevent the witness from testifying." [244] Thus, in a trial for murder, the question arose whether statements made by the victim to a police officer three weeks before she was murdered, that the defendant had threatened her, could be admitted. The state court had admitted them on the basis that the defendant's having murdered the victim had made the victim unavailable to testify, but the Supreme Court reversed, holding that, unless the testimony had been confronted or fell within the dying declaration exception, it could not be admitted "on the basis of a prior *judicial* assessment that the defendant is guilty as charged," for to admit it on that basis it would "not sit well with the right to trial by jury." [245]

In *Davis v. Washington*,[246] the Court began to explore the parameters of *Crawford* by considering when a police interrogation is "testimonial" for purposes of the Confrontation Clause. *Davis* involved a 911 call in which a woman described being assaulted by a former boyfriend. A tape of that call was admitted as evidence of a felony violation of a domestic no-contact order, despite the fact that the woman in question did not testify. Although again declining to establish all the parameters of when a response to police interrogation is testimonial, the Court held that statements to the police are nontestimonial when made under circumstances that "objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." [247] Statements made after such an emergency has ended, however, would be treated as testimonial and could not be introduced into evidence.[248]

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[242] *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. ___, No. 07–591, slip op. (Justice Thomas concurring).

[243] Giles v. California, 128 S. Ct. 2678, 2682, 2683 (2008).

[244] 128 S. Ct. at 2683.

[245] 128 S. Ct. at 2686.

[246] 547 U.S. 813 (2006).

[247] 547 U.S. at 822.

[248] 547 U.S. at 828–29. Thus, where police responding to a domestic violence report interrogated a woman in the living room while her husband was being questioned in the kitchen, there was no present threat to the woman, so such informa-

In *Michigan v. Bryant*,[249] however, the Court appeared to extend the scope and basis of the "ongoing emergency" exception. In *Bryant*, a man dying from a gun shot wound was found by police lying on the ground next to his car in a gas station parking lot, several blocks away from where he had been shot. In response to questions from several police officers, the victim identified the defendant as his assailant, and his response was later used in the defendant's trial despite the victim's unavailability to testify. In determining whether such statements were related to an ongoing emergency (and thus were non-testimonial), the majority noted that an objective analysis of this question was "highly context-dependent",[250] and depended on the nature of the crime, the weapon utilized, the medical condition of the victim, and the formality of the setting. Further, in determining the testimonial nature of such information, the Court considered not just the intent of the declarant, but also the intentions of the police coming upon the crime scene who, ignorant of preceding events, began seeking information to decide whether there was a continuing danger to the victim or the public.[251] Considering that there are other potential exceptions to the Confrontation Clause where the "primary purpose" for creation of evidence is not related to gathering evidence for trial,[252] the breadth of this opinion may signal a retreat from the limits of *Crawford*.

The Court continued its shift away from a broader reading of *Crawford* in *Ohio v. Clark*,[253] a case that held that the Confrontation Clause did not bar the introduction of statements that a child made to his preschool teacher regarding abuse committed by the defendant.[254] To reach its holding, the Court, relying on a multifactor approach to the primary purpose test similar to *Bryant*, noted that the statements in question (1) occurred in the context of an ongoing emergency involving suspected child abuse; (2) were made

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tion as was solicited was testimonial. Id. at 830 (facts of *Hammon v. Indiana*, considered together with *Davis*.)

[249] 562 U.S. ___, No. 09–150, slip op (2011). Justice Sotomayor wrote the majority opinion, joined by Chief Justice Roberts and Justices Kennedy, Breyer and Alito. Justice Thomas file an opinion concurring in judgment, while Justices Scalia and Ginsburg filed dissenting opinions. Justice Kagan did not participate in the case.

[250] Slip op. at 16.

[251] Slip op. at 20.

[252] *See* slip op. at 15 n.9. The Court noted that many exceptions to hearsay rules rest on the belief that certain statements are made for a purpose other than use in a prosecution *See, e.g.*, Fed. Rule Evid. 801(d)(2)(E) (statement by a co-conspirator during and in furtherance of the conspiracy); 803(4) (Statements for Purposes of Medical Diagnosis or Treatment); 803(6) (Records of Regularly Conducted Activity); 803(8) (Public Records and Reports); 803(9) (Records of Vital Statistics); 803(11) (Records of Religious Organizations); 803(12) (Marriage, Baptismal, and Similar Certificates); 803(13) (Family Records); and 804(b)(3) (Statement Against Interest).

[253] *See* 576 U.S. ___, No. 13–1352, slip op. (2015).

[254] *Id.* at 1.

by a very young child, who did not intend his statements to be a substitute for trial testimony; (3) historically were admissible at common law; and (4) were not made to law enforcement officers.[255] In so holding, the Court appeared to lessen the importance of the primary purpose test, concluding that the primary purpose test is a "necessary, but not always sufficient, condition" for the exclusion of out-of-court statements under the Sixth Amendment, as evidence that satisfies the primary purpose test may still be presented at trial if the evidence would have been admissible at the time of the founding.[256]

In two pre-*Crawford* cases, the Court took contrasting approaches to the Confrontation Clause regarding state efforts to protect a child from psychological trauma while testifying. In *Coy v. Iowa*,[257] the Court held that the right of confrontation is violated by a procedure, authorized by statute, placing a one-way screen between complaining child witnesses and the defendant, thereby sparing the witnesses from viewing the defendant. This conclusion was reached even though the witnesses could be viewed by the defendant's counsel and by the judge and jury, even though the right of cross-examination was in no way limited, and even though the state asserted a strong interest in protecting child sex-abuse victims from further trauma.[258] The Court's opinion by Justice Scalia declared that a defendant's right during his trial to *face-to-face* confrontation with his accusers derives from "the irreducible literal meaning of the clause," and traces "to the beginnings of Western legal culture."[259] Squarely rejecting the Wigmore view "that the only essential interest preserved by the right was cross-examination,"[260] the Court emphasized the importance of face-to-face confrontation in eliciting truthful testimony.

Coy's interpretation of the Confrontation Clause, though not its result, was rejected in *Maryland v. Craig*.[261] In *Craig*, the Court upheld Maryland's use of one-way, closed circuit television to protect a child witness in a sex crime from viewing the defendant. As in *Coy*, procedural protections other than confrontation were afforded: the child witness must testify under oath, is subject to cross examination, and is viewed by the judge, jury, and defendant. The

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[255] *Id.* at 7–10.
[256] *Id.* at 7.
[257] 487 U.S. 1012 (1988).
[258] On this latter point, the Court indicated that only "individualized findings," rather than statutory presumption, could suffice to create an exception to the rule. 487 U.S. at 1021.
[259] 487 U.S. at 1015, 1021.
[260] 487 U.S. at 1018 n.2.
[261] 497 U.S. 836 (1990).

critical factual difference between the two cases was that Maryland required a case-specific finding that the child witness would be traumatized by presence of the defendant, while the Iowa procedures struck down in *Coy* rested on a statutory presumption of trauma. But the difference in approach is explained by the fact that Justice O'Connor's views, expressed in a concurring opinion in *Coy*, became the opinion of the Court in *Craig*.[262] Beginning with the proposition that the Confrontation Clause does not, as evidenced by hearsay exceptions, grant an absolute right to face-to-face confrontation, the Court in *Craig* described the clause as "reflect[ing] a *preference* for face-to-face confrontation."[263] This preference can be overcome "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[264] Relying on the traditional and "transcendent" state interest in protecting the welfare of children, on the significant number of state laws designed to protect child witnesses, and on "the growing body of academic literature documenting the psychological trauma suffered by child abuse victims,"[265] the Court found a state interest sufficiently important to outweigh a defendant's right to face-to-face confrontation. Reliability of the testimony was assured by the "rigorous adversarial testing [that] preserves the essence of effective confrontation."[266] All of this, of course, would have led to a different result in *Coy* as well, but *Coy* was distinguished with the caveat that "[t]he requisite finding of necessity must of course be a case-specific one"; Maryland's required finding that a child witness would suffer "serious emotional distress" if not protected was clearly adequate for this purpose.[267]

In another case involving child sex crime victims, the Court held that there is no right of face-to-face confrontation at an in-chambers hearing to determine the competency of a child victim to testify, because the defendant's attorney participated in the hear-

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[262] *Coy* was decided by a 6–2 vote. Justice Scalia's opinion of the Court was joined by Justices Brennan, White, Marshall, Stevens, and O'Connor; Justice O'Connor's separate concurring opinion was joined by Justice White; Justice Blackmun's dissenting opinion was joined by Chief Justice Rehnquist; and Justice Kennedy did not participate. In *Craig*, a 5–4 decision, Justice O'Connor's opinion of the Court was joined by the two *Coy* dissenters and by Justices White and Kennedy. Justice Scalia's dissent was joined by Justices Brennan, Marshall, and Stevens.

[263] 497 U.S. at 849 (emphasis in original).

[264] 497 U.S. at 850. Dissenting Justice Scalia objected that face-to-face confrontation "is not a preference 'reflected' by the Confrontation Clause [but rather] a constitutional right unqualifiedly guaranteed," and that the Court "has applied 'interest-balancing' analysis where the text of the Constitution simply does not permit it." Id. at 863, 870.

[265] 497 U.S. at 855.

[266] 497 U.S. at 857.

[267] 497 U.S. at 855.

ing, and because the procedures allowed "full and effective" opportunity to cross-examine the witness at trial and request reconsideration of the competency ruling.[268] And there is no absolute right to confront witnesses with relevant evidence impeaching those witnesses; failure to comply with a rape shield law's notice requirement can validly preclude introduction of evidence relating to a witness's prior sexual history.[269]

COMPULSORY PROCESS

The provision requires, of course, that the defendant be afforded legal process to compel witnesses to appear,[270] but another apparent purpose of the provision was to make inapplicable in federal trials the common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense.[271] "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law," applicable to states by way of the Fourteenth Amendment, and the right is violated by a state law providing that coparticipants in the same crime could not testify for one another.[272]

The right to present witnesses is not absolute, however; a court may refuse to allow a defense witness to testify when the court finds that defendant's counsel willfully failed to identify the witness in a pretrial discovery request and thereby attempted to gain a tactical advantage.[273]

In *Pennsylvania v. Ritchie*, the Court indicated that requests to compel the government to reveal the identity of witnesses or produce exculpatory evidence should be evaluated under due process rather than compulsory process analysis, adding that "compulsory

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[268] Kentucky v. Stincer, 482 U.S. 730, 744 (1987).

[269] Michigan v. Lucas, 500 U.S. 145 (1991).

[270] United States v. Cooper, 4 U.S. (4 Dall.) 341 (C.C. Pa. 1800) (Justice Chase on circuit).

[271] 3 J. Story, Commentaries on the Constitution of the United States 1786 (1833). *See* Rosen v. United States, 245 U.S. 467 (1918).

[272] Washington v. Texas, 388 U.S. 14, 19–23 (1967). Texas permitted coparticipants to testify for the prosecution.

[273] Taylor v. Illinois, 484 U.S. 400 (1988).

process provides no *greater* protections in this area than due process."[274]

ASSISTANCE OF COUNSEL

Absolute Right to Counsel at Trial

Historical Practice.—The records of neither the Congress that proposed what became the Sixth Amendment nor the state ratifying conventions elucidate the language on assistance of counsel. The development of the common-law principle in England had denied to anyone charged with a felony the right to retain counsel, while the right was afforded in misdemeanor cases. This rule was ameliorated in practice, however, by the judicial practice of allowing counsel to argue points of law and then generously interpreting the limits of "legal questions." Colonial and early state practice varied, ranging from the existent English practice to appointment of counsel in a few states where needed counsel could not be retained.[275] Contemporaneously with the proposal and ratification of the Sixth Amendment, Congress enacted two statutory provisions that seemed to indicate an understanding that the Sixth Amendment guarantee was limited to retained counsel by a defendant wishing and able to afford assistance.[276]

By federal statute, an individual tried for a capital crime in a federal court was entitled to appointed counsel, and, by judicial practice, the federal courts came to appoint counsel frequently for indigents charged with noncapital crimes, although it may be assumed that the practice fell short at times of what is now constitutionally required.[277] State constitutions and statutes gradually ensured a defendant the right to appear in state trials with retained counsel, but the states were far less uniform on the existence and scope of a right to appointed counsel. It was in the context of a right to appointed counsel that the Supreme Court began to develop its modern jurisprudence on a constitutional right to counsel generally, first applying procedural due process analysis under the Fourteenth Amend-

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[274] 480 U.S. 39, 56 (1987) (ordering trial court review of files of child services agency to determine whether they contain evidence material to defense in child abuse prosecution).

[275] W. Beaney, The Right to Counsel in American Courts 8–26 (1955).

[276] Section 35 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, provided that parties in federal courts could manage and plead their own causes personally or by the assistance of counsel as provided by the rules of court. The Act of April 30, 1790, ch. 9, 1 Stat. 118, provided: "Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have free access to him at all reasonable hours."

[277] W. Beaney, The Right to Counsel in American Courts 29–30 (1955).

ment to state trials, also finding a Sixth Amendment based right to appointed counsel in federal prosecutions, and eventually applying this Sixth Amendment based right to the states.

Development of Right.—The development began in *Powell v. Alabama*,[278] in which the Court set aside the convictions of eight black youths sentenced to death in a hastily carried-out trial without benefit of counsel. Due process, Justice Sutherland said for the Court, always requires the observance of certain fundamental personal rights associated with a hearing, and "the right to the aid of counsel is of this fundamental character." This observation was about the right to retain counsel of one's choice and at one's expense, and included an eloquent statement of the necessity of counsel. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[279]

The failure to afford the defendants an opportunity to retain counsel violated due process, but the Court acknowledged that as indigents the youths could not have retained counsel. Therefore, the Court concluded, under the circumstances—"the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives"—"the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment." The holding was narrow. "[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether

[278] 287 U.S. 45 (1932).
[279] 287 U.S. at 68–69.

requested or not, to assign counsel for him as a necessary requisite of due process of law . . . ." [280]

The next step in the expansion came in *Johnson v. Zerbst*,[281] in which the Court announced an absolute rule requiring appointment of counsel for federal criminal defendants who could not afford to retain a lawyer. The right to assistance of counsel, Justice Black wrote for the Court, "is necessary to insure fundamental human rights of life and liberty." Without stopping to distinguish between the right to retain counsel and the right to have counsel provided if the defendant cannot afford to hire one, the Justice quoted Justice Sutherland's invocation of the necessity of legal counsel for even the intelligent and educated layman and said: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." [282] Any waiver, the Court ruled, must be by the intelligent choice of the defendant, will not be presumed from a silent record, and must be determined by the trial court before proceeding in the absence of counsel.[283]

An effort to obtain the same rule in the state courts in all criminal proceedings was rebuffed in *Betts v. Brady*.[284] Justice Roberts for the Court observed that the Sixth Amendment would compel the result only in federal courts but that in state courts the Due Process Clause of the Fourteenth Amendment "formulates a concept less rigid and more fluid" than those guarantees embodied in the Bill of Rights, although a state denial of a right protected in one of the first eight Amendments might "in certain circumstances" be a violation of due process. The question was rather "whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." [285] Examining the common-law rules, the English practice, and the state constitutions, laws and practices, the

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[280] 287 U.S. at 71.

[281] 304 U.S. 458 (1938).

[282] 304 U.S. at 462, 463.

[283] 304 U.S. at 464–65. The standards for a valid waiver were tightened in Walker v. Johnston, 312 U.S. 275 (1941), setting aside a guilty plea made without assistance of counsel, by a ruling requiring that a defendant appearing in court be advised of his right to counsel and asked whether or not he wished to waive the right. *See also* Von Moltke v. Gillies, 332 U.S. 708 (1948); Carnley v. Cochran, 369 U.S. 506 (1962). A waiver must be knowing, voluntary, and intelligent, but need not be based on a full and complete understanding of all of the consequences. Iowa v. Tovar, 541 U.S. 77 (2004) (holding that warnings by trial judge detailing risks of waiving right to counsel are not constitutionally required before accepting guilty plea from uncounseled defendant).

[284] 316 U.S. 455 (1942).

[285] 316 U.S. at 461–62, 465.

Court concluded that it was the "considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right essential to a fair trial." Want of counsel in a particular case might result in a conviction lacking in fundamental fairness and so necessitate the interposition of constitutional restriction upon state practice, but this was not the general rule.[286] Justice Black in dissent argued that the Fourteenth Amendment made the Sixth applicable to the states and required the appointment of counsel, but that even on the Court's terms counsel was a fundamental right and appointment was required by due process.[287]

Over time the Court abandoned the "special circumstances" language of *Powell v. Alabama* [288] when capital cases were involved and finally in *Hamilton v. Alabama*,[289] held that in a capital case a defendant need make no showing of particularized need or of prejudice resulting from absence of counsel; henceforth, assistance of counsel was a constitutional requisite in capital cases. In non-capital cases, developments were such that Justice Harlan could assert that "the 'special circumstances' rule has continued to exist in form while its substance has been substantially and steadily eroded." [290] The rule was designed to afford some certainty in the determination of when failure to appoint counsel would result in a trial lacking in "fundamental fairness." Generally, the Court developed three categories of prejudicial factors, often overlapping in individual cases, which required the furnishing of assistance of counsel. There were (1) the personal characteristics of the defendant which made it unlikely he could obtain an adequate defense of his own,[291] (2) the technical

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[286] 316 U.S. at 471, 473.

[287] 316 U.S. at 474 (joined by Justices Douglas and Murphy).

[288] 287 U.S. 45, 71 (1932).

[289] 368 U.S. 52 (1961). Earlier cases employing the "special circumstances" language were Williams v. Kaiser, 323 U.S. 471 (1945); Tompkins v. Missouri, 323 U.S. 485 (1945); Hawk v. Olson, 326 U.S. 271 (1945); De Meerleer v. Michigan, 329 U.S. 663 (1947); Marino v. Ragen, 332 U.S. 561 (1947); Haley v. Ohio, 332 U.S. 596 (1948). Dicta appeared in several cases thereafter suggesting an absolute right to counsel in capital cases. Bute v. Illinois, 333 U.S. 640, 674 (1948); Uveges v. Pennsylvania, 335 U.S. 437, 441 (1948). A state court decision finding a waiver of the right in a capital case was upheld in Carter v. Illinois, 329 U.S. 173 (1946).

[290] Gideon v. Wainwright, 372 U.S. 335, 350 (1963).

[291] Youth and immaturity (Moore v. Michigan, 355 U.S. 155 (1957); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Wade v. Mayo, 334 U.S. 672 (1948); Marino v. Ragen, 332 U.S. 561 (1947); De Meerleer v. Michigan, 329 U.S. 663 (1947)), inexperience (Moore v. Michigan, *supra* (limited education), Uveges v. Pennsylvania, *supra*), and insanity or mental abnormality (Massey v. Moore, 348 U.S. 105 (1954); Palmer v. Ashe, 342 U.S. 134 (1951)), were commonly cited characteristics of the defendant demonstrating the necessity for assistance of counsel.

complexity of the charges or of possible defenses to the charges,[292] and (3) events occurring at trial that raised problems of prejudice.[293] The last characteristic especially had been used by the Court to set aside convictions occurring in the absence of counsel,[294] and the last case rejecting a claim of denial of assistance of counsel had been decided in 1950.[295]

Against this background, a unanimous Court in *Gideon v. Wainwright* [296] overruled *Betts v. Brady* and held "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." [297] Justice Black, a dissenter in the 1942 decision, asserted for the Court that *Betts* was an "abrupt break" with earlier precedents, citing *Powell* and *Johnson v. Zerbst*. Rejecting the *Betts* reasoning, the Court decided that the right to assistance of counsel is "fundamental" and the Fourteenth Amendment does make the right constitutionally required in state courts.[298] The Court's opinion in *Gideon* left unanswered the question whether the right

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[292] Technicality of the crime charged (Moore v. Michigan, 355 U.S. 155 (1957); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); Williams v. Kaiser, 323 U.S. 471 (1945)), or the technicality of a possible defense (Rice v. Olson, 324 U.S. 786 (1945); McNeal v. Culver, 365 U.S. 109 (1961)), were commonly cited.

[293] The deliberate or careless overreaching by the court or the prosecutor (Gibbs v. Burke, 337 U.S. 772 (1949); Townsend v. Burke, 334 U.S. 736 (1948); Palmer v. Ashe, 342 U.S. 134 (1951); White v. Ragen, 324 U.S. 760 (1945)), prejudicial developments during the trial (Cash v. Culver, 358 U.S. 633 (1959); Gibbs v. Burke, *supra*), and questionable proceedings at sentencing (Townsend v. Burke, *supra*), were commonly cited.

[294] Hudson v. North Carolina, 363 U.S. 697 (1960), held that an unrepresented defendant had been prejudiced when his co-defendant's counsel plead his client guilty in the presence of the jury, the applicable state rules to avoid prejudice in such situation were unclear, and the defendant in any event had taken no steps to protect himself. The case seemed to require reversal of any conviction when the record contained a prejudicial occurrence that under state law might have been prevented or ameliorated. Carnley v. Cochran, 369 U.S. 506 (1962), reversed a conviction because the unrepresented defendant failed to follow some advantageous procedure that a lawyer might have utilized. Chewning v. Cunningham, 368 U.S. 443 (1962), found that a lawyer might have developed several defenses and adopted several tactics to defeat a charge under a state recidivist statute, and that therefore the unrepresented defendant had been prejudiced.

[295] Quicksal v. Michigan, 339 U.S. 660 (1950). *See also* Canizio v. New York, 327 U.S. 82 (1946); Foster v. Illinois, 332 U.S. 134 (1947); Gayes v. New York, 332 U.S. 145 (1947); Bute v. Illinois, 333 U.S. 640 (1948); Gryger v. Burke, 334 U.S. 728 (1948). *Cf.* White v. Ragen, 324 U.S. 760 (1945).

[296] 372 U.S. 335 (1963).

[297] 372 U.S. at 344.

[298] 372 U.S. at 342–43, 344. Justice Black, of course, believed the Fourteenth Amendment made applicable to the States all the provisions of the Bill of Rights, Adamson v. California, 332 U.S. 46, 71 (1947), but for purposes of delivering the opinion of the Court followed the due process absorption doctrine. Justice Douglas, concurring, maintained the incorporation position. *Gideon*, 372 U.S. at 345. Justice Harlan concurred, objecting both to the Court's manner of overruling Betts v. Brady and to the incorporation implications of the opinion. Id. at 349.

to assistance of counsel could be claimed by defendants charged with misdemeanors or serious misdemeanors as well as with felonies, and it was not until later that the Court held that the right applies to any misdemeanor case in which imprisonment is imposed—that no person may be sentenced to jail who was convicted in the absence of counsel, unless he validly waived his right.[299] The Court subsequently extended the right to cases where a suspended sentence or probationary period is imposed, on the theory that any future incarceration that occurred would be based on the original uncounseled conviction.[300]

Because the absence of counsel when a defendant is convicted or pleads guilty goes to the fairness of the proceedings and undermines the presumption of reliability that attaches to a judgment of a court, *Gideon* has been held fully retroactive, so that convictions obtained in the absence of counsel without a valid waiver are not only voidable,[301] but also may not be subsequently used either to support guilt in a new trial or to enhance punishment upon a valid conviction.[302]

Limits on the Right to Retained Counsel.—*Gideon v. Wainwright*[303] is regarded as having consolidated a right to counsel at trial in the Sixth Amendment, be the trial federal or state or counsel retained or appointed.[304] The Sixth Amendment cases, together

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[299] Scott v. Illinois, 440 U.S. 367 (1979), adopted a rule of actual punishment and thus modified Argersinger v. Hamlin, 407 U.S. 25 (1972), which had held counsel required if imprisonment were possible. The Court has also extended the right of assistance of counsel to juvenile proceedings. *In re* Gault, 387 U.S. 1 (1967). *See also* Specht v. Patterson, 386 U.S. 605 (1967).

[300] Alabama v. Shelton, 535 U.S. 654 (2002).

[301] Pickelsimer v. Wainwright, 375 U.S. 2 (1963); Doughty v. Maxwell, 376 U.S. 202 (1964); Kitchens v. Smith, 401 U.S. 847 (1971). *See* Linkletter v. Walker, 381 U.S. 618, 639 (1965).

[302] Loper v. Beto, 405 U.S. 473 (1972) (error to have permitted counseled defendant in 1947 trial to have his credibility impeached by introduction of prior uncounseled convictions in the 1930s; Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented); United States v. Tucker, 404 U.S. 443 (1972) (error for sentencing judge in 1953 to have relied on two previous convictions at which defendant was without counsel); Burgett v. Texas, 389 U.S. 109 (1967) (admission of record of prior conviction without the assistance of counsel at trial, with instruction to jury to regard it only for purposes of determining sentence if it found defendant guilty, but not to use it in considering guilt, was inherently prejudicial); *but see* United States v. Bryant, 579 U.S. ___, No. 15–420, slip op. at 13 (2016) (holding that the use of prior, uncounseled tribal-court domestic abuse convictions as the predicates for a sentence enhancement in a subsequent conviction does not violate the Sixth Amendment right to counsel, as repeat offender laws penalize only the last offense committed by the defendant); Nichols v. United States, 511 U.S. 738 (1994) (as Scott v. Illinois, 440 U.S. 367 (1979) recognized that an uncounseled misdemeanor conviction is valid if defendant is not incarcerated, such a conviction may be used as the basis for penalty enhancement upon a subsequent conviction).

[303] 372 U.S. 335 (1963).

[304] *E.g.*, Wheat v. United States, 486 U.S. 153, 158 (1988).

with pre-*Gideon* cases that applied due process analysis under the Fourteenth Amendment to state proceedings, point to an unquestioned right to retain counsel for the course of a prosecution, but also to circumstances in which the choice of a particular representative must give way to the right's fundamental purpose of ensuring the integrity of the adversary trial system.

The pre-*Gideon* cases often spoke of the right to retain counsel expansively. Thus, in *Chandler v. Fretag*, when a defendant appearing in court to plead guilty to house-breaking was advised for the first time that, because of three prior convictions, he could be sentenced to life imprisonment as a habitual offender, the court's denial of his request for a continuance to consult an attorney was a violation of his Fourteenth Amendment due process rights.[305] "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. . . . A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."[306]

Though there is a presumption under the Sixth Amendment that a defendant may retain counsel of choice, the right to choose a particular attorney is not absolute. The prospect of compromised loyalty or competence may be sufficiently immediate and serious for a court to deny a defendant's selection. In *Wheat v. United States*, the district court had denied a defendant's proffered waiver of conflict of interest and refused to allow representation by an attorney who represented the defendant's co-conspirators in an illegal drug enterprise.[307] Upholding the district court's discretion to disallow representation in instances of actual conflict of interests or serious potential for conflict, the Court mentioned other situations in which a defendant's choice may not be honored. A defendant, for example, is not entitled to an advocate who is not a member of the bar, nor may a defendant insist on representation by an attorney who denies counsel for financial reasons or otherwise, nor may a defendant demand the services of a lawyer who may be compromised by past or ongoing relationships with the Government.[308]

The right to retain counsel of choice generally does not bar operation of forfeiture provisions, even if the forfeiture serves to deny to a defendant the wherewithal to employ counsel. In *Caplin &*

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[305] 348 U.S. 3 (1954).

[306] 348 U.S. at 9, 10. *See also*House v. Mayo, 324 U.S. 42 (1945); Hawk v. Olson, 326 U.S. 271 (1945); Reynolds v. Cochran, 365 U.S. 525 (1961).

[307] 486 U.S. 153 (1988).

[308] 486 U.S. at 159.

Drysdale v. United States,[309] the Court upheld a federal statute requiring forfeiture to the government of property and proceeds derived from drug-related crimes constituting a "continuing criminal enterprise,"[310] even though a portion of the forfeited assets had been used to retain defense counsel. Although a defendant may spend his own money to employ counsel, the Court declared, "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that defendant will be able to retain the attorney of his choice."[311] Because the statute vests title to the forfeitable assets in the United States at the time of the criminal act,[312] the defendant has no right to give them to a "third party" even if the purpose is to exercise a constitutionally protected right.[313] Moreover, on the same day *Caplin & Drysdale* was decided, the Court, in *United States v. Monsanto*, held that the government may, prior to trial, freeze assets that a defendant needs to hire an attorney if probable cause exists to "believe that the property will ultimately be proved forfeitable."[314] Nonetheless, the holdings from *Caplin & Drysdale* and *Monsanto* are limited in that the Court, in *Luis v. United States*, has held that the Sixth Amendment provides criminal defendants the right to preserve *legitimate, untainted* assets unrelated to the underlying crime in order to retain counsel of their choice.[315]

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[309] 491 U.S. 617 (1989).

[310] 21 U.S.C. § 853.

[311] 491 U.S. at 626.

[312] The statute was interpreted in United States v. Monsanto, 491 U.S. 600 (1989), as requiring forfeiture of all assets derived from the covered offenses, and as making no exception for assets the defendant intends to use for his defense.

[313] Dissenting Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, described the Court's ruling as allowing the Sixth Amendment right to counsel of choice to be "outweighed by a legal fiction." 491 U.S. at 644 (dissenting from both *Caplin & Drysdale* and *Monsanto*).

[314] *Monsanto*, 491 U.S. at 615 ("Indeed, it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that . . . the Government may restrain persons where there is a finding of probable cause to believe that the accused has committed a serious offense."). A subsequent case held that where a grand jury had returned an indictment based on probable cause, that conclusion was binding on a court during forfeiture proceedings and the defendants do not have a right to have such a conclusion re-examined in a separate judicial hearing in order to unfreeze the assets to pay for their counsel. Kaley v. United States, 571 U.S. ___, No. 12–464, slip op. (2014).

[315] 578 U.S. ___, No. 14–419, slip op. at 1 (2016) (announcing the judgment of the Court). The Court in *Luis* split as to the reasoning for holding that a pretrial freeze of untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice. Four Justices employed a balancing test, weighing the government's contingent future interest in the untainted assets against the interests in preserving the right to counsel—a right at the "heart of a fair, effective criminal justice system"—in concluding that the defendant had the right to use innocent property to pay a reasonable fee for assistance of counsel. *See id.* at 11–16 (Breyer, J.,

Nevertheless, where the right to be assisted by counsel of one's choice is wrongly denied, a Sixth Amendment violation occurs regardless of whether the alternate counsel retained was effective, or whether the denial caused prejudice to the defendant.[316] Further, because such a denial is not a "trial error" (a constitutional error that occurs during presentation of a case to the jury), but a "structural defect" (a constitutional error that affects the framework of the trial),[317] the Court had held that the decision is not subject to a "harmless error" analysis.[318]

Effective Assistance of Counsel.—"[T]he right to counsel is the right to the effective assistance of counsel."[319] This right to effective assistance has two aspects. First, a court may not restrict defense counsel in the exercise of the representational duties and prerogatives attendant to our adversarial system of justice.[320] Second, defense counsel can deprive a defendant of effective assistance by failing to provide competent representation that is adequate to ensure a fair trial,[321] or, more broadly, a just outcome.[322] The right to effective assistance may be implicated as early as the appointment process. Cases requiring appointment of counsel for indigent defendants hold that, as a matter of due process, the assignment of defense counsel must be timely and made in a manner that affords "effective aid in the preparation and trial of the case."[323] The Sixth

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joined by Roberts, C.J., Ginsburg & Sotomayor, JJ.). Justice Thomas, in providing the fifth and deciding vote, concurred in judgment only, contending that "textual understanding and history" alone suffice to "establish that the Sixth Amendment prevents the Government from freezing untainted assets in order to secure potential forfeiture." *See id.* at 1 (Thomas, J., concurring); *see also id.* at 9 ("I cannot go further and endorse the plurality's atextual balancing analysis.").

[316] United States v. Gonzalez-Lopez, 548 U.S. 140, 144–45 (2006).

[317] Arizona v. Fulminante, 499 U.S. 279, 307–310 (1991).

[318] *Gonzalez-Lopez*, 548 U.S. at 148–49. The Court noted that an important component of the finding that denial of the right to choose one's own counsel was a "structural defect" was the difficulty of assessing the effect of such denial on a trial's outcome. Id. at 149 n.4.

[319] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . . ." 397 U.S. at 771. As a corollary, there is no Sixth Amendment right to effective assistance where there is no Sixth Amendment right to counsel. Wainwright v. Torna, 455 U.S. 586 (1982) (summarily holding that defendant may not raise ineffective assistance claim in context of proceeding in which he had no constitutional right to counsel).

[320] *E.g.*, Geders v. United States, 425 U.S. 80 (1976) (trial judge barred consultation between defendant and attorney overnight); Herring v. New York, 422 U.S. 853 (1975) (application of statute to bar defense counsel from making final summation).

[321] Strickland v. Washington, 466 U.S. 668, 686 (1984).

[322] Lafler v. Cooper, 566 U.S. ___, No. 10–209, slip op. (2012) (erroneous advice during plea bargaining).

[323] Powell v. Alabama, 287 U.S. 45, 71–72 (1932); Glasser v. United States, 315 U.S. 60, 70 (1942).

Amendment also is implicated when a court appoints a defendant's attorney to represent his co-defendant as well, where the co-defendants are known to have potentially conflicting interests.[324]

Restrictions on representation imposed during trial also have been stricken as impermissible interference with defense counsel. The Court invalidated application of a statute that empowered a judge to deny final summations before judgment in a nonjury trial: "The right to the assistance of counsel . . . ensures to the defense in a criminal trial the opportunity to participate fully and fairly . . . ."[325] And, in *Geders v. United States*,[326] the Court held that a trial judge's order preventing a defendant from consulting his counsel during a 17-hour overnight recess between his direct and cross-examination, to prevent tailoring of testimony or "coaching," deprived the defendant of his right to assistance of counsel and was invalid.[327] Other direct and indirect restraints upon counsel have been found to violate the Amendment.[328] Government investigators also are barred from impermissibly interfering with the relationship between defendant and counsel.[329]

Additionally, the Sixth Amendment's right to effective assistance attaches directly to the fidelity and competence of defense counsel's services, regardless of whether counsel is appointed or privately retained or whether the government in any way brought about the defective representation. "The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's en-

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[324] Glasser v. United States, 315 U.S. 60 (1942).

[325] Herring v. New York, 422 U.S. 853, 858 (1975). "[T]he right to assistance to counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments." 422 U.S. at 857.

[326] 425 U.S. 80 (1976).

[327] *Geders* was distinguished in Perry v. Leeke, 488 U.S. 272 (1989), in which the Court upheld a trial court's order that the defendant and his counsel not consult during a 15-minute recess between the defendant's direct testimony and his cross-examination.

[328] *E.g.*, Ferguson v. Georgia, 365 U.S. 570 (1961) (where Georgia statute, uniquely, barred sworn testimony by defendants, a defendant was entitled to the assistance of counsel in presenting the unsworn statement allowed him under Georgia law); Brooks v. Tennessee, 406 U.S. 605 (1972) (alternative holding) (statute requiring defendant to testify prior to any other witness for defense or to forfeit the right to testify denied him due process by depriving him of the tactical advice of counsel on whether to testify and when).

[329] United States v. Morrison, 449 U.S. 361 (1981) (Court assumed that investigators who met with defendant on another matter without knowledge or permission of counsel and who disparaged counsel and suggested she could do better without him, interfered with counsel, but Court held that in absence of showing of adverse consequences to representation, dismissal of indictment was inappropriate remedy).

titlement to constitutional protection."[330] To an argument that a state need only appoint for indigent defendants to satisfy Sixth Amendment requirements, the Court responded that "the State's conduct of a criminal trial itself implicates the State in the defendant's conviction", and no state may proceed against a defendant whose counsel, appointed or retained, cannot defend him fully and faithfully.[331]

Fidelity has been at issue in cases of joint representation of codefendants. In *Glasser v. United States*, the Court found a trial judge erred in appointing one defendant's attorney to also represent a codefendant in a conspiracy case; the judge knew of potential conflicts of interest in the case, and the original defendant had earlier expressed a desire for sole representation.[332] Counsel for codefendants in another case made a timely assertion to the trial judge that continuing joint representation could pose a conflict of interest, and the Court found that the trial judge erred in not examining the assertion of potential conflict closely and permitting or appointing separate counsel, absent a finding that the risk of conflict was remote.[333] Joint representation does not deny effective assistance *per se*, however. Judges are not automatically required to initiate an inquiry into the propriety of multiple representation, being able to assume in the absence of undefined "special circumstances" that no conflict exists. On the other hand, a defendant who objects to joint representation must be given an opportunity to make the case that potential conflicts exists. Absent an objection, a defendant must later show the existence of an "actual conflict of interest which adversely affected his lawyer's performance." Once it is established that a conflict did actively affect the lawyer's joint representation, however, a defendant need not additionally prove that the lawyer's representation was prejudicial to the outcome of the case.[334]

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[330] Cuyler v. Sullivan, 446 U.S. 335, 344 (1980).

[331] Id.

[332] 315 U.S. 60 (1942).

[333] Holloway v. Arkansas, 435 U.S. 475 (1978). Counsel had been appointed by the court.

[334] Cuyler v. Sullivan, 446 U.S. 335, 348–50 (1980). *Accord But see* Wood v. Georgia, 450 U.S. 261 (1981) (where counsel retained by defendants' employer had conflict between their interests and employer's, and all the facts were known to trial judge, he should have inquired further); Wheat v. United States, 486 U.S. 153 (1988) (district court correctly denied defendant's waiver of right to conflict-free representation; separate representation order is justified by likelihood of attorney's conflict of interest). Where an alleged conflict is not premised on joint representation, but rather on a prior representation of a different client, for example, a defendant may be required to show actual prejudice in addition to a potential conflict. Mickens v. Taylor, 535 U.S. 162 (2002). For earlier cases presenting more direct violations of defendant's rights, *see* Glasser v. United States, 315 U.S. 60 (1942); United States v. Hayman, 342 U.S. 205 (1952); and Ellis v. United States, 356 U.S. 674 (1958).

As to attorney competence, although the Court touched on the question in 1970,[335] it did not articulate a general Sixth Amendment standard for adequacy of representation until 1984 in *Strickland v. Washington*.[336] There are two components to the *Strickland* test: deficient representation and resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question.[337] The gauge of deficient representation is an objective standard of reasonableness "under prevailing professional norms" that takes into account "all the circumstances" and evaluates conduct "from counsel's perspective at the time."[338] Providing effective assistance is not limited to a single path. No detailed rules or guidelines for adequate representation are appropriate: "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."[339]

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[335] In McMann v. Richardson, 397 U.S. 759, 768–71 (1970), the Court observed that whether defense counsel provided adequate representation, in advising a guilty plea, depended not on whether a court would retrospectively consider his advice right or wrong "but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *See also* Tollett v. Henderson, 411 U.S. 258, 266–69 (1973); United States v. Agurs, 427 U.S. 97, 102 n.5 (1976).

[336] 466 U.S. 668 (1984). *Strickland* involved capital sentencing, and the Court had left open the since-resolved issue of what standards might apply in ordinary sentencing, where there is generally far more discretion than in capital sentencing, or in the guilt/innocence phase of a capital trial. 466 U.S. at 686.

[337] The Court often emphasizes that the *Strckland* test is necessarily difficult to pass: Ineffective assistance of counsel claims can put rules of waiver and forfeiture at issue and otherwise threaten the integrity of the adversarial system if wide-ranging, after-the-fact second-guessing of counsel's action is freely encouraged. *E.g.*, Harrington v. Richter, 562 U.S. ___, No. 09–587, slip op. at 15 (2011). Furthermore, ineffective assistance of counsel claims frequently are asserted in federal court to support petitions for writs of *habeas corpus* filed by state prisoners. Making a successful *Strickland* claim in a *habeas* context, as opposed to direct review, was made doubly daunting by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104–132, § 104, 110 Stat. 1218–1219, amending 28 U.S.C. § 2254. After the passage of AEDPA, one must go beyond showing that a state court applied federal law incorrectly to also show that the court misapplied established Supreme Court precedent in a manner that no fair-minded jurist could find to be reasonable. Harrington v. Richter, 562 U.S. ___, No. 09–587, slip op. at 10–14, 15–16 (counsel's decision to forgo inquiry into blood evidence held to be at least arguably reasonable). *See also* Burt v. Titlow, 571 U.S. ___, No. 12–414, slip op. (2013); Cullen v. Pinholster, 563 U.S. 170 (2011).

[338] 466 U.S. at 688, 689. *See also* Maryland v. Kulbicki, 577 U.S. ___, No. 14–848, slip op. at 3 (2015) (per curiam) (reversing an opinion by Maryland's highest state court, which found that counsel was ineffective because the defendant's attorneys did not question the methodology used by the state in analyzing bullet fragments, on the grounds that this methodology "was widely accepted" at the time of trial, and courts "regularly admitted [such] evidence").

[339] 466 U.S. at 689. *Strickland* observed that "American Bar Association standards and the like" may reflect prevailing norms of practice, "but they are only guides." Id. at 688. Subsequent cases also cite ABA standards as touchstones of prevailing norms of practice. *E.g.*, Wiggins v. Smith, 539 U.S. 510, 524 (2003), and Rompilla v.

Because even the most highly competent attorneys might choose to defend a client differently, "[j]udicial scrutiny of counsel's performance must be highly deferential." [340] Counsel's obligation is a general one: to act within the wide range of legitimate, lawful, and reasonable conduct.[341] "[S]trategic choices made after thorough investigation of relevant law and facts . . . are virtually unchallengeable," [342] as is "a reasonable decision that makes particular investigations unnecessary," [343] or a reasonable decision selecting which issues to raise on appeal.[344] In *Strickland* itself, the allegation of ineffective assistance failed: The Court found that the defense attorney's decision to forgo character and psychological evidence in a capital sentencing proceeding to avoid rebuttal evidence of the defendant's criminal history was "the result of reasonable professional judgment." [345]

On the other hand, defense counsel does have a general duty to investigate a defendant's background, and limiting investigation and presentation of mitigating evidence must be supported by rea-

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Beard, 545 U.S. 374, 387 (2005). But in Bobby v. Van Hook, the Court held that the Sixth Circuit had erred in assessing an attorney's conduct in the 1980s under 2003 ABA guidelines, and also noted that its holding "should not be regarded as accepting the legitimacy of a less categorical use of the [2003] Guidelines to evaluate post-2003 representation." . 558 U.S. ___, No. 09–144, slip op. at 5 n.1 (2009) (per curiam).

[340] *Strickland*, 466 U.S. at 689. The purpose is "not to improve the quality of legal representation, . . . [but] simply to ensure that criminal defendants receive a fair trial." Id.

[341] There is no obligation to assist the defendant in presenting perjured testimony, Nix v. Whiteside, 475 U.S. 157 (1986), and a defendant has no right to require his counsel to use peremptory challenges to exclude jurors on the basis of race. Georgia v. McCollum, 505 U.S. 42 (1992). Also, "effective" assistance of counsel does not guarantee the accused a "meaningful relationship" of "rapport" with his attorney such that he is entitled to a continuance in order to change attorneys during a trial. Morris v. Slappy, 461 U.S. 1 (1983).

[342] *Strickland*, 466 U.S. at 690. *See also* Yarborough v. Gentry, 540 U.S. 1 (2003) (deference to attorney's choice of tactics for closing argument); *Burt*, slip op. at 10 (2013) (where a reasonable interpretation of the record indicated that a criminal defendant claimed actual innocence, the defendant's attorney was justified in withdrawing a guilty plea).

[343] *Strickland*, 466 U.S. at 691. *See also* Woodford v. Visciotti, 537 U.S. 19 (2002) (state courts could reasonably have concluded that failure to present mitigating evidence was outweighed by "severe" aggravating factors); Schriro v. Landrigan, 550 U.S. 465 (2007) (federal district court was within its discretion to conclude that attorney's failure to present mitigating evidence made no difference in sentencing).

[344] There is no obligation to present on appeal all nonfrivolous issues requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983) (appointed counsel may exercise his professional judgment in determining which issues are best raised on appeal).

[345] 466 U.S. at 699. *Accord* Wong v. Belmontes, 558 U.S. ___, No. 08–1263 (2009) (per curiam); Darden v. Wainwright, 477 U.S. 168 (1986) (decision not to introduce mitigating evidence).

sonable efforts and judgment.[346] Also, even though deference to counsel's choices may seem particularly apt in the unstructured, often style-driven arena of plea bargaining,[347]an accused, in considering a plea, is clearly entitled to advice of counsel on the prospect of conviction at trial and the extent of punishment that might be imposed. Thus, in *Lafler v. Cooper*, the government conceded that the deficient representation part of the *Strickland* test was met when an attorney erroneously advised the defendant during plea negotiations that the facts in his case would not support a conviction for attempted murder.[348]

Moreover, in *Padilla v. Kentucky*, the Court held that defense counsel's Sixth Amendment duty to a client considering a plea goes beyond advice on issues directly before the criminal court to reach advice on deportation.[349] Because of its severity, historical association with the criminal justice system, and increasing certainty following conviction and imprisonment, deportation was found to be of a "unique nature": the Court pointedly stated that it was not addressing whether distinguishing between direct and collateral consequences of conviction was appropriate in bounding defense counsel's constitutional duty in a criminal case.[350] Further, the Court held that defense counsel failed to meet prevailing professional norms in representing to Padilla that he did not have to worry about deportation because of the length of his legal residency in the U.S. The Court emphasized that this conclusion was not based on the attorney's mistaken advice, but rather on a broader obligation to inform a noncitizen client whether a plea carries a risk of deporta-

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[346] *See* Wiggins v. Smith, 539 U.S. 510 (2003) (attorney's failure to pursue defendant's personal history and present important mitigating evidence at capital sentencing was objectively unreasonable); Rompilla v. Beard, 545 U.S. 374 (2005) (attorneys' failure to consult trial transcripts from a prior conviction that the attorneys knew the prosecution would rely on in arguing for the death penalty was inadequate); Porter v. McCollum, 558 U.S. ___, No. 08–10537, slip op. (2009) (per curiam) (attorney's failure to interview witnesses or search records in preparation for penalty phase of capital murder trial constituted ineffective assistance of counsel); *See also*, Sears v. Upton, 561 U.S. ___, No. 09–8854, slip op. (2010); Cullen v. Pinholster, 563 U.S. ___, No. 09–1088, slip op. (2011) (Sotomayor, J. dissenting); Hinton v. Alabama, 571 U.S. ___, No. 13–6440, slip op. (2014) (per curiam) (attorney's hiring of a questionably competent expert witness because of a mistaken belief in the legal limit on the amount of funds payable on behalf of an indigent defendant constitutes ineffective assistance).

[347] *See, e.g.*, Premo v. Moore, 562 U.S. ___, No. 09–658, slip op. (2011).

[348] Lafler v. Cooper, 566 U.S. ___, No. 10–209, slip op. (2012). Failure to communicate a plea offer to a defendant also may amount to deficient representation. Missouri v. Frye, 566 U.S. ___, No. 10–444, slip op. (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

[349] Padilla v. Kentucky, 559 U.S. ___, No. 08–651, slip op. (2010).

[350] 559 U.S. ___, No. 08–651, slip op. at 8.

tion.[351] Silence is not an option. On the issue of prejudice to Padilla from ineffective assistance, the Court sent the case back to lower courts for further findings.[352]

What constitutes prejudice from attorney error, the second *Strickland* requirement, has proved to be a more difficult issue, and one that gained additional doctrinal salience after *Lafler* and *Frye*.[353] The touchstone of "prejudice" under *Strickland* is that the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [354] Nevertheless, defendants frequently fall short on the prejudice requirement, with the Court posing it as a threshold matter and failing to find how other representation could have made a significant difference.[355]

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[351] 559 U.S. ___, No. 08–651, slip op. at 12–16.

[352] In *Chaidez v. United States*, 568 U.S. ___, No. 11–820, slip op. (2013), the Court held that *Padilla* announced a "new rule" of criminal procedure that did not apply "retroactively" during collateral review of convictions then already final. For a discussion of retroactive application of the Court's criminal procedure decisions, *see supra* Article III: Section 2. Judicial Power and Jurisdiction: Clause 1. Cases and Controversies; Grants of Jurisdiction: Judicial Power and Jurisdiction-Cases and Controversies: The Requirements of a Real Interest: Retroactivity Versus Prospectivity.

[353] The *Frye* Court observed that, according to the Bureau of Justice Statistics, ninety-seven percent of recent federal convictions and ninety-four percent of recent state convictions had resulted from guilty pleas. Hill v. Lockhart had earlier established a basis for a Sixth Amendment challenge to a *conviction* arising from a plea bargain if a defendant could show he accepted the plea after having received ineffective assistance of counsel. By laying a basis for a Sixth Amendment challenge to a *failure to accept a plea offer* from the prosecution, *Frye* and *Lafler* recognized the possiblility of prejudice from ineffective bargaining alone regardless of the fairness of a subsequent conviction after a later plea to the court or a full trial.

[354] *Strickland*, 466 U.S. at 694. This standard does not require that "a defendant show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. *See also* Porter v. McCollum, 558 U.S. ___, No. 08–10537, slip op. at 15 (2009). Also, presentation of a plausible mitigation theory supported by evidence does not foreclose prejudice based on counsel's earlier failure to have conducted an adequate mitigation investigation. Sears v. Upton, 561 U.S. ___, No. 09–8854, slip op. (2010) (counsel presented evidence of supportive family ties as a mitigating factor in the penalty phase of a capital case, but a fuller investigation by counsel would have uncovered evidence of physical abuse, pronounced brain damage, and significantly diminished mental functioning). *See also*, *e.g.*, Glover v. United States, 531 U.S. 198 (2001) (6- to 21-month increase in prison term is sufficient "prejudice" under *Strickland* to raise issue of ineffective counsel).

[355] *E.g.*, Smith v. Spisak, 558 U.S. ___, No. 08–724, slip op. at 11–15 (2010). *See also* Hill v. Lockhart, 474 U.S. 52, 60 (1985). In Hill v. Lockhart, 474 U.S. 52 (1985), the Court applied the *Strickland* test to attorney decisions in plea bargaining, holding that a defendant must show a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty. And, prejudice may be particularly difficult to infer from a decision to plead guilty because of the many uncertainties still outstanding during plea negotiations. Premo v. Moore, 562 U.S. ___, No. 09–658, slip op. (2011).

Beyond *Strickland's* "reasonable probability of a different result" starting point, there are issues of when an "outcome determinative" test alone suffices, what exceptions exist, and whether the general rule should be modified. In *Lockhart v. Fretwell*, the Court appeared to refine the *Strickland* test when it stated that an "analysis focusing solely on mere outcome determination" is "defective" unless attention is also given to whether the result was "fundamentally unfair or unreliable."[356] However, the Court subsequently characterized *Lockhart* as addressing a class of exceptions to the "outcome determinative" test, and not supplanting it. According to *Williams v. Taylor*, it would disserve justice in some circumstances to find prejudice premised on a likelihood of a different outcome.[357] An overriding interest in fundamental fairness precluded a prejudice finding in *Lockhart*, for example, because such a finding would be nothing more than a fortuitous windfall for the defendant. As another example, it would be unjust to find legitimate prejudice in a defense attorney's interference with a defendant's perjured testimony, even if that testimony could have altered a trial's outcome.[358] In *Lafler v. Cooper*, four dissenters further would have imposed a fundamental fairness overlay to foreclose relief whenever a defendant proceeded to trial after turning down a plea offer because of incompetent advice of counsel.[359] In their view, conviction after a full and fair trial cannot be prejudicial in a constitutional

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But see Missouri v. Frye, 566 U.S. ___, No. 10–444, slip op. (2012) and Lafler v. Cooper, 566 U.S. ___, No. 10–209, slip op. (2012), in which the Court acknowledged that prejudice could arise from not accepting a plea offer from the prosecution because of inadequate counsel. When prejudice does arise from not accepting a plea offer, fashioning a remedy should neither grant the defendant a windfall (*e.g.*, automatic revival of the plea offer regardless of the defendant's subsequent conduct or conviction), nor must the government's efforts in securing a later conviction be ignored. To determine a remedy, the *Lafler* majority would leave it to the trial court's discretion in each case to sentence under the forgone plea, sentence under the subsequent conviction, or sentence in accordance with alternatives somewhere in between. The dissenting Justices pointedly criticized this "opaque" guidance.

[356] 506 U.S. 364, 368–70 (1993). Defense counsel had failed to raise a constitutional claim during sentencing that would have saved the defendant from a death sentence. The case precedent that supported the claim was itself overturned after sentencing but before defendant asserted in a habeas writ that he had received ineffective assistance. The Court held, 7–2, that even though the adequacy of counsel's representation is assessed under the standards that existed contemporaneously with the conduct, it was inappropriate in assessing prejudice to give the defendant the benefit of overturned case law. So long as the defendant was not deprived of a procedural or substantive right to which he would still be entitled, relief is not available. 506 U.S. at 372–73.

[357] 529 U.S. 362 (2000).

[358] 529 U.S. at 391–93. The latter example references Nix. v. Whiteside, 475 U.S. 157, 175–76 (1986).

[359] 566 U.S. ___, No. 10–209, slip op. (2012) (Scalia, J., with Roberts, C.J., and Thomas, J., dissenting); 566 U.S. ___, No. 10–209, slip op. (2012) (Alito, J., dissenting).

sense, even if a forgone plea would have yielded lesser charges or punishment. This view did not prevail, however.

A second category of recognized exceptions to the application of the "outcome determinative" prejudice test includes the relatively limited number of cases in which prejudice is presumed. This presumption occurs when there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[360] These situations, the Court explained in *United States v. Cronic*, involve some kind of "breakdown of the adversarial process," and include actual or constructive denial of counsel, denial of such basics as the right to effective cross-examination, or failure of counsel to subject the prosecution's case to meaningful adversarial testing.[361] "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show [prejudice],"[362] and consequently most claims of inadequate representation continue to be measured by the *Strickland* standard.[363]

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[360] United States v. Cronic, 466 U.S. 648, 658 (1984).

[361] 466 U.S. at 657, 659. *But see* Bell v. Cone, 535 U.S. 685 (2002) (failure to introduce mitigating evidence and waiver of closing argument in penalty phase of death penalty case was not failure to test prosecution's case, where mitigating evidence had been presented during guilt phase and where waiver of argument deprived skilled prosecutor of an opportunity for rebuttal); Mickens v. Taylor, 535 U.S. 162 (2002) (failure of judge who knew or should have known of an attorney's conflicting interest to inquire as to whether such conflict was prejudicial not grounds for automatic reversal). In Wright v. Van Patten, 128 S. Ct. 743 (2008) (per curiam), the Supreme Court noted that it has never ruled on whether, during a plea hearing at which the defendant pleads guilty, defense counsel's being linked to the courtroom by speaker phone, rather than being physically present, is likely to result in such poor performance that *Cronic* should apply. The fact that the Court has never ruled on the question means that "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law,'" and, as a consequence, under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), the defendant is not entitled to *habeas* relief. Id. at 748 (quoting Carey v. Musladin, 549 U.S. 70, 77 (2006), as to which see "Limitations on *Habeas Corpus* Review of Capital Sentences" under Eighth Amendment, *infra*.

[362] *Cronic*, 466 U.S. at 659 n.26.

[363] *Strickland* and *Cronic* were decided the same day, and the Court's opinion in each cited the other. See *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 666 n.41. The *Cronic* presumption of prejudice may be appropriate when counsel's "overall performance" is brought into question, whereas *Strickland* is generally the appropriate test for "claims based on specified [counsel] errors." *Cronic*, 466 U.S. at 666 n.41. The narrow reach of *Cronic* has been illustrated by subsequent decisions. Not constituting *per se* ineffective assistance is a defense counsel's failure to file a notice of appeal, or in some circumstances even to consult with the defendant about an appeal. Roe v. Flores-Ortega, 528 U.S. 470 (2000). *But see* Lozada v. Deeds, 498 U.S. 430, 432 (1991) (per curiam). *See also* Florida v. Nixon, 543 U.S. 175 (2004) (no presumption of prejudice when a defendant has failed to consent to a tenable strategy counsel has adequately disclosed to and discussed with him). A standard somewhat different from *Cronic* and *Strickland* governs claims of attorney conflict of interest.

Self-Representation.—The Court has held that the Sixth Amendment, in addition to guaranteeing the right to retained or appointed counsel, also guarantees a defendant the right to represent himself.[364] It is a right the defendant must adopt knowingly and intelligently; under some circumstances the trial judge may deny the authority to exercise it, as when the defendant simply lacks the competence to make a knowing or intelligent waiver of counsel or when his self-representation is so disruptive of orderly procedures that the judge may curtail it.[365] The right applies only at trial; there is no constitutional right to self-representation on direct appeal from a criminal conviction.[366]

The essential elements of self-representation were spelled out in *McKaskle v. Wiggins*,[367] a case involving the self-represented defendant's rights vis-a-vis "standby counsel" appointed by the trial court. The "core of the *Faretta* right" is that the defendant "is entitled to preserve actual control over the case he chooses to present to the jury," and consequently, standby counsel's participation "should not be allowed to destroy the jury's perception that the defendant is representing himself."[368] But participation of standby counsel even in the jury's presence and over the defendant's objection does not violate the defendant's Sixth Amendment rights when serving the basic purpose of aiding the defendant in complying with routine courtroom procedures and protocols and thereby relieving the trial judge of these tasks.[369]

See discussion of Cuyler v. Sullivan under "Protection of Right to Retained Counsel," *supra*.

[364] Faretta v. California, 422 U.S. 806 (1975). An invitation to overrule *Faretta* because it leads to unfair trials for defendants was declined in Indiana v. Edwards, 128 S. Ct. 2379, 2388 (2008). Even if the defendant exercises his right to his detriment, the Constitution ordinarily guarantees him the opportunity to do so. A defendant who represents himself cannot thereafter complain that the quality of his defense denied him effective assistance of counsel. 422 U.S. at 834–35 n.46. The Court, however, has not addressed what state aid, such as access to a law library, might need to be made available to a defendant representing himself. Kane v. Garcia Espitia, 546 U.S. 9 (2005) (per curiam). Related to the right of self-representation is the right to testify in one's own defense. Rock v. Arkansas, 483 U.S. 44 (1987) (per se rule excluding all hypnotically refreshed testimony violates right).

[365] The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. Indiana v. Edwards, 128 S. Ct. 2379 (2008). Mental competence to stand trial, however, is sufficient to ensure the right to waive the right to counsel in order to plead guilty. Godinez v. Moran, 509 U.S. 389, 398 (1993).

[366] Martinez v. Court of App. of Cal., Fourth App. Dist., 528 U.S. 152 (2000). The Sixth Amendment itself "does not include any right to appeal." 528 U.S. at 160.

[367] 465 U.S. 168 (1984).

[368] 465 U.S. at 178.

[369] 465 U.S. at 184.

Right to Assistance of Counsel in Nontrial Situations

Judicial Proceedings Before Trial.—Even a preliminary hearing where no government prosecutor is present can trigger the right to counsel.[370] "[A] criminal defendant's defendant's initial appearance before a judicial officer, where he learns the charges against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel."[371] "Attachment," however, may signify "nothing more than the beginning of the defendant's prosecution [and] . . . not mark the beginning of a substantive entitlement to the assistance of counsel."[372] Thus, counsel need be appointed only "as far in advance of trial, and as far in advance of any pretrial 'critical stage,' as necessary to guarantee effective assistance at trial."[373]

Dicta in *Powell v. Alabama*,[374] however, indicated that "during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself." This language was gradually expanded upon and the Court developed a concept of "a critical stage in a criminal proceeding" as indicating when the defendant must be represented by counsel. Thus, in *Hamilton v. Alabama*,[375] the Court noted that arraignment under state law was a "critical stage" because the defense of insanity had to be pleaded then or lost, pleas in abatement had to be made then, and motions to quash on the ground of racial exclusion of grand jurors or that the grand jury was improperly drawn had to be made then. In *White v. Maryland*,[376] the Court set aside a conviction obtained at a trial at which the defendant's plea of guilty, entered at a preliminary hearing at which he was without counsel, was introduced as evidence against him at trial. Finally, in *Coleman v. Ala-*

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[370] Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008) (right to appointed counsel attaches even if no public prosecutor, as distinct from a police officer, is aware of that initial proceeding or involved in its conduct).

[371] 128 S. Ct. at 2592.

[372] 128 S. Ct. at 2592 (Alito, J., concurring). Justice Alito's concurrence, joined by Chief Justice Roberts and Justice Scalia, was not necessary for the majority opinion in *Rothgery*, but the majority noted that it had not decided "whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this." Id.

[373] 128 S. Ct. at 2595 (Alito, J. concurring).

[374] 287 U.S. 45, 57 (1932).

[375] 368 U.S. 52 (1961).

[376] 373 U.S. 59 (1963).

bama,[377] the Court denominated a preliminary hearing as a "critical stage" necessitating counsel even though the only functions of the hearing were to determine probable cause to warrant presenting the case to a grand jury and to fix bail; no defense was required to be presented at that point and nothing occurring at the hearing could be used against the defendant at trial. The Court hypothesized that a lawyer might by skilled examination and cross-examination expose weaknesses in the prosecution's case and thereby save the defendant from being bound over, and could in any event preserve for use in cross-examination at trial and impeachment purposes testimony he could elicit at the hearing; he could discover as much as possible of the prosecution's case against defendant for better trial preparation; and he could influence the court in such matters as bail and psychiatric examination. The result seems to be that reached in pre-*Gideon* cases in which a defendant was entitled to counsel if a lawyer might have made a difference.[378]

Custodial Interrogation.—At first, the Court followed the rule of "fundamental fairness," assessing whether under all the circumstances a defendant was so prejudiced by the denial of access to counsel that his subsequent trial was tainted.[379] It held in *Spano v. New York*[380] that, under the totality of circumstances, a confession obtained in a post-indictment interrogation was involuntary, and four Justices wished to place the holding solely on the basis that post-indictment interrogation in the absence of defendant's lawyer was a denial of his right to assistance of counsel. The Court issued that holding in *Massiah v. United States*,[381] in which federal officers caused an informer to elicit from the already-indicted

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[377] 399 U.S. 1 (1970). Justice Harlan concurred solely because he thought the precedents compelled him to do so, id. at 19, while Chief Justice Burger and Justice Stewart dissented. Id. at 21, 25. Inasmuch as the role of counsel at the preliminary hearing stage does not necessarily have the same effect upon the integrity of the factfinding process as the role of counsel at trial, *Coleman* was denied retroactive effect in Adams v. Illinois, 405 U.S. 278 (1972). Justice Blackmun joined Chief Justice Burger in pronouncing *Coleman* wrongly decided. Id. at 285, 286. *Hamilton* and *White*, however, were held to be retroactive in Arsenault v. Massachusetts, 393 U.S. 5 (1968).

[378] *Compare* Hudson v. North Carolina, 363 U.S. 697 (1960), *with* Chewning v. Cunningham, 368 U.S. 443 (1962), *and* Carnley v. Cochran, 369 U.S. 506 (1962).

[379] Crooker v. California, 357 U.S. 433 (1958) (five-to-four decision); Cicenia v. Lagay, 357 U.S. 504 (1958) (five-to-three).

[380] 360 U.S. 315 (1959).

[381] 377 U.S. 201 (1964). *See also* McLeod v. Ohio, 381 U.S. 356 (1965) (applying *Massiah* to the states, in a case not involving trickery but in which defendant was endeavoring to cooperate with the police). *But see* Hoffa v. United States, 385 U.S. 293 (1966). *Cf.* Milton v. Wainwright, 407 U.S. 371 (1972). In Kansas v. Ventris, 556 U.S. ___, No. 07–1356, slip op. at 5 (Apr. 29, 2009), the Court "conclude[d] that the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation," not merely if and when the defendant's statement is admitted into evidence.

defendant, who was represented by a lawyer, incriminating admissions that were secretly overheard over a broadcasting unit. Then, in *Escobedo v. Illinois*,[382] the Court held that preindictment interrogation violated the Sixth Amendment. But *Miranda v. Arizona*[383] switched from reliance on the Sixth Amendment to reliance on the Fifth Amendment's Self-Incrimination Clause in cases of pre-indictment custodial interrogation, although *Miranda* still placed great emphasis upon police warnings of the right to counsel and foreclosure of interrogation in the absence of counsel without a valid waiver by defendant.[384]

Massiah was reaffirmed and in some respects expanded by the Court. In *Brewer v. Williams*,[385] the right to counsel was found violated when police elicited from defendant incriminating admissions not through formal questioning but rather through a series of conversational openings designed to play on the defendant's known weakness. The police conduct occurred in the post-arraignment period in the absence of defense counsel and despite assurances to the attorney that defendant would not be questioned in his absence. In *United States v. Henry*,[386] the Court held that government agents violated the Sixth Amendment right to counsel when they contacted the cellmate of an indicted defendant and promised him payment under a contingent fee arrangement if he would "pay attention" to incriminating remarks initiated by the defendant and others. The Court concluded that, even if the government agents did not intend the informant to take affirmative steps to elicit incriminating statements from the defendant in the absence of counsel, the agents must have known that that result would follow.

The Court extended the *Edwards v. Arizona*[387] rule protecting in-custody requests for counsel to post-arraignment situations where the right derives from the Sixth Amendment rather than the Fifth. In the subsequently overruled *Michigan v. Jackson*, the Court held

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[382] 378 U.S. 478 (1964).

[383] 384 U.S. 436 (1966).

[384] The different issues in Fifth and Sixth Amendment cases were summarized in Fellers v. United States, 540 U.S. 519 (2004), which held that absence of an interrogation is irrelevant in a *Massiah*-based Sixth Amendment inquiry.

[385] 430 U.S. 387 (1977). Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. Id. at 415, 429, 438. *Compare* Rhode Island v. Innis, 446 U.S. 291 (1980), decided on self-incrimination grounds under similar facts.

[386] 447 U.S. 264 (1980). Justices Blackmun, White, and Rehnquist dissented. Id. at 277, 289. *Accord*, Kansas v. Ventris, 556 U.S. ___, No. 07–1356, slip op. at 2 (Apr. 29, 2009). *But cf.* Weatherford v. Bursey, 429 U.S. 545, 550 (1977) (rejecting a per se rule that, regardless of the circumstances, "if an undercover agent meets with a criminal defendant who is awaiting trial and with his attorney and if the forthcoming trial is discussed without the agent revealing his identity, a violation of the defendant's constitutional rights has occurred . . . ").

[387] 451 U.S. 477 (1981). See Fifth Amendment, "*Miranda v. Arizona*," *supra*.

that, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[388] The Court concluded that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before."[389] The protection, however, is not as broad under the Sixth Amendment as it is under the Fifth. Although *Edwards* has been extended to bar custodial questioning stemming from a separate investigation as well as questioning relating to the crime for which the suspect was arrested,[390] this extension does not apply for purposes of the Sixth Amendment right to counsel. The Sixth Amendment right is "offense-specific," and so also is "its *Michigan v. Jackson* effect of invalidating subsequent waivers in police-initiated interviews."[391] Therefore, although a defendant who has invoked his Sixth Amendment right to counsel with respect to the offense for which he is being prosecuted may not waive that right, he may waive his *Miranda*-based right not to be interrogated about unrelated and uncharged offenses.[392]

In *Montejo v. Louisiana*,[393] the Court overruled *Michigan v. Jackson*, finding that the Fifth Amendment's "*Miranda-Edwards-Minnick* line of cases" constitutes sufficient protection of the right to counsel. In *Montejo*, the defendant had not actually requested a lawyer, but had stood mute at a preliminary hearing at which the judge ordered the appointment of counsel. Later, before Montejo had met his attorney, two police detectives read him his *Miranda* rights and he agreed to be interrogated. *Michigan v. Jackson* had prohibited waivers of the right to counsel after a defendant's assertion of the right to counsel, so the Court in *Montejo* was faced with the

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[388] 475 U.S. 625, 636 (1986).

[389] 475 U.S. at 631. If a prisoner does not ask for the assistance of counsel, however, and voluntarily waives his rights following a *Miranda* warning, these reasons disappear. Moreover, although the right to counsel is more difficult to waive at trial than before trial, "whatever standards suffice for *Miranda*'s purposes will also be sufficient [for waiver of Sixth Amendment rights] in the context of postindictment questioning." Patterson v. Illinois, 487 U.S. 285, 298 (1988).

[390] Arizona v. Roberson, 486 U.S. 675 (1988).

[391] McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). The reason that the right is "offense-specific" is that "it does not attach until a prosecution is commenced." Id.

[392] Rejecting an exception to the offense-specific limitation for crimes that are closely related factually to a charged offense, the Court instead borrowed the *Blockburger* test from double-jeopardy law: if the same transaction constitutes a violation of two separate statutory provisions, the test is "whether each provision requires proof of a fact which the other does not." Texas v. Cobb, 532 U.S. 162, 173 (2001). This meant that the defendant, who had been charged with burglary, had a right to counsel on that charge, but not with respect to murders committed during the burglary.

[393] 556 U.S. ___, No. 07–1529, slip op. at 15 (2009).

question of whether *Michigan v. Jackson* applied where an attorney had been appointed in the absence of such an assertion.

The Court in *Montejo* noted that "[n]o reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present."[394] But, to apply *Michigan v. Jackson* only when the defendant invokes his right to counsel "would be unworkable in more than half the States of the Union," where "appointment of counsel is automatic upon a finding of indigency" or may be made "*sua sponte* by the court."[395] "On the other hand, eliminating the invocation requirement would render the rule easy to apply but depart fundamentally from the *Jackson* rationale," which was "to prevent police from badgering defendants into changing their minds about their rights" after they had invoked them.[396] Moreover, the Court found, *Michigan v. Jackson* achieves little by way of preventing unconstitutional conduct. Without *Jackson*, there would be "few if any" instances in which "fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial. . . . The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end. . . . Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but 'badgering' by later requests is prohibited."[397] Thus, the Court in *Montejo* overruled *Michigan v. Jackson*.[398]

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[394] 556 U.S. ___, No. 07–1529, slip op. at 10.
[395] 556 U.S. ___, No. 07–1529, slip op. at 13, 4.
[396] 556 U.S. ___, No. 07–1529, slip op. at 13, 10.
[397] 556 U.S. ___, No. 07–1529, slip op. at 15.
[398] Justice Stevens, joined by Justices Souter and Ginsburg, and by Justice Breyer except for footnote 5, dissented. He wrote, "The majority's analysis flagrantly misrepresents *Jackson's* underlying rationale and the constitutional interests the decision sought to protect. . . . [T]he *Jackson* opinion does not even mention the anti-badgering considerations that provide the basis for the Court's decision today. Instead, *Jackson* relied primarily on cases discussing the broad protections guaranteed by the Sixth Amendment right to counsel—not its Fifth Amendment counterpart. *Jackson* emphasized that the purpose of the Sixth Amendment is to 'protec[t] the unaided layman at critical confrontations with his adversary,' by giving him 'the right to rely on counsel as a medium between him[self] and the State.' . . . Once *Jackson* is placed in its proper Sixth Amendment context, the majority's justifications for overruling the decision crumble." Slip op. at 5, 6 (internal quotation marks and citations omitted). Justice Stevens added, "Even if *Jackson* had never been decided, it would be clear that Montejo's Sixth Amendment rights were violated. . . . Because police questioned Montejo without notice to, and outside the presence of, his lawyer, the

The remedy for violation of the Sixth Amendment rule is exclusion from evidence of statements so obtained.[399] And, although the basis for the Sixth Amendment exclusionary rule—to protect the right to a fair trial—differs from that of the Fourth Amendment rule—to deter illegal police conduct—exceptions to the Fourth Amendment's exclusionary rule can apply as well to the Sixth. In *Nix v. Williams*,[400] the Court held the "inevitable discovery" exception applicable to defeat exclusion of evidence obtained as a result of an interrogation violating the accused's Sixth Amendment rights. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."[401] Also, an exception to the Sixth Amendment exclusionary rule has been recognized for the purpose of impeaching the defendant's trial testimony.[402]

Lineups and Other Identification Situations.—The concept of the "critical stage" was again expanded and its rationale formulated in *United States v. Wade*,[403] which, with *Gilbert v. California*,[404] held that lineups are a critical stage and that in-court identification of defendants based on out-of-court lineups or show-ups without the presence of defendant's counsel is inadmissible. The Sixth Amendment guarantee, said Justice Brennan, was intended to do away with the common-law limitation of assistance of counsel to matters of law, excluding matters of fact. The abolition of the fact-law distinction took on new importance due to the changes in investigation and prosecution since adoption of the Sixth Amendment. "When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshaled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our

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interrogation violated Montejo's right to counsel even under pre-*Jackson* precedent." Slip op. at 10–11.

[399] *See* Michigan v. Jackson, 475 U.S. 625 (1986).

[400] 467 U.S. 431 (1984).

[401] 467 U.S. at 446.

[402] Michigan v. Harvey, 494 U.S. 344 (1990) (post-arraignment statement taken in violation of Sixth Amendment is admissible to impeach defendant's inconsistent trial testimony); Kansas v. Ventris, 556 U.S. ___, No. 07–1356, slip op. at 6 (2009) (statement made to informant planted in defendant's holding cell admissible for impeachment purposes because "[t]he interests safeguarded by . . . exclusion are 'outweighed by the need to prevent perjury and to assure the integrity of the trial process").

[403] 388 U.S. 218 (1967).

[404] 388 U.S. 263 (1967).

cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings. . . . The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" [405]

"It is central to [the principle of *Powell v. Alabama*] that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." [406] Counsel's presence at a lineup is constitutionally necessary because the lineup stage is filled with numerous possibilities for errors, both inadvertent and intentional, which cannot adequately be discovered and remedied at trial.[407] However, because there was less certainty and frequency of possible injustice at this stage, the Court held that the two cases were to be given prospective effect only; more egregious instances, where identification had been based upon lineups conducted in a manner that was unnecessarily suggestive and conducive to irreparable mistaken identification, could be invalidated under the Due Process Clause.[408] The *Wade-Gilbert* rule is inapplicable to other methods of obtaining identification and other evidentiary material relating to the defendant, such as blood samples, handwriting exemplars, and the like, because there is minimal risk that the absence of counsel might derogate from the defendant's right to a fair trial.[409]

In *United States v. Ash*,[410] the Court redefined and modified its "critical stage" analysis. According to the Court, the "core purpose" of the guarantee of counsel is to assure assistance at trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." But assistance would be less than meaningful in the light of developments in criminal investigation and procedure if it were limited to the formal trial itself; therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or

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[405] United States v. Wade, 388 U.S. 218, 224–25 (1967).

[406] 388 U.S. at 226 (citations omitted).

[407] 388 U.S. at 227–39. Previously, the manner of an extra-judicial identification affected only the weight, not the admissibility, of identification testimony at trial. Justices White, Harlan, and Stewart dissented, denying any objective need for the Court's per se rule and doubting its efficacy in any event. Id. at 250.

[408] Stovall v. Denno, 388 U.S. 293 (1967).

[409] Gilbert v. California, 388 U.S. 263, 265–67 (1967) (handwriting exemplars); Schmerber v. California, 384 U.S. 757, 765–66 (1966) (blood samples).

[410] 413 U.S. 300 (1973). Justices Brennan, Douglas, and Marshall dissented. Id. at 326.

by both."[411] Therefore, unless the pretrial stage involved the physical presence of the accused at a trial-like confrontation at which the accused requires the guiding hand of counsel, the Sixth Amendment does not guarantee the assistance of counsel.

Because the defendant was not present when witnesses to the crime viewed photographs of possible guilty parties, and therefore there was no trial-like confrontation, and because the possibilities of abuse in a photographic display are discoverable and reconstructable at trial by examination of witnesses, an indicted defendant is not entitled to have his counsel present at such a display.[412]

Both Wade and Gilbert had already been indicted and counsel had been appointed to represent them when their lineups were conducted, a fact noted in the opinions and in subsequent ones,[413] but the cases in which the rulings were denied retroactive application involved preindictment lineups.[414] Nevertheless, in *Kirby v. Illinois*,[415] the Court held that no right to counsel exists with respect to lineups that precede some formal act of charging a suspect. The Sixth Amendment does not become operative, explained Justice Stewart's plurality opinion, until "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearings, indictment, information, or arraignment. . . . The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

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[411] 413 U.S. at 309–10, 312–13. Justice Stewart, concurring on other grounds, rejected this analysis, id. at 321, as did the three dissenters. Id. at 326, 338–344. "The fundamental premise underlying all of this Court's decisions holding the right to counsel applicable at 'critical' pretrial proceedings, is that a 'stage' of the prosecution must be deemed 'critical' for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary 'to protect the fairness of the trial itself.'" Id. at 339 (Justice Brennan dissenting). Examination of defendant by court-appointed psychiatrist to determine his competency to stand trial, after his indictment, was a "critical" stage, and he was entitled to the assistance of counsel before submitting to it. Estelle v. Smith, 451 U.S. 454, 469–71 (1981). Constructive notice is insufficient to alert counsel to psychiatric examination to assess future dangerousness of an indicted client. Satterwhite v. Texas, 486 U.S. 249 (1987) (also subjecting Estelle v. Smith violations to harmless error analysis in capital cases).

[412] 413 U.S. at 317–21. The due process standards are discussed under the Fourteenth Amendment, "Criminal Identification Process," *infra*.

[413] United States v. Wade, 388 U.S. 218, 219, 237 (1967); Gilbert v. California, 388 U.S. 263, 269, 272 (1967); Simmons v. United States, 390 U.S. 377, 382–83 (1968).

[414] Stovall v. Denno, 388 U.S. 293 (1967); Foster v. California, 394 U.S. 440 (1969); Coleman v. Alabama, 399 U.S. 1 (1970).

[415] 406 U.S. 682, 689 (1972).

It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[416] The Court's distinguishing of the underlying basis for *Miranda v. Arizona*[417] left that case basically unaffected by *Kirby*, but it appears that *Escobedo v. Illinois*,[418] and perhaps other cases, is greatly restricted thereby.

Post-Conviction Proceedings.—The right to counsel under the Sixth Amendment applies to "criminal prosecutions," a restriction that limits its scope but does not exhaust all constitutional rights to representation in adversarial contexts associated with the criminal justice process. The Sixth Amendment requires counsel at the sentencing stage,[419] and the Court has held that, where sentencing was deferred after conviction and the defendant was placed on probation, he must be afforded counsel at a hearing on revocation of probation and imposition of the deferred sentence.[420] Beyond this, however, the Court has eschewed Sixth Amendment analysis, instead delimiting the right to counsel under due process and equal protection principles.[421]

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[416] 406 U.S. at 689–90. Justices Brennan, Douglas, and Marshall, dissenting, argued that it had never previously been doubted that *Wade* and *Gilbert* applied in preindictment lineup situations and that, in any event, the rationale of the rule was no different whatever the formal status of the case. Id. at 691. Justice White, who dissented in *Wade* and *Gilbert*, dissented in *Kirby* simply on the basis that those two cases controlled this one. Id. at 705. Indictment, as the quotation from *Kirby* indicates, is not a necessary precondition. Any initiation of judicial proceedings suffices. *E.g.*, Brewer v. Williams, 430 U.S. 387 (1977) (suspect had been seized pursuant to an arrest warrant, arraigned, and committed by court); United States v. Gouveia, 467 U.S. 180 (1984) (Sixth Amendment attaches as of arraignment—there is no right to counsel for prison inmates placed under administrative segregation during a lengthy investigation of their participation in prison crimes).

[417] "[T]he *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial *interrogation* is inherently coercive." 406 U.S. at 688 (emphasis by Court).

[418] "But *Escobedo* is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination. . . .' Johnson v. New Jersey, 384 U.S. 719, 729. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts, Johnson v. New Jersey, *supra*, at 733–34, and those facts are not remotely akin to the facts of the case before us." 406 U.S. at 689. *But see* id. at 693 n.3 (Justice Brennan dissenting).

[419] Townsend v. Burke, 334 U.S. 736 (1948).

[420] Mempa v. Rhay, 389 U.S. 128 (1967) (applied retroactively in McConnell v. Rhay, 393 U.S. 2 (1968)).

[421] State criminal appeals, applications for collateral relief, and post-sentencing parole or probation determinations are examples of procedures with respect to which the Court has not invoked the Sixth Amendment. Using due process analysis, the Court has found no constitutional right to counsel in prison disciplinary proceedings. Wolff v. McDonnell, 418 U.S. 539, 560–70 (1974); Baxter v. Palmigiano, 425 U.S. 308, 314–15 (1976). *See* Fourteenth Amendment, "Rights of Prisoners," *infra*.

Noncriminal and Investigatory Proceedings.—Commitment proceedings that lead to the imposition of essentially criminal punishment are subject to the Due Process Clause and require the assistance of counsel.[422] A state administrative investigation by a fire marshal inquiring into the causes of a fire was held not to be a criminal proceeding and hence, despite the fact that the petitioners had been committed to jail for noncooperation, not the type of hearing at which counsel was requisite.[423] Another decision refused to extend the right to counsel to investigative proceedings antedating a criminal prosecution, and sustained the contempt conviction of private detectives who refused to testify before a judge authorized to conduct a non-prosecutorial, fact-finding inquiry akin to a grand jury proceeding, and who based their refusal on the ground that their counsel were required to remain outside the hearing room.[424]

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[422] Specht v. Patterson, 386 U.S. 605 (1967).
[423] *In re* Groban, 352 U.S. 330 (1957). Four Justices dissented.
[424] Anonymous v. Baker, 360 U.S. 287 (1959). Four Justices dissented.

SEVENTH AMENDMENT

CIVIL TRIALS

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CIVIL TRIALS

SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

TRIAL BY JURY IN CIVIL CASES

The Right and the Characteristics of the Civil Jury

History.—On September 12, 1787, as the Convention was in its final stages, Mr. Williamson of North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." The comment elicited some support and the further observation that because of the diversity of practice in civil trials in the states it would be impossible to draft a suitable provision.[1] When on September 15 it was moved that a clause be inserted in Article III, § 2, to guarantee that "a trial by jury shall be preserved as usual in civil cases," this objection seems to have been the only one urged in opposition and the motion was defeated.[2] The omission, however, was cited by many opponents of ratification and "was pressed with an urgency and zeal . . . well-nigh preventing its ratification."[3] A guarantee of right to jury in civil cases was one of the amendments urged on Congress by the ratifying conventions[4] and it was included from the first among Madison's pro-

[1] 2 M. Farrand, Records of the Federal Convention of 1787, at 587 (rev. ed. 1937).
[2] Id. at 628.
[3] J. Story, Commentaries on the Constitution of the United States 1757 (1833). "[I]t is a most important and valuable amendment; and places upon the high ground of constitutional right the inestimable privilege of a trial by jury in civil cases, a privilege scarcely inferior to that in criminal cases, which is conceded by all to be essential to political and civil liberty." Id. at 1762.
[4] J. Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 326 (2d ed. 1836) (New Hampshire); 2 id. at 399–414 (New York); 3 id. at 658 (Virginia).

posals to the House.[5] It does not appear that the text of the proposed amendment or its meaning was debated during its passage.[6]

Composition and Functions of Civil Jury.—Traditionally, the Supreme Court has treated the Seventh Amendment as preserving the right of trial by jury in civil cases as it "existed under the English common law when the amendment was adopted."[7] The right was to "a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts and (except in acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."[8] Decision of the jury must be by unanimous verdict.[9] In *Colgrove v. Battin*,[10] however, the Court by a five-to-four vote held that rules adopted in a federal district court authorizing civil juries composed of six persons were permissible under the Seventh Amendment and congressional enactments. By the reference in the Amendment to the "common law," the Court thought, "the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury."[11]

The primary purpose of the Amendment is to preserve "the common law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are resolved by the court and issues of

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[5] 1 ANNALS OF CONGRESS 436 (1789). "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."

[6] It is simply noted in 1 ANNALS OF CONGRESS 760 (1789), that on August 18 the House "considered and adopted" the committee version: "In suits at common law, the right of trial by jury shall be preserved." On September 7, the SENATE JOURNAL states that this provision was adopted after insertion of "where the consideration exceeds twenty dollars." 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1150 (1971).

[7] Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1913); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–48 (1830).

[8] Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899).

[9] Maxwell v. Dow, 176 U.S. 581 (1900); American Publishing Co. v. Fisher, 166 U.S. 464 (1897); Springville v. Thomas, 166 U.S. 707 (1897).

[10] 413 U.S. 149 (1973). Justices Marshall and Stewart dissented on constitutional and statutory grounds, id. at 166, while Justices Douglas and Powell relied only on statutory grounds without reaching the constitutional issue. Id. at 165, 188.

[11] 413 U.S. at 155–56. The Court did not consider what number less than six, if any, would fail to satisfy the Amendment's requirements. "What is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. . . . It is undoubtedly true that at some point the number becomes too small to accomplish these goals . . . " Id. at 160 n.16. Application of similar reasoning has led the Court to uphold elimination of the unanimity as well as the 12-person requirement for criminal trials. *See* Williams v. Florida, 399 U.S. 78 (1970) (jury size); Apodaca v. Oregon, 406 U.S. 404 (1972) (unanimity); and Sixth Amendment discussion, *supra,* "The Attributes of the Jury."

fact are to be determined by the jury under appropriate instructions by the court."[12] But it "does not exact the retention of old forms of procedure"; nor does it "prohibit the introduction of new methods of ascertaining what facts are in issue" or new rules of evidence.[13] Those matters that were tried by a jury in England in 1791 are to be so tried today and those matters, such as matters that fall under equity, and admiralty and maritime jurisprudence, that were tried by the judge in England in 1791 are to be so tried today,[14] and when new rights and remedies are created "the right of action should be analogized to its historical counterpart, at law or in equity, for the purpose of determining whether there is a right of jury trial," unless Congress has expressly prescribed the mode of trial.[15]

Courts in Which the Guarantee Applies.—The Amendment governs only courts that sit under the authority of the United States,[16] including courts in the territories[17] and the District of Columbia,[18] and does not apply generally to state courts.[19] But when a state court is enforcing a federally created right, of which the right to trial by jury is a substantial part, the state may not eliminate trial by jury as to one or more elements.[20] Ordinarily, a federal court enforcing a state-created right will follow its own rules with regard to the allocation of functions between judge and jury, a rule the Court based on the "interests" of the federal court system, eschewing reliance on the Seventh Amendment but noting its influence.[21] Where

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[12] Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Walker v. New Mexico & So. Pac. R.R., 165 U.S. 593, 596 (1897); Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 497–99 (1931); Dimick v. Schiedt, 293 U.S. 474, 476, 485–86 (1935).

[13] Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931); *Ex parte* Peterson, 253 U.S. 300, 309 (1920).

[14] Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830); Slocum v. New York Life Ins. Co., 228 U.S. 364, 377–78 (1913); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476 (1935). *But see* Ross v. Bernhard, 396 U.S. 531 (1970), which may foreshadow a new analysis.

[15] Luria v. United States, 231 U.S. 9, 27–28 (1913).

[16] Pearson v. Yewdall, 95 U.S. 294, 296 (1877); Edwards v. Elliott, 88 U.S. (21 Wall.) 532, 557 (1874); The Justices v. Murray, 76 U.S. (9 Wall.) 274, 277 (1870); Walker v. Sauvinet, 92 U.S. 90 (1876); St. Louis & K.C. Land Co. v. Kansas City, 241 U.S. 419 (1916).

[17] Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1851); Kennon v. Gilmer, 131 U.S. 22, 28 (1889).

[18] Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899).

[19] Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916). *See also* Melancon v. McKeithen, 345 F. Supp. 105 (E.D. La.) (three-judge court), *aff'd per curiam*, 409 U.S. 943 (1972); Alexander v. Virginia, 413 U.S. 836 (1973).

[20] Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952). Four dissenters contended that the ruling was contrary to the unanimous decision in *Bombolis*.

[21] Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) (citing Herron v. Southern Pacific Co., 283 U.S. 91 (1931)).

the "interests" of the state and federal systems can be reconciled, however, a court should endeavor to implement the rules of the state courts.[22]

Waiver of the Right.—Parties may enter into a stipulation waiving a jury and submitting the case to the court upon an agreed statement of facts, even without any legislative provision for waiver.[23] Prior to adoption of the Federal Rules, Congress had, "by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing."[24] Under the Federal Rules of Civil Procedure, any party may make a timely demand for a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, and failure so to serve a demand constitutes a waiver of the right.[25] However, a waiver is not to be implied from a request for a directed verdict.[26]

Application of the Amendment

Cases "at Common Law".—The coverage of the Amendment is "limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law."[27] The term "common law" was used in contradistinction to suits in which equitable rights alone were recognized at the time of the framing of the Amendment and equitable remedies were administered.[28] Illustrative of the Court's course of decision on this subject are two unani-

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[22] Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996). In *Gasperini*, the Court examined whether New York law, which required that state trial courts and courts of appeals review jury awards to determine if they "deviate materially from reasonable compensation," should be applied by federal courts exercising diversity jurisdiction. The Court, in what has been characterized as a "state-friendly" decision, *Leading Cases*, 110 HARV. L. REV. 266 (1996), found that absent inconsistent federal interests, the state standard of review should be applied by the federal courts. The Court held that a district court could apply such a standard consistent with Seventh Amendment precepts, but that the court of appeals could only review an award under an "abuse of discretion" standard. 518 U.S. at 434–35.

[23] *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44, 53 (1872); Rogers v. United States, 141 U.S. 548, 554 (1891); Parsons v. Armor, 28 U.S. (3 Pet.) 413 (1830); Campbell v. Boyreau, 62 U.S. (21 How.) 223 (1859).

[24] Baylis v. Travellers' Ins. Co., 113 U.S. 316, 321 (1885). The provision did not preclude other kinds of waivers, Duignan v. United States, 274 U.S. 195, 198 (1927), though every reasonable presumption was indulged against a waiver. Hodges v. Easton, 106 U.S. 408, 412 (1883).

[25] FED. R. CIV. P. 38.

[26] Aetna Life Ins. Co. v. Kennedy, 301 U.S. 389 (1937); Fed. R. Civ. P. 50(a).

[27] Shields v. Thomas, 59 U.S. (18 How.) 253, 262 (1856).

[28] Parsons v. Bedford, 28 U.S. (3 Pet.) 443, 447 (1930); Barton v. Barbour, 104 U.S. 126, 133 (1881). Formerly, it did not apply to cases where recovery of money damages was incidental to equitable relief even though damages might have been recovered in an action at law. Clark v. Wooster, 119 U.S. 322, 325 (1886); Pease v.

mous decisions holding that civil juries were required, one in a suit by a landlord to recover possession of real property from a tenant allegedly behind on rent, the other in a suit for damages for alleged racial discrimination in the rental of housing in violation of federal law. In the former case, the Court reasoned that its Seventh Amendment precedents "require[d] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty."[29] The statutory cause of action, the Court found, had several counterparts in the common law, all of which involved a right to trial by jury. In the latter case, the plaintiff had argued that the Amendment was inapplicable to new causes of action created by congressional action, but the Court disagreed. "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[30]

Omission of provision for a jury has been upheld in a number of other cases on the ground that the suit in question was not a suit at common law within the meaning of the Amendment, or that the issues raised were not peculiarly legal in their nature.[31] Where

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Rathbun-Jones Eng. Co., 243 U.S. 273, 279 (1917). *But see* Dairy Queen v. Wood, 369 U.S. 469 (1962) (legal claims must be tried before equitable ones).

[29] Pernell v. Southall Realty Co., 416 U.S. 363 (1974).

[30] Curtis v. Loether, 415 U.S. 189, 194 (1974). "A damage action under the statute sounds basically in tort—the statute merely defines a new legal duty and authorizes the court to compensate a plaintiff for the injury caused by the defendants' wrongful breach. . . . [T]his cause of action is analogous to a number of tort actions recognized at common law." Id. at 195. *See also* Chauffeurs, Teamsters and Helpers Local 391 v. Terry, 494 U.S. 558 (1990) (suit against union for back pay for breach of duty of fair representation is a suit for compensatory damages, hence plaintiff is entitled to a jury trial); Wooddell v. International Bhd. of Electrical Workers Local 71, 502 U.S. 93 (1991) (similar suit against union for money damages entitles union member to jury trial; a claim for injunctive relief was incidental to the damages claim); Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998) (jury trial required for copyright action with close analogue at common law, even though the relief sought is not actual damages but statutory damages based on what is "just").

[31] Among such actions or issues were, *e.g.*, (1) enforcement of claims against the United States, McElrath v. United States, 102 U.S. 426, 440 (1880); *see also* Galloway v. United States, 319 U.S. 372, 388 (1943); (2) suit under a territorial statute authorizing a special nonjury tribunal to hear claims against a municipality having no legal obligation but based on moral obligation only, Guthrie Nat'l Bank v. Guthrie, 173 U.S. 528, 534 (1899); *see also* United States v. Realty Co., 163 U.S. 427, 439 (1896); New Orleans v. Clark, 95 U.S. 644, 653 (1877); (3) cancellation of a naturalization certificate for fraud, Luria v. United States, 231 U.S. 9, 27 (1913); (4) reversal of an order to deport an alien, Gee Wah Lee v. United States, 25 F.2d 107 (5th Cir. 1928), cert. denied, 277 U.S. 608 (1928); (5) damages for patent infringement, Filer & Stowell Co. v. Diamond Iron Works, 270 F. 489 (2d Cir. 1921), cert. denied, 256 U.S. 691 (1921); (6) reversal of an award under the Longshoremen's and Harbor Workers' Compensation Act, Crowell v. Benson, 285 U.S. 22, 45 (1932); (7)

there is no direct historical antecedent dating to the adoption of the amendment, the court may also consider whether existing precedent and the sound administration of justice favor resolution by judges or juries.[32]

The amendment does not apply to cases in admiralty and maritime jurisdiction, in which the trial is by a court without a jury,[33] nor does it reach statutory proceedings unknown to the common law, such as an application to a court of equity to enforce an order of an administrative body.[34] Thus, when Congress committed to administrative determination the finding of a violation of the Occupational Safety and Health Act with the discretion to fix a fine for a violation, the charged party being able to obtain judicial review of the administrative proceeding in a federal court of appeal and the fine being collectible in a suit in federal court, the argument that the absence of a jury trial in the process for a charged party violated the Seventh Amendment was unanimously rejected. "At least in cases in which 'public rights' are being litigated—*e.g.*, cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."[35]

On the other hand, if Congress assigns such cases to Article III courts, a jury may be required. In *Tull v. United States*,[36] the Court ruled that the Amendment requires trial by jury in civil actions to determine liability for civil penalties under the Clean Water Act, but not to assess the amount of penalty. The penal nature of the Clean Water Act's civil penalty remedy distinguishes it from restitution-based remedies available in equity courts, and therefore makes it a

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reversal of a decision of customs appraisers on the value of imports, Auffmordt v. Hedden, 137 U.S. 310, 329 (1890); (8) a summary disposition by referee in bankruptcy of issues regarding voidable preferences as asserted and proved by the trustee, Katchen v. Landy, 382 U.S. 323 (1966); and (9) a determination by a judge in calculating just compensation in a federal eminent domain proceeding of the issue as to whether the condemned lands were originally within the scope of the government's project or were adjacent lands later added to the plan, United States v. Reynolds, 397 U.S. 14 (1970).

[32] Markman v. Westview Instruments, Inc., 517 U.S. 348 (1996) (interpretation and construction of terms underlying patent claims may be reserved entirely for the court).

[33] Parsons v. Bedford, 28 U.S. (3 Pet.) 443 (1830); Waring v. Clarke, 46 U.S. (5 How.) 441, 460 (1847); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). *But see* Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963).

[34] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). *See also* ICC v. Brimson, 154 U.S. 447, 488 (1894); Yakus v. United States, 321 U.S. 414, 447 (1944).

[35] Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 450 (1977).

[36] 481 U.S. 412 (1987).

remedy of the type that could be imposed only by courts of law.[37] However, a jury need not invariably determine the remedy in a trial in which it must determine liability. Because the Court viewed assessment of the amount of penalty as involving neither the "substance" nor a "fundamental element" of a common-law right to trial by jury, it held permissible the Act's assignment of that task to the trial judge.

Later, the Court relied on a broadened concept of "public rights" to define the limits of congressional power to assign causes of action to tribunals in which jury trials are unavailable. In *Granfinanciera, S.A. v. Nordberg*,[38] the Court declared that Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." The Seventh Amendment test, the Court indicated, is the same as the Article III test for whether Congress may assign adjudication of a claim to a non-Article III tribunal.[39] As a general matter, "public rights" involve "'the relationship between the government and persons subject to its authority,'" whereas "private rights" relate to "'the liability of one individual to another.'"[40] Although finding room for "some debate," the Court determined that a bankruptcy trustee's right to recover for a fraudulent conveyance "is more accurately character-

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[37] The statute itself specified only a maximum amount for the penalty; the Court derived its "punitive" characterization from indications in the legislative history that Congress desired consideration of the need for retribution and deterrence as well as the need for restitution.

[38] 492 U.S. 33, 51–52 (1989).

[39] "[I]f a statutory cause of action . . . is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking 'the essential attributes of the judicial power.' And if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties the right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." 492 U.S. at 53–54 (citation omitted).

[40] 492 U.S. at 51 n.8 (quoting Crowell v. Benson, 285 U.S. 22, 50, 51 (1932)). The Court qualified certain statements in *Atlas Roofing* and in the process refined its definition of "public rights." There are some "public rights" cases, the Court explained, in which "the Federal Government is not a party in its sovereign capacity," but which involve "statutory rights that are integral parts of a public regulatory scheme." It is in cases of this nature that Congress may "dispense with juries as factfinders through its choice of an adjudicative forum." This does not mean, however, that Congress may assign "at least the initial factfinding in *all* cases involving controversies entirely between private parties to administrative tribunals or other tribunals not involving juries, so long as they are established as adjuncts to Article III courts." 492 U.S. at 55 n.10 (emphasis added).

ized as a private rather than a public right," at least when the defendant had not submitted a claim against the bankruptcy estate.[41]

The Continuing Law-Equity Distinction.—The use of the term "common law" in the Amendment to indicate those cases in which the right to jury trial was to be preserved reflected, of course, the division of the English and United States legal systems into separate law and equity jurisdictions, in which actions cognizable in courts of law generally were triable to a jury whereas in equity there was no right to a jury. In the federal court system there were unitary courts having jurisdiction in both law and equity, but distinct law and equity procedures, including the use or nonuse of the jury. Adoption of the Federal Rules of Civil Procedure in 1938 merged law and equity into a single civil jurisdiction and established uniform rules of procedure. Legal and equitable claims which previously had to be brought as separate causes of action on different "sides" of the court could now be joined in a single action, and in some instances, such as compulsory counterclaims, had to be joined in one action.[42] But the traditional distinction between law and equity for purposes of determining when there was a constitutional right to trial by jury remained and led to some difficulty.[43]

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[41] 492 U.S. at 55. On the other hand, a creditor who submits a claim against the bankruptcy estate subjects himself to the bankruptcy court's equitable power, and is not entitled to a jury trial when subsequently sued by the bankruptcy trustee to recover preferential monetary transfers. Langenkamp v. Culp, 498 U.S. 42 (1990).

[42] 5 J. MOORE, FEDERAL PRACTICE §§ 38.01–38.05 (2d ed. 1971).

[43] Under the old equity rules, it had been held that the absolute right to a trial of the facts by a jury could not be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Hipp v. Babin, 60 U.S. (19 How.) 271, 278 (1857). The Seventh Amendment was interpreted to mean that equitable and legal issues could not be tried in the same suit, so that such aid in the federal courts had to be sought in separate proceedings. Scott v. Neely, 140 U.S. 106, 109 (1891); Bennett v. Butterworth, 52 U.S. (11 How.) 669 (1850); Lewis v. Cocks, 90 U.S. (23 Wall.) 466, 470 (1874); Killian v. Ebbinghaus, 110 U.S. 568, 573 (1884); Buzard v. Houston, 119 U.S. 347, 351 (1886). If an action at law evoked an equitable counterclaim, the trial judge would order the legal issues to be separately tried after the disposition of the equity issues. In this procedure, however, *res judicata* and collateral estoppel could operate so as to curtail the litigant's right to a jury finding on factual issues common to both claims. But priority of scheduling was considered to be a matter of discretion. Federal statutes prohibiting courts of the United States from sustaining suits in equity if the remedy was complete at law served to guard the right of trial by jury and were liberally construed. Schoenthal v. Irving Trust Co., 287 U.S. 92, 94 (1932).

Nor was the distinction between law and equity to be obliterated by state legislation. Thompson v. Railroad Companies, 73 U.S. (6 Wall.) 134 (1868). So, if state law, in advance of judgment, treated the whole proceeding upon a simple contract, including determination of validity and of amount due, as an equitable proceeding, it brought the case within the federal equity jurisdiction upon removal. Ascertainment of plaintiff's demand being properly by action at law, however, the fact that the equity court had power to summon a jury on occasion did not afford an equiva-

This difficulty has been resolved by stressing the fundamental nature of the jury trial right and protecting it against diminution through resort to equitable principles. In *Beacon Theatres v. Westover*,[44] the Court held that a district court erred in trying all issues itself in an action in which the plaintiff sought a declaratory judgment and an injunction barring the defendant from instituting an antitrust action against it, and the defendant had filed a counterclaim alleging violation of the antitrust laws and asking for treble damages. It did not matter, the Court ruled, that the equitable claims had been filed first and the law counterclaims involved allegations common to the equitable claims. Subsequent jury trial of these issues would probably be precluded by collateral estoppel, hence "only under the most imperative circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."[45] Then, in *Dairy Queen v. Wood*,[46] in which the plaintiff sought several types of relief, including an injunction and an accounting for money damages, the Court held that, even though the claim for legal relief was incidental to the equitable relief sought, the Seventh Amendment required that the issues pertaining to that legal relief be tried before a jury, because

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lent of the right of trial by jury secured by the Seventh Amendment. Whitehead v. Shattuck, 138 U.S. 146 (1891); Buzard v. Houston, 119 U.S. 347 (1886); Greeley v. Lowe, 155 U.S. 58, 75 (1894). But where state law gave an equitable remedy, such as to quiet title to land, the federal courts enforced it, if it did not obstruct the rights of the parties as to trial by jury. Clark v. Smith, 38 U.S. (13 Pet.) 195 (1839); Holland v. Challen, 110 U.S. 15 (1884); Reynolds v. Crawfordsville *Bank*, 112 U.S. 405 (1884); Chapman v. Brewer, 114 U.S. 158 (1885); Cummings v. National Bank, 101 U.S. 153, 157 (1879); United States v. Landram, 118 U.S. 81 (1886); More v. Steinbach, 127 U.S. 70 (1888). *Cf. Ex parte* Simons, 247 U.S. 321 (1918).

By the inclusion in the Law and Equity Act of 1915 of § 274(b) of the Judicial Code, 38 Stat. 956, the transfer of cases to the other side of the court was made possible. The new procedure permitted legal questions arising in an equity action to be determined therein without sending the case to the law side. This section also permitted equitable defenses to be interposed in an action at law. The same order was preserved as under the system of separate courts. The equitable issues were disposed of first, and if a legal issue remained, it was triable by a jury. Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935). *See also* Liberty Oil Co. v. Condon Bank, 260 U.S. 235 (1922). There was no provision for legal counterclaims in an equitable action, for the reason that Equity Rule 30, requiring the answer to a bill in equity to state any counterclaim arising out of the same transaction, was not intended to change the line between law and equity and was construed as referring to equitable counterclaims only. American Mills Co. v. American Surety Co., 260 U.S. 360, 364 (1922); Stamey v. United States, 37 F.2d 188 (W.D. Wash. 1929). Equitable jurisdiction existing at the time of the filing of the bill was not disturbed by the subsequent availability of legal remedies, and the scheduling was discretionary. American Life Ins. Co. v. Stewart, 300 U.S. 203 (1937).

[44] 359 U.S. 500 (1959).

[45] 359 U.S. at 510–11.

[46] 369 U.S. 469 (1962).

the primary rights being adjudicated were legal in character. Thus, the rule that emerged was that legal claims must be tried before equitable ones and before a jury if the litigant so wished.[47]

In *Ross v. Bernhard*,[48] the Court further held that the right to a jury trial depends on the nature of the issue to be tried rather than the procedural framework in which it is raised. The case involved a stockholder derivative action,[49] which has always been considered to be a suit in equity. The Court agreed that the action was equitable but asserted that it involved two separable claims. The first, the stockholder's standing to sue for a corporation, is an equitable issue; the second, the corporation's claim asserted by the stockholder, may be either equitable or legal. Because the 1938 merger of law and equity in the federal courts eliminated any procedural obstacles to transferring jurisdiction to the law side once the equitable issue of standing was decided, the Court continued, if the corporation's claim being asserted by the stockholder was legal in nature, it should be heard on the law side and before a jury.[50] Whether this analysis will be followed in other areas so that the right to a jury trial extends to all legal issues in actions formerly within equity's concurrent jurisdiction is a question now open.[51]

Procedures Limiting Jury's Role.—As noted above, the primary purpose of the Seventh Amendment was to preserve the his-

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[47] If legal and equitable claims are joined, and the court erroneously dismisses the legal claims and decides common issues in the equitable action, the plaintiff cannot be collaterally estopped from relitigating those common issues in a jury trial. Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990).

[48] 396 U.S. 531 (1970).

[49] The stockholders' derivative action is a creation of equity made necessary by the traditional concept of "the corporate entity" or the "concept of separate personality." That is, the corporation is an entity distinct and separate from its shareholders. Thus, while shareholders were relieved from unlimited liability for corporate liabilities, the complementary result was that harm to the corporation did not confer any right of action upon a shareholder to sue to right that harm. But if the harm were caused by the abuse of those who managed and controlled the corporation, the corporation naturally would not proceed against them and the common law courts would not allow the shareholders to bring an action running to the "separate personality" of the corporation; equity thus permitted a derivative action in which the shareholder is permitted to set in motion the adjudication of a cause of action belonging to the corporation. Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980 (1957).

[50] Justices Stewart and Harlan and Chief Justice Burger dissented, arguing that the Seventh Amendment did not expand the right to a jury trial, that the Rules simply preserved the right as it had existed, and that it was error to think that the two could somehow "magically interact" to enlarge the right in a way that neither did alone. Ross v. Bernhard, 396 U.S. 531, 543 (1970).

[51] Among the possibilities in which a legal right was enforceable in equity in the absence of an adequate remedy at law are suits to compel specific performance of a contract, suits for cancellation of a contract, and suits to enjoin tortious action. On *Ross*' implications, *see* J. MOORE, FEDERAL PRACTICE §§ 38.11[8.–8], 38.11[9] (2d ed. 1971).

toric line separating the province of the jury from that of the judge, without at the same time preventing procedural improvement that does not transgress this line. Elucidating this formula, the Court has concluded that it is constitutional for a federal judge, in the course of trial, (1) to express his opinion upon the facts, provided that all questions of fact are ultimately submitted to the jury,[52] (2) to call the jury's attention to parts of the evidence that he deems of special importance,[53] being careful to distinguish between matters of law and matters of opinion,[54] (3) to inform the jury, when there is not sufficient evidence to justify a verdict, that such is the case,[55] (4) to require a jury to answer specific interrogatories in addition to rendering a general verdict,[56] (5) to direct the jury, after the plaintiff's case is all in, to return a verdict for the defendant on the ground of the insufficiency of the evidence,[57] (6) to set aside a verdict that is against the law or the evidence, and to order a new trial,[58] and (7) to refuse the defendant a new trial on the condition, accepted by plaintiff, that the plaintiff remit a portion of the damages awarded him,[59] but not, on the other hand, to deny the plaintiff a new trial on the condition, accepted by the defendant, that the defendant consent to an increase of the damage award.[60] Nor can a Court of Appeals reverse a jury's finding on the issue of the reasonableness of a stevedoring company's conduct in failing to avert an injury to one of its employees. The Court of Appeals had found that the stevedore had acted unreasonably as a matter of law, but the Supreme Court held that, "[u]nder the Seventh Amendment, that issue should have been left to the jury's determination." [61]

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[52] Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545, 553 (1886); United States v. Philadelphia & Reading R.R., 123 U.S. 113, 114 (1887).

[53] Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545 (1886) (citing Carver v. Jackson, 29 U.S. (4 Pet.) 1, 80 (1830); Magniac v. Thompson, 32 U.S. (7 Pet.) 348, 390 (1833); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 131 (1852); Transportation Line v. Hope, 95 U.S. 297, 302 (1877)).

[54] Games v. Dunn, 39 U.S. (14 Pet.) 322, 327 (1840).

[55] Sparf and Hansen v. United States, 156 U.S. 51, 99–100 (1895); Pleasants v. Fant, 89 U.S. (22 Wall.) 116, 121 (1875); Randall v. Baltimore & Ohio R.R., 109 U.S. 478, 482 (1883); Meehan v. Valentine, 145 U.S. 611, 625 (1892); Coughran v. Bigelow, 164 U.S. 301 (1896).

[56] Walker v. New Mexico So. Pac. R.R., 165 U.S. 593, 598 (1897).

[57] Treat Mfg. Co. v. Standard Steel & Iron Co., 157 U.S. 674 (1895); Randall v. Baltimore & Ohio R.R., 109 U.S. 478, 482 (1883), and cases cited therein.

[58] Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1889).

[59] Arkansas Cattle Co. v. Mann, 130 U.S. 69, 74 (1889).

[60] Dimick v. Schiedt, 293 U.S. 474, 476–78 (1935).

[61] International Terminal Operating Co. v. N. V. Nederl. Amerik Stoomv. Maats., 393 U.S. 74, 75 (1968) (per curiam). *But see* Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 322 (1967), where the Court held that the Seventh Amendment does not bar an appellate court from granting a judgment *n. o. v.* insofar as "there is no greater restriction on the province of the jury when an appellate court enters judgment *n. o. v.* than when a trial court does." A federal appellate court may also

"In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment." [62] Thus, in order to screen out frivolous complaints or defenses, Congress "has power to prescribe what must be pleaded to state the claim, just as it has the power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of—including the pleading and proof requirements for . . . private actions." [63] A "heightened pleading rule simply 'prescribes the means of making an issue,' and . . . , when '[t]he issue [is] made as prescribed, the right of trial by jury accrues.'" [64]

Directed Verdicts.—In 1913, in *Slocum v. New York Life Ins. Co.*,[65] the Court held that a federal appeals court lacked authority to order the entry of a judgment contrary to the verdict in a case in which the federal trial court should have directed a verdict for one party, but the jury had found for the other party contrary to the evidence; the only course open to either court was to order a new trial. Although plainly in accordance with the common law as it stood in 1791, the five-to-four decision was subjected to a heavy barrage of professional criticism based on convenience and urging recognition of capacity for growth in the common law.[66] *Slocum* was then impaired, if not completely undermined, by subsequent holdings.[67]

In the first of these cases, the Court held that a trial court had the right to enter a judgment for the plaintiff on the verdict of the jury after having reserved decision on a motion by the defendant for dismissal on the ground of insufficient evidence.[68] The Court distinguished *Slocum* and noted that its ruling qualified some of its

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review a district court's denial of a motion to set aside an award as excessive under an abuse of discretion standard. Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) (New York law that requires appellate courts to order a new trial when a jury award "deviates materially from what would be reasonable compensation" may be applied by a federal district court exercising diversity jurisdiction, "with appellate control of the trial court's ruling limited to review for 'abuse of discretion'").

[62] Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 327 n.8 (2007).

[63] 551 U.S. at 327.

[64] 551 U.S. at 328 (quoting Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 320 (1902)).

[65] 228 U.S. 364 (1913).

[66] F. James, Civil Procedure 332–33 & n.8 (1965).

[67] *But see* Hetzel v. Prince William County, 523 U.S. 208 (1998) (when an appeals court affirms liability but orders the level of damages to be reconsidered, the plaintiff has a Seventh Amendment right either to accept the reduced award or to have a new trial).

[68] Baltimore & Carolina Line v. Redman, 295 U.S. 654 (1935).

assertions in *Slocum*.[69] In the second case[70] the Court sustained a United States district court in rejecting the defendant's motion for dismissal and in peremptorily directing a verdict for the plaintiff. The Supreme Court held that there was ample evidence to support the verdict and that the trial court, in following Arkansas procedure in the diversity action, had acted consistently with the Federal Conformity Act.[71] In the third case,[72] which involved an action against the government for benefits under a war risk insurance policy that had been allowed to lapse, the trial court directed a verdict for the government on the ground of the insufficiency of the evidence, and was sustained in so doing by both the appeals court and the Supreme Court. Justice Black, joined by Justices Douglas and Murphy asserted in dissent, "Today's decision marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment."[73] That the Court should experience occasional difficulty in harmonizing the idea of preserving the historic common law covering the relations of judge and jury with the notion of a developing common law is not surprising.[74]

Jury Trial Under the Federal Employers' Liability Act.—One aspect of the problem of delineating the respective provinces of judge and jury divided the Justices for a lengthy period but now appears quiescent—cases arising under the Federal Employers' Liability Act. The argument was frequently couched by the majority in terms of protecting the function of the jury from usurpation by judges intent on subverting and limiting remedial legislation enacted by Congress,[75] and by the minority in terms of the costs to

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[69] 295 U.S. at 661. The Court's opinions in both *Redman* and *Slocum* were by Justice Van Devanter.

[70] Lyon v. Mutual Benefit Ass'n, 305 U.S. 484 (1939).

[71] Ch. 255, § 5, 17 Stat. 197 (1872), now superseded by the Federal Rules of Civil Procedure.

[72] Galloway v. United States, 319 U.S. 372, 389 (1943), in which the Court wrote, "the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure," citing Berry v. United States, 312 U.S. 450 (1941). In the latter case the Court remarked that the new rule has given "district judges, under certain circumstances, . . . the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of facts—a jury being the constitutional tribunal provided for trying facts in courts of law." Id. at 452–53.

[73] 319 U.S. 372, 397. The case, being a claim against the United States, need not have been tried by a jury except for the allowance of Congress.

[74] *See*, *e.g.*, Neely v. Martin K. Eby Construction Co., Inc., 386 U.S. 317 (1967), interpreting Rules 50(b), 50(c)(2) and 50(d) of the Federal Rules of Civil Procedure, as well as the Seventh Amendment.

[75] *E.g.*, Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943), in which Justice Black's opinion of the Court initiated the line of cases here considered; Bailey v.

the Supreme Court in time and effort spent in evaluating the quantum of evidence necessary to create a jury question.[76]

Although the considerations present in the FELA cases were not inherently different from those in any civil case where the direction of a verdict or a decision of an issue by the court may raise *sub silentio* the issue whether the Seventh Amendment right to a jury trial has been impaired by court usurpation of the jury function, cases under the FELA, which retained the common-law requirements of negligence as a prerequisite to recovery, involved peculiarly difficult decisions as to the adequacy of proof of negligence. "Special and important reasons for the grant of certiorari in these cases are certainly present," the Court wrote in a leading case, "when lower federal and state courts persistently deprive litigants of their right to a jury determination."[77] The operating test was: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on ground of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." Similar issues have arisen under such statutes as the Jones Act[78] and the Safety Appliance Act.[79]

"Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is

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Central Vermont Ry., 319 U.S. 350 (1943); Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29 (1944). *See* Rogers v. Missouri Pacific R.R., 352 U.S. 500, 507–10 (1957). Trial by jury is "part and parcel of the remedy afforded railroad workers" under the FELA. Bailey v. Central Vermont Ry., 319 U.S. at 354. "The difference between the majority and minority of the Court in our treatment of FELA cases concerns the degree of vigilance we should exercise in safeguarding the jury trial—guaranteed by the Seventh Amendment." Harris v. Pennsylvania R.R., 361 U.S. 15, 17 (1959) (Justice Douglas concurring). "[T]his Court is vigilant to exercise its power of review . . . to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." Rogers v. Missouri Pacific R.R., 352 U.S. at 509.

[76] Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting), contains a lengthy review and critique of the Court's practice.

[77] Rogers v. Missouri Pacific R.R., 352 U.S. 500, 510 (1957).

[78] Schulz v. Pennsylvania R.R., 350 U.S. 523 (1956); Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957); Michalic v. Cleveland Tankers, 364 U.S. 325 (1960). *See also* Senko v. La Crosse Dredging Corp., 352 U.S. 370 (1957); A. & G. Stevedores v. Ellerman Lines, 369 U.S. 355 (1962).

[79] Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 525 n.2 (1957) (Justice Frankfurter dissenting).

made out whether or not the evidence allows the jury a choice of other probabilities." [80] A persistent dissent in the line of cases expressed the fear that in FELA cases "anything that a jury says goes, with the consequences that all meaningful judicial supervision over jury verdicts in such cases has been put at an end. . . . If so, . . . the time has come when the Court should frankly say so. If not, then the Court should at least give expression to the standards by which the lower courts are to be guided in these cases." [81]

Appeals From State Courts to the Supreme Court

The clause of the Amendment prohibiting the re-examination of any fact found by a jury is not restricted in its application to suits at common law tried before juries in courts of the United States. It applies equally to cases tried before a jury in a state court and brought to the Supreme Court on appeal.[82] The Court has indicated frequently, however, that, in cases involving a claim of a denial of constitutional rights, it is free to examine and review the evidence upon which the lower court based its conclusions, a position that under some circumstances could conflict with the principle of jury autonomy.[83]

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[80] Rogers v. Missouri Pacific R.R., 352 U.S. at 507. The cases are collected at 510 n.26. The cases are tabulated and categorized in Wilkerson v. McCarthy, 336 U.S. 53, 68–73 (1949) (Justice Douglas concurring), and Harris v. Pennsylvania R.R., 361 U.S. 15, 16–25 (1959). *See also* Harrison v. Missouri Pac. R.R., 372 U.S. 248 (1963); Basham v. Pennsylvania R.R., 372 U.S. 699 (1963).

[81] Harris v. Pennsylvania R.R., 361 U.S. 15, 27–28 (1959) (Justice Harlan dissenting). *See also* Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957) (Justice Frankfurter dissenting); Dick v. New York Life Ins. Co., 359 U.S. 437, 447 (1959) (Justice Frankfurter dissenting).

[82] The Justices v. Murray, 76 U.S. (9 Wall.) 274, 278 (1870); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 242–46 (1897).

[83] *See* Time, Inc. v. Pape, 401 U.S. 279, 284–92 (1971), and cases cited therein.

EIGHTH AMENDMENT

FURTHER GUARANTEES IN CRIMINAL CASES

CONTENTS

FURTHER GUARANTEES IN CRIMINAL CASES

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

EXCESSIVE BAIL

"This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[1] "The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept."[2] These two contrasting views of the "excessive bail" provision, expressed by the Court in the same Term, reflect the ambiguity inherent in the phrase and the absence of evidence regarding the intent of those who drafted and who ratified the Eighth Amendment.[3]

The history of the bail controversy in England is crucial to understanding why the ambiguity exists.[4] The Statute of Westminster the First of 1275[5] set forth a detailed enumeration of those offenses that were bailable and those that were not, and, though supplemented by later statutes, it served for something like five and a

[1] Stack v. Boyle, 342 U.S. 1, 4 (1951). Note that, in Bell v. Wolfish, 441 U.S. 520, 533 (1979), the Court enunciated a narrower view of the presumption of innocence, describing it as "a doctrine that allocates the burden of proof in criminal trials," and denying that it has any "application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."

[2] Carlson v. Landon, 342 U.S. 524, 545 (1952). Justice Black in dissent accused the Court of reducing the provision "below the level of a pious admonition" by saying in effect that "the Amendment does no more than protect a right to bail which Congress can grant and which Congress can take away." Id. at 556.

[3] The only recorded comment of a Member of Congress during debate on adoption of the "excessive bail" provision was that of Mr. Livermore. "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be judges?" 1 ANNALS OF CONGRESS 754 (1789).

[4] Still the best and most comprehensive treatment is Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 965–89 (1965), *reprinted in* C. FOOTE, STUDIES ON BAIL 181, 187–211 (1966).

[5] 3 Edw. 1, ch. 12.

half centuries as the basic authority.[6] *Darnel's Case*,[7] in which the judges permitted the continued imprisonment of persons without bail merely upon the order of the King, was one of the moving factors in the enactment of the Petition of Right in 1628.[8] The Petition cited the Magna Carta as proscribing the kind of detention that was permitted in *Darnel's Case*. The right to bail was again subverted a half-century later by various technical subterfuges by which petitions for *habeas corpus* could not be presented,[9] and Parliament reacted by enacting the Habeas Corpus Act of 1679,[10] which established procedures for effectuating release from imprisonment and provided penalties for judges who did not comply with the Act. That avenue closed, the judges then set bail so high that it could not be met, and Parliament responded by including in the Bill of Rights of 1689[11] a provision "[t]hat excessive bail ought not to be required." This language, along with essentially the rest of the present Eighth Amendment, was included within the Virginia Declaration of Rights,[12] was picked up in the Virginia recommendations for inclusion in a federal bill of rights by the state ratifying convention,[13] and was introduced verbatim by Madison in the House of Representatives.[14]

Thus, in England, the right to bail generally was conferred by the basic 1275 statute, as supplemented; the procedure for assuring access to the right was conferred by the Habeas Corpus Act of 1679; and protection against abridgement through the fixing of excessive bail was conferred by the Bill of Rights of 1689. In the United States, the Constitution protected *habeas corpus* in Article 1, § 9, but did not confer a right to bail. The question is, therefore, whether the First Congress in proposing the Bill of Rights knowingly sought to curtail excessive bail without guaranteeing a right to bail, or

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[6] 1 J. Stephen, A History of the Criminal Law of England 233–43 (1833). The statute is summarized at pp. 234–35.

[7] 3 How. St. Tr. 1 (1627).

[8] 3 Charles 1, ch. 1. Debate on the Petition, as precipitated by *Darnel's Case*, is reported in 3 How. St. Tr. 59 (1628). Coke especially tied the requirement that imprisonment be pursuant to a lawful cause reportable on *habeas corpus* to effectuation of the right to bail. Id. at 69.

[9] *Jenkes' Case*, 6 How. St. Tr. 1189, 36 Eng. Rep. 518 (1676).

[10] 31 Charles 2, ch. 2. The text is in 2 Documents on Fundamental Human Rights 327–340 (Z. Chafee ed., 1951).

[11] I W. & M. 2, ch. 2, clause 10.

[12] 7 F. Thorpe, *The Federal and State Constitutions*, H. R. Doc. No. 357, 59th Cong., 2d Sess. 3813 (1909). "Sec. 9. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[13] 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Constitution 658 (2d ed. 1836).

[14] 1 Annals of Congress 438 (1789).

whether the phrase "excessive bail" was meant to be a shorthand expression of both rights.

Compounding the ambiguity is a distinctive trend in the United States that had its origin in a provision of the Massachusetts Body of Liberties of 1641:[15] guaranteeing bail to every accused person except those charged with a capital crime or contempt in open court. Copied in several state constitutions,[16] this guarantee was contained in the Northwest Ordinance in 1787,[17] along with a guarantee of moderate fines and against cruel and unusual punishments, and was inserted in the Judiciary Act of 1789,[18] enacted contemporaneously with the passage through Congress of the Bill of Rights. It appears, therefore, that Congress was aware in 1789 that certain language conveyed a right to bail and that certain other language merely protected against one means by which a pre-existing right to bail could be abridged.

Long unresolved was the issue of whether "preventive detention"—the denial of bail to an accused, unconvicted defendant because it is feared or it is found probable that if released he will be a danger to the community—is constitutionally permissible. Not until 1984 did Congress authorize preventive detention in federal criminal proceedings.[19]

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[15] "No mans person shall be restrained or imprisoned by any Authority what so ever, before the law hath sentenced him thereto, If he can put in sufficient securtie, bayle, or mainprise, for his appearance, and good behavior in the meane time, unlesse it be in Crimes Capitall, and Contempts in open Court, and in such cases where some expresse act of Court doth allow it." *Reprinted in* I DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 79, 82 (Z. Chafee, ed., 1951).

[16] "That all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great." 5 F. Thorpe, *The Federal and State Constitutions*, H. DOC. NO. 357, 59th Congress, 2d Sess. 3061 (1909) (Pennsylvania, 1682). The 1776 Pennsylvania Constitution contained the same clause in section 28, and in section 29 was a clause guaranteeing against excessive bail. Id. at 3089.

[17] "All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." Art. II, 32 JOURNALS OF THE CONTINENTAL CONGRESS 334 (1787), *reprinted in* 1 Stat. 52 n.

[18] "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which case it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion herein . . . ." 1 Stat. 91 § 33 (1789).

[19] Congress first provided for pretrial detention without bail of certain persons and certain classes of persons in the District of Columbia. D.C. Code, §§ 23–1321 *et seq.*, held constitutional in United States v. Edwards, 430 A.2d 1321 (D.C. App. 1981), *cert. denied*, 455 U.S. 1022 (1982). The law applies only to persons charged with violating statutes applicable exclusively in the District of Columbia, United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1978), while in other federal courts, the Bail Reform Act of 1966, as amended, applies. 80 Stat. 214, 18 U.S.C. §§ 3141–56. Amendments contained in the Bail Reform Act of 1984 added general preventive detention authority. *See* 18 U.S.C. § 3142(d) and (e). Those

The Court first tested and upheld under the Due Process Clause of the Fourteenth Amendment a state statute providing for preventive detention of juveniles.[20] Then, in *United States v. Salerno*,[21] the Court upheld application of preventive detention provisions of the Bail Reform Act of 1984 against facial challenge under the Eighth Amendment. The function of bail, the Court explained, is limited neither to preventing flight of the defendant prior to trial nor to safeguarding a court's role in adjudicating guilt or innocence. "[W]e reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release."[22] Instead, "[t]he only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil."[23] "[D]etention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel" satisfies this requirement.[24]

Bail is "excessive" in violation of the Eighth Amendment when it is set at a figure higher than an amount reasonably calculated to ensure the asserted governmental interest.[25] If the only asserted interest is to guarantee that the accused will stand trial and submit to sentence if found guilty, then "bail must be set by a court at a sum designed to ensure that goal, and no more."[26] To challenge bail as excessive, one must move for a reduction, and, if that motion is denied, appeal to the Court of Appeals, and, if unsuccessful, appeal to the Supreme Court Justice sitting for that circuit.[27] The Amendment is apparently inapplicable to postconviction release pend-

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amendments authorized pretrial detention for persons charged with certain serious crimes (*e.g.*, crimes of violence, capital crimes, and crimes punishable by 10 or more years' imprisonment) if the court or magistrate finds that no conditions will reasonably assure both the appearance of the person and the safety of others. Detention can also be ordered in other cases where there is a serious risk that the person will flee or that the person will attempt to obstruct justice. Preventive detention laws have also been adopted in some states. Parker v. Roth, 202 Neb. 850, 278 N.W.2d 106, *cert. denied*, 444 U.S. 920 (1979).

[20] Schall v. Martin, 467 U.S. 253 (1984).

[21] 481 U.S. 739 (1988).

[22] 481 U.S. at 753.

[23] 481 U.S. at 754.

[24] 481 U.S. at 755. The Court also ruled that there was no violation of due process, the governmental objective being legitimate and there being a number of procedural safeguards (detention applies only to serious crimes, the arrestee is entitled to a prompt hearing, the length of detention is limited, and detainees must be housed apart from criminals).

[25] Stack v. Boyle, 342 U.S. 1, 4–6 (1951).

[26] United States v. Salerno, 481 U.S. at 754.

[27] Stack v. Boyle, 342 U.S. at 6–7.

ing appeal, but the practice has apparently been to grant such releases.[28]

EXCESSIVE FINES

For years the Supreme Court had little to say about excessive fines. In an early case, it held that it had no appellate jurisdiction to revise the sentence of an inferior court, even though the excessiveness of the fines was apparent on the face of the record.[29] Justice Brandeis once contended in dissent that the denial of second-class mailing privileges to a newspaper on the basis of its past conduct, because it imposed additional mailing costs which grew day by day, amounted to an unlimited fine that was an "unusual" and "unprecedented" punishment proscribed by the Eighth Amendment.[30] The Court has elected to deal with the issue of fines levied upon indigents, resulting in imprisonment upon inability to pay, in terms of the Equal Protection Clause,[31] thus obviating any necessity to develop the meaning of "excessive fines" in relation to ability to pay. The Court has held the clause inapplicable to civil jury awards of punitive damages in cases between private parties, "when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."[32] The Court based this conclusion on a review of the history and purposes of the Excessive Fines Clause. At the time the Eighth Amendment was adopted, the Court noted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense."[33] The Eighth Amendment itself, as were antecedents of the clause in the Virginia Declaration of Rights and in the English Bill of Rights of 1689, "clearly was adopted with the particular intent of placing limits on the powers of the new government."[34] Therefore, while leaving open the issues of whether the clause has any applicability to civil penalties or to *qui tam* actions, the Court determined that "the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government."[35] The Court has held, however, that the Excessive Fines Clause can be applied in civil forfeiture cases.[36]

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[28] Hudson v. Parker, 156 U.S. 277 (1895).
[29] *Ex parte* Watkins, 32 U.S. (7 Pet.) 568, 574 (1833).
[30] Milwaukee Pub. Co. v. Burleson, 255 U.S. 407, 435 (1921).
[31] Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).
[32] Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989).
[33] 492 U.S. at 265.
[34] 492 U.S. at 266.
[35] 492 U.S. at 268.
[36] In Austin v. United States, 509 U.S. 602 (1993), the Court noted that the application of the Excessive Fines Clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be seen as punishment. The Court was apparently willing to consider any number of

In 1998, however, the Court injected vitality into the strictures of the clause. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." [37] In *United States v. Bajakajian*,[38] the government sought to require that a criminal defendant charged with violating federal reporting requirements regarding the transportation of more than $10,000 in currency out of the country forfeit the currency involved, which totaled $357,144. The Court held that the forfeiture [39] in this particular case violated the Excessive Fines Cause because the amount forfeited was "grossly disproportionate to the gravity of defendant's offense." [40] In determining proportionality, the Court did not limit itself to a comparison of the fine amount to the proven offense, but it also considered the particular facts of the case, the character of the defendant, and the harm caused by the offense.[41]

CRUEL AND UNUSUAL PUNISHMENTS

During congressional consideration of the Cruel and Unusual Punishments Clause one Member objected to "the import of [the words] being too indefinite" and another Member said: "No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws

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factors in making this evaluation; civil forfeiture was found to be at least partially intended as punishment, and thus limited by the clause, based on its common law roots, its focus on culpability, and various indications in the legislative histories of its more recent incarnations.

[37] United States v. Bajakajian, 524 U.S. 321, 334 (1998).

[38] 524 U.S. 321 (1998).

[39] The Court held that a criminal forfeiture, which is imposed at the time of sentencing, should be considered a fine, because it serves as a punishment for the underlying crime. 524 U.S. at 328. The Court distinguished this from civil forfeiture, which, as an *in rem* proceeding against property, would generally not function as a punishment of the criminal defendant. 524 U.S. at 330–32.

[40] 524 U.S. at 334.

[41] In *Bajakajian*, the lower court found that the currency in question was not derived from illegal activities, and that the defendant, who had grown up a member of the Armenian minority in Syria, had failed to report the currency out of distrust of the government. 524 U.S. at 325–26. The Court found it relevant that the defendant did not appear to be among the class of persons for whom the statute was designed; *i.e.*, a money launderer or tax evader, and that the harm to the government from the defendant's failure to report the currency was minimal. 524 U.S. at 338.

by any declaration of this kind."[42] It is clear from some of the complaints about the absence of a bill of rights including a guarantee against cruel and unusual punishments in the ratifying conventions that tortures and barbarous punishments were much on the minds of the complainants,[43] but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates additional concern with arbitrary and disproportionate punishments.[44] Though few in number, the decisions of the Supreme Court interpreting this guarantee have applied it in both senses.

Style of Interpretation

At first, the Court was inclined to an historical style of interpretation, determining whether a punishment was "cruel and unusual" by looking to see if it or a sufficiently similar variant had been considered "cruel and unusual" in 1789.[45] In *Weems v. United States*,[46] however, the Court concluded that the framers had not merely intended to bar the reinstitution of procedures and techniques condemned in 1789, but had intended to prevent the authorization of "a coercive cruelty being exercised through other forms of punishment." The Amendment therefore was of an "expansive and vital character"[47] and, in the words of a later Court, "must draw its meaning from the evolving standards of decency that mark the progress

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[42] 1 ANNALS OF CONGRESS 754 (1789).

[43] *E.g.*, 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 111 (2d ed. 1836); 3 id. at 447–52.

[44] *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839 (1969). Disproportionality, in any event, was used by the Court in Weems v. United States, 217 U.S. 349 (1910). It is not clear what, if anything, the word "unusual" adds to the concept of "cruelty" (*but see* Furman v. Georgia, 408 U.S. 238, 276 n.20 (1972) (Justice Brennan concurring)), although it may have figured in *Weems*, 217 U.S. at 377, and in Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958) (plurality opinion), and it did figure in Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) ("severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history").

[45] Wilkerson v. Utah, 99 U.S. 130 (1878); *In re* Kemmler, 136 U.S. 436 (1890); *cf.* Weems v. United States, 217 U.S. 349, 368–72 (1910). Chief Justice Rehnquist subscribed to this view (*see*, *e.g.*, Woodson v. North Carolina, 428 U.S. 280, 208 (dissenting)), and the views of Justices Scalia and Thomas appear to be similar. *See*, *e.g.*, Harmelin v. Michigan, 501 U.S. 957, 966–90 (1991) (Justice Scalia announcing judgment of Court) (relying on original understanding of Amendment and of English practice to argue that there is no proportionality principle in non-capital cases); and Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Justice Thomas dissenting) (objecting to Court's extension of the Amendment "beyond all bounds of history and precedent" in holding that "significant injury" need not be established for sadistic and malicious beating of shackled prisoner to constitute cruel and unusual punishment).

[46] 217 U.S. 349 (1910).

[47] 217 U.S. at 376–77.

of a maturing society."[48] The proper approach to an interpretation of this provision has been one of the major points of difference among the Justices in the capital punishment cases.[49]

Application and Scope

Well over a century ago, the Court began defining limits on the scope of criminal punishments allowed under the Eighth Amendment, noting that while "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted," "it is safe to affirm that punishments of torture," such as drawing and quartering, disemboweling alive, beheading, public dissection, and burning alive, are "forbidden by . . . [the] Constitution."[50] Nonetheless, in the context of capital punishment the Court has upheld the use of a firing squad[51] and electrocution,[52] generally holding that the Eighth Amendment prohibits punishments which "involve the unnecessary and wanton infliction of pain."[53] In two more recent cases, the Supreme Court held that the lethal injection protocols of the Commonwealth of Kentucky and the State of Oklahoma each withstood scrutiny under the Eighth Amendment, finding that neither protocol presented a "substantial risk of serious harm" or an "objectively intolerable risk of harm."[54]

Divestiture of the citizenship of a natural born citizen was held to be cruel and unusual punishment in *Trop v. Dulles*.[55] The Court viewed divestiture as a penalty more cruel and "more primitive than

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[48] Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion). This oft-quoted passage was later repeated, with the Court adding that cruel and unusual punishment "is judged not by the standards that prevailed in 1685 . . . or when the Bill of Rights was adopted, but rather by those that currently prevail." Atkins v. Virginia, 536 U.S. 304, 311–12 (2002).

[49] *See* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

[50] *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1879).

[51] *Id.* at 137–38.

[52] *See In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."); *see also* Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459 (1947).

[53] *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion).

[54] *See* Baze v. Rees, 553 U.S. 35, 50 (2008) (plurality opinion) (upholding Kentucky's use of a three-drug cocktail consisting of an anesthetic (sodium thiopental), a muscle relaxant, and an agent that induced cardiac arrest); *see also* Glossip v. Gross, 576 U.S. ___, No. 14–7955, slip op. (2015) (upholding Oklahoma's use of a three-drug cocktail that utilized a sedative called midazolam in lieu of sodium thiopental).

[55] 356 U.S. 86 (1958). Again the Court was divided. Four Justices joined the plurality opinion while Justice Brennan concurred on the ground that the requisite relation between the severity of the penalty and legitimate purpose under the war power was not apparent. Id. at 114. Four Justices dissented, denying that denation-

torture," because it entailed statelessness or "the total destruction of the individual's status in organized society." "The question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment." A punishment must be examined "in light of the basic prohibition against inhuman treatment," and the Amendment was intended to preserve the "basic concept . . . [of] the dignity of man" by assuring that the power to impose punishment is "exercised within the limits of civilized standards." [56]

Capital Punishment

The Court's 1972 decision in *Furman v. Georgia*,[57] finding constitutional deficiencies in the manner in which the death penalty was arrived at but not holding the death penalty unconstitutional *per se*, was a watershed in capital punishment jurisprudence. In the long run the ruling may have had only minor effect in determining who is sentenced to death and who is actually executed, but it had the indisputable effect of constitutionalizing capital sentencing law and of involving federal courts in extensive review of capital sentences.[58] Prior to 1972, constitutional law governing capital punishment was relatively simple and straightforward. Capital punishment was constitutional, and there were few grounds for constitutional review. *Furman* and the five 1976 follow-up cases that reviewed state laws revised in light of *Furman* reaffirmed the constitutionality of capital punishment *per se*, but also opened up several avenues for constitutional review. Since 1976, the Court has issued a welter of decisions attempting to apply and reconcile the sometimes conflicting principles it had announced: that sentencing discretion must be confined through application of specific guidelines that narrow and define the category of death-eligible defendants and thereby prevent arbitrary imposition of the death penalty, but that jury discretion must also be preserved in order to weigh the mitigating circumstances of individual defendants who fall within the death-eligible class.

While the Court continues to tinker with application of these principles, it also has taken steps to attempt to reduce the many

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alization was a punishment and arguing that instead it was merely a means by which Congress regulated discipline in the armed forces. Id. at 121, 124–27.

[56] 356 U.S. at 99–100. The action of prison guards in handcuffing a prisoner to a hitching post for long periods of time violated basic human dignity and constituted "gratuitous infliction of 'wanton and unnecessary pain'" prohibited by the clause. Hope v. Pelzer, 536 U.S. 730, 738 (2002).

[57] 408 U.S. 238 (1972).

[58] See Carol S. Steiker and Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

procedural and substantive opportunities for delay and defeat of the carrying out of death sentences, and to give the states more leeway in administering capital sentencing. The early post-*Furman* stage involving creation of procedural protections for capital defendants that were premised on a "death is different" rationale.[59] Later, the Court grew increasingly impatient with the delays that were made possible through procedural protections, especially those associated with federal *habeas corpus* review.[60] Having consistently held that capital punishment is not inherently unconstitutional, the Court seemed bent on clarifying and even streamlining constitutionally required procedures so that those states that choose to impose capital punishment may do so without inordinate delays. In the *habeas* context, the interest in finality at first trumped a death-is-different approach.[61] Then, in *In re Troy Anthony Davis*,[62] the Court found a death-row convict with a claim of actual innocence to be entitled to a District Court determination of his *habeas* petition. Justice Stevens, in a concurring opinion joined by Justices Ginsburg and Breyer, "refuse[d] to endorse" Justice Scalia's reasoning (in a dissent joined by Justice Thomas) that would read the Constitution to permit the execution of a convict "who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man."

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[59] *See*, *e.g.*, Gardner v. Florida, 430 U.S. 349, 357–58 (1977): "From the point of view of the defendant, [death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

[60] *See*, *e.g.*, Barefoot v. Estelle, 463 U.S. 880, 888 (1983): "unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit." *See also* Gomez v. United States District Court, 503 U.S. 653 (1992) (vacating orders staying an execution, and refusing to consider, because of "abusive delay," a claim that "could have been brought more than a decade ago"—that California's method of execution (cyanide gas) constitutes cruel and unusual punishment).

[61] In Herrera v. Collins, 506 U.S. 390, 405 (1993), the Court rejected the position that "the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus," and also declared that, because of "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." Id. at 417. In a subsequent part of the opinion, however, the Court assumed for the sake of argument that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," and it imposed a high standard for making this showing. 506 U.S. at 417–419.

[62] 557 U.S. ___, No. 08–1443 (2009).

The writ has also been restricted statutorily.[63]

Changed membership on the Court has had an effect. Gone from the Court are several Justices who believed that all capital punishment constitutes cruel and unusual punishment, often resulting in consistent votes to issue stays against any challenged death sentence.[64] While two current members of the Court have recently concluded that the "death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment,'"[65] a majority of the Court has held that it is "settled that capital punishment is constitutional," resulting in most challenges focusing on how the death penalty is applied, such as the consideration of aggravating and mitigating circumstances and the appropriate scope of federal review.[66]

General Validity and Guiding Principles.—In *Trop v. Dulles*, the majority refused to consider "the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty."[67] But a coalition of civil rights and civil liberties organizations mounted a campaign against the death penalty in the 1960s, and the Court eventually confronted the issues involved. The answers were not, it is fair to say, consistent.

A series of cases testing the means by which the death penalty was imposed[68] culminated in what appeared to be a decisive rejec-

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[63] *See*, *e.g.*, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214.

[64] For example, the position of Justices Brennan and Marshall that the "death penalty is unconstitutional in all circumstances" resulted in two automatic votes against any challenged death sentence during their time on the Court. *See, e.g.*, Lenhard v. Wolff, 444 U.S. 807, 808 (1979) (Brennan & Marshall, JJ., dissenting). Justice Blackmun, who retired in 1994, concluded late in his career that the Court's effort to reconcile the twin goals of fairness to the individual defendant and consistency and rationality of sentencing had failed and that the death penalty, "as currently administered, is unconstitutional." *See* Callins v. Collins, 510 U.S. 1141, 1159 (1994) (Blackmun, J., dissenting). Justice Stevens, who retired from the Court in 2010, concluded in a 2008 case that the death penalty is "patently excessive and cruel and unusual punishment violative of the Eighth Amendment" because of what he perceived as its "negligible returns." *See* Baze v. Rees, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (internal citations and quotations omitted). Nonetheless, because the "Court has held the death penalty constitutional" and out of "respect" for the Court's precedents, Justice Stevens' remaining years on the Court did not yield automatic votes against the death penalty akin to those of Justices Brennan, Marshall, and Blackmun.

[65] *See* Glossip v. Gross, 576 U.S. ___, No. 14–7955, slip op. at 2 (2015) (Breyer & Ginsburg, JJ., dissenting).

[66] *See id.* at 4 (Alito, J., joined by Roberts, C.J., and Scalia, Kennedy, and Thomas, JJ.).

[67] 356 U.S. 86, 99 (1958).

[68] In Rudolph v. Alabama, 375 U.S. 889 (1963), Justices Goldberg, Douglas, and Brennan, dissenting from a denial of certiorari, argued that the Court should have

tion of the attack in *McGautha v. California*.[69] Nonetheless, the Court then agreed to hear a series of cases directly raising the question of the validity of capital punishment under the Cruel and Unusual Punishments Clause, and, to considerable surprise, the Court held in *Furman v. Georgia* [70] that the death penalty, at least as administered, violated the Eighth Amendment. There was no unifying opinion of the Court in *Furman*; the five Justices in the majority each approached the matter from a different angle in a separate concurring opinion. Two Justices concluded that the death penalty was "cruel and unusual" *per se* because the imposition of capital punishment "does not comport with human dignity" [71] or because it is "morally unacceptable" and "excessive." [72] One Justice concluded that because death is a penalty inflicted on the poor and hapless defendant but not the affluent and socially better defendant, it violates the implicit requirement of equality of treatment found within the Eighth Amendment.[73] Two Justices concluded that capital punishment was both "cruel" and "unusual" because it was applied in an arbitrary, "wanton," and "freakish" manner [74] and so infrequently that it served no justifying end.[75]

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heard the case to consider whether the Constitution permitted the imposition of death "on a convicted rapist who has neither taken nor endangered human life," and presented a line of argument questioning the general validity of the death penalty under the Eighth Amendment. The Court addressed exclusion of death-scrupled jurors in Witherspoon v. Illinois, 391 U.S. 510 (1968). *Witherspoon* and subsequent cases explicating it are discussed under Sixth Amendment—Impartial Jury.

[69] 402 U.S. 183 (1971). *McGautha* was decided in the same opinion with Crampton v. Ohio. McGautha raised the question whether provision for imposition of the death penalty without legislative guidance to the sentencing authority in the form of standards violated the Due Process Clause; *Crampton* raised the question whether due process was violated when both the issue of guilt or innocence and the issue of whether to impose the death penalty were determined in a unitary proceeding. Justice Harlan for the Court held that standards were not required because, ultimately, it was impossible to define with any degree of specificity which defendant should live and which die; although bifurcated proceedings might be desirable, they were not required by due process.

[70] 408 U.S. 238 (1972). The change in the Court's approach was occasioned by the shift of Justices Stewart and White, who had voted with the majority in *McGautha*.

[71] 408 U.S. at 257 (Justice Brennan).

[72] 408 U.S. at 314 (Justice Marshall).

[73] 408 U.S. at 240 (Justice Douglas).

[74] 408 U.S. at 306 (Justice Stewart).

[75] 408 U.S. at 310 (Justice White). The four dissenters, in four separate opinions, argued with different emphases that the Constitution itself recognized capital punishment in the Fifth and Fourteenth Amendments, that the death penalty was not "cruel and unusual" when the Eighth and Fourteenth Amendments were proposed and ratified, that the Court was engaging in a legislative act to strike it down now, and that even under modern standards it could not be considered "cruel and unusual." Id. at 375 (Chief Justice Burger), 405 (Justice Blackmun), 414 (Justice Powell), 465 (Justice Rehnquist). Each of the dissenters joined each of the opinions of the others.

Because only two of the Justices in *Furman* thought the death penalty to be invalid in all circumstances, those who wished to reinstate the penalty concentrated upon drafting statutes that would correct the faults identified in the other three majority opinions.[76] Enactment of death penalty statutes by 35 states following *Furman* led to renewed litigation, but not to the elucidation one might expect from a series of opinions.[77] Instead, although the Court seemed firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state's taking of human life,[78] it chose several different paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court determined that the penalty of death for deliberate murder is not *per se* cruel and

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[76] Collectors of judicial "put downs" of colleagues should note Justice Rehnquist's characterization of the many expressions of faults in the system and their correction as "glossolalial." Woodson v. North Carolina, 428 U.S. 280, 317 (1976) (dissenting).

[77] Justice Frankfurter once wrote of the development of the law through "the process of litigating elucidation." International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. *See*, *e.g.*, Chief Justice Burger, Lockett v. Ohio, 438 U.S. 586, 602 (1978) (plurality opinion) ("The signals from this Court have not . . . always been easy to decipher"); Justice White, id. at 622 ("The Court has now completed its about-face since *Furman*") (concurring in result); and Justice Rehnquist, id. at 629 (dissenting) ("the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed"), and id. at 632 ("I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years").

[78] On crimes not involving the taking of life or the actual commission of the killing by a defendant, *see* Coker v. Georgia, 433 U.S. 584 (1977) (rape of an adult woman); Kennedy v. Louisiana, 128 S. Ct. 2461 (2008) (rape of an eight-year-old child); Enmund v. Florida, 458 U.S. 782 (1982) (felony murder where defendant aided and abetted a robbery during which a murder was committed but did not himself kill, attempt to kill, or intend that a killing would take place). *Compare Enmund* with Tison v. Arizona, 481 U.S. 137 (1987) (death sentence upheld where defendants did not kill but their involvement in the events leading up to the murders was active, recklessly indifferent, and substantial). Those cases in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings, may constitute an exception to the Court's narrowing of the crimes for which capital punishment may be imposed. The federal hijacking statute, 49 U.S.C. § 46502, imposes the death penalty only when a death occurs during commission of the hijacking. By contrast, the treason statute, 18 U.S.C. § 2381, permits the death penalty in the absence of a death, and represents a situation in which great and fatal danger might be present. But the treason statute also constitutes a crime against the state, which may be significant. In Kennedy v. Louisiana, 128 S. Ct. 2641, 2659 (2008), in overturning a death sentence imposed for the rape of a child, the Court wrote, "Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."

unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the individual defendant and his crime are cruel and unusual, and that standards and procedures may be established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in *Furman*.[79] Divisions among the Justices, however, made it difficult to ascertain the form that permissible statutory schemes may take.[80]

Because the three Justices in the majority in *Furman* who did not altogether reject the death penalty thought the problems with the system revolved about discriminatory and arbitrary imposition,[81] legislatures turned to enactment of statutes that purported to do away with these difficulties. One approach was to provide for automatic imposition of the death penalty upon conviction for certain forms of murder. More commonly, states established special procedures to follow in capital cases, and specified aggravating and mitigating factors that the sentencing authority must consider in imposing sentence. In five cases in 1976, the Court rejected automatic sentencing, but approved other statutes specifying factors for jury consideration.[82]

First, the Court concluded that the death penalty as a punishment for murder does not itself constitute cruel and unusual punishment. Although there were differences of degree among the seven Justices in the majority on this point, they all seemed to concur that reenactment of capital punishment statutes by 35 states precluded the Court from concluding that this form of penalty was no longer acceptable to a majority of the American people. Rather, they

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[79] Justices Brennan and Marshall adhered to the view that the death penalty is per se unconstitutional. *E.g.*, Coker v. Georgia, 433 U.S. 584, 600 (1977); Lockett v. Ohio, 438 U.S. 586, 619 (1978); Enmund v. Florida, 458 U.S. 782, 801 (1982).

[80] A comprehensive evaluation of the multiple approaches followed in *Furman*-era cases may be found in Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

[81] Thus, Justice Douglas thought the penalty had been applied discriminatorily, Furman v. Georgia, 408 U.S. 238 (1972), Justice Stewart thought it "wantonly and . . . freakishly imposed," id. at 310, and Justice White thought it had been applied so infrequently that it served no justifying end. Id. at 313.

[82] The principal opinion was in Gregg v. Georgia, 428 U.S. 153 (1976) (upholding statute providing for a bifurcated proceeding separating the guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court). Statutes of two other states were similarly sustained, Proffitt v. Florida, 428 U.S. 242 (1976) (statute generally similar to Georgia's, with the exception that the trial judge, rather than jury, was directed to weigh statutory aggravating factors against statutory mitigating factors), and Jurek v. Texas, 428 U.S. 262 (1976) (statute construed as narrowing death-eligible class, and lumping mitigating factors into consideration of future dangerousness), while those of two other states were invalidated, Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976) (both mandating death penalty for first-degree murder).

concluded, a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, to rule that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute their own judgments for the people and their elected representatives. A death penalty statute, just as all other statutes, comes before the courts bearing a presumption of validity that can be overcome only upon a strong showing by those who attack its constitutionality. Whether in fact the death penalty validly serves the permissible functions of retribution and deterrence, the judgments of the state legislatures are that it does, and those judgments are entitled to deference. Therefore, the infliction of death as a punishment for murder is not without justification and is not unconstitutionally severe. Nor is the punishment of death disproportionate to the crime being punished, murder.[83]

Second, however, a different majority concluded that statutes *mandating* the imposition of death for crimes classified as first-degree murder violate the Eighth Amendment. A review of history, traditional usage, legislative enactments, and jury determinations led the plurality to conclude that mandatory death sentences had been rejected by contemporary standards. Moreover, mandatory sentencing precludes the individualized "consideration of the character and record of the . . . offender and the circumstances of the particular offense" that "the fundamental respect for humanity underlying the Eighth Amendment" requires in capital cases.[84]

A third principle established by the 1976 cases was that the procedure by which a death sentence is imposed must be structured so as to reduce arbitrariness and capriciousness as much as possible.[85] What emerged from the prevailing plurality opinion in these

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[83] Gregg v. Georgia, 428 U.S. 153, 168–87 (1976) (Justices Stewart, Powell, and Stevens); Roberts v. Louisiana, 428 U.S. 325, 350–56 (1976) (Justices White, Blackmun, Rehnquist, and Chief Justice Burger). The views summarized in the text are those in the Stewart opinion in *Gregg*. Justice White's opinion basically agrees with this opinion in concluding that contemporary community sentiment accepts capital punishment, but did not endorse the proportionality analysis. Justice White's *Furman* dissent and those of Chief Justice Burger and Justice Blackmun show a rejection of proportionality analysis. Justices Brennan and Marshall dissented, reiterating their *Furman* views. *Gregg*, 428 U.S. at 227, 231.

[84] Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976). Justices Stewart, Powell, and Stevens composed the plurality, and Justices Brennan and Marshall concurred on the basis of their own views of the death penalty. Id. at 305, 306, 336.

[85] Here adopted is the constitutional analysis of the Stewart plurality of three. "[T]he holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds," Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976), a comment directed to the *Furman* opinions but equally

cases are requirements (1) that the sentencing authority, jury or judge,[86] be given standards to govern its exercise of discretion and be given the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused;[87] (2) that to prevent jury prejudice on the issue of guilt there be a separate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, be presented;[88] (3) that special forms of appellate review be provided not only of the conviction but also of the sentence, to ascertain that the sentence was fairly imposed both in light of the facts of the individual case and by com-

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applicable to these cases and to *Lockett*. *See* Marks v. United States, 430 U.S. 188, 192–94 (1977).

[86] The Stewart plurality noted its belief that jury sentencing in capital cases performs an important social function in maintaining the link between contemporary community values and the penal system, but agreed that sentencing may constitutionally be vested in the trial judge. Gregg v. Georgia, 428 U.S. 153, 190 (1976). Subsequently, however, the Court issued several opinions holding that the Sixth Amendment right to a jury trial is violated if a judge makes factual findings (e.g., as to the existence of aggravating circumstances) upon which a death sentence is based. Hurst v. Florida, 577 U.S. ___, No. 14–7505, slip op. at 1–2 (2016); Ring v. Arizona, 536 U.S. 584 (2002). Notably, one Justice in both cases would have found that the Eighth Amendment—not the Sixth Amendment—requires that "a jury, not a judge, make the decision to sentence a defendant to death." *Ring*, 536 U.S. at 614 (Breyer, J., concurring in the judgment). *See also Hurst*, slip op. at 1 (Breyer, J., concurring in the judgment).

[87] Gregg v. Georgia, 428 U.S. 153, 188–95 (1976). Justice White seemed close to the plurality on the question of standards, id. at 207 (concurring), but while Chief Justice Burger and Justice Rehnquist joined the White opinion "agreeing" that the system under review "comports" with *Furman*, Justice Rehnquist denied the constitutional requirement of standards in any event. Woodson v. North Carolina, 428 U.S. 280, 319–21 (1976) (dissenting). In McGautha v. California, 402 U.S. 183, 207–08 (1971), the Court had rejected the argument that the absence of standards violated the Due Process Clause. On the vitiation of *McGautha*, *see Gregg*, 428 U.S. at 195 n.47, and Lockett v. Ohio, 438 U.S. 586, 598–99 (1978). In assessing the character and record of the defendant, the jury may be required to make a judgment about the possibility of future dangerousness of the defendant, from psychiatric and other evidence. Jurek v. Texas, 428 U.S. 262, 275–76 (1976). Moreover, testimony of psychiatrists need not be based on examination of the defendant; general responses to hypothetical questions may also be admitted. Barefoot v. Estelle, 463 U.S. 880 (1983). *But cf.* Estelle v. Smith, 451 U.S. 454 (1981) (holding Self-incrimination and Counsel Clauses applicable to psychiatric examination, at least when a doctor testifies about his conclusions with respect to future dangerousness).

[88] Gregg v. Georgia, 428 U.S. 153, 163, 190–92, 195 (1976) (plurality opinion). McGautha v. California, 402 U.S. 183 (1971), had rejected a due process requirement of bifurcated trials, and the *Gregg* plurality did not expressly *require* it under the Eighth Amendment. But the plurality's emphasis upon avoidance of arbitrary and capricious sentencing by juries seems to look inevitably toward bifurcation. The dissenters in Roberts v. Louisiana, 428 U.S. 325, 358 (1976), rejected bifurcation and viewed the plurality as requiring it. All states with post-*Furman* capital sentencing statutes took the cue by adopting bifurcated capital sentencing procedures, and the Court has not been faced with the issue again. *See* Raymond J. Pascucci, et al., *Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1224–25 (1984).

parison with the penalties imposed in similar cases.[89] The Court later ruled, however, that proportionality review is not constitutionally required.[90] *Gregg*, *Proffitt*, and *Jurek* did not require such comparative proportionality review, the Court noted, but merely suggested that proportionality review is one means by which a state may "safeguard against arbitrarily imposed death sentences."[91]

The Court added a fourth major guideline in 2002, holding that the Sixth Amendment right to trial by jury comprehends the right to have a jury make factual determinations on which a sentencing increase is based.[92] This means that capital sentencing schemes are unconstitutional if judges are allowed to make factual findings as to the existence of aggravating circumstances that are prerequisites for imposition of a death sentence.

Implementation of Procedural Requirements.—Most states responded to the 1976 requirement that the sentencing authority's discretion be narrowed by enacting statutes spelling out "aggravating" circumstances, and requiring that at least one such aggravating circumstance be found before the death penalty is imposed. The Court has required that the standards be relatively precise and instructive so as to minimize the risk of arbitrary and capricious action by the sentencer, the desired result being a principled way to distinguish cases in which the death penalty should be imposed from cases in which it should not be. Thus, the Court invalidated a capital sentence based upon a jury finding that the murder was "outrageously or wantonly vile, horrible, and inhuman," reasoning that "a person of ordinary sensibility could fairly [so] characterize almost every murder."[93] Similarly, an "especially heinous, atrocious, or cruel" aggravating circumstance was held to be unconstitutionally vague.[94] The "especially heinous, cruel, or depraved" standard is cured, however, by a narrowing interpretation requiring a finding of infliction of mental anguish or physical abuse before the victim's death.[95]

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[89] Gregg v. Georgia, 428 U.S. 153, 195, 198 (1976) (plurality); Proffitt v. Florida, 428 U.S. 242, 250–51, 253 (1976) (plurality); Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality).

[90] Pulley v. Harris, 465 U.S. 37 (1984).

[91] 465 U.S. at 50.

[92] Ring v. Arizona, 536 U.S. 584 (2002). *See also* Hurst v. Florida, 577 U.S. ___, No. 14–7505, slip op. at 1–2 (2016).

[93] Godfrey v. Georgia, 446 U.S. 420, 428–29 (1980) (plurality opinion).

[94] Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988). *But see* Tuilaepa v. California, 512 U.S. 967 (1994) (holding that permitting capital juries to consider the circumstances of the crime, the defendant's prior criminal activity, and the age of the defendant, without further guidance, is not unconstitutionally vague).

[95] Walton v. Arizona, 497 U.S. 639 (1990). *Accord*, Lewis v. Jeffers, 497 U.S. 764 (1990). *See also* Gregg v. Georgia, 428 U.S. 153, 201 (1976) (upholding full statutory

The proscription against a mandatory death penalty has also received elaboration. The Court invalidated statutes making death the mandatory sentence for persons convicted of first-degree murder of a police officer,[96] and for prison inmates convicted of murder while serving a life sentence without possibility of parole.[97] Flaws related to those attributed to mandatory sentencing statutes were found in a state's structuring of its capital system to deny the jury the option of convicting on a lesser included offense, when doing so would be justified by the evidence.[98] Because the jury had to choose between conviction or acquittal, the statute created the risk that the jury would convict because it felt the defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when at that stage the jury should concentrate on determining whether the prosecution had proved defendant's guilt beyond a reasonable doubt.[99]

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circumstance of "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"); Proffitt v. Florida, 428 U.S. 242, 255 (1976) (upholding "especially heinous, atrocious or cruel" aggravating circumstance as interpreted to include only "the conscienceless or pitiless crime which is unnecessarily torturous to the victim"); Sochor v. Florida, 504 U.S. 527 (1992) (impermissible vagueness of "heinousness" factor cured by narrowing interpretation including strangulation of a conscious victim); Arave v. Creech, 507 U.S. 463 (1993) (consistent application of narrowing construction of phrase "exhibited utter disregard for human life" to require that the defendant be a "cold-blooded, pitiless slayer" cures vagueness); Bell v. Cone, 543 U.S. 447 (2005) (presumption that state supreme court applied a narrowing construction because it had done so numerous times).

[96] Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam) (involving a different defendant from the first Roberts v. Louisiana case, 428 U.S. 325 (1976).

[97] Sumner v. Shuman, 483 U.S. 66 (1987).

[98] Beck v. Alabama, 447 U.S. 625 (1980). The statute made the guilt determination "depend . . . on the jury's feelings as to whether or not the defendant deserves the death penalty, without giving the jury any standards to guide its decision on this issue." Id. at 640. *Cf.* Hopper v. Evans, 456 U.S. 605 (1982). No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses is due to the defendant's refusal to waive the statute of limitations for those lesser offenses. Spaziano v. Florida, 468 U.S. 447 (1984). *See* Hopkins v. Reeves, 524 U.S. 88 (1998) (defendant charged with felony murder did not have right to instruction as to second degree murder or manslaughter, where Nebraska traditionally did not consider these lesser included offenses). *See also* Schad v. Arizona, 501 U.S. 624 (1991) (first-degree murder defendant, who received instruction on lesser included offense of second-degree murder, was not entitled to a jury instruction on the lesser included offense of robbery). In *Schad* the Court also upheld Arizona's characterization of first degree murder as a single crime encompassing two alternatives, premeditated murder and felony-murder, and not requiring jury agreement on which alternative had occurred.

[99] Also impermissible as distorting a jury's role are prosecutor's comments or jury instructions that mislead a jury as to its primary responsibility for deciding whether to impose the death penalty. *Compare* Caldwell v. Mississippi, 472 U.S. 320 (1985) (jury's responsibility is undermined by court-sanctioned remarks by prosecutor that jury's decision is not final, but is subject to appellate review) *with* California v. Ramos, 463 U.S. 992 (1983) (jury responsibility not undermined by instruc-

The overarching principle of *Furman* and of the *Gregg* series of cases was that the jury should not be "without guidance or direction" in deciding whether a convicted defendant should live or die. The jury's attention was statutorily "directed to the specific circumstances of the crime . . . and on the characteristics of the person who committed the crime." [100] Discretion was channeled and rationalized. But, in *Lockett v. Ohio*,[101] a Court plurality determined that a state law was invalid because it prevented the sentencer from giving weight to any mitigating factors other than those specified in the law. In other words, the jury's discretion was curbed too much. "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [102] Similarly, the reason that a three-justice plurality viewed North Carolina's mandatory death sentence for persons convicted of first degree murder as invalid was that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant." [103] *Lockett* and *Woodson* have since been endorsed by a Court

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tion that governor has power to reduce sentence of life imprisonment without parole). *See also* Lowenfield v. Phelps, 484 U.S. 231 (1988) (poll of jury and supplemental jury instruction on obligation to consult and attempt to reach a verdict was not unduly coercive on death sentence issue, even though consequence of failing to reach a verdict was automatic imposition of life sentence without parole); Romano v. Oklahoma, 512 U.S. 1 (1994) (imposition of death penalty after introduction of evidence that defendant had been sentenced to death previously did not diminish the jury's sense of responsibility so as to violate the Eighth Amendment); Jones v. United States, 527 U.S. 373 (1999) (court's refusal to instruct the jury on the consequences of deadlock did not violate Eighth Amendment, even though court's actual instruction was misleading as to range of possible sentences).

[100] Gregg v. Georgia, 428 U.S. 153, 197–98 (1976) (plurality).

[101] 438 U.S. 586 (1978). The plurality opinion by Chief Justice Burger was joined by Justices Stewart, Powell, and Stevens. Justices Blackmun, Marshall, and White concurred in the result on separate and conflicting grounds. Id. at 613, 619, 621. Justice Rehnquist dissented. Id. at 628.

[102] 438 U.S. at 604 (emphasis in original). Although, under the Eighth and Fourteenth Amendments, the state must bear the burden "to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650 (1990) (plurality). *A fortiori*, a statute "may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise." Kansas v. Marsh, 548 U.S. 163, 173 (2006).

[103] Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (opinion of Justice Stewart, joined by Justices Powell and Stevens). *Accord*, Roberts v. Louisiana, 428 U.S. 325 (1976) (statute mandating death penalty for five categories of homicide constituting first-degree murder).

majority.[104] Thus, a great measure of discretion was again accorded the sentencing authority, be it judge or jury, subject only to the consideration that the legislature must prescribe aggravating factors.[105]

The Court has explained this apparent contradiction as constituting recognition that "individual culpability is not always measured by the category of crime committed,"[106] and as the product of an attempt to pursue the "twin objectives" of "measured, consistent application" of the death penalty and "fairness to the accused."[107] The requirement that aggravating circumstances be spelled out by statute serves a narrowing purpose that helps consistency of application; absence of restriction on mitigating evidence helps promote fairness to the accused through an "individualized" consideration of his circumstances. In the Court's words, statutory aggravating circumstances "play a constitutionally necessary function at the stage of legislative definition [by] circumscribing the class of persons eligible for the death penalty,"[108] while consideration of all miti-

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[104] Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (adopting *Lockett*); Sumner v. Shuman, 483 U.S. 66 (1987) (adopting *Woodson*). The majority in *Eddings* was composed of Justices Powell, Brennan, Marshall, Stevens, and O'Connor; Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented. The *Shuman* majority was composed of Justices Blackmun, Brennan, Marshall, Powell, Stevens, and O'Connor; dissenting were Justices White and Scalia and Chief Justice Rehnquist. *Woodson* and the first Roberts v. Louisiana had earlier been followed in the second Roberts v. Louisiana, 431 U.S. 633 (1977), a *per curiam* opinion from which Chief Justice Burger, and Justices Blackmun, White, and Rehnquist dissented.

[105] Justice White, dissenting in *Lockett* from the Court's holding on consideration of mitigating factors, wrote that he "greatly fear[ed] that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that 'its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'" 438 U.S. at 623. More recently, Justice Scalia voiced similar misgivings. "Shortly after introducing our doctrine *requiring* constraints on the sentencer's discretion to 'impose' the death penalty, the Court began developing a doctrine *forbidding* constraints on the sentencer's discretion to '*decline* to impose' it. This second doctrine—counterdoctrine would be a better word—has completely exploded whatever coherence the notion of 'guided discretion' once had. . . . In short, the practice which in *Furman* had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* and *Lockett* renamed the discretion not to sentence to death and pronounced constitutionally required." Walton v. Arizona, 497 U.S. 639, 661, 662 (1990) (concurring in the judgment). For a critique of these criticisms of *Lockett*, *see* Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991).

[106] Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion of Justices Stewart, Powell, and Stevens) (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972) (Chief Justice Burger dissenting)).

[107] Eddings v. Oklahoma, 455 U.S. 104, 110–11 (1982).

[108] Zant v. Stephens, 462 U.S. 862, 878 (1983). This narrowing function may be served at the sentencing phase or at the guilt phase; the fact that an aggravating

gating evidence requires focus on "the character and record of the individual offender and the circumstances of the particular offense" consistent with "the fundamental respect for humanity underlying the Eighth Amendment." [109] As long as the defendant's crime falls within the statutorily narrowed class, the jury may then conduct "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." [110]

So far, the Justices who favor abandonment of the *Lockett* and *Woodson* approach have not prevailed. The Court has, however, given states greater leeway in fashioning procedural rules that have the effect of controlling how juries may use mitigating evidence that must be admitted and considered.[111] States may also cure some constitutional errors on appeal through operation of "harmless error" rules and reweighing of evidence by the appellate court.[112] Also, the Court has constrained the use of federal *habeas corpus* to review state court judgments. As a result of these trends, the Court recognizes a significant degree of state autonomy in capital sentencing in spite of its rulings on substantive Eighth Amendment law.[113]

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circumstance justifying capital punishment duplicates an element of the offense of first-degree murder does not render the procedure invalid. Lowenfield v. Phelps, 484 U.S. 231 (1988).

[109] Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)).

[110] Zant v. Stephens, 462 U.S. 862, 879 (1983).

[111] *See*, *e.g.*, Johnson v. Texas, 509 U.S. 350 (1993) (consideration of youth as a mitigating factor may be limited to jury estimation of probability that defendant would commit future acts of violence).

[112] Richmond v. Lewis, 506 U.S. 40 (1992) (no cure of trial court's use of invalid aggravating factor where appellate court fails to reweigh mitigating and aggravating factors).

[113] As such, the Court has opined that it is not the role of the Eighth Amendment to establish a special "federal code of evidence" governing "the admissibility of evidence at capital sentencing proceedings." *See* Romano v. Oklahoma, 512 U.S. 1, 11–12 (1994). Instead, the test for a constitutional violation attributable to evidence improperly admitted at a capital sentencing proceeding is whether the evidence "so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process." *Id.* at 12. As a consequence, the Court found nothing constitutionally impermissible with a state having joint sentencing proceedings for two defendants whose underlying conviction arose from the same single chain of events. *See* Kansas v. Carr, 577 U.S. ___, No. 14–449, slip op. at 15–16 (2016) (rejecting the argument that joinder of two defendants was fundamentally unfair because evidence that one defendant unduly influenced another defendant's conduct may have "infected" the jury's decision making). Indeed, the Court approvingly noted that joint proceedings before a single jury for defendants that commit the same crimes are "not only permissible but are often preferable" in order to avoid the "wanto[n] and freakis[h]" imposition of the death sentence. *See id.* at 17 (citing Gregg v. Georgia, 428 U.S. 153, 206–207 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.)).

While holding fast to the *Lockett* requirement that sentencers be allowed to consider all mitigating evidence,[114] the Court has upheld state statutes that control the relative weight that the sentencer may accord to aggravating and mitigating evidence.[115] "The requirement of individualized sentencing is satisfied by allowing the jury to consider all relevant mitigating evidence"; there is no additional requirement that the jury be allowed to weigh the severity of an aggravating circumstance in the absence of any mitigating factor.[116] So, too, the legislature may specify the consequences of the jury's finding an aggravating circumstance; it may mandate that a death sentence be imposed if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance,[117] or if the jury finds that aggravating circumstances outweigh mitigating circumstances.[118] And a court may instruct that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion,

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[114] *See*, *e.g.*, Hitchcock v. Dugger, 481 U.S. 393 (1987) (instruction limiting jury to consideration of mitigating factors specifically enumerated in statute is invalid); Penry v. Lynaugh, 492 U.S. 302 (1989) (jury must be permitted to consider the defendant's evidence of mental retardation and abused background outside of context of deliberateness or assessment of future dangerousness); Skipper v. South Carolina, 476 U.S. 1 (1986) (exclusion of evidence of defendant's good conduct in jail denied defendant his *Lockett* right to introduce all mitigating evidence); Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) (jury must be permitted to consider the defendant's evidence of childhood neglect and mental illness damage outside of the context of assessment of future dangerousness); Brewer v. Quarterman, 550 U.S. 286 (2007) (same). *But cf.* Franklin v. Lynaugh, 487 U.S. 164 (1988) (consideration of defendant's character as revealed by jail behavior may be limited to context of assessment of future dangerousness).

[115] "Neither [*Lockett* nor *Eddings*] establishes the weight which must be given to any particular mitigating evidence, or the manner in which it must be considered; they simply condemn any procedure in which such evidence has no weight at all." Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (Justice Stevens concurring in judgment).

[116] Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990).

[117] 494 U.S. at 307.

[118] Boyde v. California, 494 U.S. 370 (1990). A court is not required give a jury instruction expressly directing the jury to consider mitigating circumstance, as long as the instruction actually given affords the jury the discretion to take such evidence into consideration. Buchanan v. Angelone, 522 U.S. 269 (1998). In this vein, the Court has held that capital sentencing courts are not obliged to inform the jury affirmatively that mitigating circumstances lack the need for proof beyond a reasonable doubt. *See* Kansas v. Carr, 577 U.S. ___, No. 14–449, slip op. at 11 (2016) (noting that ambiguity in capital sentencing instructions gives rise to constitutional error only if there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents consideration of constitutionally relevant evidence). By the same token, a court did not offend the Constitution by directing the jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to the jury's question about proper construction of mitigating circumstances. Weeks v. Angelone, 528 U.S. 225 (2000). Nor did a court offend the Constitution by instructing the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime," without specifying that such circumstance need not be a circumstance *of the crime*, but could include "some likelihood of future good conduct." This was because the jurors had heard "extensive forward-looking evi-

prejudice, public opinion, or public feeling," because in essence the instruction merely cautions the jury not to base its decision "on factors not presented at the trial." [119] However, a jury instruction that can be interpreted as requiring jury unanimity on the existence of each mitigating factor before that factor may be weighed against aggravating factors is invalid as in effect allowing one juror to veto consideration of any and all mitigating factors. Instead, each juror must be allowed to give effect to what he or she believes to be established mitigating evidence.[120] Due process considerations can also come into play; if the state argues for the death penalty based on the defendant's future dangerousness, due process requires that the jury be informed if the alternative to a death sentence is a life sentence without possibility of parole.[121]

What is the effect on a death sentence if an "eligibility factor" (a factor making the defendant eligible for the death penalty) or an "aggravating factor" (a factor, to be weighed against mitigating factors, in determining whether a defendant who has been found eligible for the death penalty should receive it) is found invalid? In *Brown v. Sanders*, the Court announced "the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." [122]

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dence," and it was improbable that they would believe themselves barred from considering it. Ayers v. Belmontes, 549 U.S. 7, 10, 15, 16 (2006).

[119] California v. Brown, 479 U.S. 538, 543 (1987).

[120] Mills v. Maryland, 486 U.S. 367 (1988); McKoy v. North Carolina, 494 U.S. 433 (1990). *Compare* Smith v. Spisak, 558 U.S. ___, No. 08–724, slip op. at 2–9 (2010) (distinguishing jury instructions in *Mills* from instructions directing each juror to independently assess any mitigating factors before jury as a whole balanced the weight of mitigating evidence against each aggravating factor, with unanimity required before balance in favor of an aggravating factor may be found).

[121] Simmons v. South Carolina, 512 U.S. 154 (1994). *See also* Lynch v. Arizona, 578 U.S. ___, No. 15–8366, slip op. at 3–4 (2016) (holding that the possibility of clemency and the potential for future "legislative reform" does not justify a departure from the rule of *Simmons*); Kelly v. South Carolina, 534 U.S. 246, 252 (2002) (concluding that a prosecutor need not express an intent to rely on future dangerousness; logical inferences may be drawn); Shafer v. South Carolina, 532 U.S. 36, 40 (2001) (holding that an amended South Carolina law still runs afoul of *Simmons*).

[122] 546 U.S. 212, 220 (2006). In some states, "the only aggravating factors permitted to be considered by the sentencer [are] the specified eligibility factors." Id. at 217. These are known as weighing states; non-weighing states, by contrast, are those that permit "the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors." Id. Prior to Brown v. Sanders, in weighing states, the Court deemed "the sentencer's consideration of an invalid eligibility factor" to require "reversal of the sentence (unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors)." Id.

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury's consideration of an aggravating factor later found to be invalid,[123] or on a trial judge's consideration of improper aggravating circumstances.[124] In each case the sentencing authority had found other aggravating circumstances justifying imposition of capital punishment, and in *Zant* evidence relating to the invalid factor was nonetheless admissible on another basis.[125] Even in states that require the jury to weigh statutory aggravating and mitigating circumstances (and even in the absence of written findings by the jury), the appellate court may preserve a death penalty through harmless error review or through a reweighing of the aggravating and mitigating evidence.[126] By contrast, where there is a possibility that the jury's reliance on a "totally irrelevant" factor (defendant had served time pursuant to an invalid conviction subsequently vacated) may have been decisive in balancing aggravating and mitigating factors, a death sentence may not stand notwithstanding the presence of other aggravating factors.[127]

In *Oregon v. Guzek*, the Court could "find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce," *at sentencing*, new evidence, available to him at the time of trial, "that shows he was not present at the scene of the crime."[128] Although "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," such evidence is a traditional concern of sentencing because it tends to show "*how*, not *whether*," the defendant committed the crime.[129] Alibi evidence, by contrast, concerns "whether the defendant committed the basic crime,"

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[123] Zant v. Stephens, 462 U.S. 862 (1983).

[124] Barclay v. Florida, 463 U.S. 954 (1983).

[125] In Eighth Amendment cases as in other contexts involving harmless constitutional error, the court must find that error was "'harmless beyond a reasonable doubt in that it did not contribute to the [sentence] obtained.'" Sochor v. Florida, 504 U.S. 527, 540 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Thus, where psychiatric testimony was introduced regarding an invalid statutory aggravating circumstance, and where the defendant was not provided the assistance of an independent psychiatrist in order to develop rebuttal testimony, the lack of rebuttal testimony might have affected how the jury evaluated another aggravating factor. Consequently, the reviewing court erred in reinstating a death sentence based on this other valid aggravating factor. Tuggle v. Netherland, 516 U.S. 10 (1995).

[126] Clemons v. Mississippi, 494 U.S. 738 (1990). *Cf.* Parker v. Dugger, 498 U.S. 308 (1991) (affirmance of death sentence invalid because appellate court did not reweigh non-statutory mitigating evidence).

[127] Johnson v. Mississippi, 486 U.S. 578 (1988).

[128] 546 U.S. 517, 523 (2006).

[129] 546 U.S. at 524, 526 (Court's emphasis deleted in part).

and "thereby attacks a previously determined matter in a proceeding [*i.e.*, sentencing] at which, in principle, that matter is not at issue." [130]

Focus on the character and culpability of the defendant led the Court initially to hold that introduction of evidence about the character of the victim or the amount of emotional distress caused to the victim's family or community was inappropriate because it "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." [131] Changed membership on the Court resulted in overruling of these decisions, however, and a holding that "victim impact statements" are not barred from evidence by the Eighth Amendment.[132] "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." [133] In the view of the Court majority, admissibility of victim impact evidence was necessary in order to restore balance to capital sentencing. Exclusion of such evidence had "unfairly weighted the scales in a capital trial; while virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the

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[130] 546 U.S. at 526.

[131] Booth v. Maryland, 482 U.S. 496, 503 (1987). And culpability, the Court added, "depends not on fortuitous circumstances such as the composition [or articulateness] of [the] victim's family, but on circumstances over which [the defendant] has control." Id. at 504 n.7. The decision was 5–4, with Justice Powell's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, and Stevens, and with Chief Justice Rehnquist and Justices White, O'Connor, and Scalia dissenting. *See also* South Carolina v. Gathers, 490 U.S. 805 (1989), holding that a prosecutor's extensive comments extolling the personal characteristics of a murder victim can invalidate a death sentence when the victim's character is unrelated to the circumstances of the crime.

[132] Payne v. Tennessee, 501 U.S. 808 (1991). "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief," Chief Justice Rehnquist explained for the Court. Id. at 825. Justices White, O'Connor, Scalia, Kennedy, and Souter joined in that opinion. Justices Marshall, Blackmun, and Stevens dissented.

[133] 501 U.S. at 827. Overruling of *Booth* may have been unnecessary in *Payne*, because the principal "victim impact" evidence introduced involved trauma to a surviving victim of attempted murder who had been stabbed at the same time his mother and sister had been murdered and who had apparently witnessed those murders; this evidence could have qualified as "admissible because . . . relate[d] directly to the circumstances of the crime." *Booth*, 482 U.S. at 507 n.10. *Gathers* was directly at issue in *Payne* because of the prosecutor's references to effects on family members not present at the crime.

loss to the victim's family and to society which has resulted from the defendant's homicide." [134]

Limitations on Capital Punishment: Methods of Execution.— Throughout the history of the United States, various methods of execution have been deployed by the states in carrying out the death penalty. In the early history of the nation, hanging was the "nearly universal form of execution." [135] In the late 19th century and continuing into the 20th century, the states began adopting electrocution as a substitute for hanging based on the "well-grounded belief that electrocution is less painful and more humane than hanging." [136] And by the late 1970s, following *Gregg*, states began adopting statutes allowing for execution by lethal injection, perceiving lethal injection to be a more humane alternative to electrocution or other popular pre-*Gregg* means of carrying out the death penalty, such as firing squads or gas chambers.[137] Today the overwhelming majority of the states that allow for the death penalty use lethal injection as the "exclusive or primary method of execution." [138]

Despite a national evolution over the past two hundred years with respect to the methods deployed in carrying out the death penalty, the choice to adopt arguably more humane means of capital punishment has not been the direct result of a decision from the Supreme Court. In fact, while the Court has broadly articulated that there are some limits to the methods that can be employed in carrying out death sentences (such as torturing someone to death),[139] the Supreme Court has "never invalidated a State's chosen procedure" for carrying out the death penalty as a violation of the Eighth Amendment.[140] In 1878, the Court, relying on a long history of using firing squads in carrying out executions in military tribunals, held that the "punishment of shooting as a mode of executing the death penalty" did not constitute a cruel and unusual punishment.[141] Twelve years later, the Court upheld the use of the newly created electric chair, deferring to the judgment of the New York state legislature and finding that it was "plainly right" that electro-

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[134] 501 U.S. at 822 (citation omitted).
[135] *See* State v. Frampton, 627 P. 2d 922, 934 (Wash. 1981).
[136] *See* Malloy v. South Carolina, 237 U.S. 180, 185 (1915).
[137] *See* Baze v. Rees, 553 U.S. 35, 42 (2008) (plurality opinion).
[138] *Id*.
[139] *See* Wilkerson v. Utah, 99 U.S. 130, 135–36 (1879) (noting in dicta that certain forms of torture, such as drawing and quartering, disemboweling alive, beheading, public dissection, and burning alive, are "forbidden by . . . [the] Constitution").
[140] *See Baze*, 553 U.S. at 48 (plurality opinion).
[141] *See Wilkerson*, 99 U.S. at 134–35.

cution was not "inhuman and barbarous." [142] Fifty-seven years later, a plurality of the Court concluded that it would not be "cruel and unusual" to execute a prisoner whose first execution failed due to a mechanical malfunction, as an "unforeseeable accident" did not amount to the "wanton infliction of pain" barred by the Eighth Amendment.[143]

The declaration in *Trop* that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" [144] and the continued reliance on that declaration by a majority of the Court in several key Eighth Amendment cases [145] set the stage for potential "method of execution" challenges to the newest mode for the death penalty: lethal injection. Following several decisions clarifying the proper procedural mechanism to raise challenges to methods of execution,[146] the Court, in *Baze v. Rees*, rejected a method of execution challenge to Kentucky's lethal injection protocol, a three-drug protocol consisting of (1) an anesthetic that would render a prisoner unconscious; (2) a muscle relaxant; and (3) an agent that would induce cardiac arrest.[147] A plurality opinion, written by Chief Justice Roberts and joined by Justices Kennedy and Alito, concluded that to constitute cruel and unusual punishment, a particular method for carrying out the death penalty must present a "substantial" or "objectively intolerable" risk of harm.[148] In so concluding, the plurality opinion rejected the view that a prisoner could succeed on an Eighth Amendment method of execution challenge by merely demonstrating that a "marginally" safer alternative existed, because such a standard would "embroil" the courts in ongoing scientific inquiries and force courts to second guess the informed choices of state legislatures respecting capital punishment.[149] As a result, the plurality reasoned that to address a "substantial risk of serious harm" effectively, the

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[142] *See In re* Kemmler, 136 U.S. 436, 447 (1890).

[143] *See* Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947) (plurality opinion). Justice Frankfurter concurred in judgment, providing the fifth vote for the Court's judgment. *Id.* at 466 (Frankfurter, J., concurring). He grounded his decision on whether the Eighth Amendment had been incorporated against the states through the Fourteenth Amendment, ultimately concluding that Louisiana's choice of execution cannot be said to be "repugnant to the conscience of mankind." *Id.* at 471.

[144] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[145] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419 (2008); Hudson v. McMillian, 503 U.S. 1, 8 (1992); Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion).

[146] *See, e.g.*, Hill v. McDonough, 547 U.S. 573 (2006) (ruling that a challenge to the constitutionality of an execution method could be brought as a civil rights claim under 28 U.S.C. § 1983); Nelson v. Campbell, 541 U.S. 637 (2004) (same).

[147] 553 U.S. 35, 44 (2008).

[148] *Id*. at 50.

[149] *Id*. at 51.

prisoner must propose an alternative method of execution that is feasible, can be readily implemented, and can significantly reduce a substantial risk of severe pain.[150] Given the "heavy burden" that the plurality placed on those pursuing an Eighth Amendment method of execution claim, the plurality upheld Kentucky's protocol in light of (1) the consensus of state lethal injection procedures; (2) the safeguards Kentucky put in place to protect against any risks of harm; and (3) the lack of any feasible, safer alternative to the three-drug protocol.[151] Four other Justices, for varying reasons, concurred in the judgment of the Court.[152]

Seven years later, in a seeming reprise of the *Baze* litigation, a majority of the Court in *Glossip v. Gross* formally adopted the *Baze* plurality's reasoning with respect to Eighth Amendment claims involving methods of execution, resulting in the rejection of a challenge to Oklahoma's three-drug lethal injection protocol.[153] Following *Baze*, anti-death penalty advocates successfully persuaded pharmaceutical companies to stop providing states with the anesthetic that constituted the first of the three drugs used in the protocol challenged in the 2008 case, resulting in several states, including Oklahoma, substituting a sedative called midazolam in the protocol.[154] In *Glossip*, the Court held that Oklahoma's use of midazolam in its execution protocol did not violate the Eighth Amendment, because the challengers had failed to present a known and available alternative to midazolam and did not adequately demonstrate that the drug was ineffective in rendering a prisoner insensate to pain.[155] Ultimately, given the holdings in *Baze* and *Glossip*, and the burden those cases imposed upon the plaintiffs challenging a state's chosen method of execution on Eighth Amendment grounds, it appears that only those modes of the death penalty that demonstrably result in substantial risks of harm for the prisoner relative to viable alternatives can be challenged as unconstitutional, a stan-

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[150] *Id*. at 52.

[151] *Id*. at 53–61.

[152] Justice Stevens, while announcing his skepticism regarding the constitutionality of the death penalty as a whole, concluded that, based on existing precedent, the petitioners' evidence failed to prove a violation of the Eighth Amendment. *Id*. at 71–87 (Stevens, J., concurring). Justice Thomas, on behalf of himself and Justice Scalia, rejected the idea that the Court had the capacity to adjudicate claims involving methods of execution properly and instead argued that an execution method violates the Eighth Amendment only if it is deliberately designed to inflict pain. *Id*. at 94–107 (Thomas, J., concurring). Justice Breyer concluded that insufficient evidence in either the record or in available medical literature demonstrated that Kentucky's lethal injection method created significant risk of unnecessary suffering. *Id*. at 107–13 (Breyer, J., concurring).

[153] *See* 576 U.S. ___, No. 14–7955, slip op. (2015).

[154] *Id*. at 5–7.

[155] *Id*. at 16–29.

dard that may result in the political process (as opposed the judiciary) being the primary means of making wholesale changes to a particular method of execution.

Limitations on Capital Punishment: Proportionality.—The Court has also considered whether, based on the nature of the underlying offense (or, as explored in the next topic, the capacity of the defendant), the imposition of capital punishment may be inappropriate in particular cases. "[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.' Whether this requirement has been fulfilled is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791 but by the norms that 'currently prevail.' The Amendment 'draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.'" [156] However, the "Court has . . . made it clear that '[t]he Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions.'" [157]

In *Coker v. Georgia*,[158] the Court held that the state may not impose a death sentence upon a rapist who did not take a human life. In *Kennedy v. Louisiana*,[159] the Court held that this was true even when the rape victim was a child.[160] In *Coker* the Court announced that the standard under the Eighth Amendment was that punishments are barred when they "are 'excessive' in relation to the crime committed. Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might

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[156] Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) (citations omitted).

[157] 128 S. Ct. at 2675 (Alito, J., dissenting) (quoting Harmelin v. Michigan, 501 U.S. 957, 990 (1991)).

[158] 433 U.S. 584 (1977). Justice White's opinion was joined only by Justices Stewart, Blackmun, and Stevens. Justices Brennan and Marshall concurred on their view that the death penalty is *per se* invalid, id. at 600, and Justice Powell concurred on a more limited basis than Justice White's opinion. Id. at 601. Chief Justice Burger and Justice Rehnquist dissented. Id. at 604.

[159] 128 S. Ct. 2641 (2008). Justice Kennedy's opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justices Scalia and Thomas joined.

[160] The Court noted, however, that "[o]ur concern here is limited to crimes against individual persons [where a victim's life is not taken]. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State." 128 S. Ct. at 2659.

fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted." [161] Although the Court thought that the death penalty for rape passed the first test ("it may measurably serve the legitimate ends of punishment"),[162] it found that it failed the second test (proportionality). Georgia was the sole state providing for death for the rape of an adult woman, and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of the injury to the person and to the public." [163] In *Kennedy v. Louisiana*, the Court found that both "evolving standards of decency" and "a national consensus" preclude the death penalty for a person who rapes a child.[164]

Applying the *Coker* analysis, the Court ruled in *Enmund v. Florida* [165] that death is an unconstitutional penalty for felony murder if the defendant did not himself kill, or attempt to take life, or intend that anyone be killed. Although a few more states imposed capital punishment in felony murder cases than had imposed it for rape, nonetheless the weight was heavily against the practice, and the evidence of jury decisions and other indicia of a modern consensus also opposed the death penalty in such circumstances. Moreover, the Court determined that death was a disproportionate sentence for one who neither took life nor intended to do so. Because

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[161] 433 U.S. at 592.

[162] 433 U.S. at 593 n.4.

[163] 433 U.S. at 598.

[164] 128 S. Ct. 2641, 2649, 2653 (2008). The Court noted that, since *Gregg*, it had "spent more than 32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder. Though that practice remains sound, beginning the same process for crimes for which no one has been executed in more than 40 years would require experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty. Evolving standards of decency are difficult to reconcile with a regime that seeks to expand the death penalty to an area where standards to confine its use are indefinite and obscure." Id. at 2661.

[165] 458 U.S. 782 (1982). Justice White wrote the opinion of the Court and was joined by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, with Justices Powell and Rehnquist and Chief Justice Burger, dissented. Id. at 801. *Accord*, Cabana v. Bullock, 474 U.S. 376 (1986) (also holding that the proper remedy in a *habeas* case is to remand for state court determination as to whether *Enmund* findings have been made).

the death penalty is likely to deter only when murder is the result of premeditation and deliberation, and because the justification of retribution depends upon the degree of the defendant's culpability, the imposition of death upon one who participates in a crime in which a victim is murdered by one of his confederates and not as a result of his own intention serves neither of the purposes underlying the penalty.[166] In *Tison v. Arizona*, however, the Court eased the "intent to kill" requirement, holding that, in keeping with an "apparent consensus" among the states, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." [167]

Limitations on Capital Punishment: Diminished Capacity.— The Court has grappled with several cases involving application of the death penalty to persons of diminished capacity. The first such case involved a defendant whose competency at the time of his offense, at trial, and at sentencing had not been questioned, but who subsequently developed a mental disorder. The Court held in *Ford v. Wainwright* [168] that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of sanity at the time of execution must be determined in a proceeding satisfying the minimum requirements of due process.[169] The Court noted that execution of the insane had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and continued to be so viewed. And, although no states purported to permit the execution of the insane, Florida and some others left the determination to the governor. Florida's procedures, the Court held, violated due process because the decision was vested in the governor without the defendant's having the opportunity to be heard, the gover-

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[166] Justice O'Connor thought the evidence of contemporary standards did not support a finding that capital punishment was not appropriate in felony murder situations. 458 U.S. at 816–23. She also objected to finding the penalty disproportionate, first because of the degree of participation of the defendant in the underlying crime, id. at 823–26, but also because the Court appeared to be constitutionalizing a standard of intent required under state law.

[167] 481 U.S. 137, 158 (1987). The decision was 5–4. Justice O'Connor's opinion for the Court viewed a "narrow" focus on intent to kill as "a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers," id. at 157, and concluded that "reckless disregard for human life" may be held to be "implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Id.

[168] 477 U.S. 399 (1986).

[169] There was an opinion of the Court only on the first issue: that the Eighth Amendment creates a right not to be executed while insane. The Court's opinion did not attempt to define insanity; Justice Powell's concurring opinion would have held the prohibition applicable only for "those who are unaware of the punishment they are about to suffer and why they are to suffer it." 477 U.S. at 422.

nor's decision being based on reports of three state-appointed psychiatrists.[170]

In *Panetti v. Quarterman*,[171] the Court considered two of the issues raised, but not clearly answered, in *Ford*: what definition of insanity should be used in capital punishment cases, and what process must be afforded to the defendant to prove his incapacity. Although the court below had found that it was sufficient to establish competency that a defendant know that he is to be executed and the reason why, the Court in *Panetti* rejected these criteria, and sent the case back to the lower court for it to consider whether the defendant had a rational understanding of the reasons the state gave for an execution, and how that reflected on his competency.[172] The Court also found that the failure of the state to provide the defendant an adequate opportunity to respond to the findings of two court-appointed mental health experts violated due process.[173]

In 1989, when first confronted with the issue of whether execution of the mentally retarded is constitutional, the Court found "insufficient evidence of a national consensus against executing mentally retarded people."[174] In 2002, however, the Court determined in *Atkins v. Virginia*[175] that "much ha[d] changed" since 1989, that the practice had become "truly unusual," and that it was "fair to

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[170] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity . . . calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." Id. at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, set forth the Court's holding.

[171] 127 S. Ct. 2842 (2007).

[172] 127 S. Ct. at 2862. In *Panetti*, the defendant, despite apparent mental problems, was found to understand both his imminent execution and the fact that the State of Texas intended to execute him for having murdered his mother-in-law and father-in-law. It was argued, however, that defendant, suffering from delusions, believed that the stated reason for his execution was a "sham" and that the state wanted to execute him to "stop him from preaching."

[173] 127 S. Ct. at 2858.

[174] Penry v. Lynaugh, 492 U.S. 302, 335 (1989). Although unwilling to conclude that execution of a mentally retarded person is "categorically prohibited by the Eighth Amendment," id. at 335, the Court noted that, because of the requirement of individualized consideration of culpability, a retarded defendant is entitled to an instruction that the jury may consider and give mitigating effect to evidence of retardation or a background of abuse. Id. at 328. *See also* Tennard v. Dretke, 542 U.S. 274 (2004) (evidence of low intelligence should be admissible for mitigating purposes without being screened on basis of severity of disability).

[175] 536 U.S. 304 (2002). *Atkins* was 6–3 decision by Justice Stevens.

say" that a "national consensus" had developed against it.[176] In 1989, only two states and the Federal Government prohibited execution of the mentally retarded while allowing executions generally. By 2002, an additional 16 states had prohibited execution of the mentally retarded, and no states had reinstated the power. But the important element of consensus, the Court explained, was "not so much the number" of states that had acted, but instead "the consistency of the direction of change."[177] The Court's "own evaluation of the issue" reinforced the consensus. Neither of the two generally recognized justifications for the death penalty—retribution and deterrence—applies with full force to mentally retarded offenders. Retribution necessarily depends on the culpability of the offender, yet mental retardation reduces culpability. Deterrence is premised on the ability of offenders to control their behavior, yet "the same cognitive and behavioral impairments that make these defendants less morally culpable . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based on that information."[178]

In *Atkins*, the Court wrote, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'"[179] In *Schriro v. Smith*, the Court again quoted this language, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim."[180] States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge."[181]

In *Hall v. Florida*,[182] however, the Court limited the states' ability to define intellectual disability by invalidating Florida's "bright line" cutoff based on Intelligence Quotient (IQ) test scores. A Florida statute stated that anyone with an IQ above 70 was prohibited from offering additional evidence of mental disability and was thus subject to capital punishment.[183] The Court invalidated this rigid standard, observing that "[i]ntellectual disability is a condition, not a

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[176] 536 U.S. at 314, 316.

[177] 536 U.S. at 315.

[178] 536 U.S. at 320. The Court also noted that reduced capacity both increases the risk of false confessions and reduces a defendant's ability to assist counsel in making a persuasive showing of mitigation.

[179] 536 U.S. at 317 (citation omitted), quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986).

[180] 546 U.S. 6, 7 (2005) (per curiam).

[181] 546 U.S. at 7.

[182] 572 U.S. ___, No. 12–10882, slip op. (2014).

[183] FLA. STAT. § 921.137.

number." [184] The majority found that, although IQ scores are helpful in determining mental capabilities, they are imprecise in nature and may only be used as a factor of analysis in death penalty cases.[185] This reasoning was buttressed by a consensus of mental health professionals who concluded that an IQ test score should be read not as a single fixed number, but as a range.[186]

The Court's conclusion that execution of juveniles constitutes cruel and unusual punishment evolved in much the same manner. Initially, a closely divided Court invalidated one statutory scheme that permitted capital punishment to be imposed for crimes committed before age 16, but upheld other statutes authorizing capital punishment for crimes committed by 16- and 17-year-olds. Important to resolution of the first case was the fact that Oklahoma set no minimum age for capital punishment, but by separate provision allowed juveniles to be treated as adults for some purposes.[187] Although four Justices favored a flat ruling that the Eighth Amendment barred the execution of anyone younger than 16 at the time of his offense, concurring Justice O'Connor found Oklahoma's scheme defective as not having necessarily resulted from the special care and deliberation that must attend decisions to impose the death penalty. The following year Justice O'Connor again provided the decisive vote when the Court in *Stanford v. Kentucky* held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17. Like Oklahoma, neither Kentucky nor Missouri [188] directly specified a minimum age for the death penalty. To Justice O'Connor, however, the critical difference was that there clearly was no national consensus forbidding imposition of capital punishment on 16- or 17-year-old murderers, whereas there was such a consensus against execution of 15-year-olds.[189]

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[184] *Hall*, slip op. at 21.

[185] *Id.* Of those states that allow for the death penalty, a number of them do not have strict cut-offs for IQ scores. *See, e.g.*, CAL. PENAL CODE § 1376 (West 2016); LA. CODE CRIM. PROC. ANN. art. 905.5.1 (2016); NEV. REV. STAT. § 174.098.7; UTAH CODE ANN. § 77–15a–102 (Lexis-Nexis 2016). Similarly, the U.S. Code does not set a strict IQ cutoff. *See* 18 U.S.C. § 3596(c) (2012).

[186] This range, referred to as a "standard error or measurement" or "SEM," is used by many states in evaluating the existence of intellectual disability. *Hall*, slip op. at 12.

[187] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[188] Wilkins v. Missouri was decided along with *Stanford*.

[189] *Compare Thompson*, 487 U.S. at 849 (O'Connor, J., concurring) (two-thirds of all state legislatures had concluded that no one should be executed for a crime committed at age 15, and no state had "unequivocally endorsed" a lower age limit) *with Stanford*, 492 U.S. at 370 (15 of 37 states permitting capital punishment decline to impose it on 16-year-old offenders; 12 decline to impose it on 17-year-old offenders).

Although the Court in *Atkins v. Virginia* contrasted the national consensus said to have developed against executing the mentally retarded with what it saw as a lack of consensus regarding execution of juvenile offenders over age 15,[190] less than three years later the Court held that such a consensus had developed. The Court's decision in *Roper v. Simmons* [191] drew parallels with *Atkins*. A consensus had developed, the Court held, against the execution of juveniles who were age 16 or 17 when they committed their crimes. Since *Stanford*, five states had eliminated authority for executing juveniles, and no states that formerly prohibited it had reinstated the authority. In all, 30 states prohibited execution of juveniles: 12 that prohibited the death penalty altogether, and 18 that excluded juveniles from its reach. This meant that 20 states did not prohibit execution of juveniles, but the Court noted that only five of these states had actually executed juveniles since *Stanford*, and only three had done so in the 10 years immediately preceding *Roper*. Although the pace of change was slower than had been the case with execution of the mentally retarded, the consistent direction of change toward abolition was deemed more important.[192]

As in *Atkins*, the Court in *Roper* relied on its "own independent judgment" in addition to its finding of consensus among the states.[193] Three general differences between juveniles and adults make juveniles less morally culpable for their actions. Because juveniles lack maturity and have an underdeveloped sense of responsibility, they often engage in "impetuous and ill-considered actions and de-

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[190] 536 U.S. at 314, n.18.

[191] 543 U.S. 551 (2005). The case was decided by 5–4 vote. Justice Kennedy wrote the Court's opinion, and was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice O'Connor, who had joined the Court's 6–3 majority in *Atkins*, wrote a dissenting opinion, as did Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas.

[192] Dissenting in *Roper*, Justice O'Connor disputed the consistency of the trend, pointing out that since *Stanford* two states had passed laws reaffirming the permissibility of executing 16- and 17-year-old offenders. 543 U.S. at 596.

[193] 543 U.S. at 564. The *Stanford* Court had been split over the appropriate scope of inquiry in cruel and unusual punishment cases. Justice Scalia's plurality would have focused almost exclusively on an assessment of what the state legislatures and Congress have done in setting an age limit for application of capital punishment. 492 U.S. at 377 ("A revised national consensus so broad, so clear and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved."). The *Stanford* dissenters would have broadened this inquiry with a proportionality review that considers the defendant's culpability as one aspect of the gravity of the offense, that considers age as one indicator of culpability, and that looks to other statutory age classifications to arrive at a conclusion about the level of maturity and responsibility that society expects of juveniles. 492 U.S. at 394–96. The *Atkins* majority adopted the approach of the *Stanford* dissenters, conducting a proportionality review that brought their own "evaluation" into play along with their analysis of consensus on the issue of executing the mentally retarded.

cisions." Juveniles are also more susceptible than adults to "negative influences" and peer pressure. Finally, the character of juveniles is not as well formed, and their personality traits are "more transitory, less fixed." [194] For these reasons, irresponsible conduct by juveniles is "not as morally reprehensible," they have "a greater claim than adults to be forgiven," and "a greater possibility exists that a minor's character deficiencies will be reformed." [195] Because of the diminished culpability of juveniles, the penological objectives of retribution and deterrence do not provide adequate justification for imposition of the death penalty. The majority preferred a categorical rule over individualized assessment of each offender's maturity, explaining that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." [196]

The *Roper* Court found confirmation for its holding in "the overwhelming weight of international opinion against the juvenile death penalty." [197] Although "not controlling," the rejection of the juvenile death penalty by other nations and by international authorities was "instructive," as it had been in earlier cases, for Eighth Amendment interpretation.[198]

Limitations on Capital Punishment: Equality of Application.—One of the principal objections to imposition of the death penalty, voiced by Justice Douglas in his concurring opinion in *Furman*, was that it was not being administered fairly—that the capital sentencing laws vesting "practically untrammeled discretion" in juries were being used as vehicles for racial discrimination, and that "discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments." [199] This argument has not carried the day. Although the Court has acknowledged the possibility that the death

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[194] 543 U.S. at 569, 570.

[195] 543 U.S. at 570.

[196] 543 U.S. at 572–573. Strongly disagreeing, Justice O'Connor wrote that "an especially depraved juvenile offender may . . . be just as culpable as many adult offenders considered bad enough to deserve the death penalty. . . . [E]specially for 17-year-olds . . . the relevant differences between 'adults' and 'juveniles' appear to be a matter of degree, rather than of kind." Id. at 600.

[197] 543 U.S. at 578 (noting "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," id. at 575).

[198] 543 U.S. at 577, 578. Citing as precedent Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (plurality opinion); *Atkins*, 536 U.S. at 317 n.21; Enmund v. Florida, 458 U.S. 782, 796–97, n.22 (1982), Thompson v. Oklahoma, 487 U.S. 815, 830–31 & n.31 (1988) (plurality opinion); and Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (plurality opinion).

[199] 408 U.S. at 248, 257.

penalty may be administered in a racially discriminatory manner, it has made proof of such discrimination quite difficult.

A measure of protection against jury bias was provided by the Court's holding that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." [200]

Proof of prosecution bias is another matter. The Court ruled in *McCleskey v. Kemp* [201] that a strong statistical showing of racial disparity in capital sentencing cases is insufficient to establish an Eighth Amendment violation. Statistics alone do not establish racial discrimination in any particular case, the Court concluded, but "at most show only a likelihood that a particular factor entered into some decisions." [202] Just as important to the outcome, however, was the Court's application of the two overarching principles of prior capital punishment cases: that a state's system must narrow a sentencer's discretion to impose the death penalty (*e.g.*, by carefully defining "aggravating" circumstances), but must *not* constrain a sentencer's discretion to consider mitigating factors relating to the character of the defendant. Although the dissenters saw the need to narrow discretion in order to reduce the chance that racial discrimination underlies jury decisions to impose the death penalty,[203] the majority emphasized the need to preserve jury discretion not to impose capital punishment. Reliance on statistics to establish a *prima facie* case of discrimination, the Court feared, could undermine the requirement that capital sentencing jurors "focus their collective judgment on the unique characteristics of a particular criminal defendant"—a focus that can result in "final and unreviewable" leniency.[204]

Limitations on Habeas Corpus Review of Capital Sentences.—The Court's rulings limiting federal *habeas corpus* review of state convictions, reinforced by the Antiterrorism and Effective Death Penalty Act of 1996,[205] may be expected to reduce significantly the amount of federal court litigation over state imposition of capital punishment. In the *habeas* context, the Court rejected the

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[200] Turner v. Murray, 476 U.S. 28, 36–37 (1986).

[201] 481 U.S. 279 (1987) (5-to-4 decision).

[202] 481 U.S. at 308.

[203] 481 U.S. at 339–40 (Brennan), 345 (Blackmun), 366 (Stevens).

[204] 481 U.S. at 311. Concern for protecting "the fundamental role of discretion in our criminal justice system" also underlay the Court's rejection of an equal protection challenge in *McCleskey*. *See* discussion of "Capital Punishment" under the Fourteenth Amendment, *infra*. *See also* United States v. Bass, 536 U.S. 862 (2002) (per curiam), requiring a threshold evidentiary showing before a defendant claiming selective prosecution on the basis of race is entitled to a discovery order that the government provide information on its decisions to seek the death penalty.

[205] Pub. L. 104–132, 110 Stat. 1214.

"death is different" approach by applying to capital cases the same rules that limit federal petitions in non-capital cases.[206] Then, in *In re Troy Anthony Davis*,[207] the Court found a death-row convict with a claim of actual innocence to be entitled to a District Court determination of his *habeas* petition.[208]

The Court held in *Penry v. Lynaugh* [209] that its *Teague v. Lane* [210] rule of nonretroactivity applies to capital sentencing challenges. Under *Teague*, new rules of constitutional interpretation announced after a defendant's conviction has become final will not be applied in *habeas* cases unless one of two exceptions applies.[211] The two exceptions—the situations in which "[a] new rule applies retroactively in a collateral proceeding"—are when "(1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." [212] The first exception has also been stated to be "that a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" [213] The second exception has

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[206] Herrera v. Collins, 506 U.S. 390, 405 (1993) ("we have 'refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus'") (quoting Murray v. Giarratano, 492 U.S. 1, 9 (1989)).

[207] 557 U.S. ___, No. 08–1443 (2009).

[208] Justice Stevens, in a concurring opinion joined by Justices Ginsburg and Breyer, noted that the fact that seven of the state's key witnesses had recanted their trial testimony, and that several people had implicated the state's principal witness as the shooter, made the case "exceptional." Justices Scalia, joined by Justice Thomas, dissented.

[209] 492 U.S. 302 (1989).

[210] 489 U.S. 288 (1989).

[211] The "new rule" limitation was suggested in a plurality opinion in *Teague*, and a Court majority in *Penry* and later cases adopted it. In Danforth v. Minnesota, 128 S. Ct. 1029, 1033 (2008), the Court held that *Teague* does not "constrain[ ] the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion."

[212] Whorton v. Bockting, 549 U.S. 406, 416 (2007). In Saffle v. Parks, 494 U.S. 484, 494, 495 (1990), the Court stated the two exceptions as follows: "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe . . . or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.' . . . The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."

[213] Teague v. Lane, 489 U.S. at 311, quoting Mackey v. United States, 401 U.S. 667, 692 (1971). "*Teague* by its terms applies only to procedural rules." Bousley v. United States, 523 U.S. 614, 620 (1998). "New *substantive* rules generally apply retroactively . . . because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose on him." Schriro v. Summerlin, 542 U.S. 348, 351, 352 (2004) (internal quotation marks omitted) (the holding of Ring v. Arizona, that "a sentencing judge, sitting without a jury [may not] find an aggravating circumstance neces-

also been stated to be "that a new rule should be applied retroactively if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty,'" and "without which the likelihood of an accurate conviction is seriously diminished."[214] Further restricting the availability of federal *habeas* review is the Court's definition of "new rule." Interpretations that are a logical outgrowth or application of an earlier rule are nonetheless "new rules" unless the result was "dictated" by that precedent.[215] Although in *Penry* itself the Court determined that the requested rule (requiring an instruction that the jury consider mitigating evidence of the defendant's mental retardation and abused childhood) was *not* a "new rule" because it was dictated by *Eddings* and *Lockett*, in subsequent *habeas* capital sentencing cases the Court has found substantive review barred by the "new rule" limitation.[216]

A second restriction on federal *habeas* review also has ramifications for capital sentencing review. Claims that state convictions are unsupported by the evidence are weighed by a "rational factfinder" inquiry: "whether, after viewing the evidence in the light most fa-

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sary for imposition of the death penalty," 542 U.S. at 353, quoting *Ring*, 536 U.S. at 609, was a procedural, not a substantive rule).

[214] Teague v. Lane, 489 U.S. at 311, 313, quoting Mackey v. United States, 401 U.S. at 693. The second exception was at issue in Sawyer v. Smith, 497 U.S. 227 (1990), in which the Court held the exception inapplicable to the Caldwell v. Mississippi rule that the Eighth Amendment is violated by prosecutorial misstatements characterizing the jury's role in capital sentencing as merely recommendatory. It is "not enough," the Court in *Sawyer* explained, "that a new rule is aimed at improving the accuracy of a trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." Id. at 242.

[215] *Penry*, 492 U.S. at 314; *accord*, Whorton v. Bockting, 549 U.S. 406, 416 (2007). Put another way, it is not enough that a decision is "within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision." A decision announces a "new rule" if its result "was susceptible to debate among reasonable minds" or if it would not have been "an illogical or even a grudging application" of the prior decision to hold it inapplicable. Butler v. McKellar, 494 U.S. 407, 415 (1990).

[216] *See, e.g.*, Butler v. McKellar, 494 U.S. 407 (1990) (1988 ruling in Arizona v. Roberson, that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a *separate* investigation, announced a "new rule" not dictated by the 1981 decision in Edwards v. Arizona that police must refrain from all further questioning of an in-custody accused who invokes his right to counsel); Saffle v. Parks, 494 U.S. 484 (1990) (*habeas* petitioner's request that capital sentencing be reversed because of an instruction that the jury "avoid any influence of sympathy" is a request for a new rule not "compel[led]" by *Eddings* and *Lockett*, which governed *what* mitigating evidence a jury must be allowed to consider, not *how* it must consider that evidence); Sawyer v. Smith, 497 U.S. 227 (1990) (1985 ruling in Caldwell v. Mississippi, although a "predictable development in Eighth Amendment law," established a "new rule" that false prosecutorial comment on jurors' responsibility can violate the Eighth Amendment by creating an unreasonable risk of arbitrary imposition of the death penalty, since no case prior to *Caldwell* had invalidated a prosecutorial comment on Eighth Amendment grounds). *But see* Stringer v. Black, 503 U.S. 222 (1992) (neither Maynard v. Cartwright, 486 U.S. 356 (1988), nor Clemons v. Mississippi, 494 U.S. 738 (1990), announced a "new rule").

vorable to the prosecution, *any* rational trier of fact have found the essential elements of the crime beyond a reasonable doubt." [217] This same standard for reviewing alleged errors of state law, the Court determined, should be used by a federal *habeas* court to weigh a claim that a generally valid aggravating factor is unconstitutional *as applied* to the defendant.[218] In addition, the Court has held that, absent an independent constitutional violation, *habeas corpus* relief for prisoners who assert innocence based on newly discovered evidence should generally be denied.[219] In *In re Troy Anthony Davis*,[220] however, the Court found a death-row convict with a claim of actual innocence to be entitled to a District Court determination of his *habeas* petition.[221]

Third, a different harmless error rule is applied when constitutional errors are alleged in *habeas* proceedings. The *Chapman v. California* [222] rule applicable on direct appeal, requiring the state to prove beyond a reasonable doubt that a constitutional error is harmless, is inappropriate for *habeas* review, the Court concluded, given the "secondary and limited" role of federal *habeas* proceedings.[223] The appropriate test is that previously used only for nonconstitutional errors: "whether the error has substantial and injurious effect or influence in determining the jury's verdict." [224] Further,

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[217] Lewis v. Jeffers, 497 U.S. 764, 781 (1990) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[218] Lewis v. Jeffers, 497 U.S. 764, 780–84 (1990). The lower court erred, therefore, in conducting a comparative review to determine whether application in the defendant's case was consistent with other applications.

[219] Herrera v. Collins, 506 U.S. 390 (1993) (holding that a petitioner would have to meet an "extraordinarily high" threshold of proof of innocence to warrant federal *habeas* relief). *Accord*, House v. Bell, 547 U.S. 518, 554–55 (2006) (defendant failed to meet *Herrera* standard but nevertheless put forward enough evidence of innocence to meet the less onerous standard of Schlup v. Delo, 513 U.S. 298 (1995), which "held that prisoners asserting innocence as a gateway to [*habeas* relief for claims forfeited under state law] must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" Id. at 2076–2077, quoting Schlup v. Delo, 513 U.S. at 327.) The Court here distinguished "freestanding" claims under *Herrera* from "gateway" claims under *Schlup*, the difference apparently being that success on a freestanding claim results in the overturning of a conviction, whereas success on a gateway claim results in a remand to the trial court to hear the claim. *See also* Article III, *Habeas Corpus*: Scope of the Writ.

[220] 557 U.S. ___, No. 08–1443 (2009).

[221] Justice Stevens, in a concurring opinion joined by Justices Ginsburg and Breyer, "refuse[d] to endorse" Justice Scalia's reasoning (in a dissent joined by Justice Thomas) that would read the Constitution to permit the execution of a convict "who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man."

[222] 386 U.S. 18 (1967).

[223] Brecht v. Abrahamson, 507 U.S. 619, 633 (1993).

[224] Brecht v. Abrahamson, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). *Brecht* was a non-capital case, but the rule was subse-

the "substantial and injurious effect standard" is to be applied in federal *habeas* proceedings even "when the state appellate court failed to recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California* . . . ." [225]

A fourth rule was devised to prevent successive "abusive" or defaulted *habeas* petitions. Federal courts are barred from hearing such claims unless the defendant can show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him *eligible* for the death penalty under applicable state law.[226]

The Antiterrorism and Effective Death Penalty Act of 1996 prohibits federal *habeas* relief based on claims that were adjudicated on the merits in state court unless the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." [227] The Court's decision in *Bell v. Cone*,[228] rejecting a claim that an attorney's failure to present mitigating evidence during the capital sentencing phase of a trial and his waiver of a closing argument at sentencing should entitle a condemned prisoner to relief, illustrates how these restrictions can operate to defeat challenges to state-imposed death sentences.[229]

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quently applied in a capital case. Calderon v. Coleman, 525 U.S. 141 (1998) (per curiam). In Hedgpeth v. Pulido, 129 S. Ct. 530 (2008) (per curiam), the Court held that a reviewing court should apply *Brecht's* "substantial and injurious effect" standard where conviction was based on a general verdict after jury had been instructed on alternative theories of guilt and may have relied on an invalid one.

[225] Fry v. Pliler, 551 U.S. 112, 114 (2007).

[226] Sawyer v. Whitley, 505 U.S. 333 (1992). The focus on eligibility limits inquiry to elements of the crime and to aggravating factors, and thereby prevents presentation of mitigating evidence. Here the court was barred from considering an allegation of ineffective assistance of counsel for failure to introduce the defendant's mental health records as a mitigating factor at sentencing.

[227] 28 U.S.C. § 2254(d)(1).

[228] 535 U.S. 685 (2002).

[229] The state court's decision, which applied the rule from Strickland v. Washington, 466 U.S. 668 (1984), rather than the rule from United States v. Cronic, 466 U.S. 648 (1984), to hold that the attorney's performance was not constitutionally inadequate, was not "contrary to" clearly established law. *Cronic* had held that there are some situations, *e.g.*, when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," so presumptively unfair as to obviate the need to show actual prejudice to the defendant's case. *See* "Effective Assistance of Counsel" under Sixth Amendment. The Bell v. Cone Court emphasized the word "entirely," noting that the petitioner challenged the defense attorney's performance only "at specific points" in the process. Nor was the second statutory test met. *Strickland*, a "highly deferential" test asking whether an attorney's performance fell below an "objective standard of reasonableness," was not "unreasonably applied." The attorney could reasonably have concluded that evidence presented during the guilt phase of the trial was still "fresh" to the jury, and that repetition through the presentation

In *Carey v. Musladin*,[230] the Court noted that it had previously held that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes,"[231] but that it had never ruled on the effect on a defendant's fair trial rights of *spectator* conduct. In *Carey*, the spectator conduct that allegedly affected the defendant's right to a fair trial consisted of members of the victim's family wearing buttons with the victim's photograph. Given the lack of holdings from the Court on the question of spectator conduct, the Court in *Carey* found that "it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law" in denying the defendant relief.[232] Consequently, the Antiterrorism and Effective Death Penalty Act of 1996 precluded *habeas* relief. Similarly, because the Supreme Court has never ruled on whether, during a plea hearing at which the defendant pleads guilty, defense counsel's being linked to the courtroom by speaker phone, rather than being physically present, is likely to result in such poor performance that the *Cronic* standard for ineffective assistance of counsel should apply, the Court again could not say "that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'"[233]

The Court has also ruled that a death row inmate has no constitutional right to an attorney to help prepare a petition for state collateral review.[234]

Proportionality

In *O'Neil v. Vermont*,[235] Justice Field argued in dissent that, in addition to prohibiting punishments deemed barbarous and inhumane, the Eighth Amendment also condemned "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." In *Weems v. United States*,[236] the Court adopted this view in striking down a sentence in the Philippine Islands of 15 years incarceration at hard labor with chains on the

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of mitigating evidence or through a closing statement was unnecessary to counter the state's presentation of aggravating circumstances justifying a death sentence.

[230] 549 U.S. 70 (2006).

[231] Estelle v. Williams, 425 U.S. 501, 512 (1976).

[232] 549 U.S. at 77 (quoting from 28 U.S.C. § 2254(d)(1)).

[233] Wright v. Van Patten, 128 S. Ct. 743 (2008) (per curiam), quoting Carey v. Musladin, 549 U.S. 70, 77 (2006) (under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), defendant not entitled to *habeas* relief).

[234] Murray v. Giarratano, 492 U.S. 1 (1989) ("unit attorneys" assigned to prisons were available for some advice prior to filing a claim).

[235] 144 U.S. 323, 339–40 (1892). *See also* Howard v. Fleming, 191 U.S. 126, 135–36 (1903).

[236] 217 U.S. 349 (1910). The Court was here applying not the Eighth Amendment but a statutory bill of rights applying to the Philippines, which it interpreted as having the same meaning. Id. at 367.

ankles, loss of all civil rights, and perpetual surveillance, for the offense of falsifying public documents. The Court compared the sentence with those meted out for other offenses and concluded: "This contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice." [237] Punishments as well as fines, therefore, can be condemned as excessive.[238]

In *Robinson v. California* [239] the Court carried the principle to new heights, setting aside a conviction under a law making it a crime to "be addicted to the use of narcotics." The statute was unconstitutional because it punished the "mere status" of being an addict without any requirement of a showing that a defendant had ever used narcotics within the jurisdiction of the state or had committed any act at all within the state's power to proscribe, and because addiction is an illness that—however it is acquired—physiologically compels the victim to continue using drugs. The case could stand for the principle, therefore, that one may not be punished for a status in the absence of some act,[240] or it could stand for the broader principle that it is cruel and unusual to punish someone for conduct that he is unable to control, which would make it a holding of far-reaching importance.[241] In *Powell v. Texas*,[242] a majority of the Justices took the latter view of *Robinson*, but the re-

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[237] 217 U.S. at 381.

[238] "The Eighth Amendment succinctly prohibits 'excessive' sanctions." Atkins v. Virginia, 536 U.S. 304, 311 (2002) (applying proportionality review to determine whether execution of the mentally retarded is cruel and unusual). Proportionality in the context of capital punishment is considered under "Limitations on Capital Punishment: Proportionality," *supra*.

[239] 370 U.S. 660 (1962).

[240] A different approach to essentially the same problem was taken in Thompson v. Louisville, 362 U.S. 199, 206 (1960), which set aside a conviction for loitering and disorderly conduct as being supported by "no evidence whatever." *Cf.* Johnson v. Florida, 391 U.S. 596 (1968) (no evidence that the defendant was "wandering or strolling around" in violation of vagrancy law).

[241] Fully applied, the principle would raise to constitutional status the concept of *mens rea*, and it would thereby constitutionalize some form of insanity defense as well as other capacity defenses. For a somewhat different approach, *see* Lambert v. California, 355 U.S. 225 (1957) (due process denial for city to apply felon registration requirement to someone present in city but lacking knowledge of requirement). More recently, this controversy has become a due process matter, with the holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the facts necessary to constitute the crime charged, Mullaney v. Wilbur, 421 U.S. 684 (1975), raising the issue of the insanity defense and other such questions. *See* Rivera v. Delaware, 429 U.S. 877 (1976); Patterson v. New York, 432 U.S. 197, 202–05 (1977). In Solem v. Helm, 463 U.S. 277, 297 n.22 (1983), an Eighth Amendment proportionality case, the Court suggested in dictum that life imprisonment without possibility of parole of a recidivist who was an alcoholic, and all of whose crimes

sult, because of one Justice's view of the facts, was a refusal to invalidate a conviction of an alcoholic for public drunkenness. Whether either the Eighth Amendment or the Due Process Clauses will govern the requirement of the recognition of capacity defenses to criminal charges remains to be decided.

The Court has gone back and forth in its acceptance of proportionality analysis in non-capital cases. It appeared that such analysis had been closely cabined in *Rummel v. Estelle*,[243] upholding a mandatory life sentence under a recidivist statute following a third felony conviction, even though the defendant's three nonviolent felonies had netted him a total of less than $230. The Court reasoned that the unique quality of the death penalty rendered capital cases of limited value, and distinguished *Weems* on the ground that the length of the sentence was of considerably less concern to the Court than were the brutal prison conditions and the post-release denial of significant rights imposed under the peculiar Philippine penal code. Thus, in order to avoid improper judicial interference with state penal systems, Eighth Amendment judgments must be informed by objective factors to the maximum extent possible. But when the challenge to punishment goes to the length rather than the seriousness of the offense, the choice is necessarily subjective. Therefore, the *Rummel* rule appeared to be that states may punish any behavior properly classified as a felony with any length of imprisonment purely as a matter legislative grace.[244] The Court dismissed as unavailing the factors relied on by the defendant. First, the fact that the nature of the offense was nonviolent was found not necessarily relevant to the seriousness of a crime, and the determination of what

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had been influenced by his alcohol use, was "unlikely to advance the goals of our criminal justice system in any substantial way."

[242] 392 U.S. 514 (1968). The plurality opinion by Justice Marshall, joined by Justices Black and Harlan and Chief Justice Warren, interpreted *Robinson* as proscribing only punishment of "status," and not punishment for "acts," and expressed a fear that a contrary holding would impel the Court into constitutional definitions of such matters as *actus reus*, *mens rea*, insanity, mistake, justification, and duress. Id. at 532–37. Justice White concurred, but only because the record did not show that the defendant was unable to stay out of public; like the dissent, Justice White was willing to hold that if addiction as a status may not be punished neither can the yielding to the compulsion of that addiction, whether to narcotics or to alcohol. Id. at 548. Dissenting Justices Fortas, Douglas, Brennan, and Stewart wished to adopt a rule that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." That is, one under an irresistible compulsion to drink or to take narcotics may not be punished for those acts. Id. at 554, 567.

[243] 445 U.S. 263 (1980).

[244] In Hutto v. Davis, 454 U.S. 370 (1982), on the authority of *Rummel*, the Court summarily reversed a decision holding disproportionate a prison term of 40 years and a fine of $20,000 for defendant's possession and distribution of approximately nine ounces of marijuana said to have a street value of about $200.

is a "small" amount of money, being so subjective, was a legislative task. In any event, the state could focus on recidivism, not the specific acts. Second, the comparison of punishment imposed for the same offenses in other jurisdictions was found unhelpful, differences and similarities being more subtle than gross, and in any case in a federal system one jurisdiction would always be more severe than the rest. Third, the comparison of punishment imposed for other offenses in the same state ignored the recidivism aspect.[245]

Rummel was distinguished in *Solem v. Helm*,[246] the Court stating unequivocally that the Cruel and Unusual Punishments Clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed," and that "[t]here is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences."[247] Helm, like Rummel, had been sentenced under a recidivist statute following conviction for a nonviolent felony involving a small amount of money.[248] The difference was that Helm's sentence of life imprisonment without possibility of parole was viewed as "far more severe than the life sentence we considered in *Rummel v. Estelle*."[249] Rummel, the Court pointed out, "was likely to have been eligible for parole within 12 years of his initial confinement," whereas Helm had only the possibility of executive clemency, characterized by the Court as "nothing more than a hope for 'an *ad hoc* exercise of clemency.'"[250] The *Solem* Court also spelled out the "objective criteria" by which proportionality issues should be judged: "(I) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[251] Measured by these criteria, Helm's sentence was cruel and unusual. His crime was relatively minor, yet life imprisonment without possibility for parole was the harshest penalty possible in South Dakota, reserved for such other offenses as murder, manslaughter, kidnap-

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[245] *Rummel*, 445 U.S. at 275–82. The dissent deemed these three factors to be sufficiently objective to apply and thought they demonstrated the invalidity of the sentence imposed. Id. at 285, 295–303.

[246] 463 U.S. 277 (1983). The case, like *Rummel*, was decided by a 5–4 vote.

[247] 463 U.S. at 284, 288.

[248] The final conviction was for uttering a no-account check in the amount of $100; previous felony convictions were also for nonviolent crimes described by the Court as "relatively minor." 463 U.S. at 296–97.

[249] 463 U.S. at 297.

[250] 463 U.S. at 297, 303.

[251] 463 U.S. at 292.

ing, and arson. In only one other state could he have received so harsh a sentence, and in no other state was it mandated.[252]

The Court remained closely divided in holding in *Harmelin v. Michigan*[253] that a mandatory term of life imprisonment without possibility of parole was not cruel and unusual as applied to the crime of possession of more than 650 grams of cocaine. There was an opinion of the Court only on the issue of the mandatory nature of the penalty, the Court rejecting an argument that sentencers in non-capital cases must be allowed to hear mitigating evidence.[254] As to the length of sentence, three majority Justices—Kennedy, O'Connor, and Souter—would recognize a narrow proportionality principle, but considered Harmelin's crime severe and by no means grossly disproportionate to the penalty imposed.[255]

Twelve years after *Harmelin* the Court still could not reach a consensus on rationale for rejecting a proportionality challenge to California's "three-strikes" law, as applied to sentence a repeat felon to 25 years to life imprisonment for stealing three golf clubs valued at $399 apiece.[256] A plurality of three Justices (O'Connor, Kennedy, and Chief Justice Rehnquist) determined that the sentence was "justified by the State's public safety interest in incapacitating and de-

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[252] For a suggestion that Eighth Amendment proportionality analysis may limit the severity of punishment possible for prohibited private and consensual homosexual conduct, *see* Justice Powell's concurring opinion in Bowers v. Hardwick, 478 U.S. 186, 197 (1986).

[253] 501 U.S. 957 (1991).

[254] "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense." 501 U.S. at 994. The Court's opinion, written by Justice Scalia, then elaborated an understanding of "unusual"—set forth elsewhere in a part of his opinion subscribed to only by Chief Justice Rehnquist—that denies the possibility of proportionality review altogether. Mandatory penalties are not unusual in the constitutional sense because they have "been employed in various form throughout our Nation's history." This is an application of Justice Scalia's belief that cruelty and unusualness are to be determined solely by reference to the punishment at issue, and without reference to the crime for which it is imposed. *See* id. at 975–78 (not opinion of Court—only Chief Justice Rehnquist joined this portion of the opinion). Because a majority of other Justices indicated in the same case that they do recognize at least a narrow proportionality principle (*see* id. at 996 (Justices Kennedy, O'Connor, and Souter concurring); id. at 1009 (Justices White, Blackmun, and Stevens dissenting); id. at 1027 (Justice Marshall dissenting)), the fact that three of those Justices (Kennedy, O'Connor, and Souter) joined Justice Scalia's opinion on mandatory penalties should probably not be read as representing agreement with Justice Scalia's general approach to proportionality.

[255] Because of the "serious nature" of the crime, the three-Justice plurality asserted that there was no need to apply the other *Solem* factors comparing the sentence to sentences imposed for other crimes in Michigan, and to sentences imposed for the same crime in other jurisdictions. 501 U.S. at 1004. Dissenting Justice White, joined by Justices Blackmun and Stevens (Justice Marshall also expressed agreement on this and most other points, id. at 1027), asserted that Justice Kennedy's approach would "eviscerate" *Solem*. Id. at 1018.

[256] Ewing v. California, 538 U.S. 11 (2003).

terring recidivist felons, and amply supported by [the petitioner's] long, serious criminal record," and hence was not the "rare case" of "gross disproportional[ity]." [257] The other two Justices voting in the majority were Justice Scalia, who objected that the proportionality principle cannot be intelligently applied when the penological goal is incapacitation rather than retribution,[258] and Justice Thomas, who asserted that the Cruel and Unusual Punishments Clause "contains no proportionality principle." [259] Not surprisingly, the Court also rejected a *habeas corpus* challenge to California's "three-strikes" law for failure to clear the statutory hurdle of establishing that the sentencing was contrary to, or an unreasonable application of, "clearly established federal law." [260] Justice O'Connor's opinion for a five-Justice majority explained, in understatement, that the Court's precedents in the area "have not been a model of clarity . . . that have established a clear or consistent path for courts to follow." [261]

Declaring that "[t]he concept of proportionality is central to the Eighth Amendment," Justice Kennedy, writing for a five-Justice majority in *Graham v. Florida*,[262] held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." [263] Justice Kennedy characterized proportionality cases as falling within two general types. The first type comprises challenges to the length of actual sentences imposed as being grossly disproportionate, and such challenges are resolved under approaches taken in *Solem*, *Harmelin*, and similar cases. The second type comprises challenges to particular sentencing practices as being categorically impermissible, but categorical restrictions had theretofore been limited to imposing the death penalty on those with diminished capacity. In *Graham*, Justice Kennedy broke new ground and recognized a categorical restriction on life without parole for nonhomicide offenses by juveniles, citing considerations and applying analysis similar to those used in his juvenile capital

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[257] 538 U.S. at 29–30.

[258] 538 U.S. at 31.

[259] 538 U.S. at 32. The four dissenting Justices thought that the sentence was invalid under the *Harmelin* test used by the plurality, although they suggested that the Solem v. Helm test would have been more appropriate for a recidivism case. *See* 538 U.S. at 32, n.1 (opinion of Justice Stevens).

[260] Lockyer v. Andrade, 538 U.S. 63 (2003). The three-strikes law had been used to impose two consecutive 25-year-to-life sentences on a 37-year-old convicted of two petty thefts with a prior conviction.

[261] 538 U.S. at 72.

[262] 560 U.S. ___, No. 08–7412, slip op. (2010).

[263] Id. at 31. The opinion distinguishes life without parole from a life sentence. An offender need not be guaranteed eventual release under the *Graham* holding, just a realistic opportunity for release based on conduct during confinement.

punishment opinion in *Roper*.[264] In considering objective indicia of a national consensus on the sentence, the *Graham* opinion looked beyond statutory authorization—thirty-seven states and the District of Columbia permitted life without parole for some juvenile nonhomicide offenders—to actual imposition, which was rare outside Florida. Justice Kennedy also found support "in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over."[265] After finding that a consensus had developed against the sentencing practice at issue, Justice Kennedy expressed an independent judgment that imposing life without parole on juveniles for nonhomicide offenses failed to serve legitimate penological goals adequately.[266] Factors in reaching this conclusion included the severity of the sentence, the relative culpability of juveniles, and the prospect for their rehabilitation.[267]

The concept of proportionality also drove Justice Kagan's analysis in *Miller v. Alabama*, a case questioning the imposition of mandatory life imprisonment without parole on juveniles convicted of homicide.[268] Her analysis began by recounting the factors, stated in *Roper* and *Graham*, that mark children as constitutionally different from adults for purposes of sentencing: Children have diminished capacities and greater prospects for reform.[269] Nevertheless, these factors, even when coupled with the severity of a life without parole sentence, did not lead Justice Kagan to bar life without parole for juveniles in homicide cases categorically.[270] Her more immediate concern was that the mandatory life sentences in *Miller* left no room for a sentencer to consider a juvenile offender's special immaturity, vulnerability, suggestibility, and the like.[271] In Justice Kagan's view, a process that mandates life imprisonment without parole for juvenile offenders is constitutionally flawed because it forecloses any

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[264] *See* 543 U.S. 551 (2005). Concurring in the judgement in *Graham*, Chief Justice Roberts resolved the case under a proportionality test, finding the majority's categorical restriction to be unwise and unnecessary in Graham's circumstances. 560 U.S. ___, No. 08–7412, slip op. (Roberts, C.J., concurring).

[265] 560 U.S. ___, No. 08–7412, slip op. at 29.

[266] For a parallel discussion in *Roper*, see 543 U.S. 551, 568–75 (2005).

[267] In dissent, Justice Thomas, joined by Justice Scalia and, in part, by Justice Alito, questioned both the basis and the reach of the majority opinion. In addition to strongly objecting to adopting any categorical rule in a nonhomicide context, Justice Thomas pointedly criticized the conclusion that the legislative and judicial records established a consensus against imposing life without parole on juvenile offenders in nonhomicide cases. He also disparaged the majority's independent judgment on the morality and justice of the sentence as wrongfully pre-empting the political process. 560 U.S. ___, No. 08–7412, slip op. (Thomas, J., dissenting).

[268] 567 U.S. ___, No. 10–9646, slip op. (2012).

[269] *Id.* at 8.

[270] *Id.* at 20.

[271] *Id.* at 15.

consideration of the hallmark distinctions of youth in meting out society's severest penalties.[272] In leading four Justices in dissent, Chief Justice Roberts observed that most states and the Federal Government have statutes mandating life sentences without parole for certain juvenile offenders in homicide cases, and that those mandated sentences are commonly imposed. These sentences simply are not "unusual," nor does state law and practice indicate societal opprobrium toward them. Justice Kagan remained unconvinced, finding the dissent's methodology less persuasive when the issue is the process that must be used in imposing a particular sentence as opposed to categorically barring a type of sentence altogether.

Prisons and Punishment

"It is unquestioned that '[c]onfinement in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards.'"[273] "Conditions [in prison] must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment. . . . Conditions . . . , alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."[274] These general principles apply both to the treatment of individuals[275] and to the creation or maintenance of prison conditions that are inhu-

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[272] *Id.* at 8. In *Montgomery v. Louisiana*, the Court cautioned, however, that *Miller* should not be read as merely imposing additional procedural hurdles before a juvenile offender could be sentenced to life without parole. *See* 577 U.S. ___, No. 14–280, slip op. at 16 (2016). Instead, according to the *Montgomery* Court, *Miller* barred a sentence of life without parole for "all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility." *Id.* at 17.

[273] Rhodes v. Chapman, 452 U.S. 337, 345 (1981) (quoting Hutto v. Finney, 437 U.S. 678, 685 (1978)).

[274] 452 U.S. at 347. *See also* Overton v. Bazzetta, 539 U.S. 126, 137 (2003) (rejecting a challenge to a two-year withdrawal of visitation as punishment for prisoners who commit multiple substance abuse violations, characterizing the practice as "not a dramatic departure from accepted standards for conditions of confinement," but indicating that a permanent ban "would present different considerations").

[275] *E.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (beating prisoner with leather strap violates Eighth Amendment); Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate medical neglect of a prisoner violates Eighth Amendment); Helling v. McKinney, 509 U.S. 25 (1993) (prisoner who alleged exposure to secondhand "environmental" tobacco smoke stated a cause of action under the Eighth Amendment). In Erickson v. Pardus, 551 U.S. 89 (2007) (per curiam), the Court overturned a lower court's dismissal, on procedural grounds, of a prisoner's claim of having been denied medical treatment, with life-threatening consequences. Justice Thomas, however, dissented on the ground "that the Eighth Amendment's prohibition on cruel and unusual punishment historically concerned only injuries relating to a criminal sentence. . . . But even applying the Court's flawed Eighth Amendment jurisprudence, I would draw

mane to inmates generally.[276] Ordinarily there is both a subjective and an objective inquiry. Before conditions of confinement not formally meted out as punishment by the statute or sentencing judge can qualify as "punishment," there must be a culpable, "wanton" state of mind on the part of prison officials.[277] In the context of general prison conditions, this culpable state of mind is "deliberate indifference";[278] in the context of emergency actions, *e.g.*, actions required to suppress a disturbance by inmates, only a malicious and sadistic state of mind is culpable.[279] When excessive force is alleged, the objective standard varies depending upon whether that force was applied in a good-faith effort to maintain or restore discipline, or whether it was applied maliciously and sadistically to cause harm. In the good-faith context, there must be proof of significant injury. When, however, prison officials "maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated," and there is no need to prove that "significant injury" resulted.[280]

Beginning with *Holt v. Sarver*,[281] federal courts found prisons or entire prison systems to violate the Cruel and Unusual Punishments Clause, and broad remedial orders directed to improving prison

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the line at actual, serious injuries and reject the claim that exposure to the *risk* of injury can violate the Eighth Amendment." Id. at 95 (internal quotation marks omitted).

[276] *E.g.*, Hutto v. Finney, 437 U.S. 678 (1978).

[277] Wilson v. Seiter, 501 U.S. 294 (1991).

[278] 501 U.S. at 303. Deliberate indifference in this context means something more than disregarding an unjustifiably high risk of harm that should have been known, as might apply in the civil context. Rather, it requires a finding that the responsible person acted in reckless disregard of a risk of which he or she was aware, as would generally be required for a criminal charge of recklessness. Farmer v. Brennan, 511 U.S. 825 (1994). In upholding capital punishment by a three-drug lethal injection protocol, despite the risk that the protocol will not be properly followed and consequently result in severe pain, a Court plurality found that, although "subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment . . . , the conditions presenting the risk must be '*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.' . . . [T]o prevail on such a claim there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that they were 'subjectively blameless for purposes of the Eighth Amendment.'" Baze v. Rees, 128 S. Ct. 1520, 1530–31 (emphasis added by the Court). This case is also discussed, *supra*, under Eighth Amendment, "Application and Scope."

[279] Whitley v. Albers, 475 U.S. 312 (1986) (arguably excessive force in suppressing prison uprising did not constitute cruel and unusual punishment).

[280] Hudson v. McMillian, 503 U.S. 1, 9 (1992) (beating of a shackled prisoner resulted in bruises, swelling, loosened teeth, and a cracked dental plate). *Accord* Wilkins v. Gaddy, 559 U.S. ___, No. 08–10914, slip op. (2010) (per curiam).

[281] 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (district court ordered to retain jurisdiction until unconstitutional conditions corrected, 505 F.2d 194 (8th Cir. 1974). The Supreme Court ultimately sustained the decisions of the lower courts in Hutto v. Finney, 437 U.S. 678 (1978)).

conditions and ameliorating prison life were imposed in more than two dozen states.[282] But, although the Supreme Court expressed general agreement with the thrust of the lower court actions, it set aside two rather extensive decrees and cautioned the federal courts to proceed with deference to the decisions of state legislatures and prison administrators.[283] In both cases, the prisons involved were of fairly recent vintage and the conditions, while harsh, did not approach the conditions described in many of the lower court decisions that had been left undisturbed.[284] Thus, concerns of federalism and of judicial restraint apparently actuated the Court to begin to curb the lower federal courts from ordering remedial action for systems in which the prevailing circumstances, given the resources states choose to devote to them, "cannot be said to be cruel and unusual under contemporary standards."[285]

Congress initially encouraged litigation over prison conditions by enactment in 1980 of the Civil Rights of Institutionalized Persons Act,[286] but then in 1996 added restrictions through enactment of the Prison Litigation Reform Act.[287] The Court upheld the latter law's provision for an automatic stay of prospective relief upon the filing of a motion to modify or terminate that relief, ruling that separation of powers principles were not violated.[288]

Limitation of the Clause to Criminal Punishments

The Eighth Amendment deals only with criminal punishment, and has no application to civil processes. In holding the Amendment inapplicable to the infliction of corporal punishment upon school-

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[282] Rhodes v. Chapman, 452 U.S. 337, 353–54 n.1 (1981) (Justice Brennan concurring) (collecting cases). *See* Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981).

[283] Bell v. Wolfish, 441 U.S. 520 (1979); Rhodes v. Chapman, 452 U.S. 337 (1981).

[284] *See*, *e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976) (describing conditions of "horrendous overcrowding," inadequate sanitation, infested food, and "rampant violence"); Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1981) (describing conditions "unfit for human habitation"). The primary issue in both *Wolfish* and *Chapman* was that of "double-celling," the confinement of two or more prisoners in a cell designed for one. In both cases, the Court found the record did not support orders ending the practice.

[285] Rhodes v. Chapman, 452 U.S. 337, 347 (1981). *See also* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1991) (allowing modification, based on a significant change in law or facts, of a 1979 consent decree that had ordered construction of a new jail with single-occupancy cells; modification was to depend upon whether the upsurge in jail population was anticipated when the decree was entered, and whether the decree was premised on the mistaken belief that single-celling is constitutionally mandated).

[286] Pub. L. 96–247, 94 Stat. 349, 42 U.S.C. §§ 1997 *et seq.*

[287] Pub. L. 104–134, title VIII, 110 Stat. 1321–66—1321–77.

[288] Miller v. French, 530 U.S. 327 (2000). *See also* Porter v. Nussle, 534 U.S. 516 (2002) (applying the Act's requirement that prisoners exhaust administrative remedies).

children for disciplinary purposes, the Court explained that the Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such."[289] These limitations, the Court thought, should not be extended outside the criminal process.

[289] Ingraham v. Wright, 430 U.S. 651, 667 (1977) (citations omitted). Constitutional restraint on school discipline, the Court ruled, is to be found in the Due Process Clause, if at all.

UNENUMERATED RIGHTS

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

RIGHTS RETAINED BY THE PEOPLE

The Federalists contended that a bill of rights was unnecessary. They responded to those opposing ratification of the Constitution because of the lack of a declaration of fundamental rights by arguing that, inasmuch as it would be impossible to list all rights, it would be dangerous to list some and thereby lend support to the argument that government was unrestrained as to those rights not listed.[1] Madison adverted to this argument in presenting his proposed amendments to the House of Representatives. "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution."[2] It is clear from its text and from Madison's statement that the Amendment states but a rule of construction, making clear that a Bill of Rights might not by implication be taken to increase the powers of the national government in areas not enumerated, and that it does not contain within itself any guar-

[1] THE FEDERALIST No. 84 (Modern Library ed. 1937).

[2] 1 ANNALS OF CONGRESS 439 (1789). Earlier, Madison had written to Jefferson: "My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. . . . I have not viewed it in an important light—1. because I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted. 2. because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power." 5 WRITINGS OF JAMES MADISON, 271–72 (G. Hunt ed., 1904). *See also* 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1898 (1833).

antee of a right or a proscription of an infringement.[3] In 1965, however, the Amendment was construed to be positive affirmation of the existence of rights which are not enumerated but which are nonetheless protected by other provisions.

The Ninth Amendment had been mentioned infrequently in decisions of the Supreme Court[4] until it became the subject of some exegesis by several of the Justices in *Griswold v. Connecticut*.[5] The Court in that case voided a statute prohibiting use of contraceptives as an infringement of the right of marital privacy. Justice Douglas, writing for the Court, asserted that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[6] Thus, although privacy is not mentioned in the Constitution, it is one of the values served and protected by the First Amendment through its protection of associational rights, and by the Third, the Fourth, and the Fifth Amendments as well. The Justice recurred to the text of the Ninth Amendment, apparently to support the thought that these penumbral rights are protected by one Amendment or a complex of Amendments despite the absence of a specific reference. Justice Goldberg, concurring, devoted several pages to the Amendment.

"The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments. . . . To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it

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[3] To some extent, the Ninth and Tenth Amendments overlap with respect to the question of unenumerated powers, one of the two concerns expressed by Madison, more clearly in his letter to Jefferson but also in his introductory speech.

[4] In United Public Workers v. Mitchell, 330 U.S. 75, 94–95 (1947), upholding the Hatch Act, the Court said: "We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments [is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth, and Tenth Amendments." *See* Ashwander v. TVA, 297 U.S. 288, 300–11 (1936), and Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 143–44 (1939). *See also* Justice Chase's opinion in Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798), and Justice Miller for the Court in Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662–63 (1875).

[5] 381 U.S. 479 (1965).

[6] 381 U.S. at 484. The opinion was joined by Chief Justice Warren and by Justices Clark, Goldberg, and Brennan.

no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment. . . . Nor do I mean to state that the Ninth Amendment constitutes an independent source of right protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." [7]

Therefore, although neither Douglas' nor Goldberg's opinion sought to make the Ninth Amendment a substantive source of constitutional guarantees, both read it as indicating a function of the courts to interpose a veto over legislative and executive efforts to abridge other fundamental rights. Both opinions seemed to concur that the fundamental right claimed and upheld was derivative of several express rights and, in this case, really, the Ninth Amendment added almost nothing to the argument. But, if there is a claim of a fundamental right that cannot reasonably be derived from one of the provisions of the Bill of Rights, even with the Ninth Amendment, how is the Court to determine, first, that it is fundamental, and second, that it is protected from abridgment? [8]

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[7] 381 U.S. at 488, 491, 492. Chief Justice Warren and Justice Brennan joined this opinion. Justices Harlan and White concurred, id. at 499, 502, without alluding to the Ninth Amendment, but instead basing their conclusions on substantive due process, finding that the state statute "violates basic values implicit in the concept of ordered liberty" (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Id. at 500. It appears that the source of the fundamental rights to which Justices Douglas and Goldberg referred must be found in a concept of substantive due process, despite the former's express rejection of this ground. Id. at 481–82. Justices Black and Stewart dissented. Justice Black viewed the Ninth Amendment ground as essentially a variation of the due process argument under which Justices claimed the right to void legislation as irrational, unreasonable, or offensive, without finding any violation of an express constitutional provision.

[8] As Justice Scalia observed, "the [Ninth Amendment's] refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people." Troxel v. Granville, 530 U.S. 57, 91 (2000) (dissenting from recognition of due-process-derived parental right to direct the upbringing of their children).

Notice the recurrence to the Ninth Amendment as a "constitutional 'saving clause'" in Chief Justice Burger's plurality opinion in Richmond Newspapers v. Virginia, 448 U.S. 555, 579–80 & n.15 (1980). Scholarly efforts to establish the clause as a substantive protection of rights include J. Ely, Democracy and Distrust: A Theory of Judicial Review 34–41 (1980); and C. Black, Decision According to Law (1981), critically reviewed in W. Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment*, 91 Yale L. J. 207 (1981). For a collection of articles on the Ninth Amendment,

see THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989).

TENTH AMENDMENT

RESERVED POWERS

CONTENTS

RESERVED POWERS

TENTH AMENDMENT

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

RESERVED POWERS

Scope and Purpose

"The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people. It added nothing to the instrument as originally ratified." [1] "The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." [2] That this provision was not conceived to be a yardstick for measuring the powers granted to the Federal Government or reserved to the states was firmly settled by the refusal of both Houses of Congress to insert the word "expressly" before the word "delegated," [3] and was confirmed by Madison's remarks in the course of the debate, which took place while the proposed amendment was pending, concerning Hamilton's plan to establish a national bank. "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could

[1] United States v. Sprague, 282 U.S. 716, 733 (1931).

[2] United States v. Darby, 312 U.S. 100, 124 (1941). "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' [citing Darby], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." Fry v. United States, 421 U.S. 542, 547 n.7 (1975). This policy was effectuated, at least for a time, in National League of Cities v. Usery, 426 U.S. 833 (1976).

[3] Annals of Congress 767–68 (1789) (defeated in House 17 to 32); 2 B. Schwartz, The Bill of Rights: A Documentary History 1150–51 (1971) (defeated in Senate by unrecorded vote).

not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States."[4] Nevertheless, for approximately a century, from the death of Marshall until 1937, the Tenth Amendment was frequently invoked to curtail powers expressly granted to Congress, notably the powers to regulate commerce, to enforce the Fourteenth Amendment, and to lay and collect taxes.

In *McCulloch v. Maryland*,[5] Marshall rejected the proffer of a Tenth Amendment objection and offered instead an expansive interpretation of the necessary and proper clause[6] to counter the argument. The counsel for the State of Maryland cited fears of opponents of ratification of the Constitution about the possible swallowing up of states' rights and referred to the Tenth Amendment to allay these apprehensions, all in support of his claim that the power to create corporations was reserved by that amendment to the states.[7] Stressing the fact that the amendment, unlike the cognate section of the Articles of Confederation, omitted the word "expressly" as a qualification of granted powers, Marshall declared that its effect was to leave the question "whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend upon a fair construction of the whole instrument."[8]

Effect of Provision on Federal Powers

Federal Taxing Power.—Not until after the Civil War was the idea that the reserved powers of the states comprise an independent qualification of otherwise constitutional acts of the Federal Government actually applied to nullify, in part, an act of Congress. This result was first reached in a tax case, *Collector v. Day*.[9] Holding that a national income tax, in itself valid, could not be constitutionally levied upon the official salaries of state officers, Justice Nelson made the sweeping statement that "the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."[10]

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[4] 2 ANNALS OF CONGRESS 1897 (1791).

[5] 17 U.S. (4 Wheat.) 316 (1819).

[6] *See* discussion under "Coefficient or Elastic Clause," *supra*.

[7] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 372 (1819) (argument of counsel).

[8] 17 U.S. at 406. "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." United States v. Darby, 312 U.S. 100, 124 (1941).

[9] 78 U.S. (11 Wall.) 113 (1871).

[10] 78 U.S. at 124.

In 1939, *Collector v. Day* was expressly overruled.[11] Nevertheless, the problem of reconciling state and national interest still confronts the Court occasionally, and was elaborately considered in *New York v. United States*,[12] where, by a vote of six-to-two, the Court upheld the right of the United States to tax the sale of mineral waters taken from property owned by a state. Speaking for four members of the Court, Chief Justice Stone justified the tax on the ground that "[t]he national taxing power would be unduly curtailed if the State, by extending its activities, could withdraw from it subjects of taxation traditionally within it."[13] Justices Frankfurter and Rutledge found in the Tenth Amendment "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter."[14] Justices Douglas and Black dissented, saying: "If the power of the Federal Government to tax the States is conceded, the reserved power of the States guaranteed by the Tenth Amendment does not give them the independence which they have always been assumed to have."[15]

Federal Police Power.—A year before *Collector v. Day* was decided, the Court held invalid, except as applied in the District of Columbia and other areas over which Congress has exclusive authority, a federal statute penalizing the sale of dangerous illuminating oils.[16] The Court did not refer to the Tenth Amendment. Instead, it asserted that the "express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested."[17] Similarly, in the *Employers' Liability Cases*,[18] an act of Congress making every carrier engaged in interstate commerce liable to "any" employee, including those whose activities related solely to intrastate activities, for injuries caused by negligence, was held unconstitutional by a closely divided Court, without explicit reliance on the Tenth Amend-

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[11] Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939). The Internal Revenue Service is authorized to sue a state auditor personally and recover from him an amount equal to the accrued salaries which, after having been served with notice of levy, he paid to state employees delinquent in their federal income tax. Sims v. United States, 359 U.S. 108 (1959).

[12] 326 U.S. 572 (1946).

[13] 326 U.S. at 589.

[14] 326 U.S. at 584.

[15] 326 U.S. at 595. The issue was canvassed, but inconclusively, in Massachusetts v. United States, 435 U.S. 444 (1978).

[16] United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870).

[17] 76 U.S. at 44.

[18] 207 U.S. 463 (1908). *See also* Keller v. United States, 213 U.S. 138 (1909).

ment. Not until it was confronted with the Child Labor Law, which prohibited the transportation in interstate commerce of goods produced in establishments in which child labor was employed, did the Court hold that the state police power was an obstacle to adoption of a measure which operated directly and immediately upon interstate commerce. In *Hammer v. Dagenhart*,[19] five members of the Court found in the Tenth Amendment a mandate to nullify this law as an unwarranted invasion of the reserved powers of the states. This decision was expressly overruled in *United States v. Darby*.[20]

During the twenty years following *Hammer v. Dagenhart*, a variety of measures designed to regulate economic activities, directly or indirectly, were held void on similar grounds. Excise taxes on the profits of factories in which child labor was employed,[21] on the sale of grain futures on markets which failed to comply with federal regulations,[22] on the sale of coal produced by nonmembers of a coal code established as a part of a federal regulatory scheme,[23] and a tax on the processing of agricultural products, the proceeds of which were paid to farmers who complied with production limitations imposed by the Federal Government,[24] were all found to invade the reserved powers of the states. In *Schechter Poultry Corp. v. United States*,[25] the Court, after holding that the commerce power did not extend to local sales of poultry, cited the Tenth Amendment to refute the argument that the existence of an economic emergency justified the exercise of what Chief Justice Hughes called "extraconstitutional authority."[26]

In 1941, the Court came full circle in its exposition of the Tenth Amendment. Having returned four years earlier to the position of John Marshall when it sustained the Social Security Act[27] and the National Labor Relations Act,[28] the Court explicitly restated Marshall's thesis in upholding the Fair Labor Standards Act in *United States v. Darby*.[29] Speaking for a unanimous Court, Chief Justice Stone wrote: "The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and ac-

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[19] 247 U.S. 251 (1918).
[20] 312 U.S. 100 (1941).
[21] *Child Labor Tax Case*, 259 U.S. 20, 26, 38 (1922).
[22] Hill v. Wallace, 259 U.S. 44 (1922). *See also* Trusler v. Crooks, 269 U.S. 475 (1926).
[23] Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[24] United States v. Butler, 297 U.S. 1 (1936).
[25] 295 U.S. 495 (1935).
[26] 295 U.S. at 529.
[27] Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).
[28] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
[29] 312 U.S. 100 (1941). *See also* United States v. Carolene Products Co., 304 U.S. 144, 147 (1938); Case v. Bowles, 327 U.S. 92, 101 (1946).

knowledges no limitations other than are prescribed in the Constitution.' . . . That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attended the exercise of the police power of the states. . . . Our conclusion is unaffected by the Tenth Amendment which . . . states but a truism that all is retained which has not been surrendered." [30]

But even prior to 1937 not all federal statutes promoting objectives which had traditionally been regarded as the responsibilities of the states had been held invalid. In *Hamilton v. Kentucky Distilleries Co.*,[31] a unanimous Court, in an opinion by Justice Brandeis, upheld "War Prohibition," saying, "That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is nonetheless true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power." [32] And, in a series of cases that today seems irreconcilable with *Hammer v. Dagenhart*, the Court sustained federal laws penalizing the interstate transportation of lottery tickets,[33] of women for immoral purposes,[34] of stolen automobiles,[35] and of tick-infected cattle,[36] as well as a statute prohibiting the mailing of obscene matter.[37] It affirmed the power of Congress to punish the forgery of bills of lading purporting to cover interstate shipments of merchandise,[38] to subject prison-made goods moved from one state to another to the laws of the receiving state,[39] to regulate prescriptions for the medicinal use of liquor as an appropriate measure for the enforcement of the Eighteenth Amendment,[40] and to control extortionate means of collecting and attempting to collect payments on loans, even when all aspects of the credit transaction took place within one state's boundaries.[41] More recently, the Court upheld provisions of federal surface mining law

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[30] 312 U.S. 100, 114, 123, 124 (1941). *See also* Fernandez v. Wiener, 326 U.S. 340, 362 (1945).
[31] 251 U.S. 146 (1919).
[32] 251 U.S. at 156.
[33] Lottery Case (Champion v. Ames), 188 U.S. 321 (1903).
[34] Hoke v. United States, 227 U.S. 308 (1913).
[35] Brooks v. United States, 267 U.S. 432 (1925).
[36] Thornton v. United States, 271 U.S. 414 (1926).
[37] Roth v. United States, 354 U.S. 476 (1957).
[38] United States v. Ferger, 250 U.S. 199 (1919).
[39] Kentucky Whip & Collar Co. v. Ill. Cent. R.R., 299 U.S. 334 (1937).
[40] Everard's Breweries v. Day, 265 U.S. 545 (1924).
[41] Perez v. United States, 402 U.S. 146 (1971).

that could be characterized as "land use regulation" traditionally subject to state police power regulation.[42]

In 1995, reversing this trend, the Court in *United States v. Lopez*[43] struck down a statute prohibiting possession of a gun at or near a school, rejecting an argument that possession of firearms in school zones can be punished under the Commerce Clause because it impairs the functioning of the national economy. Acceptance of this rationale, the Court said, would eliminate "a[ny] distinction between what is truly national and what is truly local," would convert Congress's commerce power into "a general police power of the sort retained by the States," and would undermine the "first principle" that the Federal Government is one of enumerated and limited powers.[44] Application of the same principle led five years later to the Court's decision in *United States v. Morrison*[45] invalidating a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. Congress may not regulate "non-economic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce," the Court concluded. "[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."[46]

Notwithstanding these federal inroads into powers otherwise reserved to the states, the Court has held that Congress could not itself undertake to punish a violation of state law; in *United States v. Constantine*,[47] a grossly disproportionate excise tax imposed on retail liquor dealers carrying on business in violation of local law was held unconstitutional. However, Congress does not contravene reserved state police powers when it levies an occupation tax on all persons engaged in the business of accepting wagers regardless of

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[42] Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981).

[43] 514 U.S. 549 (1995).

[44] 514 U.S. at 552, 567–68.

[45] 529 U.S. 598 (2000).

[46] 529 U.S. at 618.

[47] 296 U.S. 287 (1935). The Civil Rights Act of 1875, which made it a crime for one person to deprive another of equal accommodations at inns, theaters or public conveyances, was found to exceed the powers conferred on Congress by the Thirteenth and Fourteenth Amendments and hence to be an unlawful invasion of the powers reserved to the states by the Tenth Amendment. *Civil Rights Cases*, 109 U.S. 3, 15 (1883). Congress has now accomplished this end under its commerce power, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964), but it is clear that the rationale of the *Civil Rights Cases* has been greatly modified if not severely impaired. *Cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (13th Amendment); Griffin v. Breckenridge, 403 U.S. 88 (1971) (13th Amendment); United States v. Guest, 383 U.S. 745 (1966) (14th Amendment).

whether those persons are violating state law, and imposes severe penalties for failure to register and pay the tax.[48]

Federal Regulations Affecting State Activities and Instrumentalities.—Since the mid-1970s, the Court has been closely divided over whether the Tenth Amendment or related constitutional doctrine constrains congressional authority to subject state activities and instrumentalities to generally applicable requirements enacted pursuant to the commerce power.[49] According to *Garcia v. San Antonio Metropolitan Transit Authority*,[50] the Tenth Amendment imposes practically no judicially enforceable limit on generally applicable federal legislation, and states must look to the political process for redress. *Garcia*, however, like *National League of Cities v. Usery*,[51] the case it overruled, was a 5–4 decision, and there are later indications that the Court may be ready to resurrect some form of Tenth Amendment constraint on Congress.[52]

In *National League of Cities v. Usery*, the Court conceded that the legislation under attack, which regulated the wages and hours of certain state and local governmental employees, was "undoubtedly within the scope of the Commerce Clause,"[53] but it cautioned that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[54] The Court approached but did not reach the conclusion that the Tenth Amendment was the prohibition here, not that it directly interdicted federal power because power which is delegated is *not* reserved, but that it implicitly embodied a policy against impairing the states' integrity or ability to function.[55] But, in the end, the Court held that the legislation was invalid, not because it violated a prohibition found in the Tenth Amendment or elsewhere, but because the law was "not within the authority granted Congress."[56] In subsequent cases applying or dis-

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[48] United States v. Kahriger, 345 U.S. 22, 25–26 (1953); Lewis v. United States, 348 U.S. 419 (1955).

[49] The matter is discussed more fully under "Supremacy Clause Versus the Tenth Amendment," *supra*.

[50] 469 U.S. 528 (1985).

[51] 426 U.S. 833 (1976).

[52] "[W]e need not address the question whether general applicability [*i.e.*, applicability to individuals as well as to the states] is a constitutional requirement for federal regulation of the States . . . ." Reno v. Condon, 528 U.S. 141 (2000), discussed *infra*.

[53] 426 U.S. at 841.

[54] 426 U.S. at 845.

[55] 426 U.S. at 843.

[56] 426 U.S. at 832.

tinguishing *National League of Cities*, the Court and dissenters wrote as if the Tenth Amendment was the prohibition.[57] Whatever the source of the constraint, it was held not to limit the exercise of power under the Reconstruction Amendments.[58]

The Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*.[59] Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren," and that the Court in 1976 had "tried to repair what did not need repair."[60] With only passing reference to the Tenth Amendment, the Court nonetheless clearly reverted to the Madisonian view of the Amendment reflected in *United States v. Darby*.[61] States retain a significant amount of sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[62] The principal restraints on congressional exercise of the commerce power are to be found not in the Tenth Amendment or in the Commerce Clause itself, but in the structure of the Federal Government and in the political processes.[63] "Freestanding conceptions of state sovereignty" such as the *National League of Cities* test subvert the federal system by "invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."[64] Although continuing to recognize that "Congress's authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitu-

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[57] *E.g.*, FERC v. Mississippi, 456 U.S. 742, 771 (1982) (Justice Powell dissenting); id. at 775 (Justice O'Connor dissenting); EEOC v. Wyoming, 460 U.S. 226 (1983). The *EEOC* Court distinguished *National League of Cities*, holding that application of the Age Discrimination in Employment Act to state fish and game wardens did not directly impair the state's ability to structure integral operations in areas of traditional governmental function, since the state remained free to assess each warden's fitness on an individualized basis and retire those found unfit for the job.

[58] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); City of Rome v. United States, 446 U.S. 156 (1980); Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980) (plurality opinion of Chief Justice Burger).

[59] 469 U.S. 528 (1985). The issue was again decided by a 5-to-4 vote, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection.

[60] 469 U.S. at 557.

[61] 312 U.S. 100, 124 (1941), discussed *supra*. Madison's views were quoted by the Court in *Garcia*, 469 U.S. at 549.

[62] 469 U.S. at 549.

[63] "Apart from the limitation on federal authority inherent in the delegated nature of Congress's Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." 469 U.S. at 550. The Court cited the role of states in selecting the President, and the equal representation of states in the Senate. Id. at 551.

[64] 469 U.S. at 550, 546.

tional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits." [65] In sum, the Court in *Garcia* seems to have said that most but not necessarily all disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions. What it would take for legislation to so threaten the "special and specific position" that states occupy in the constitutional system as to require judicial rather than political resolution was not delineated.

The first indication was that it would take a very unusual case indeed. In *South Carolina v. Baker*, the Court expansively interpreted *Garcia* as meaning that there must be an allegation of "some extraordinary defects in the national political process" before the Court will apply substantive judicial review standards to claims that Congress has regulated state activities in violation of the Tenth Amendment.[66] A claim that Congress acted on incomplete information would not suffice, the Court noting that South Carolina had "not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." [67] Thus, the general rule was that "limits on Congress's authority to regulate state activities . . . are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." [68]

Later indications were that the Court may have been looking for ways to back off from *Garcia*. One device was to apply a "clear statement" rule requiring unambiguous statement of congressional intent to displace state authority. After noting the serious constitutional issues that would be raised by interpreting the Age Discrimination in Employment Act to apply to appointed state judges, the Court in *Gregory v. Ashcroft* [69] explained that, because *Garcia* "con-

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[65] 469 U.S. at 556.

[66] 485 U.S. 505, 512 (1988). Justice Scalia, in a concurring opinion, objected to this language as departing from the Court's assertion in *Garcia* that the "constitutional structure" imposes some affirmative limits on congressional action. Id. at 528.

[67] 485 U.S. at 513.

[68] 485 U.S. at 512.

[69] 501 U.S. 452 (1991). The Court left no doubt that it considered the constitutional issue serious. "[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at 'the heart of representative government' [and] is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause]." Id. at 463. In the latter context the Court's opinion by Justice O'Connor cited Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM.

strained" consideration of "the limits that the state-federal balance places on Congress's powers," a plain statement rule was all the more necessary. "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."[70]

The Court's 1992 decision in *New York v. United States*[71] may portend a more direct retreat from *Garcia*. The holding in *New York*, that Congress may not "commandeer" state regulatory processes by ordering states to enact or administer a federal regulatory program, applied a limitation on congressional power previously recognized in dictum[72] and in no way inconsistent with the holding in *Garcia*. Language in the opinion, however, seems more reminiscent of *National League of Cities* than of *Garcia*. First, the Court's opinion by Justice O'Connor declares that it makes no difference whether federalism constraints derive from limitations inherent in the Tenth Amendment, or instead from the absence of power delegated to Congress under Article I; "the Tenth Amendment thus directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."[73] Second, the Court, without reference to *Garcia*, thoroughly repudiated *Garcia's* "structural" approach requiring states to look primarily to the political processes for protection. In rejecting arguments that New York's sovereignty could not have been infringed because its representatives had participated in developing the compromise legislation and had consented to its enactment, the Court declared that "[t]he Constitution does not protect the sovereignty of States for the benefit of the States or State governments, [but instead] for the protection of individuals." Consequently, "State officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution."[74] The stage appears to be set, therefore, for some relaxation of *Garcia's* obstacles to federalism-based challenges to legislation enacted pursuant to the commerce power.

L. REV. 1 (1988). *See also* McConnell, Federalism: Evaluating the Founders' Design, 54 U. CHI. L. REV. 1484 (1987) (also cited by the Court); and Van Alystyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

[70] 501 U.S. at 464.

[71] 505 U.S. 144 (1992).

[72] *See*, *e.g.*, Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264, 288 (1981); FERC v. Mississippi, 456 U.S. 742, 765 (1982); South Carolina v. Baker, 485 U.S. 505, 513–15 (1988).

[73] 505 U.S. at 157. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. . . ." Id. at 156 (quoted with approval in Watters v. Wachovia Bank, N.A., 550 U.S. 1, 22 (2007), which held that a national bank's state-chartered subsidiary real estate lending business is subject to federal, not state, law).

[74] 505 U.S. at 181, 182.

Extending the principle applied in *New York*, the Court in *Printz v. United States* [75] held that Congress may not "circumvent" the prohibition on commandeering a state's regulatory processes "by conscripting the State's officers directly." [76] *Printz* struck down interim provisions of the Brady Handgun Violence Protection Act that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers. "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." [77]

In *Reno v. Condon*,[78] the Court distinguished *New York* and *Printz* in upholding the Driver's Privacy Protection Act of 1994 (DPPA), a federal law that restricts the disclosure and resale of personal information contained in the records of state motor vehicles departments. The Court returned to a principle articulated in *South Carolina v. Baker* that distinguishes between laws that improperly seek to control the manner in which states regulate private parties, and those that merely regulate state activities directly.[79] Here, the Court found that the DPPA "does not require the States in their sovereign capacities to regulate their own citizens," but rather "regulates the States as the owners of databases." [80] The Court saw no need to decide whether a federal law may regulate the states exclusively, because the DPPA is a law of general applicability that regulates private resellers of information as well as states.[81]

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[75] 521 U.S. 898 (1997).
[76] 521 U.S. at 935.
[77] 521 U.S. at 935.
[78] 528 U.S. 141 (2000).
[79] 485 U.S. 505, 514–15 (1988).
[80] 528 U.S. at 151.
[81] 528 U.S. at 151.

ELEVENTH AMENDMENT

SUITS AGAINST STATES

CONTENTS

SUITS AGAINST STATES

ELEVENTH AMENDMENT

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATE SOVEREIGN IMMUNITY

Purpose and Early Interpretation

Though Eleventh Amendment jurisprudence can appear esoteric and abstruse and the decisions under it inconsistent, the Amendment remains a vital element of federal jurisdiction that "go[es] to the very heart of [the] federal system and affect[s] the allocation of power between the United States and the several states." [1] The limit on state accountability in federal courts embodied through the Amendment might seem a discrete, straightforward adjustment of our federal structure precipitated by early case law, but discerning the implications of this embodiment continues to occasion heated dispute.

In accepting a suit against a state by a citizen of another state in 1793,[2] the Supreme Court provoked such anger in Georgia and such anxiety in other states that, at the first meeting of Congress following the decision, the Eleventh Amendment was proposed by an overwhelming vote of both Houses and ratified with, what was for that day, "vehement speed." [3] *Chisholm* had been brought under that part of the jurisdictional provision of Article III that authorized cognizance of "controversies . . . between a State and Citizens of another State." At the time of the ratification debates, opponents of the proposed Constitution had objected to the subjection of a state to suits in federal courts and had been met with conflicting responses—on the one hand, an admission that the accusation was true and that it was entirely proper so to provide, and, on the other hand, that the accusation was false and the clause applied only when

[1] C. WRIGHT, THE LAW OF FEDERAL COURTS § 48 at 286 (4th ed. 1983).

[2] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

[3] The phrase is Justice Frankfurter's, from Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 708 (1949) (dissenting), a federal sovereign immunity case. The amendment was proposed on March 4, 1794, when it passed the House; ratification occurred on February 7, 1795, when the twelfth state acted, there then being fifteen states in the Union.

a state was the party plaintiff.[4] So matters stood when Congress, in enacting the Judiciary Act of 1789, without recorded controversy gave the Supreme Court original jurisdiction of suits between states and citizens of other states.[5] *Chisholm v. Georgia* was brought under this jurisdictional provision to recover under a contract for supplies executed with the state during the Revolution. Four of the five Justices agreed that a state could be sued under this Article III jurisdictional provision and that under section 13 of the Act the Supreme Court properly had original jurisdiction.[6]

The Amendment proposed by Congress and ratified by the states was directed specifically toward overturning the result in *Chisholm* and preventing suits against states by citizens of other states or by citizens or subjects of foreign jurisdictions. It did not, as other possible versions of the Amendment would have done, altogether bar suits against states in the federal courts.[7] That is, it barred suits against states based on the status of the party plaintiff and did not address the instance of suits based on the nature of the subject matter.[8]

The early decisions seemed to reflect this understanding of the Amendment, although the point was not necessary to the decisions and thus the language is dictum.[9] In *Cohens v. Virginia*,[10] Chief

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[4] The Convention adopted this provision largely as it came from the Committee on Detail, without recorded debate. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 423–25 (rev. ed. 1937). In the Virginia ratifying convention, George Mason, who had refused to sign the proposed Constitution, objected to making states subject to suit, 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526–27 (1836), but both Madison and John Marshall (the latter had not been a delegate at Philadelphia) denied states could be made party defendants, id. at 533, 555–56, while Randolph (who had been a delegate, as well as a member of the Committee on Detail) granted that states could be and ought to be subject to suit. Id. at 573. James Wilson, a delegate and member of the Committee on Detail, seemed to say in the Pennsylvania ratifying convention that states would be subject to suit. 2 id. at 491. *See* Hamilton, in THE FEDERALIST No. 81 (Modern Library ed. 1937), also denying state suability. *See* Fletcher,*supra* at 1045–53 (discussing sources and citing other discussions).

[5] Ch. 20, § 13, 1 Stat. 80 (1789). *See also* Fletcher,*supra*, at 1053–54. For a thorough consideration of passage of the Act itself, *see* J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. 1, ANTECEDENTS AND BEGINNINGS TO 1801 457–508 (1971).

[6] Goebel, *supra*, at 726–34; Fletcher,*supra*, at 1054–58.

[7] Fletcher, *supra*, at 1058–63; Goebel, supra, at 736.

[8] Party status is one part of the Article III grant of jurisdiction, as in diversity of citizenship of the parties; subject matter jurisdiction is the other part, as in federal question or admiralty jurisdiction.

[9] One square holding, however, was that of Justice Washington, on Circuit, in United States v. Bright, 24 Fed. Cas. 1232 (C.C.D. Pa. 1809) (No. 14,647), that the Eleventh Amendment's reference to "any suit in law or equity" excluded admiralty cases, so that states were subject to suits in admiralty. This understanding, *see* Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 124 (1828); 3 J. STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES 560–61 (1833), did not receive a holding of the Court during this period, *see* Georgia v. Madrazo, *supra*; United States v. Pe-

Justice Marshall ruled for the Court that the prosecution of a writ of error to review a judgment of a state court alleged to be in violation of the Constitution or laws of the United States did not commence or prosecute a suit against the state but was simply a continuation of one commenced by the state, and thus could be brought under § 25 of the Judiciary Act of 1789.[11] But, in the course of the opinion, the Chief Justice attributed adoption of the Eleventh Amendment not to objections to subjecting states to suits *per se* but to well-founded concerns about creditors being able to maintain suits in federal courts for payment,[12] and stated his view that the Eleventh Amendment did not bar suits against the states under federal

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ters, 9 U.S. (5 Cr.) 115 (1809); *Ex parte* Madrazo, 32 U.S. (7 Pet.) 627 (1833), and was held to be in error in *Ex parte* New York (No. 1), 256 U.S. 490 (1921).

[10] 19 U.S. (6 Wheat.) 264 (1821).

[11] 1 Stat. 73, 85.

[12] "It is a part of our history that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these, a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a state, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states." 19 U.S. at 406–07.

question jurisdiction [13] and did not in any case reach suits against a state by its own citizens.[14]

In *Osborn v. Bank of the United States*,[15] the Court, again through Chief Justice Marshall, held that the Bank of the United States [16] could sue the Treasurer of Ohio, over Eleventh Amendment objections, because the plaintiff sought relief against a state officer rather than against the state itself. This ruling embodied two principles, one of which has survived and one of which the Marshall Court itself soon abandoned. The latter holding was that a suit is not one against a state unless the state is a named party of record.[17] The former holding, the primary rationale through which the strictures of the Amendment are escaped, is that a state official possesses no official capacity when acting illegally and consequently can derive no protection from an unconstitutional statute of a state.[18]

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[13] "The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. . . . [A]re we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." 19 U.S. at 382–83.

[14] "If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another state, or by a citizen or subject of any foreign state.' It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." 19 U.S. at 412.

[15] 22 U.S. (9 Wheat.) 738 (1824).

[16] The Bank of the United States was treated as if it were a private citizen, rather than as the United States itself, and hence a suit by it was a diversity suit by a corporation, as if it were a suit by the individual shareholders. Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809).

[17] 22 U.S. at 850–58. For a reassertion of the Chief Justice's view of the limited effect of the Amendment, *see* id. at 857–58. *But compare* id. at 849. The holding was repudiated in Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828), in which it was conceded that the suit had been brought against the governor solely in his official capacity and with the design of forcing him to exercise his official powers. It is now well settled that in determining whether a suit is prosecuted against a state "the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit." *In re* Ayers, 123 U.S. 443, 487 (1887).

[18] 22 U.S. at 858–59, 868. For the flowering of the principle, *see Ex parte* Young, 209 U.S. 123 (1908).

Expansion of the Immunity of the States.—Until the period following the Civil War, Chief Justice Marshall's understanding of the Amendment generally prevailed. The aftermath of that conflict, however, presented the Court occasion to consider anew the circumstances and import of the Amendment's adoption. Following the war, Congress effectively gave the federal courts general federal question jurisdiction,[19] at a time when a large number of states in the South were defaulting on their revenue bonds in violation of the Contract Clause of the Constitution.[20] As bondholders consequently sought relief in federal courts, the Supreme Court gradually worked itself into the position of holding that the Eleventh Amendment, or, more properly speaking, the principles "of which the Amendment is but an exemplification,"[21] is a bar not only of suits against a state by citizens of other states, but also of suits brought by citizens of that state itself.[22]

Expansion as a formal holding occurred in *Hans v. Louisiana*,[23] a suit against the state by a resident of that state brought in federal court under federal question jurisdiction, alleging a violation of the Contract Clause in the state's repudiation of its obligation to pay interest on certain bonds. Admitting that the Amendment on its face prohibited only the entertaining of a suit against a state by citizens of another state, or citizens or subjects of a foreign state, the Court nonetheless thought the literal language was an insufficient basis for decision. Rather, wrote Justice Bradley for the Court, the Eleventh Amendment was a result of the "shock of surprise throughout the country" at the *Chisholm* decision and reflected the determination that the decision was wrong and that federal jurisdiction did not extend to making defendants of unwilling states.[24]

Under this view, the amendment reversed an erroneous decision and restored the proper interpretation of the Constitution. The views of the opponents of subjecting states to suit "were most sensible and just; and [those views] apply equally to the present case

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[19] Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. *See* discussion under "Development of Federal Question Jurisdiction," *supra*.

[20] *See*, *e.g.*, Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C. L. REV. 747 (1981); Orth, *The Fair Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction*, 2 TUL. LAW. 2 (1980); Orth, *The Virginia State Debt and the Judicial Power of the United States*, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 106 (D. Bodenhamer & J. Ely eds., 1983).

[21] *Ex parte* New York (No. 1), 256 U.S. 490, 497 (1921).

[22] *E.g.*, *In re* Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); *The Virginia Coupon Cases*, 114 U.S. 269 (1885); Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883); Louisiana v. Jumel, 107 U.S. 711 (1882). In Antoni v. Greenhow, 107 U.S. 769, 783 (1883), three concurring Justices propounded the broader reading of the Amendment that soon prevailed.

[23] 134 U.S. 1 (1890).

[24] 134 U.S. at 11.

as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of." [25] "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . . The suability of a State without its consent was a thing unknown to the law." [26] Thus, although the literal terms of the Amendment did not so provide, "the manner in which [*Chisholm*] was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing," [27] led the Court unanimously to hold that states could not be sued by their own citizens on grounds arising under the Constitution and laws of the United States.

Then, in *Ex parte New York (No. 1)*,[28] the Court held that, absent consent to suit, a state was immune to suit in admiralty, the Eleventh Amendment's reference to "any suit in law or equity" notwithstanding. "That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification. . . . It is true the Amendment speaks only of suits in law or equity; but this is because . . . the Amendment was the outcome of a purpose to set aside the effect of the decision of this court in *Chisholm v. Georgia* . . . from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case." [29] Just as *Hans v. Louisiana* had demonstrated the "impropriety of construing the Amendment" so as to permit federal question suits against a state, so "it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or

[25] 134 U.S. at 14–15.
[26] 134 U.S. at 15, 16.
[27] 134 U.S. at 18. The Court acknowledged that Chief Justice Marshall's opinion in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 382–83, 406–07, 410–12 (1821), was to the contrary, but observed that the language was unnecessary to the decision and thus dictum, "and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion." 134 U.S. at 20.
[28] 256 U.S. 490 (1921).
[29] 256 U.S. at 497–98.

not." [30] An *in rem* admiralty action may be brought, however, if the state is not in possession of the *res*.[31]

And in extending protection against suits brought by foreign governments, the Court made clear the immunity flowed not from the Eleventh Amendment but from concepts of state sovereign immunity generally. "Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' The Federalist, No. 81." [32]

In the 1980s, four Justices, led by Justice Brennan, argued that *Hans* was incorrectly decided, that the Amendment was intended only to deny jurisdiction against the states in diversity cases, and that *Hans* and its progeny should be overruled.[33] But the remaining five Justices adhered to *Hans* and in fact stiffened it with a rule of construction quite severe in its effect.[34] The *Hans* interpretation was further solidified with the Court's ruling in *Seminole Tribe*

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[30] 256 U.S. at 498. *See also* Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982); Welch v. Texas Dep't of Highways and Transp., 483 U.S. 468 (1987).

[31] California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) (application of the Abandoned Shipwreck Act) (distinguishing *Ex parte* New York and *Treasure Salvors* as involving *in rem* actions against property actually in possession of the state).

[32] Principality of Monaco v. Mississippi, 292 U.S. 313, 322–23 (1934) (footnote omitted); Breard v. Greene, 523 U.S. 371, 377 (1998) (foreign nation may not contest validity of criminal conviction after state's failure at time of arrest to comply with notice requirements of Vienna Convention on Consular Relations). Similarly, relying on *Monaco*, the Court held that the Amendment bars suits by Indian tribes against non-consenting states. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

[33] *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (dissenting); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (dissenting); Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (dissenting); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 309 (1990) (concurring). Joining Justice Brennan were Justices Marshall, Blackmun, and Stevens. *See also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (Justice Stevens concurring).

[34] *E.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–103 (1984) (opinion of the Court by Justice Powell); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237–40, 243–44 n.3 (1985) (opinion of the Court by Justice Powell); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472–74, 478–95 (1987) (plurality opinion of Justice Powell); Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Justice Scalia concurring in part and dissenting in part); Dellmuth v. Muth, 491 U.S. 223, 227–32 (opinion of the Court by Justice Kennedy); Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989) (plurality opinion of Justice White); id. at 105 (concurring opinions of Justices O'Connor and Scalia); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (opinion of the Court by Justice O'Connor).

of Florida v. Florida,[35] that Congress lacks the power under Article I to abrogate state immunity under the Eleventh Amendment, and with its ruling in *Alden v. Maine*[36] that the broad principle of sovereign immunity reflected in the Eleventh Amendment bars suits against states in *state* courts as well as federal.

Having previously reserved the question of whether federal statutory rights could be enforced in *state* courts,[37] the Court in *Alden v. Maine*[38] held that states could also assert Eleventh Amendment "sovereign immunity" in their own courts. Recognizing that the application of the Eleventh Amendment, which limits only the federal courts, was a "misnomer"[39] as applied to state courts, the Court nonetheless concluded that the principles of common law sovereign immunity applied absent "compelling evidence" that the states had surrendered such by the ratification of the Constitution. Although this immunity is subject to the same limitations as apply in federal courts, the Court's decision effectively limited the application of significant portions of federal law to state governments. Both *Seminole Tribe* and *Alden* were also 5–4 decisions with the four dissenting Justices maintaining that *Hans* was wrongly decided.

This now-institutionalized 5–4 split continued with *Federal Maritime Commission v. South Carolina State Ports Authority*,[40] which held that state sovereign immunity also applies to quasi-judicial proceedings in federal agencies. The operator of a cruise ship devoted to gambling had been denied entry to the Port of Charleston, and subsequently filed a complaint with the Federal Maritime Commission, alleging a violation of the Shipping Act of 1984.[41] Justice Breyer, writing for the four dissenting justices, emphasized the executive (as opposed to judicial nature) of such agency adjudications, and pointed out that the ultimate enforcement of such proceedings in federal court was exercised by a federal agency (as is allowed under the doctrine of sovereign immunity). The majority, however, while admitting to a "relatively barren historical record," presumed that when a proceeding was "unheard of" at the time of the founding of

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[35] 517 U.S. 44 (1996).

[36] 527 U.S. 706 (1999).

[37] Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 287 (1973).

[38] 527 U.S. 706 (1999).

[39] 527 U.S. at 713.

[40] 535 U.S. 743 (2002). Justice Breyer's dissenting opinion describes a need for "continued dissent" from the majority's sovereign immunity holdings. 535 U.S. at 788.

[41] 46 U.S.C. §§ 40101 *et seq.*

the Constitution, it could not subsequently be applied in derogation of a "State's dignity" within our system of federalism.[42]

The Nature of the States' Immunity

A great deal of the difficulty in interpreting and applying the Eleventh Amendment stems from the fact that the Court has not been clear, or at least has not been consistent, with respect to what the Amendment really does and how it relates to the other parts of the Constitution. One view of the Amendment, set out above in the discussion of *Hans v. Louisiana*, *Ex parte New York*, and *Principality of Monaco*, is that *Chisholm* was erroneously decided and that the Amendment's effect, its express language notwithstanding, was to restore the "original understanding" that Article III's grants of federal court jurisdiction did not extend to suits against the states. That view finds present day expression.[43] It explains the decision in *Edelman v. Jordan*,[44] in which the Court held that a state could properly raise its Eleventh Amendment defense on appeal after having defended and lost on the merits in the trial court. "[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."[45] But that the bar is not wholly jurisdictional seems established as well.[46]

Moreover, if under Article III there is no jurisdiction of suits against states, the settled principle that states may consent to suit[47] becomes conceptually difficult, as it is not possible to confer jurisdiction where it is lacking through the consent of the parties.[48] And there is jurisdiction under Article III of some suits against states,

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[42] 535 U.S. at 755, 760.

[43] *E.g.*, Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 291–92 (1973) (Justice Marshall concurring); Nevada v. Hall, 440 U.S. 410, 420–21 (1979); Patsy v. Florida Board of Regents, 457 U.S. 496, 520 (1982) (Justice Powell dissenting); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 64 (1996).

[44] 415 U.S. 651 (1974).

[45] 415 U.S. at 678. The Court relied on Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945), where the issue was whether state officials who had voluntarily appeared in federal court had authority under state law to waive the state's immunity. *Edelman* has been followed in Sosna v. Iowa, 419 U.S. 393, 396 n.2 (1975); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977), with respect to the Court's responsibility to raise the Eleventh Amendment jurisdictional issue on its own motion.

[46] *See* Patsy v. Florida Board of Regents, 457 U.S. 496, 515–16 n.19 (1982), in which the Court bypassed the Eleventh Amendment issue, which had been brought to its attention, because of the interest of the parties in having the question resolved on the merits. *See* id. at 520 (Justice Powell dissenting).

[47] Clark v. Barnard, 108 U.S. 436 (1883).

[48] *E.g.*, People's Band v. Calhoun, 102 U.S. 256, 260–61 (1880). *See* Justice Powell's explanation in Patsy v. Florida Board of Regents, 457 U.S. 496, 528 n.13 (1982) (dissenting) (no jurisdiction under Article III of suits against *unconsenting* states).

such as those brought by the United States or by other states.[49] Furthermore, Congress is able in at least some instances to legislate away state immunity,[50] although it may not enlarge Article III jurisdiction.[51] The Court has declared that "the principle of sovereign immunity [reflected in the Eleventh Amendment] is a constitutional limitation on the federal judicial power established in Art. III," but almost in the same breath has acknowledged that "[a] sovereign's immunity may be waived."[52]

Another explanation of the Eleventh Amendment is that it merely recognized the continued vitality of the doctrine of sovereign immunity as established prior to the Constitution: a state was not subject to suit without its consent.[53] This view also has support in modern case law: "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."[54] The Court in dealing with questions of governmental immunity from suit has traditionally treated interchangeably precedents dealing with state immunity and those dealing with Federal Governmental immunity.[55] Viewing the Amendment and its radiations into Article III in this way provides a consistent explanation of the consent to suit as a waiver.[56] The limited effect of the doctrine in this context in federal court arises from the fact that traditional sovereign immunity arose in a unitary state, barring unconsented suit against a sovereign in its own courts or the courts of another sovereign. But upon entering the Union the states surrendered their sovereignty

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[49] *See*, *e.g.*, the Court's express rejection of the Eleventh Amendment defense in these cases. United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904).

[50] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

[51] The principal citation is, of course, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[52] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98, 99 (1984).

[53] As Justice Holmes explained, the doctrine is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). Of course, when a state is sued in federal court pursuant to federal law, the Federal Government, not the defendant state, is "the authority that makes the law" creating the right of action. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 154 (1996) (Justice Souter dissenting). On the sovereign immunity of the United States, see *supra* pp. 746–48. For the history and jurisprudence, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[54] Alden v. Maine, 527 U.S. 706, 713 (1999).

[55] *See*, *e.g.*, United States v. Lee, 106 U.S. 196, 210–14 (1882); Belknap v. Schild, 161 U.S. 10, 18 (1896); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 642–43, 645 (1911).

[56] A sovereign may consent to suit. *E.g.*, United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940).

to some undetermined and changing degree to the national government, a sovereign that does not have plenary power over them but that is more than their coequal.[57]

Outside the area of federal court jurisdiction, *Nevada v. Hall*,[58] perfectly illustrates the difficulty. This case arose when a California resident sued a Nevada state agency in a California court because one of the agency's employees negligently injured him in an automobile accident in California. Although it recognized that the rule during the framing of the Constitution was that a state could not be sued without its consent in the courts of another sovereign, the Court discerned no evidence in the federal constitutional structure, in the specific language, or in the intention of the Framers, that would impose a general, federal constitutional constraint upon the action of a state in authorizing suit in its own courts against another state. The Court did imply that in some cases a "substantial threat to our constitutional system of cooperative federalism" might arise and occasion a different result, but this was not such a case.[59]

Within the area of federal court jurisdiction, the issue becomes the extent to which the states upon entering the Union gave up their immunity to suit in federal court. *Chisholm* held, and enactment of the Eleventh Amendment reversed the holding, that the states had given up their immunity to suit in diversity cases based on common law or state law causes of action; *Hans v. Louisiana* and subsequent cases held that the Amendment in effect codified an understanding of broader immunity to suits based on federal causes of action.[60] Other cases have held that the states did give up their immunity to suits by the United States or by other states and that subjection to suit continues.[61]

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[57] *See* Fletcher,*supra*.

[58] 440 U.S. 410 (1979).

[59] 440 U.S. at 424 n.24. The Court looked to the Full Faith and Credit Clause as a possible constitutional limitation. The dissent would have found implicit constitutional assurance of state immunity as an essential component of federalism. *Id.* at 427 (Justice Blackmun), 432 (Justice Rehnquist). In *Franchise Tax Board v. Hyatt*, the Court was equally divided on the question of whether to overrule *Hall*, signaling that *Hall*'s continued viability may be a subject of future debate at the Supreme Court. Franchise Tax Bd. of Cal. v. Hyatt, 578 U.S. ___, No. 14–1175, slip op. at 1 (2016).

[60] For a while only Justice Brennan advocated this view, Parden v. Terminal Ry., 377 U.S. 184 (1964); Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 298 (1973) (dissenting), but in time he was joined by three others. *See*, *e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissenting).

[61] *E.g.*, United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904). *See* Kansas v. Colorado, 533 U.S. 1 (2001) (state may seek

Still another view of the Eleventh Amendment is that it embodies a state sovereignty principle limiting the power of the Federal Government.[62] In this respect, the federal courts may not act without congressional guidance in subjecting states to suit, and Congress, which can act to the extent of its granted powers, is constrained by judicially created doctrines requiring it to be explicit when it legislates against state immunity.[63]

Suits Against States

Despite the apparent limitations of the Eleventh Amendment, individuals may, under certain circumstances, bring constitutional and statutory cases against states. In some of these cases, the state's sovereign immunity has either been waived by the state or abrogated by Congress. In other cases, the Eleventh Amendment does not apply because the procedural posture is such that the Court does not view them as being against a state. As discussed below, this latter doctrine is most often seen in suits to enjoin state officials. However, it has also been invoked in bankruptcy and admiralty cases, where the *res*, or property in dispute, is in fact the legal target of a dispute.[64]

The application of this last exception to the bankruptcy area has become less relevant, because even when a bankruptcy case is not focused on a particular *res*, the Court has held that a state's sovereign immunity is not infringed by being subject to an order of a bankruptcy court. "The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to au-

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damages from another state, including damages to its citizens, provided it shows that the state has an independent interest in the proceeding).

[62] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Quern v. Jordan, 440 U.S. 332, 337 (1979).

[63] *See* Hutto v. Finney, 437 U.S. 678 (1978), in which the various opinions differ among themselves as to the degree of explicitness required. *See also* Quern v. Jordan, 440 U.S. 332, 343–45 (1979). As noted in the previous section, later cases stiffened the rule of construction. The parallelism of congressional power to regulate and to legislate away immunity is not exact. Thus, in Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279 (1973), the Court strictly construed congressional provision of suits as not reaching states, while in Maryland v. Wirtz, 392 U.S. 183 (1968), it had sustained the constitutionality of the substantive law.

[64] *See* Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446–48 (2004) (exercise of bankruptcy court's *in rem* jurisdiction over a debtor's estate to discharge a debt owed to a state does not infringe the state's sovereignty); California v. Deep Sea Research, Inc., 523 U.S. 491, 507–08 (1998) (despite state claims over shipwrecked vessel, the Eleventh Amendment does not bar federal court *in rem* admiralty jurisdiction where the *res* is not in the possession of the sovereign).

thorize limited subordination of state sovereign immunity in the bankruptcy arena."[65] Thus, where a federal law authorized a bankruptcy trustee to recover "preferential transfers" made to state educational institutions,[66] the court held that the sovereign immunity of the state was not infringed despite the fact that the issue was "ancillary" to a bankruptcy court's *in rem* jurisdiction.[67]

Because Eleventh Amendment sovereign immunity inheres in states and not their subdivision or establishments, a state agency that wishes to claim state sovereign immunity must establish that it is acting as an arm of the state: "agencies exercising state power have been permitted to invoke the [Eleventh] Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself."[68] In evaluating such a claim, the Court will examine state law to determine the nature of the entity, and whether to treat it as an arm of the state.[69] The Court has consistently refused to extend Eleventh Amendment sovereign immunity to counties, cities, or towns,[70] even though such political subdivisions exercise a "slice of state power."[71] Even when such entities enjoy immunity from suit under state law, they do not have Eleventh Amendment immunity in federal court and the states may not confer it.[72] Similarly, entities created pursuant to interstate compacts (and subject

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[65] Central Virginia Community College v. Katz, 546 U.S. 356, 362–63 (2006).

[66] A "preferential transfer" was defined as the transfer of a property interest from an insolvent debtor to a creditor, which occurred on or within 90 days before the filing of a bankruptcy petition, and which exceeds what the creditor would have been entitled to receive under such bankruptcy filing. 11 U.S.C. § 547(b).

[67] 546 U.S. at 373.

[68] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 400–01 (1979), *citing* Edelman v. Jordan, 415 U.S. 651 (1974), and Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). The fact that a state agency can be indemnified for the costs of litigation does not divest the agency of its Eleventh Amendment immunity. Regents of the University of California v. Doe, 519 U.S. 425 (1997).

[69] *See*, *e.g.*, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (local school district not an arm of the state based on (1) its designation in state law as a political subdivision, (2) the degree of supervision by the state board of education, (3) the level of funding received from the state, and (4) the districts' empowerment to generate their own revenue through the issuance of bonds or levying taxes.

[70] Northern Insurance Company of New York v. Chatham County, 547 U.S. 189, 193 (2006) (counties have neither Eleventh Amendment immunity nor residual common law immunity). *See* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Moor v. County of Alameda, 411 U.S. 693 (1973); Workman v. City of New York, 179 U.S. 552 (1900); Lincoln County v. Luning, 133 U.S. 529 (1890). In contrast to their treatment under the Eleventh Amendment, the Court has found that state immunity from federal regulation under the Tenth Amendment extends to political subdivisions as well. *See* Printz v. United States, 521 U.S. 898 (1997).

[71] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 400–01 (1979) (quoting earlier cases).

[72] Chicot County v. Sherwood, 148 U.S. 529 (1893).

to congressional approval) are not immune from suit, absent a showing that the entity was structured so as to take advantage of the state's constitutional protections.[73]

Consent to Suit and Waiver.—The immunity of a state from suit is a privilege which it may waive at its pleasure. A state may expressly consent to being sued in federal court by statute.[74] But the conclusion that there has been consent or a waiver is not lightly inferred; the Court strictly construes statutes alleged to consent to suit. Thus, a state may waive its immunity in its own courts without consenting to suit in federal court,[75] and a general authorization "to sue and be sued" is ordinarily insufficient to constitute consent.[76] "The Court will give effect to a State's waiver of Eleventh Amendment immunity 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' A State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts, and '[t]hus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*.'"[77]

Thus, in *Port Authority Trans-Hudson Corp. v. Feeney*,[78] an expansive consent "to suits, actions, or proceedings of any form or nature at law, in equity or otherwise" was deemed too "ambiguous and general" to waive immunity in federal court, because it might be interpreted to reflect only a state's consent to suit in its own courts. But, when combined with language specifying that consent was conditioned on venue being laid "within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District," waiver was effective.[79]

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[73] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[74] Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1906).

[75] Smith v. Reeves, 178 U.S. 436 (1900); Murray v. Wilson Distilling Co., 213 U.S. 151, 172 (1909); Graves v. Texas Co., 298 U.S. 393, 403–04 (1936); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

[76] Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1947); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981). *Compare* Patsy v. Florida Bd. of Regents, 457 U.S. 496, 519 n.* (1982) (Justice White concurring), *with* id. at 522 and n.5 (Justice Powell dissenting).

[77] Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305–06 (1990) (internal citations omitted; emphasis in original).

[78] 495 U.S. 299 (1990).

[79] 495 U.S. at 306–07. *But see* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).

In a few cases, the Court has found a waiver by implication, but the vitality of these cases is questionable. In *Parden v. Terminal Railway*,[80] the Court ruled that employees of a state-owned railroad could sue the state for damages under the Federal Employers' Liability Act. One of the two primary grounds for finding lack of immunity was that by taking control of a railroad which was subject to the FELA, enacted some 20 years previously, the state had effectively accepted the imposition of the Act and consented to suit.[81] Distinguishing *Parden* as involving a proprietary activity,[82] the Court later refused to find any implied consent to suit by states participating in federal spending programs; participation was insufficient, and only when waiver has been "stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction," will it be found.[83]. Further, even if a state becomes amenable to suit under a statutory condition on accepting federal funds, remedies, especially monetary damages, may be limited, absent express language to the contrary.[84]

A state may waive its immunity by initiating or participating in litigation. In *Clark v. Barnard*,[85] the state had filed a claim for disputed money deposited in a federal court, and the Court held that the state could not thereafter complain when the court awarded the money to another claimant. However, the Court is loath to find a waiver simply because of the decision of an official or an attorney representing the state to litigate the merits of a suit, so that a state may at any point in litigation raise a claim of immunity based on

[80] 377 U.S. 184 (1964). The alternative but interwoven ground had to do with Congress's power to withdraw immunity. *See also* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[81] The implied waiver issue aside, *Parden* subsequently was overruled, a plurality of the Court emphasizing that Congress had failed to abrogate state immunity unmistakably. Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987). Justice Powell's plurality opinion was joined by Chief Justice Rehnquist and by Justices White and O'Connor. Justice Scalia, concurring, thought *Parden* should be overruled because it must be assumed that Congress enacted the FELA and other statutes with the understanding that Hans v. Louisiana shielded states from immunity. Id. at 495.

[82] Edelman v. Jordan, 415 U.S. 651, 671–72 (1974). For the same distinction in the Tenth Amendment context, see National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976).

[83] Edelman v. Jordan, 415 U.S. 651 (1974) (quoting id. at 673, Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)); Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981). Of the four *Edelman* dissenters, Justices Marshall and Blackmun found waiver through knowing participation, 415 U.S. at 688. In *Florida Dep't*, Justice Stevens noted he would have agreed with them had he been on the Court at the time but that he would now adhere to *Edelman*. Id. at 151.

[84] Sossamon v. Texas, 563 U.S. ___, No. 08–1438, slip op. (2011).

[85] 108 U.S. 436 (1883).

whether that official has the authority under state law to make a valid waiver.[86] However, this argument is only available when the state is brought into federal court involuntarily. If a state voluntarily agrees to removal of a state action to federal court, the Court has held it may not then invoke a defense of sovereign immunity and thereby gain an unfair tactical advantage.[87]

Congressional Withdrawal of Immunity.—The Constitution grants Congress power to regulate state action by legislation. At least in some instances when Congress does so, it may subject the states themselves to suit by individuals to implement the legislation. The clearest example arises from the Civil War Amendments, which directly restrict state powers and expressly authorize Congress to enforce these restrictions through appropriate legislation.[88] Thus, "the Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited, by the enforcement provisions of § 5 of the Fourteenth Amendment."[89] The power to enforce the Civil War Amendments is substantive, however, not being limited to remedying judicially cognizable violations of the amendments, but extending as well to measures that in Congress's judgment will promote compliance.[90] The principal judicial brake on this power to abrogate state immunity in legislation enforcing the Civil War Amendments is the rule requiring that congressional intent to subject states to suit be clearly stated.[91]

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[86] Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466–467 (1945); Edelman v. Jordan, 415 U.S. 651, 677–678 (1974).

[87] Lapides v. Board of Regents, 535 U.S. 613 (2002).

[88] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Hutto v. Finney, 437 U.S. 678 (1978); City of Rome v. United States, 446 U.S. 156 (1980). More recent cases affirming Congress's § 5 powers include Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); and Dellmuth v. Muth, 491 U.S. 223, 227 (1989).

[89] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (under the Fourteenth Amendment, Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

[90] In Maher v. Gagne, 448 U.S. 122 (1980), the Court found that Congress could validly authorize imposition of attorneys' fees on the state following settlement of a suit based on both constitutional and statutory grounds, even though settlement had prevented determination that there had been a constitutional violation. Maine v. Thiboutot, 448 U.S. 1 (1980), held that § 1983 suits could be premised on federal statutory as well as constitutional grounds. Other cases in which attorneys' fees were awarded against states are Hutto v. Finney, 437 U.S. 678 (1978); and New York Gaslight Club v. Carey, 447 U.S. 54 (1980). *See also* Frew v. Hawkins, 540 U.S. 431 (2004) (upholding enforcement of consent decree).

[91] Even prior to the tightening of the clear statement rule over the past several decades to require express legislative language (*see* note and accompanying text, *infra*), application of the rule curbed congressional enforcement. Fitzpatrick v. Bitzer, 427 U.S. 445 451–53 (1976); Hutto v. Finney, 437 U.S. 678, 693–98 (1978). Because of its rule of clear statement, the Court in Quern v. Jordan, 440 U.S. 332 (1979), held that in enacting 42 U.S.C. § 1983, Congress had not intended to include states within

In the 1989 case of *Pennsylvania v. Union Gas Co.*,[92] the Court—temporarily at least—ended years of uncertainty by holding expressly that Congress acting pursuant to its Article I powers (as opposed to its Fourteenth Amendment powers) may abrogate the Eleventh Amendment immunity of the states, so long as it does so with sufficient clarity. Twenty-five years earlier the Court had stated that same principle,[93] but only as an alternative holding, and a later case had set forth a more restrictive rule.[94] The premises of *Union Gas* were that by consenting to ratification of the Constitution, with its Commerce Clause and other clauses empowering Congress and limiting the states, the states had implicitly authorized Congress to divest them of immunity, that the Eleventh Amendment was a restraint upon the courts and not similarly upon Congress, and that the exercises of Congress's powers under the Commerce Clause and other clauses would be incomplete without the ability to authorize damage actions against the states to enforce congressional enactments. The dissenters disputed each of these strands of the argument, and, while recognizing the Fourteenth Amendment abrogation power, would have held that no such power existed under Article I.

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the term "person" for the purpose of subjecting them to suit. The question arose after Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), reinterpreted "person" to include municipal corporations. *Cf.* Alabama v. Pugh, 438 U.S. 781 (1978). The Court has reserved the question whether the Fourteenth Amendment itself, without congressional action, modifies the Eleventh Amendment to permit suits against states, Milliken v. Bradley, 433 U.S. 267, 290 n.23 (1977), but the result in *Milliken*, holding that the Governor could be enjoined to pay half the cost of providing compensatory education for certain schools, which would come from the state treasury, and in Scheuer v. Rhodes, 416 U.S. 232 (1974), permitting imposition of damages upon the governor, which would come from the state treasury, is suggestive. *But see* Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976) (refusing money damages under the Fourteenth Amendment), appeal dismissed sub nom. Rabinovitch v. Nyquist, 433 U.S. 901 (1977). The Court declined in *Ex parte* Young, 209 U.S. 123, 150 (1908), to view the Eleventh Amendment as modified by the Fourteenth.

[92] 491 U.S. 1 (1989). The plurality opinion of the Court was by Justice Brennan and was joined by the three other Justices who believed *Hans* was incorrectly decided. *See* id. at 23 (Justice Stevens concurring). The fifth vote was provided by Justice White, id. at 45, 55–56 (Justice White concurring), although he believed *Hans* was correctly decided and ought to be maintained and although he did not believe Congress had acted with sufficient clarity in the statutes before the Court to abrogate immunity. Justice Scalia thought the statutes were express enough but that Congress simply lacked the power. Id. at 29. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined relevant portions of both opinions finding lack of power and lack of clarity.

[93] Parden v. Terminal Railway, 377 U.S. 184, 190–92 (1964). *See also* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 283, 284, 285–86 (1973).

[94] Edelman v. Jordan, 415 U.S. 651, 672 (1974).

Pennsylvania v. Union Gas lasted less than seven years before the Court overruled it in *Seminole Tribe of Florida v. Florida*.[95] Chief Justice Rehnquist, writing for a 5–4 majority, concluded *Union Gas* had deviated from a line of cases, tracing back to *Hans v. Louisiana*,[96] that viewed the Eleventh Amendment as implementing the "fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III."[97] Because "the Eleventh Amendment restricts the judicial power under Article III, . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[98] Subsequent cases have upheld this interpretation.[99]

Section 5 of the Fourteenth Amendment, of course, is another matter. *Fitzpatrick v. Bitzer*,[100] which was "based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment," remains good law.[101] This ruling has led to a significant number of cases that examined whether a statute that might be applied against non-state actors under an Article I power, could also, under section 5 of the Fourteenth Amendment, be applied against the states.[102]

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[95] 517 U.S. 44 (1996) (invalidating a provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a state in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact).

[96] 134 U.S. 1 (1890).

[97] 517 U.S. at 64 (quoting Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–98 (1984).

[98] 517 U.S. at 72–73. Justice Souter's dissent undertook a lengthy refutation of the majority's analysis, asserting that the Eleventh Amendment is best understood, in keeping with its express language, as barring only suits based on diversity of citizenship, and as having no application to federal question litigation. Moreover, Justice Souter contended, the state sovereign immunity that the Court mistakenly recognized in Hans v. Louisiana was a common law concept that "had no constitutional status and was subject to congressional abrogation." 517 U.S. at 117. The Constitution made no provision for wholesale adoption of the common law, but, on the contrary, was premised on the view that common law rules would always be subject to legislative alteration. This "imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty." Id. at 160.

[99] College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (the Trademark Remedy Clarification Act, an amendment to the Lanham Act, did not validly abrogate state immunity); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (amendment to patent laws abrogating state immunity from infringement suits is invalid); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (abrogation of state immunity in the Age Discrimination in Employment Act is invalid).

[100] 427 U.S. 445 (1976).

[101] *Seminole Tribe*, 517 U.S. at 65–66.

[102] *See* Fourteenth Amendment, Congressional Definition of Fourteenth Amendment Rights, *infra*.

In another line of case, a different majority of the Court focused not so much on the authority Congress used to subject states to suit as on the language Congress used to overcome immunity. Henceforth, the Court held in a 1985 decision, and even with respect to statutes that were enacted prior to promulgation of this judicial rule of construction, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear *in the language of the statute*" itself.[103] This means that no legislative history will suffice at all.[104]

Indeed, at one time a plurality of the Court apparently believed that only if Congress refers specifically to state sovereign immunity and the Eleventh Amendment will its language be unmistakably clear.[105] Thus, the Court held in *Atascadero* that general language subjecting to suit in federal court "any recipient of Federal assistance" under the Rehabilitation Act was deemed insufficient to satisfy this test, not because of any question about whether states are "recipients" within the meaning of the provision but because "given their constitutional role, the states are not like any other class of recipients of federal aid."[106] As a result of these rulings, Congress began to use the "magic words" the Court appeared to insist on.[107] Later, however, the Court has accepted less precise language,[108] and in at least one context,

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[103] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (emphasis added).

[104] See, particularly, Dellmuth v. Muth, 491 U.S. 223, 230 (1989) ("legislative history generally will be irrelevant"), and Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 103–04 (1989).

[105] Justice Kennedy for the Court in *Dellmuth*, 491 U.S. at 231, expressly noted that the statute before the Court did not demonstrate abrogation with unmistakably clarity because, inter alia, it "makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity." Justice Scalia, one of four concurring Justices, expressed an "understanding" that the Court's reasoning would allow for clearly expressed abrogation of immunity "without explicit reference to state sovereign immunity or the Eleventh Amendment." Id. at 233.

[106] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985). *See also* Dellmuth v. Muth, 491 U.S. 223 (1989).

[107] In 1986, following *Atascadero*, Congress provided that states were not to be immune under the Eleventh Amendment from suits under several laws barring discrimination by recipients of federal financial assistance. Pub. L. 99–506, § 1003, 100 Stat. 1845 (1986), 42 U.S.C. § 2000d–7. Following *Dellmuth*, Congress amended the statute to insert the explicit language. Pub. L. 101–476, § 103, 104 Stat. 1106 (1990), 20 U.S.C. § 1403. *See also* the Copyright Remedy Clarification Act, Pub. L. 101–553, § 2, 104 Stat. 2749 (1990), 17 U.S.C. § 511 (making states and state officials liable in damages for copyright violations).

[108] Kimel v. Florida Board of Regents, 528 U.S. 62, 74–78 (2000). In *Kimel*, statutory language authorized age discrimination suits "against any employer (including a public agency)," and a "public agency" was defined to include "the government of a State or political subdivision thereof." The Court found this language to be sufficiently clear evidence of intent to abrogate state sovereign immunity. The relevant

has eliminated the requirement of specific abrogation language altogether.[109]

Even before the decision in *Alden v. Maine*,[110] when the Court believed that Eleventh Amendment sovereign immunity did not apply to suits in state courts, the Court applied its rule of strict construction to require "unmistakable clarity" by Congress in order to subject states to suit.[111] Although the Court was willing to recognize exceptions to the clear statement rule when the issue involved subjection of states to suit in state courts, the Court also suggested the need for "symmetry" so that states' liability or immunity would be the same in both state and federal courts.[112]

Suits Against State Officials

Courts may open their doors for relief against government wrongs under the doctrine that sovereign immunity does not prevent a suit to restrain individual officials, thereby restraining the government as well.[113] The doctrine is built upon a double fiction: that for purposes of the sovereign's immunity, a suit against an official is not a suit against the government, but for the purpose of finding state action to which the Constitution applies, the official's conduct is that of the state.[114] The doctrine preceded but is most noteworthily associated with the decision in *Ex parte Young*,[115] a case that deserves the overworked adjective, seminal.

Young arose when a state legislature passed a law reducing railroad rates and providing severe penalties for any railroad that failed to comply with the law. Plaintiff railroad stockholders brought a fed-

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portion of the opinion was written by Justice O'Connor, and joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, Ginsberg, Breyer and Stevens. *But see* Raygor v. Regents of the University of Minnesota, 534 U.S. 533 (2002) (federal supplemental jurisdiction statute which tolls limitations period for state claims during pendency of federal case not applicable to claim dismissed on the basis of Eleventh Amendment immunity).

[109] Central Virginia Community College v. Katz, 546 U.S. 356, 363 (2006) (abrogation of state sovereign immunity under the Bankruptcy Clause was effectuated by the Constitution, so it need not additionally be done by statute); id. at 383 (Justice Thomas dissenting).

[110] 527 U.S. 706 (1999).

[111] Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) (holding that states and state officials sued in their official capacity could not be made defendants in § 1983 actions in state courts).

[112] Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 206 (1991) (interest in "symmetry" is outweighed by stare decisis, the FELA action being controlled by Parden v. Terminal Ry.).

[113] *See, e.g.*, Larson v. Domestic and Foreign Corp., 337 U.S. 682 (1949), where the majority and dissenting opinions cite both federal and Eleventh Amendment cases in a suit against a federal official. *See also* Tindal v. Wesley, 167 U.S. 204, 213 (1897), applying to the states the federal rule of United States v. Lee, 106 U.S. 196 (1882).

[114] C. WRIGHT, THE LAW OF FEDERAL COURTS § 48 (4th ed. 1983).

[115] 209 U.S. 123 (1908).

eral action to enjoin Young, the state attorney general, from enforcing the law, alleging that it was unconstitutional and that they would suffer irreparable harm if he were not prevented from acting. An injunction was granted forbidding Young from acting on the law, an injunction he violated by bringing an action in state court against noncomplying railroads; for this action he was adjudged in contempt. If the Supreme Court had held that the injunction was not permissible, because the suit was one against the state, there would have been no practicable way for the railroads to attack the statute without placing themselves in great danger. They could have disobeyed it and alleged its unconstitutionality as a defense in enforcement proceedings, but if they were wrong about the statute's validity the penalties would have been devastating.[116] On the other hand, effectuating constitutional rights through an injunction would not have been possible had the injunction been deemed to be a suit against the state.

In deciding *Young*, the Court faced inconsistent lines of cases, including numerous precedents for permitting suits against state officers. Chief Justice Marshall had begun the process in *Osborn* by holding that suit was barred only when the state was formally named a party.[117] He presently was required to modify that decision and preclude suit when an official, the governor of a state, was sued in his official capacity,[118] but relying on *Osborn* and reading *Madrazo* narrowly, the Court later held in a series of cases that an official of a state could be sued to prevent him from executing a state law in conflict with the Constitution or a law of the United States, and the fact that the officer may be acting on behalf of the state or in response to a statutory obligation of the state did not make the suit one against the state.[119] Another line of cases began developing a more functional, less formalistic concept of the Eleventh Amendment and sovereign immunity, one that evidenced an increasing wariness toward affirmatively ordering states to relinquish state-controlled property [120] and culminated in the broad reading of Eleventh Amendment immunity in *Hans v. Louisiana*.[121]

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[116] In fact, the statute was eventually held to be constitutional. Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352 (1913).

[117] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

[118] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

[119] Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872); Board of Liquidation v. McComb, 92 U.S. 531 (1875); Allen v. Baltimore & Ohio R.R., 114 U.S. 311 (1885); Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887); Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894); Smyth v. Ames, 169 U.S. 466 (1898); Scranton v. Wheeler, 179 U.S. 141 (1900).

[120] Judicial reluctance to confront government officials over government-held property did not extend in like manner in a federal context, as was evident in United States v. Lee, the first case in which the sovereign immunity of the United States

Two of the leading cases, as were many cases of this period, were suits attempting to prevent Southern states from defaulting on bonds.[122] In *Louisiana v. Jumel*,[123] a Louisiana citizen sought to compel the state treasurer to apply a sinking fund that had been created under the earlier constitution for the payment of the bonds after a subsequent constitution had abolished this provision for retiring the bonds. The proceeding was held to be a suit against the state.[124] Then, *In re Ayers*[125] purported to supply a rationale for cases on the issuance of mandamus or injunctive relief against state officers that would have severely curtailed federal judicial power. Suit against a state officer was not barred when his action, aside from any official authority claimed as its justification, was a wrong simply as an individual act, such as a trespass, but if the act of the officer did not constitute an individual wrong and was something that only a state, through its officers, could do, the suit was in actuality a suit against the state and was barred.[126] That is, the unconstitutional nature of the state statute under which the officer acted did not itself constitute a private cause of action. For that, one must be able to point to an independent violation of a common law right.[127]

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was claimed and rejected. United States v. Lee, 106 U.S. 196 (1882). *See* Article III, "Suits Against United States Officials." However, the Court sustained the suit against the federal officers by only a 5-to-4 vote, and the dissent presented the arguments that were soon to inform Eleventh Amendment cases.

[121] 134 U.S. 1 (1890).

[122] *See* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1968–2003 (1983); Orth, *The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423.

[123] 107 U.S. 711 (1882).

[124] "The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done." 107 U.S. at 721. *See also* Christian v. Atlantic & N.C. R.R., 133 U.S. 233 (1890).

[125] 123 U.S. 443 (1887).

[126] 123 U.S. at 500–01, 502.

[127] *Ayers* sought to enjoin state officials from bringing suit under an allegedly unconstitutional statute purporting to overturn a contract between the state and the bondholders to receive the bond coupons for tax payments. The Court asserted that the state's contracts impliedly contained the state's immunity from suit, so that express withdrawal of a supposed consent to be sued was not a violation of the contract; but, in any event, because any violation of the assumed contract was an act of the state, to which the officials were not parties, their actions as individuals in bringing suit did not breach the contract. 123 U.S. at 503, 505–06. The rationale had been asserted by a four-Justice concurrence in Antoni v. Greenhow, 107 U.S. 769, 783 (1882). *See also* Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883); Hagood v. Southern, 117 U.S. 52 (1886); North Carolina v. Temple, 134 U.S. 22 (1890);

Although *Ayers* was in all relevant points on all fours with *Young*,[128] the *Young* Court held that the injunction had properly issued against the state attorney general, even though the state was in effect restrained as well. "The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct." [129] Justice Harlan was the only dissenter, arguing that in law and fact the suit was one only against the state and that the suit against the individual was a mere "fiction." [130]

The "fiction" remains a mainstay of our jurisprudence.[131] It accounts for a great deal of the litigation brought by individuals to challenge the carrying out of state policies. Suits against state officers alleging that they are acting pursuant to an unconstitutional

In re Tyler, 149 U.S. 164 (1893); Baltzer v. North Carolina, 161 U.S. 240 (1896); Fitts v. McGhee, 172 U.S. 516 (1899); Smith v. Reeves, 178 U.S. 436 (1900).

[128] *Ayers* "would seem to be decisive of the *Young* litigation." C. WRIGHT, THE LAW OF FEDERAL COURTS § 48 at 288 (4th ed. 1983). The *Young* Court purported to distinguish and to preserve *Ayers* but on grounds that either were irrelevant to *Ayers* or that had been rejected in the earlier case. *Ex parte* Young, 209 U.S. 123, 151, 167 (1908). Similarly, in a later case, the Court continued to distinguish *Ayers* but on grounds that did not in fact distinguish it from the case before the Court, in which it permitted a suit against a state revenue commissioner to enjoin him from collecting allegedly unconstitutional taxes. Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952).

[129] *Ex parte* Young, 209 U.S. 123, 159–60 (1908). The opinion did not address the issue of how an officer "stripped of his official . . . character" could violate the Constitution, in that the Constitution restricts only "state action," but the double fiction has been expounded numerous times since. Thus, for example, it is well settled that an action unauthorized by state law is state action for purposes of the Fourteenth Amendment. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). The contrary premise of Barney v. City of New York, 193 U.S. 430 (1904), though eviscerated by *Home Tel. & Tel.* was not expressly disavowed until United States v. Raines, 362 U.S. 17, 25–26 (1960).

[130] *Ex parte* Young, 209 U.S. 123, 173–74 (1908). In the process of limiting application of *Young*, a Court majority referred to "the Young fiction." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997).

[131] *E.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 156 n.6 (1978) (rejecting request of state officials being sued to restrain enforcement of state statute as preempted by federal law that *Young* be overruled); Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 685 (1982).

statute are the standard device by which to test the validity of state legislation in federal courts prior to enforcement and thus interpretation in the state courts.[132] Similarly, suits to restrain state officials from taking certain actions in contravention of federal statutes [133] or to compel the undertaking of affirmative obligations imposed by the Constitution or federal laws [134] are common.

For years, moreover, the accepted rule was that suits prosecuted against state officers in federal courts upon grounds that they are acting in excess of state statutory authority [135] or that they are not doing something required by state law [136] are not precluded by the Eleventh Amendment or its emanations of sovereign immunity, provided only that there are grounds to obtain federal jurisdiction.[137] However, in *Pennhurst State School & Hospital v. Halder-*

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[132] *See*, *e.g.*, Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); Truax v. Raich, 239 U.S. 33 (1915); Cavanaugh v. Looney, 248 U.S. 453 (1919); Terrace v. Thompson, 263 U.S. 197 (1923); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); Massachusetts State Grange v. Benton, 272 U.S. 525 (1926); Hawks v. Hamill, 288 U.S. 52 (1933). *See also* Graham v. Richardson, 403 U.S. 365 (1971) (enjoining state welfare officials from denying welfare benefits to otherwise qualified recipients because they were aliens); Goldberg v. Kelly, 397 U.S. 254 (1970) (enjoining city welfare officials from following state procedures for termination of benefits); Milliken v. Bradley, 433 U.S. 267 (1977) (imposing half the costs of mandated compensatory education programs upon state through order directed to governor and other officials). On injunctions against governors, *see* Continental Baking Co. v. Woodring, 286 U.S. 352 (1932); Sterling v. Constantin, 287 U.S. 378 (1932). Applicable to suits under this doctrine are principles of judicial restraint—constitutional, statutory, and prudential—discussed under Article III.

[133] *E.g.*, Edelman v. Jordan, 415 U.S. 651, 664–68 (1974); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

[134] *E.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Edelman v. Jordan, 415 U.S. 651, 664–68 (1974); Quern v. Jordan, 440 U.S. 332, 346–49 (1979).

[135] *E.g.*, Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Scully v. Bird, 209 U.S. 481 (1908); Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912); Greene v. Louisville & Interurban R.R., 244 U.S. 499 (1977); Louisville & Nashville R.R. v. Greene, 244 U.S. 522 (1917). Property held by state officials on behalf of the state under claimed state authority may be recovered in suits against the officials, although the court may not conclusively resolve the state's claims against it in such a suit. South Carolina v. Wesley, 155 U.S. 542 (1895); Tindal v. Wesley, 167 U.S. 204 (1897); Hopkins v. Clemson College, 221 U.S. 636 (1911). *See also* Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982), in which the eight Justices who agreed that the Eleventh Amendment applied divided 4-to-4 over the proper interpretation.

[136] *E.g.*, Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887); Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912); Johnson v. Lankford, 245 U.S. 541, 545 (1918); Lankford v. Platte Iron Works Co., 235 U.S. 461, 471 (1915); Davis v. Wallace, 257 U.S. 478, 482–85 (1922); Glenn v. Field Packing Co., 290 U.S. 177, 178 (1933); Lee v. Bickell, 292 U.S. 415, 425 (1934).

[137] Typically, the plaintiff would be in federal court under diversity jurisdiction, *cf.* Martin v. Lankford, 245 U.S. 547, 551 (1918), perhaps under admiralty jurisdiction, Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982), or under federal question jurisdiction. Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635 (2002). In the last instance, federal courts are obligated first to consider whether the issues presented may be decided on state law grounds before reaching federal constitutional grounds, and thus relief may be afforded on state law grounds solely.

man,[138] the Court, five-to-four, held that *Young* did not permit suits in federal courts against state officers alleging violations of *state* law. In the Court's view, *Young* was necessary to promote the supremacy of federal law, a basis that disappears if the violation alleged is of state law. The Court also still adheres to the doctrine, first pronounced in *Madrazo*,[139] that some suits against officers are "really" against the state[140] and are barred by the state's immunity, such as when the suit involves state property or asks for relief which clearly calls for the exercise of official authority, such as paying money out of the treasury to remedy past harms.[141]

For example, a suit to prevent tax officials from collecting death taxes arising from the competing claims of two states as being the last domicile of the decedent foundered upon the conclusion that there could be no credible claim of violation of the Constitution or federal law; state law imposed the obligation upon the officials and "in reality" the action was against the state.[142] Suits against state officials to recover taxes have also been made increasingly difficult to maintain. Although the Court long ago held that the sovereign immunity of the state prevented a suit to recover money in the state treasury,[143] it also held that a suit would lie against a revenue officer to recover tax moneys illegally collected and still in his possession.[144] Beginning, however, with *Great Northern Life Ins. Co. v. Read*,[145] the Court has held that this kind of suit cannot be maintained unless the state expressly consents to suits in the federal

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Cf. Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909); Hagans v. Lavine, 415 U.S. 528, 546–47 & n.12 (1974). In a case removed from state court, presence of a claim barred by the Eleventh Amendment does not destroy jurisdiction over nonbarred claims. Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998).

[138] 465 U.S. 89 (1984).

[139] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

[140] *E.g.*, Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 464 (1945).

[141] In Frew v. Hawkins, 540 U.S. 431 (2004), Texas, which was under a consent decree regarding its state Medicaid program, attempted to extend the reasoning of *Pennhurst*, arguing that unless an actual violation of federal law had been found by a court, then such court would be without jurisdiction to enforce such decree. The Court, in a unanimous opinion, declined to so extend the Eleventh Amendment, noting, among other things, that the principles of federalism were served by giving state officials the latitude and discretion to enter into enforceable consent decrees. Id. at 442.

[142] Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937). *See also* Old Colony Trust Co. v. Seattle, 271 U.S. 426 (1926). *Worcester County* remains viable. Cory v. White, 457 U.S. 85 (1982). The actions were under the Federal Interpleader Act, 49 Stat. 1096 (1936), 28 U.S.C. § 1335, under which other actions against officials have been allowed. *E.g.*, Treines v. Sunshine Mining Co., 308 U.S. 66 (1939) (joinder of state court judge and receiver in interpleader proceeding in which state had no interest and neither judge nor receiver was enjoined by final decree). *See also* Missouri v. Fiske, 290 U.S. 18 (1933).

[143] Smith v. Reeves, 178 U.S. 436 (1900).

[144] Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912).

[145] 322 U.S. 47 (1944).

courts. In this case, the state statute provided for the payment of taxes under protest and for suits afterward against state tax collection officials for the recovery of taxes illegally collected, which revenues were required to be kept segregated.[146]

In *Edelman v. Jordan*,[147] the Court appeared to begin to lay down new restrictive interpretations of what the Eleventh Amendment proscribed. The Court announced that a suit "seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[148] What the Court actually held, however, was that it was permissible for federal courts to require state officials to comply in the future with claims payment provisions of the welfare assistance sections of the Social Security Act, but that they were not permitted to hear claims seeking, or issue orders directing, payment of funds found to be wrongfully withheld.[149] Conceding that some of the characteristics of prospective and retroactive relief would be the same in their effects upon the state treasury, the Court nonetheless believed that retroactive payments were equivalent to the imposition of liabilities which must be paid from public funds in the treasury, and that this was barred by the Eleventh Amendment. The spending of money from the state treasury by state officials shaping their conduct in accordance with a prospective-only injunction is "an ancillary effect" which "is a permissible and often an inevitable consequence" of *Ex parte Young*, whereas "payment of state funds . . . as a form of compensation" to those wrongfully denied the funds in the past "is in practical effect indistinguishable in many aspects from an award of damages against the State."[150]

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[146] *See also* Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573 (1946). States may confine to their own courts suits to recover taxes. Smith v. Reeves, 178 U.S. 436 (1900); Murray v. Wilson Distilling Co., 213 U.S. 151 (1909); Chandler v. Dix, 194 U.S. 590 (1904).

[147] 415 U.S. 651 (1974).

[148] 415 U.S. at 663.

[149] 415 U.S. at 667–68. Where the money at issue is not a state's, but a private party's, then the distinction between retroactive and prospective obligations is not important. In Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635 (2002), the Court held that a challenge to a state agency decision regarding a private party's past and future contractual liabilities does not violate the Eleventh Amendment. Id. at 648. In fact, three judges questioned whether the Eleventh Amendment is even implicated where there is a challenge to a state's determination of liability between private parties. Id. at 649 (Souter, J., concurring).

[150] 415 U.S. at 668. *See also* Quern v. Jordan, 440 U.S. 332 (1979) (reaffirming *Edelman*, but holding that state officials could be ordered to notify members of the class that had been denied retroactive relief in that case that they might seek back benefits by invoking state administrative procedures; the order did not direct the payment but left it to state discretion to award retroactive relief). *But cf.* Green v. Mansour, 474 U.S. 64 (1985). "Notice relief" permitted under Quern v. Jordan is consistent with the Eleventh Amendment only insofar as it is ancillary to valid pro-

That *Edelman* in many instances will be a formal restriction rather than an actual one is illustrated by *Milliken v. Bradley*,[151] in which state officers were ordered to spend money from the state treasury in order to finance remedial educational programs to counteract the effects of past school segregation; the decree, the Court said, "fits squarely within the prospective-compliance exception reaffirmed by *Edelman*." [152] Although the payments were a result of past wrongs, of past constitutional violations, the Court did not view them as "compensation," inasmuch as they were not to be paid to victims of past discrimination but rather used to better conditions either for them or their successors.[153] The Court also applied *Edelman* in *Papasan v. Allain*,[154] holding that a claim against a state for payments representing a continuing obligation to meet trust responsibilities stemming from a 19th century grant of public lands for benefit of education of the Chickasaw Indian Nation is barred by the Eleventh Amendment as indistinguishable from an action for past loss of trust corpus, but that an Equal Protection claim for present unequal distribution of school land funds is the type of ongoing violation for which the Eleventh Amendment does not bar redress.

In *Idaho v. Coeur d'Alene Tribe*,[155] the Court further narrowed *Ex parte Young*. The implications of the case are difficult to predict, because of the narrowness of the Court's holding, the closeness of the vote (5–4), and the inability of the majority to agree on a rationale. The holding was that the Tribe's suit against state officials for a declaratory judgment and injunction to establish the Tribe's ownership and control of the submerged lands of Lake Coeur d'Alene is barred by the Eleventh Amendment. The Tribe's claim was based on federal law—Executive Orders issued in the 1870s, prior to Idaho statehood. The portion of Justice Kennedy's opinion that represented the opinion of the Court concluded that the Tribe's "unusual" suit was "the functional equivalent of a quiet title action which implicates special sovereignty interests." [156] The case was "unusual" because state ownership of submerged lands traces to the

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spective relief designed to prevent ongoing violations of federal law. Thus, where Congress has changed the AFDC law and the state is complying with the new law, an order to state officials to notify claimants that past payments may have been inadequate conflicts with the Eleventh Amendment.

[151] 433 U.S. 267 (1977).

[152] 433 U.S. at 289.

[153] 433 U.S. at 290 n.22. *See also* Hutto v. Finney, 437 U.S. 678, 690–91 (1978) (affirming order to pay attorney's fees out of state treasury as an "ancillary" order because of state's bad faith).

[154] 478 U.S. 265 (1986).

[155] 521 U.S. 261 (1997).

[156] 521 U.S. at 281.

Constitution through the "equal footing doctrine," and because navigable waters "uniquely implicate sovereign interests." [157] This was therefore no ordinary property dispute in which the state would retain regulatory control over land regardless of title. Rather, grant of the "far-reaching and invasive relief" sought by the Tribe "would diminish, even extinguish, the State's control over a vast reach of lands and waters long . . . deemed to be an integral part of its territory." [158]

A separate part of Justice Kennedy's opinion, joined only by Chief Justice Rehnquist, advocated more broad scale diminishment of *Young*. The two would apply case-by-case balancing, taking into account the availability of a state court forum to resolve the dispute and the importance of the federal right at issue. Concurring Justice O'Connor, joined by Justices Scalia and Thomas, rejected such balancing. *Young* was inapplicable, Justice O'Connor explained, because "it simply cannot be said" that a suit to divest the state of all regulatory power over submerged lands "is not a suit against the State." [159]

Addressing a suit by an independent state agency against state health officials, the Court, quoting *Pennhurst*, reiterated "that the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought." [160]

The agency sought access to records of state-run hospitals in federal court. Six Justices upheld the effort: The relief sought was straightforward and prospective, and not a burdensome encroachment on state sovereignty.[161]

Thus, as with the cases dealing with suits facially against the states themselves, the Court's greater attention to state immunity in the context of suits against state officials has resulted in a mixed picture, of some new restrictions, of the lessening of others. But a number of Justices have increasingly resorted to the Eleventh Amend-

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[157] 521 U.S. at 284.

[158] 521 U.S. at 282.

[159] 521 U.S. at 296.

[160] Virginia Office for Protection and Advocacy v. Stewart, 563 U.S. ___, No. 09–529, slip op. at 8 (2011) (quoting Pennhurst State School & Hospital v. Halderman, 465 U.S. at 107). Federal law offered states funding to improve services for the developmentally disabled and mentally ill on condition that, *inter alia*, the states designate a private or independent state entity to seek remedies for incidents of neglect and abuse. Virginia was one of eight states to establish a state entity to exercise this authority.

[161] In a concurring opinion, Justice Kennedy, joined by Justice Thomas, continued to support a case-by-case balancing analysis. Virginia Office for Protection and Advocacy v. Stewart, 563 U.S. ___, No. 09–529, slip op. (2011) (Kennedy, J., concurring).

ment as a means to reduce federal-state judicial conflict.[162] One may, therefore, expect this to be a continuingly contentious area.

Tort Actions Against State Officials.—In *Tindal v. Wesley*,[163] the Court adopted the rule of *United States v. Lee*,[164] a tort suit against federal officials, to permit a tort action against state officials to recover real property held by them and claimed by the state and to obtain damages for the period of withholding. The immunity of a state from suit has long been held not to extend to actions against state officials for damages arising out of willful and negligent disregard of state laws.[165] The reach of the rule is evident in *Scheuer v. Rhodes*,[166] in which the Court held that plaintiffs were not barred by the Eleventh Amendment or other immunity doctrines from suing the governor and other officials of a state alleging that they deprived plaintiffs of federal rights under color of state law and seeking damages, when it was clear that plaintiffs were seeking to impose individual and personal liability on the officials. There was no "executive immunity" from suit, the Court held; rather, the immunity of state officials is qualified and varies according to the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken.[167]

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[162] *See*, *e.g.*, Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 702 (1982) (dissenting opinion); Patsy v. Florida Board of Regents, 457 U.S. 496, 520 (1982) (dissenting opinion). *See also* Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973).

[163] 167 U.S. 204 (1897).

[164] 106 U.S. 196 (1883).

[165] Johnson v. Lankford, 245 U.S. 541 (1918); Martin v. Lankford, 245 U.S. 547 (1918).

[166] 416 U.S. 233 (1974).

[167] These suits, like suits against local officials and municipal corporations, are typically brought pursuant to 42 U.S.C. § 1983 and typically involve all the decisions respecting liability and immunities thereunder. On the scope of immunity of federal officials, *see* Article III, "Suits Against United States Officials," *supra*.

ELECTION OF PRESIDENT

TWELFTH AMENDMENT

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President,

as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ELECTION OF PRESIDENT

This Amendment,[1] which supersedes Article II, § 1, clause 3, was adopted so as to make impossible the situation that occurred after the election of 1800 in which Jefferson and Burr received tie votes in the electoral college, thus throwing the selection of a President into the House of Representatives, despite the fact that the electors had intended Jefferson to be President and Burr to be Vice President.[2] The difference between the procedure that the Amendment defines and the original is in its providing for a separate designation by the electors of their choices for President and Vice President, respectively. As a consequence of the disputed election of 1870, Congress enacted a statute providing that if the vote of a state is not certified by the governor under seal, it shall not be counted unless both Houses of Congress concur.[3]

[1] A number of provisions of the Amendment have been superseded by the Twentieth Amendment.

[2] Cunningham, *Election of 1800*, in 1 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 101 (A. Schlesinger ed., 1971).

[3] 3 U.S.C. § 15.

THIRTEENTH AMENDMENT

SLAVERY AND INVOLUNTARY SERVITUDE

CONTENTS

SLAVERY AND INVOLUNTARY SERVITUDE

THIRTEENTH AMENDMENT

SECTIONS 1 AND 2. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Congress shall have power to enforce this article by appropriate legislation.

ABOLITION OF SLAVERY

Origin and Purpose

On January 1, 1863, President Lincoln issued the Emancipation Proclamation [1] declaring, based on his war powers, that within named states and parts of states in rebellion against the United States "all persons held as slaves within said designated States, and parts of States, are, and henceforward shall be free . . . ." The Proclamation did not allude to slaves held in the loyal states, and, moreover, there were questions about the Proclamation's validity. Not only was there doubt concerning the President's power to issue his order at all, but also there was a general conviction that its effect would not last beyond the restoration of the seceded states to the Union.[2] Because the power of Congress was similarly deemed not to run to legislative extirpation of the "peculiar institution," [3] a constitutional amendment was then sought. After first failing to muster a two-thirds vote in the House of Representatives, the amend-

[1] 12 Stat. 1267. On September 22, 1862, Lincoln had issued the preliminary Emancipation Proclamation, which announced his intention to issue the Emancipation Proclamation on January 1, 1863.

[2] The legal issues were surveyed in Welling, *The Emancipation Proclamation*, 130 NO. AMER. REV. 163 (1880). *See also* J. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 371–404 (rev. ed. 1951); ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA (2004); and Frank J. Williams, "Doing Less" and "Doing More": The President and the Proclamation—Legally, Militarily, and Politically, in HAROLD HOLZER, EDNA GREENE MEDFORD, AND FRANK J. WILLIAMS, THE EMANCIPATION PROCLAMATION: THREE VIEWS (2006).

[3] K. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

ment was forwarded to the states on February 1, 1865, and ratified by the following December 18.[4]

In selecting the text of the Amendment, Congress "reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory, and gave them unrestricted application within the United States."[5] By its adoption, Congress intended, said Senator Trumbull, one of its sponsors, to "take this question [of emancipation] entirely away from the politics of the country. We relieve Congress of sectional strifes . . . ."[6] An early Supreme Court decision, rejecting a contention that the Amendment reached servitudes on property as it did on persons, observed in dicta that the "word servitude is of larger meaning than slavery, . . . and the obvious purpose was to forbid all shades and conditions of African slavery."

Although the Court was initially in doubt whether persons other than African-Americans could share in the protection afforded by the Amendment, it did continue to say that, although "[N]egro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void."[7]

"This Amendment . . . is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom."[8] These words of the Court in 1883 have generally been noncontroversial and have evoked little disagreement in the intervening years. The "force and effect" of the Amendment itself has been invoked only a few times by the Court to strike down state legislation which it considered to have reintroduced servitude of persons, and the Court has not used

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[4] The congressional debate on adoption of the Amendment is conveniently collected in 1 B. Schwartz, Statutory History of the United States: Civil Rights 25–96 (1970).

[5] Bailey v. Alabama, 219 U.S. 219, 240 (1911). During the debate, Senator Howard noted that the language was "the good old Anglo-Saxon language employed by our fathers in the ordinance of 1787, an expression which has been adjudicated upon repeatedly, which is perfectly well understood both by the public and by judicial tribunals. . . ." Cong. Globe, 38th Cong., 1st Sess. 1489 (1864).

[6] Cong. Globe at 1313–14.

[7] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 69, 71–72 (1873). This general applicability was again stated in Hodges v. United States, 203 U.S. 1, 16–17 (1906), and confirmed by the result of the peonage cases, discussed under the next topic.

[8] *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

section 1 of the Amendment against private parties.[9] In 1968, however, the Court overturned almost century-old precedent and held that Congress may regulate private activity in exercise of its section 2 power to enforce section 1 of the Amendment.

Certain early cases suggested broad congressional powers,[10] but the *Civil Rights Cases*[11] of 1883 began a process, culminating in *Hodges v. United States*,[12] that substantially curtailed these powers. In the former decision, the Court held unconstitutional an 1875 law[13] guaranteeing equality of access to public accommodations. Referring to the Thirteenth Amendment, the Court conceded that "legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." Appropriate legislation under the Amendment, the Court continued, could go beyond nullifying state laws establishing or upholding slavery, because the Amendment "has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States," and thereby empowering Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States."[14]

These badges and incidents as perceived by the Court, however, were those that Congress in its 1866 legislation[15] had sought "to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, pur-

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[9] In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968), the Court left open the question whether the Amendment itself, unaided by legislation, would reach the "badges and incidents" of slavery not directly associated with involuntary servitude, and it continued to reserve the question in City of Memphis v. Greene, 451 U.S. 100, 125–26 (1981). *See* Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Justice Harlan dissenting). The Court drew back from the possibility in Palmer v. Thompson, 403 U.S. 217, 226–27 (1971).

[10] United States v. Rhodes, 27 F. Cas. 785 (No. 16,151) (C.C. Ky. 1866) (Justice Swayne on circuit); United States v. Cruikshank, 25 Fed. Cas. 707, (No. 14,897) (C.C.D. La. 1874) (Justice Bradley on circuit), aff'd on other grounds, 92 U.S. 542 (1876); United States v. Harris, 106 U.S. 629, 640 (1883); Blyew v. United States, 80 U.S. 581, 601 (1871) (dissenting opinion, majority not addressing the issue).

[11] 109 U.S. 3 (1883).

[12] 203 U.S. 1 (1906). *See also* Plessy v. Ferguson, 163 U.S. 537, 542–43 (1896); Corrigan v. Buckley, 271 U.S. 323, 331 (1926); Hurd v. Hodge, 334 U.S. 24, 31 (1948).

[13] Ch. 114, 18 Stat. 335.

[14] *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

[15] Ch. 31, 14 Stat. 27 (1886), now 42 U.S.C. §§ 1981–82.

chase, lease, sell and convey property, as is enjoyed by white citizens."[16] But the Court could not see that the refusal of accommodations at an inn or a place of public amusement, without any sanction or support from any state law, could inflict upon such person any manner of servitude or form of slavery, as those terms were commonly understood. "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make. . . ."[17]

Then, in *Hodges v. United States*,[18] the Court set aside the convictions of three men for conspiring to drive several African-Americans from their employment in a lumber mill. The Thirteenth Amendment operated to abolish, and to authorize Congress to legislate to enforce abolition of, conditions of enforced compulsory service of one to another, and no attempt to analogize a private impairment of freedom to a disability of slavery would suffice to give the Federal Government jurisdiction over what was constitutionally a matter of state remedial law.

Hodges was overruled by the Court in a far-reaching decision that concluded that the 1866 congressional enactment,[19] far from simply conferring on all persons the *capacity* to buy and sell property, also prohibited private denials of the right through refusals to deal,[20] and that this statute was fully supportable by the Thirteenth Amendment. "Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation. Nor can we say that the determination Congress has made is an irrational one. . . . Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. . . . At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white

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[16] *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

[17] 109 U.S. at 24.

[18] 203 U.S. 1 (1906), *overruled by* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441 n.78 (1968).

[19] Ch. 31, 14 Stat. 27 (1866). The portion at issue is now 42 U.S.C. § 1982.

[20] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420–37 (1968). Justices Harlan and White dissented from the Court's interpretation of the statute. Id. at 449. Chief Justice Burger joined their dissent in Sullivan v. Little Hunting Park, 396 U.S. 229, 241 (1969). The 1968 Civil Rights Act forbidding discrimination in housing on the basis of race was enacted a brief time before the Court's decision. Pub. L. No. 90–284, 82 Stat. 81, 42 U.S.C. § 3601–31.

man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep." [21]

The Thirteenth Amendment, then, could provide the constitutional support for the various congressional enactments against private racial discrimination that Congress had previously based on the Commerce Clause.[22] Because the 1866 Act contains none of the limitations written into the modern laws, it has a vastly extensive application.[23]

Peonage

Notwithstanding its early acknowledgment in the *Slaughter-House Cases* that peonage was comprehended within the slavery and involuntary servitude proscribed by the Thirteenth Amendment,[24] the Court has had frequent occasion to determine whether state legislation or the conduct of individuals has contributed to reestablishment of that prohibited status. Defined as a condition of enforced servitude by which the servitor is compelled to labor against his will in liquidation of some debt or obligation, either real or pretended, peonage was found to have been unconstitutionally sanctioned by an Alabama statute, directed at defaulting sharecroppers, which imposed a criminal liability and subjected to imprisonment

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[21] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440–43 (1968). *See also* City of Memphis v. Greene, 451 U.S. 100, 124–26 (1981).

[22] *E.g.*, federal prohibition of racial discrimination in public accommodations, found lacking in constitutional basis under the Thirteenth and Fourteenth Amendments in the *Civil Rights Cases*, 109 U.S. 3 (1883), was upheld as an exercise of the commerce power in Heart of Atlanta Motel v. United States, 379 U.S. 241 (1965), and Katzenbach v. McClung, 379 U.S. 294 (1965).

[23] The 1968 statute on housing and the 1866 act are compared in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413–17 (1968). The expansiveness of the 1866 statute and of congressional power is shown by Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) (1866 law protects share in a neighborhood recreational club which ordinarily went with the lease or ownership of house in area); Runyon v. McCrary, 427 U.S. 160 (1976) (guarantee that all persons shall have the same right to make and enforce contracts as is enjoyed by white persons protects the right of black children to gain admission to private, commercially operated, nonsectarian schools); Johnson v. Railway Express Agency, 421 U.S. 454, 459–60 (1975) (statute affords a federal remedy against discrimination in private employment on the basis of race); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 285–96 (1976) (statute protects against racial discrimination in private employment against whites as well as nonwhites). *See also* Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973). The Court has also concluded that pursuant to its Thirteenth Amendment powers Congress could provide remedial legislation for African-Americans deprived of their rights because of their race. Griffin v. Breckenridge, 403 U.S. 88, 104–05 (1971). Conceivably, the reach of the 1866 law could extend to all areas in which Congress has so far legislated and to other areas as well, justifying legislative or judicial enforcement of the Amendment itself in such areas as school segregation.

[24] 83 U.S. (16 Wall.) 36 (1873).

farm workers or tenants who abandoned their employment, breached their contracts, and exercised their legal right to enter into employment of a similar nature with another person. The clear purpose of such a statute was declared to be the coercion of payment, by means of criminal proceedings, of a purely civil liability arising from breach of contract.[25]

Several years later, in *Bailey v. Alabama*,[26] the Court voided another Alabama statute that made the refusal without just cause to perform the labor called for in a written contract of employment, or to refund the money or pay for the property advanced thereunder, *prima facie* evidence of an intent to defraud, and punishable as a criminal offense, and that was enforced subject to a local rule of evidence that prevented the accused, for the purpose of rebutting the statutory presumption, from testifying as to his "uncommunicated motives, purpose, or intention." Because a state "may not compel one man to labor for another in payment of a debt by punishing him as a criminal if he does not perform the service or pay the debt," the Court refused to permit it "to accomplish the same result [indirectly] by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction." [27]

In 1914, in *United States v. Reynolds*,[28] a third Alabama enactment was condemned as conducive to peonage through the permission it accorded to persons, fined upon conviction for a misdemeanor, to confess judgment with a surety in the amount of the fine and costs, and then to agree with said surety, in consideration of the latter's payment of the confessed judgment, to reimburse him by working for him upon terms approved by the court, which, the Court pointed out, might prove more onerous than if the convict had been sentenced to imprisonment at hard labor in the first place. Fulfillment of such a contract with the surety was viewed as being virtually coerced by the constant fear it induced of rearrest, a new prosecution, and a new fine for breach of contract, which new penalty the convicted person might undertake to liquidate in a similar manner attended by similar consequences.

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[25] *Peonage Cases*, 123 F. 671 (M.D. Ala. 1903).

[26] 219 U.S. 219 (1911). Justice Holmes, joined by Justice Lurton, dissented on the ground that a state was not forbidden by this Amendment from punishing a breach of contract as a crime. "Compulsory work for no private master in a jail is not peonage." Id. at 247.

[27] 219 U.S. at 244.

[28] 235 U.S. 133 (1914).

Bailey v. Alabama was followed in *Taylor v. Georgia* [29] and *Pollock v. Williams*,[30] in which statutes of Georgia and Florida, not materially different from the one voided in *Bailey*, were held unconstitutional. Although the Georgia statute prohibited the defendant from testifying under oath, it did not prevent him from entering an unsworn denial both of the contract and of the receipt of any cash advancement thereunder, a factor that, the Court emphasized, was no more controlling than the customary rule of evidence in *Bailey*. In the Florida case, notwithstanding the fact that the defendant pleaded guilty and accordingly obviated the necessity of applying the *prima facie* presumption provision, the Court reached an identical result, chiefly on the ground that the presumption provision, despite its nonapplication, "had a coercive effect in producing the plea of guilty."

Pursuant to its section 2 enforcement powers, Congress enacted a statute by which it abolished peonage and prohibited anyone from holding, arresting, or returning, or causing or aiding in the arresting or returning, of a person to peonage.[31]

The Court looked to the meaning of the Thirteenth Amendment in interpreting two enforcement statutes, one prohibiting conspiracy to interfere with exercise or enjoyment of constitutional rights,[32] the other prohibiting the holding of a person in a condition of involuntary servitude.[33] For purposes of prosecution under these authorities, the Court held, "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." [34]

Situations in Which the Amendment Is Inapplicable

The Thirteenth Amendment has been held inapplicable in a wide range of situations. Thus, under a rubric of "services which have from time immemorial been treated as exceptional," the Court held

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[29] 315 U.S. 25 (1942).

[30] 322 U.S. 4 (1944). Justice Reed, with Chief Justice Stone concurring, contended in a dissenting opinion that a state is not prohibited by the Thirteenth Amendment from "punishing the fraudulent procurement of an advance in wages." Id. at 27.

[31] Ch. 187, § 1, 14 Stat. 546, now in 42 U.S.C. § 1994 and 18 U.S.C. § 1581. Upheld in Clyatt v. United States, 197 U.S. 207 (1905); *see also* United States v. Gaskin, 320 U.S. 527 (1944). *See also* 18 U.S.C. § 1584, which is a merger of 3 Stat. 452 (1818), and 18 Stat. 251 (1874), dealing with involuntary servitude. *Cf.* United States v. Shackney, 333 F.2d 475, 481–83 (2d Cir. 1964).

[32] 18 U.S.C. § 241.

[33] 18 U.S.C. § 1584.

[34] United States v. Kozminski, 487 U.S. 931 (1988). Compulsion of servitude through "psychological coercion," the Court ruled, is not prohibited by these statutes.

that contracts of seamen, involving to a certain extent the surrender of personal liberty, may be enforced without regard to the Amendment.[35] Similarly, enforcement of those duties that individuals owe the government, "such as services in the army, militia, on the jury, etc.," is not covered.[36] A state law requiring every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation was sustained.[37] A Thirteenth Amendment challenge to conscription for military service was summarily rejected.[38] A state law making it a misdemeanor for a lessor, or his agent or janitor, intentionally to fail to furnish such water, heat, light, elevator, telephone, or other services as may be required by the terms of the lease and necessary to the proper and customary use of the building was held not to create an involuntary servitude.[39] A federal statute making it unlawful to coerce, compel, or constrain a communications licensee to employ persons in excess of the number of the employees needed to conduct his business was held not to implicate the Amendment.[40] Injunctions and cease and desist orders in labor disputes requiring return to work do not violate the Amendment.[41]

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[35] Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

[36] Butler v. Perry, 240 U.S. 328, 333 (1916) ("the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results," id. at 332).

[37] Butler v. Perry, 240 U.S. 328 (1916).

[38] *Selective Draft Law Cases*, 245 U.S. 366 (1918). The Court's analysis, in full, of the Thirteenth Amendment issue raised by a compulsory military draft was the following: "as we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention to that effect is refuted by its mere statement." Id. at 390.

Although the Supreme Court has never squarely held that conscription need not be premised on a declaration of war, indications are that the power is not constrained by the need for a formal declaration of war by "the great representative body of the people." During the Vietnam War (an undeclared war) the Court, upholding a conviction for burning a draft card, declared that the power to classify and conscript manpower for military service was "beyond question." United States v. O'Brien, 391 U.S. 367, 377 (1968). *See also* United States v. Holmes, 387 F.2d 781, 784 (7th Cir. 1968) ("the power of Congress to raise armies and to take effective measures to preserve their efficiency, is not limited by either the Thirteenth Amendment or the absence of a military emergency"), *cert. denied*, 391 U.S. 936 (1968) (Justice Stewart concurring and Justice Douglas dissenting).

[39] Marcus Brown Co. v. Feldman, 265 U.S. 170, 199 (1921).

[40] United States v. Petrillo, 332 U.S. 1, 12–13 (1947).

[41] UAW v. WERB, 336 U.S. 245 (1949).

FOURTEENTH AMENDMENT

RIGHTS GUARANTEED

CONTENTS

RIGHTS GUARANTEED

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE FOURTEENTH AMENDMENT AND STATES' RIGHTS

Amendment of the Constitution during the post-Civil War Reconstruction period resulted in a fundamental shift in the relationship between the Federal Government and the states. The Civil War had been fought over issues of states' rights, particularly the right to control the institution of slavery.[1] In the wake of the war, the Congress submitted, and the states ratified the Thirteenth Amendment (making slavery illegal), the Fourteenth Amendment (defining and granting broad rights of national citizenship), and the Fifteenth Amendment (forbidding racial discrimination in elections). The Fourteenth Amendment was the most controversial and far-reaching of these three "Reconstruction Amendments."

CITIZENS OF THE UNITED STATES

The citizenship provisions of the Fourteenth Amendment may be seen as a repudiation of one of the more politically divisive cases of the nineteenth century. Under common law, free persons born within a state or nation were citizens thereof. In the *Dred Scott* case,[2] however, Chief Justice Taney, writing for the Court, ruled that

[1] "Since the 1950s most professional historians have come to agree with Lincoln's assertion that slavery 'was, somehow, the cause of the war.'" James M. McPherson, *Southern Comfort*, THE NEW YORK REVIEW OF BOOKS (Apr. 12, 2001), quoting Lincoln's second inaugural address.

[2] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The controversy, political as well as constitutional, that this case stirred and still stirs is exemplified and analyzed in the material collected in S. KUTLER, THE DRED SCOTT DECISION: LAW OR POLI-

this rule did not apply to freed slaves. The Court held that United States citizenship was enjoyed by only two classes of people: (1) white persons born in the United States as descendants of "persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, [and who] became also citizens of this new political body," the United States of America, and (2) those who, having been "born outside the dominions of the United States," had migrated thereto and been naturalized therein.[3] Freed slaves fell into neither of these categories.

The Court further held that, although a state could confer state citizenship upon whomever it chose, it could not make the recipient of such status a citizen of the United States. Thus, the "Negro," as an enslaved race, was ineligible to attain United States citizenship, either from a state or by virtue of birth in the United States. Even a free man descended from a Negro residing as a free man in one of the states at the date of ratification of the Constitution was held ineligible for citizenship.[4] Congress subsequently repudiated this concept of citizenship, first in section 1[5] of the Civil Rights Act of 1866[6] and then in section 1 of the Fourteenth Amendment. In doing so, Congress set aside the *Dred Scott* holding, and restored the traditional precepts of citizenship by birth.[7]

Based on the first sentence of section 1,[8] the Court has held that a child born in the United States of Chinese parents who were ineligible to be naturalized themselves is nevertheless a citizen of the United States entitled to all the rights and privileges of citizen-

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tics? (1967). *See also* Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (1978); M. Graber, Dred Scott and the Problem of Constitutional Evil (2006); Earl M. Maltz, Dred Scott and the Politics of Slavery (2007); Symposium, *150th Anniversary of the Dred Scott Decision*, 82 Chi.-Kent L. Rev. 1–455 (2007).

[3] 60 U.S. (19 How.) at 406, 418.

[4] 60 U.S. (19 How.) at 404–06, 417–18, 419–20 (1857).

[5] The proposed amendment as it passed the House contained no such provision, and it was decided in the Senate to include language like that finally adopted. Cong. Globe, 39th Cong., 1st Sess. 2560, 2768–69, 2869 (1866). The sponsor of the language said: "This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is . . . a citizen of the United States." Id. at 2890. The legislative history is discussed at some length in Afroyim v. Rusk, 387 U.S. 253, 282–86 (1967) (Justice Harlan dissenting).

[6] "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right[s] . . . ." Ch. 31, 14 Stat. 27.

[7] United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898).

[8] "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

ship.[9] The requirement that a person be "subject to the jurisdiction thereof," however, excludes its application to children born of diplomatic representatives of a foreign state, children born of alien enemies in hostile occupation,[10] or children of members of Indian tribes subject to tribal laws.[11] In addition, the citizenship of children born on vessels in United States territorial waters or on the high seas has generally been held by the lower courts to be determined by the citizenship of the parents.[12] Citizens of the United States within the meaning of this Amendment must be natural and not artificial persons; a corporate body is not a citizen of the United States.[13]

In *Afroyim v. Rusk*,[14] a divided Court extended the force of this first sentence beyond prior holdings, ruling that it withdrew from the government of the United States the power to expatriate United States citizens against their will for any reason. "[T]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other government unit." [15] In a subsequent decision, how-

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[9] United States v. Wong Kim Ark, 169 U.S. 649 (1898).

[10] 169 U.S. at 682 (these are recognized exceptions to the common-law rule of acquired citizenship by birth).

[11] 169 U.S. at 680–82; Elk v. Wilkins, 112 U.S. 94, 99 (1884).

[12] United States v. Gordon, 25 Fed. Cas. 1364 (C.C.S.D.N.Y. 1861) (No. 15,231); *In re* Look Tin Sing, 21 F. 905 (C.C.Cal. 1884); Lam Mow v. Nagle, 24 F.2d 316 (9th Cir. 1928).

[13] Insurance Co. v. New Orleans, 13 Fed. Cas. 67 (C.C.D. La. 1870). Not being citizens of the United States, corporations accordingly have been declared unable to claim the protection of that clause of the Fourteenth Amendment that secures the privileges and immunities of citizens of the United States against abridgment by state legislation. Orient Ins. Co. v. Daggs, 172 U.S. 557, 561 (1869). This conclusion was in harmony with the earlier holding in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869), to the effect that corporations were not within the scope of the privileges and immunities clause of state citizenship set out in Article IV, § 2. *See also* Selover, Bates & Co. v. Walsh, 226 U.S. 112, 126 (1912); Berea College v. Kentucky, 211 U.S. 45 (1908); Liberty Warehouse Co. v. Burley Growers' Coop. Marketing Ass'n,, 276 U.S. 71, 89 (1928); Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

[14] 387 U.S. 253 (1967). Though the Court had previously upheld the involuntary expatriation of a woman citizen of the United States during her marriage to a foreign citizen in Mackenzie v. Hare, 239 U.S. 299 (1915), the subject first received extended judicial treatment in Perez v. Brownell, 356 U.S. 44 (1958), in which the Court, by a five-to-four decision, upheld a statute denaturalizing a native-born citizen for having voted in a foreign election. For the Court, Justice Frankfurter reasoned that Congress's power to regulate foreign affairs carried with it the authority to sever the relationship of this country with one of its citizens to avoid national implication in acts of that citizen which might embarrass relations with a foreign nation. Id. at 60–62. Three of the dissenters denied that Congress had any power to denaturalize. *See* discussion of "Expatriation" under Article I, *supra*. In the years before *Afroyim*, a series of decisions had curbed congressional power.

[15] Afroyim v. Rusk, 387 U.S. 253, 262–63 (1967). The Court went on to say, "It is true that the chief interest of the people in giving permanence and security to

ever, the Court held that persons who were statutorily naturalized by being born abroad of at least one American parent could not claim the protection of the first sentence of section 1 and that Congress could therefore impose a reasonable and non-arbitrary condition subsequent upon their continued retention of United States citizenship.[16] Between these two decisions is a tension that should call forth further litigation efforts to explore the meaning of the citizenship sentence of the Fourteenth Amendment.

PRIVILEGES OR IMMUNITIES

Unique among constitutional provisions, the clause prohibiting state abridgement of the "privileges or immunities" of United States citizens was rendered a "practical nullity" by a single decision of the Supreme Court issued within five years of its ratification. In the *Slaughter-House Cases*,[17] the Court evaluated a Louisiana statute that conferred a monopoly upon a single corporation to engage in the business of slaughtering cattle. In determining whether this statute abridged the "privileges" of other butchers, the Court frustrated the aims of the most aggressive sponsors of the privileges or immunities Clause. According to the Court, these sponsors had sought to centralize "in the hands of the Federal Government large powers hitherto exercised by the States" by converting the rights of the citizens of each state at the time of the adoption of the Fourteenth Amendment into protected privileges and immunities of United States citizenship. This interpretation would have allowed business to develop unimpeded by state interference by limiting state laws "abridging" these privileges.

According to the Court, however, such an interpretation would have "transfer[red] the security and protection of all the civil rights . . . to the Federal Government, . . . to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States," and would "constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not

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citizenship in the Fourteenth Amendment was the desire to protect Negroes. . . . This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted." Four dissenters, Justices Harlan, Clark, Stewart, and White, controverted the Court's reliance on the history and meaning of the Fourteenth Amendment and reasserted Justice Frankfurter's previous reasoning in *Perez*. Id. at 268.

[16] Rogers v. Bellei, 401 U.S. 815 (1971). This, too, was a five-to-four decision, with Justices Blackmun, Harlan, Stewart, and White, and Chief Justice Burger in the majority, and Justices Black, Douglas, Brennan, and Marshall dissenting.

[17] 83 U.S. (16 Wall.) 36, 71, 77–78 (1873).

approve as consistent with those rights, as they existed at the time of the adoption of this amendment. . . . [The effect of] so great a departure from the structure and spirit of our institutions . . . is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character . . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them," and that the "one pervading purpose" of this and the other War Amendments was "the freedom of the slave race."

Based on these conclusions, the Court held that none of the rights alleged by the competing New Orleans butchers to have been violated were derived from the butchers' national citizenship; insofar as the Louisiana law interfered with their pursuit of the business of butchering animals, the privilege was one that "belong to the citizens of the States as such." Despite the broad language of this clause, the Court held that the privileges and immunities of state citizenship had been "left to the State governments for security and protection" and had not been placed by the clause "under the special care of the Federal government." The only privileges that the Fourteenth Amendment protected against state encroachment were declared to be those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws."[18] These privileges, however, had been available to United States citizens and protected from state interference by operation of federal supremacy even prior to the adoption of the Fourteenth Amendment. The *Slaughter-House Cases*, therefore, reduced the Privileges or Immunities Clause to a superfluous reiteration of a prohibition already operative against the states.

Although the Court in the *Slaughter-House Cases* expressed a reluctance to enumerate those privileges and immunities of United States citizens that are protected against state encroachment, it nevertheless felt obliged to suggest some. Among those that it identified were the right of access to the seat of government and to the seaports, subtreasuries, land officers, and courts of justice in the several states, the right to demand protection of the Federal Government on the high seas or abroad, the right of assembly, the privilege of *habeas corpus*, the right to use the navigable waters of the United States, and rights secured by treaty.[19] In *Twining v. New*

[18] 83 U.S. at 78, 79.
[19] 83 U.S. at 79–80.

Jersey,[20] the Court recognized "among the rights and privileges" of national citizenship the right to pass freely from state to state,[21] the right to petition Congress for a redress of grievances,[22] the right to vote for national officers,[23] the right to enter public lands,[24] the right to be protected against violence while in the lawful custody of a United States marshal,[25] and the right to inform the United States authorities of violation of its laws.[26] Earlier, in a decision not mentioned in *Twining*, the Court had also acknowledged that the carrying on of interstate commerce is "a right which every citizen of the United States is entitled to exercise."[27]

In modern times, the Court has continued the minor role accorded to the clause, only occasionally manifesting a disposition to enlarge the restraint that it imposes upon state action.[28] In *Hague v. CIO*,[29] two and perhaps three justices thought that the freedom to use municipal streets and parks for the dissemination of information concerning provisions of a federal statute and to assemble peacefully therein for discussion of the advantages and opportunities offered by such act was a privilege and immunity of a United States

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[20] 211 U.S. 78, 97 (1908).

[21] *Citing* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868). It was observed in United States v. Wheeler, 254 U.S. 281, 299 (1920), that the statute at issue in *Crandall* was actually held to burden directly the performance by the United States of its governmental functions. *Cf.* Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283, 491–92 (1849) (Chief Justice Taney dissenting). Four concurring Justices in Edwards v. California, 314 U.S. 160, 177, 181 (1941), would have grounded a right of interstate travel on the privileges or immunities clause. More recently, the Court declined to ascribe a source but was content to assert the right to be protected. United States v. Guest, 383 U.S. 745, 758 (1966); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969). Three Justices ascribed the source to this clause in Oregon v. Mitchell, 400 U.S. 112, 285–87 (1970) (Justices Stewart and Blackmun and Chief Justice Burger, concurring in part and dissenting in part).

[22] *Citing* United States v. Cruikshank, 92 U.S. 542 (1876).

[23] *Citing Ex parte* Yarbrough, 110 U.S. 651 (1884); Wiley v. Sinkler, 179 U.S. 58 (1900). Note Justice Douglas' reliance on this clause in Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (concurring in part and dissenting in part).

[24] *Citing* United States v. Waddell, 112 U.S. 76 (1884).

[25] *Citing* Logan v. United States, 144 U.S. 263 (1892).

[26] *Citing In re* Quarles and Butler, 158 U.S. 532 (1895).

[27] Crutcher v. Kentucky, 141 U.S. 47, 57 (1891).

[28] Colgate v. Harvey, 296 U.S. 404 (1935), which was overruled five years later, *see* Madden v. Kentucky, 309 U.S. 83, 93 (1940), represented the first attempt by the Court since adoption of the Fourteenth Amendment to convert the Privileges or Immunities Clause into a source of protection of other than those "interests growing out of the relationship between the citizen and the national government." In *Harvey*, the Court declared that the right of a citizen to engage in lawful business in other states, such as by entering into contracts or by loaning money, was a privilege of national citizenship, and this privilege was abridged by a state income tax law which excluded interest received on money from loans from taxable income only if the loan was made within the state.

[29] 307 U.S. 496, 510–18 (1939) (Justices Roberts and Black; Chief Justice Hughes may or may not have concurred on this point. Id. at 532). Justices Stone and Reed preferred to base the decision on the Due Process Clause. Id. at 518.

citizen, and, in *Edwards v. California*,[30] four Justices were prepared to rely on the clause.[31] In many other respects, however, claims based on this clause have been rejected.[32]

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[30] 314 U.S. 160, 177–83 (1941).

[31] *See also* Oregon v. Mitchell, 400 U.S. 112, 149 (1970) (Justice Douglas); id. at 285–87 (Justices Stewart and Blackmun and Chief Justice Burger).

[32] *E.g.*, Holden v. Hardy, 169 U.S. 366, 380 (1898) (statute limiting hours of labor in mines); Williams v. Fears, 179 U.S. 270, 274 (1900) (statute taxing the business of hiring persons to labor outside the state); Wilmington Mining Co. v. Fulton, 205 U.S. 60, 73 (1907) (statute requiring employment of only licensed mine managers and examiners and imposing liability on the mine owner for failure to furnish a reasonably safe place for workmen); Heim v. McCall, 239 U.S. 175 (1915); Crane v. New York, 239 U.S. 195 (1915) (statute restricting employment on state public works to citizens of the United States, with a preference to citizens of the state); Missouri Pacific Ry. v. Castle, 224 U.S. 541 (1912) (statute making railroads liable to employees for injuries caused by negligence of fellow servants and abolishing the defense of contributory negligence); Western Union Tel. Co. v. Milling Co., 218 U.S. 406 (1910) (statute prohibiting a stipulation against liability for negligence in delivery of interstate telegraph messages); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873); *In re* Lockwood, 154 U.S. 116 (1894) (refusal of state court to license a woman to practice law); Kirtland v. Hotchkiss, 100 U.S. 491, 499 (1879) (law taxing a debt owed a resident citizen by a resident of another state and secured by mortgage of land in the debtor's state); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874); Mugler v. Kansas, 123 U.S. 623 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Giozza v. Tiernan, 148 U.S. 657 (1893) (statutes regulating the manufacture and sale of intoxicating liquors); *In re* Kemmler, 136 U.S. 436 (1890) (statute regulating the method of capital punishment); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (statute regulating the franchise to male citizens); Pope v. Williams, 193 U.S. 621 (1904) (statute requiring persons coming into a state to make a declaration of intention to become citizens and residents thereof before being permitted to register as voters); Ferry v. Spokane, P. & S. Ry., 258 U.S. 314 (1922) (statute restricting dower, in case wife at time of husband's death is a nonresident, to lands of which he died seized); Walker v. Sauvinet, 92 U.S. 90 (1876) (statute restricting right to jury trial in civil suits at common law); Presser v. Illinois, 116 U.S. 252, 267 (1886) (statute restricting drilling or parading in any city by any body of men without license of the governor); Maxwell v. Dow, 176 U.S. 581, 596, 597–98 (1900) (provision for prosecution upon information, and for a jury (except in capital cases) of eight persons); New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 71 (1928) (statute penalizing the becoming or remaining a member of any oathbound association—other than benevolent orders, and the like—with knowledge that the association has failed to file its constitution and membership lists); Palko v. Connecticut, 302 U.S. 319 (1937) (statute allowing a state to appeal in criminal cases for errors of law and to retry the accused); Breedlove v. Suttles, 302 U.S. 277 (1937) (statute making the payment of poll taxes a prerequisite to the right to vote); Madden v. Kentucky, 309 U.S. 83, 92–93 (1940), (overruling Colgate v. Harvey, 296 U.S. 404, 430 (1935)) (statute whereby deposits in banks outside the state are taxed at 50¢ per $100); Snowden v. Hughes, 321 U.S. 1 (1944) (the right to become a candidate for state office is a privilege of state citizenship, not national citizenship); MacDougall v. Green, 335 U.S. 281 (1948) (Illinois Election Code requirement that a petition to form and nominate candidates for a new political party be signed by at least 200 voters from each of at least 50 of the 102 counties in the State, notwithstanding that 52% of the voters reside in only one county and 87% in the 49 most populous counties); New York v. O'Neill, 359 U.S. 1 (1959) (Uniform Reciprocal State Law to secure attendance of witnesses from within or without a state in criminal proceedings); James v. Valtierra, 402 U.S. 137 (1971) (a provision in a state constitution to the effect that low-rent housing projects could not be developed, constructed, or acquired by any state governmental body without

In *Oyama v. California*,[33] the Court, in a single sentence, agreed with the contention of a native-born youth that a state Alien Land Law that resulted in the forfeiture of property purchased in his name with funds advanced by his parent, a Japanese alien ineligible for citizenship and precluded from owning land, deprived him "of his privileges as an American citizen." The right to acquire and retain property had previously not been set forth in any of the enumerations as one of the privileges protected against state abridgment, although a federal statute enacted prior to the proposal and ratification of the Fourteenth Amendment did confer on all citizens the same rights to purchase and hold real property as white citizens enjoyed.[34]

In a doctrinal shift of uncertain significance, the Court will apparently evaluate challenges to durational residency requirements, previously considered as violations of the right to travel derived from the Equal Protection Clause,[35] as a potential violation of the Privileges or Immunities Clause. Thus, where a California law restricted the level of welfare benefits available to Californians who have been residents for less than a year to the level of benefits available in the state of their prior residence, the Court found a violation of the right of newly arrived citizens to be treated the same as other state citizens.[36] Despite suggestions that this opinion will open the door to "guaranteed equal access to all public benefits,"[37] it seems more likely that the Court is protecting the privilege of being treated immediately as a full citizen of the state one chooses for permanent residence.[38]

DUE PROCESS OF LAW

Generally

Due process under the Fourteenth Amendment can be broken down into two categories: procedural due process and substantive due process. Procedural due process, based on principles of "fundamental fairness," addresses which legal procedures are required to be followed in state proceedings. Relevant issues, as discussed in

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the affirmative vote of a majority of those citizens participating in a community referendum).

[33] 332 U.S. 633, 640 (1948).

[34] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, now 42 U.S.C. § 1982, as amended.

[35] *See* The Right to Travel, *infra*.

[36] Saenz v. Roe, 526 U.S. 489 (1999).

[37] 526 U.S. at 525 (Thomas, J., dissenting).

[38] The right of United States citizens to choose their state of residence is specifically protected by the first sentence of the 14th Amendment "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

detail below, include notice, opportunity for hearing, confrontation and cross-examination, discovery, basis of decision, and availability of counsel. Substantive due process, although also based on principles of "fundamental fairness," is used to evaluate whether a law can be applied by states at all, regardless of the procedure followed. Substantive due process has generally dealt with specific subject areas, such as liberty of contract or privacy, and over time has alternately emphasized the importance of economic and noneconomic matters. In theory, the issues of procedural and substantive due process are closely related. In reality, substantive due process has had greater political import, as significant portions of a state legislature's substantive jurisdiction can be restricted by its application.

Although the extent of the rights protected by substantive due process may be controversial, its theoretical basis is firmly established and forms the basis for much of modern constitutional case law. Passage of the Reconstruction Amendments (13th, 14th, and 15th) gave the federal courts the authority to intervene when a state threatened fundamental rights of its citizens,[39] and one of the most important doctrines flowing from this is the application of the Bill of Rights to the states through the Due Process Clause.[40] Through the process of "selective incorporation," most of the provisions of the first eight Amendments, such as free speech, freedom of religion, and protection against unreasonable searches and seizures, are applied against the states as they are against the federal government. Though application of these rights against the states is no longer controversial, the incorporation of other substantive rights, as is discussed in detail below, has been.

Definitions

"Person".—The Due Process Clause provides that no states shall deprive any "person" of "life, liberty or property" without due process of law. A historical controversy has been waged concerning whether the framers of the Fourteenth Amendment intended the word "person" to mean only natural persons, or whether the word was substituted for the word "citizen" with a view to protecting cor-

[39] The Privileges or Immunities Clause, more so than the Due Process Clause, appears at first glance to speak directly to the issue of state intrusions on substantive rights and privileges—"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." *See* AKHIL REED AMAR, THE BILL OF RIGHTS 163–180 (1998). As discussed earlier, however, the Court limited the effectiveness of that clause soon after the ratification of the 14th Amendment. *See* Privileges or Immunities, *supra*. Instead, the Due Process Clause, though selective incorporation, became the basis for the Court to recognize important substantive rights against the states.

[40] See Bill of Rights, Fourteenth Amendment, *supra*.

porations from oppressive state legislation.[41] As early as the 1877 *Granger Cases*[42] the Supreme Court upheld various regulatory state laws without raising any question as to whether a corporation could advance due process claims. Further, there is no doubt that a corporation may not be deprived of its property without due process of law.[43] Although various decisions have held that the "liberty" guaranteed by the Fourteenth Amendment is the liberty of natural,[44] not artificial, persons,[45] nevertheless, in 1936, a newspaper corporation successfully objected that a state law deprived it of liberty of the press.[46]

A separate question is the ability of a government official to invoke the Due Process Clause to protect the interests of his office. Ordinarily, the mere official interest of a public officer, such as the interest in enforcing a law, has not been deemed adequate to enable him to challenge the constitutionality of a law under the Fourteenth Amendment.[47] Similarly, municipal corporations have no standing "to invoke the provisions of the Fourteenth Amendment in

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[41] *See* Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L. J. 371 (1938).

[42] Munn v. Illinois, 94 U.S. 113 (1877). In a case arising under the Fifth Amendment, decided almost at the same time, the Court explicitly declared the United States "equally with the States . . . are prohibited from depriving persons or corporations of property without due process of law." *Sinking Fund Cases*, 99 U.S. 700, 718–19 (1879).

[43] Smyth v. Ames, 169 U.S. 466, 522, 526 (1898); Kentucky Co. v. Paramount Exch., 262 U.S. 544, 550 (1923); Liggett Co. v. Baldridge, 278 U.S. 105 (1928).

[44] As to the natural persons protected by the due process clause, these include all human beings regardless of race, color, or citizenship. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Terrace v. Thompson, 263 U.S. 197, 216 (1923). *See* Hellenic Lines v. Rhodetis, 398 U.S. 306, 309 (1970).

[45] Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). Earlier, in Northern Securities Co. v. United States, 193 U.S. 197, 362 (1904), a case interpreting the federal antitrust law, Justice Brewer, in a concurring opinion, had declared that "a corporation . . . is not endowed with the inalienable rights of a natural person."

[46] Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"). In First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), faced with the validity of state restraints upon expression by corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—but decided instead that expression was protected, irrespective of the speaker, because of the interests of the listeners. *See* id. at 778 n.14 (reserving question). *But see* id. at 809, 822 (Justices White and Rehnquist dissenting) (corporations as creatures of the state have the rights state gives them).

[47] Pennie v. Reis, 132 U.S. 464 (1889); Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900); Tyler v. Judges of Court of Registration, 179 U.S. 405, 410 (1900); Straus v. Foxworth, 231 U.S. 162 (1913); Columbus & Greenville Ry. v. Miller, 283 U.S. 96 (1931).

opposition to the will of their creator," the state.[48] However, state officers are acknowledged to have an interest, despite their not having sustained any "private damage," in resisting an "endeavor to prevent the enforcement of statutes in relation to which they have official duties," and, accordingly, may apply to federal courts "to review decisions of state courts declaring state statutes, which [they] seek to enforce, to be repugnant to the [Fourteenth Amendment of] the Federal Constitution . . . ."[49]

"Property" and Police Power.—States have an inherent "police power" to promote public safety, health, morals, public convenience, and general prosperity,[50] but the extent of the power may vary based on the subject matter over which it is exercised.[51] If a police power regulation goes too far, it will be recognized as a tak-

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[48] City of Pawhuska v. Pawhuska Oil Co., 250 U.S. 394 (1919); City of Trenton v. New Jersey, 262 U.S. 182 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933). *But see* Madison School Dist. v. WERC, 429 U.S. 167, 175 n.7 (1976) (reserving question whether municipal corporation as an employer has a First Amendment right assertable against a state).

[49] Coleman v. Miller, 307 U.S. 433, 445, 442, 443 (1939); Boynton v. Hutchinson Gas Co., 291 U.S. 656 (1934); South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938). The converse is not true, however, and the interest of a state official in vindicating the Constitution gives him no legal standing to attack the constitutionality of a state statute in order to avoid compliance with it. Smith v. Indiana, 191 U.S. 138 (1903); Braxton County Court v. West Virginia, 208 U.S. 192 (1908); Marshall v. Dye, 231 U.S. 250 (1913); Stewart v. Kansas City, 239 U.S. 14 (1915). *See also* Coleman v. Miller, 307 U.S. 433, 437–46 (1939).

[50] This power is not confined to the suppression of what is offensive, disorderly, or unsanitary. Long ago Chief Justice Marshall described the police power as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824). *See* California Reduction Co. v. Sanitary Works, 199 U.S. 306, 318 (1905); Chicago B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 592 (1906); Bacon v. Walker, 204 U.S. 311 (1907); Eubank v. City of Richmond, 226 U.S. 137 (1912); Schmidinger v. Chicago, 226 U.S. 578 (1913); Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915); Nebbia v. New York, 291 U.S. 502 (1934); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (police power encompasses preservation of historic landmarks; land-use restrictions may be enacted to enhance the quality of life by preserving the character and aesthetic features of city); City of New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, 427 U.S. 50 (1976).

[51] Hudson Water Co. v. McCarter, 209 U.S. 349 (1908); Eubank v. Richmond, 226 U.S. 137, 142 (1912); Erie R.R. v. Williams, 233 U.S. 685, 699 (1914); Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); Panhandle Co. v. Highway Comm'n, 294 U.S. 613 (1935). "It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise." Atlantic Coast Line R.R. v. City of Goldsboro, 232 U.S. 548 (1914).

ing of property for which compensation must be paid.[52] Thus, the means employed to effect its exercise may be neither arbitrary nor oppressive but must bear a real and substantial relation to an end that is public, specifically, the public health, safety, or morals, or some other aspect of the general welfare.[53]

An ulterior public advantage, however, may justify a comparatively insignificant taking of private property for what seems to be a private use.[54] Mere "cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power."[55] Moreover, it is elementary that enforcement of a law passed in the legitimate exertion of the police power is not a taking without due process of law, even if the cost is borne by the regulated.[56] Initial compliance with a regulation that is valid when adopted, however, does not preclude later protest if that regulation subsequently becomes confiscatory in its operation.[57]

"Liberty".—As will be discussed in detail below, the substantive "liberty" guaranteed by the Due Process Clause has been variously defined by the Court. In the early years, it meant almost exclusively "liberty of contract," but with the demise of liberty of contract came a general broadening of "liberty" to include personal, political and social rights and privileges.[58] Nonetheless, the Court is generally chary of expanding the concept absent statutorily recognized rights.[59]

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[52] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Welch v. Swasey, 214 U.S. 91, 107 (1909). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980). *See* also analysis of "Regulatory Takings" under the Fifth Amendment. Although the Fourteenth Amendment does not contain a "takings" provisions such as is found in the Fifth Amendment, the Court has held that such provision has been incorporated. Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 159 (1980).

[53] Liggett Co. v. Baldridge, 278 U.S. 105, 111–12 (1928); Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1936).

[54] Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) (bank may be required to contribute to fund to guarantee the deposits of contributing banks).

[55] Erie R.R. v. Williams, 233 U.S. 685, 700 (1914).

[56] New Orleans Public Service v. New Orleans, 281 U.S. 682, 687 (1930).

[57] Abie State Bank v. Bryan, 282 U.S. 765, 776 (1931).

[58] *See* the tentative effort in Hampton v. Mow Sun Wong, 426 U.S. 88, 102 & n.23 (1976), apparently to expand upon the concept of "liberty" within the meaning of the Fifth Amendment's Due Process Clause and necessarily therefore the Fourteenth's.

[59] *See* the substantial confinement of the concept in Meachum v. Fano, 427 U.S. 215 (1976); and Montanye v. Haymes, 427 U.S. 236 (1976), in which the Court applied to its determination of what is a liberty interest the "entitlement" doctrine developed in property cases, in which the interest is made to depend upon state recognition of the interest through positive law, an approach contrary to previous

The Rise and Fall of Economic Substantive Due Process: Overview

Long before the passage of the 14th Amendment, the Due Process Clause of the Fifth Amendment was recognized as a restraint upon the Federal Government, but only in the narrow sense that a legislature needed to provide procedural "due process" for the enforcement of law.[60] Although individual Justices suggested early on that particular legislation could be so in conflict with precepts of natural law as to render it wholly unconstitutional,[61] the potential of the Due Process Clause of the 14th Amendment as a substantive restraint on state action appears to have been grossly underestimated in the years immediately following its adoption.[62]

Thus, early invocations of "substantive" due process were unsuccessful. In the *Slaughter-House Cases*,[63] discussed previously in the context of the Privileges or Immunities Clause,[64] a group of butchers challenged a Louisiana statute conferring the exclusive privilege of butchering cattle in New Orleans to one corporation. In reviewing the validity of this monopoly, the Court noted that the

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due process-liberty analysis. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 482 (1972). For more recent cases, *see* DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (no due process violation for failure of state to protect an abused child from his parent, even though abuse had been detected by social service agency); Collins v. City of Harker Heights, 503 U.S. 115 (1992) (failure of city to warn its employees about workplace hazards does not violate due process; the due process clause does not impose a duty on the city to provide employees with a safe working environment); County of Sacramento v. Lewis, 523 U.S. 833 (1998) (high-speed automobile chase by police officer causing death through deliberate or reckless indifference to life would not violate the Fourteenth Amendment's guarantee of substantive due process). *But see* Chavez v. Martinez, 538 U.S. 760 (2003) (case remanded to federal circuit court to determine whether coercive questioning of severely injured suspect gave rise to a compensable violation of due process).

[60] The conspicuous exception to this was the holding in the *Dred Scott* case that former slaves, as non-citizens, could not claim the protections of the clause. 60 U.S. (19 How.) 393, 450 (1857).

[61] *See*, *e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("An act of the legislature (for I cannot call it a law), contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority") (Chase, J.).

[62] In the years following the ratification of the 14th Amendment, the Court often observed that the Due Process Clause "operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment," Hibben v. Smith, 191 U.S. 310, 325 (1903), and that "ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth," Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 (1905). *See also* French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901). There is support for the notion, however, that the proponents of the 14th Amendment envisioned a more expansive substantive interpretation of that Amendment than had developed under the Fifth Amendment. See Akhil Reed Amar, The Bill of Rights 181–197 (1998).

[63] 83 U.S. (16 Wall.) 36 (1873).

[64] *See* Privileges or Immunities Clause.

prohibition against a deprivation of property without due process "has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some forms of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. . . . We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." [65]

Four years later, in *Munn v. Illinois*,[66] the Court reviewed the regulation of rates charged for the transportation and warehousing of grain, and again refused to interpret the due process clause as invalidating substantive state legislation. Rejecting contentions that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its use and by transferring an interest in a private enterprise to the public, Chief Justice Waite emphasized that "the great office of statutes is to remedy defects in the common law as they are developed. . . . We know that this power [of rate regulation] may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

In *Davidson v. New Orleans*,[67] Justice Miller also counseled against a departure from these conventional applications of due process, although he acknowledged the difficulty of arriving at a precise, all-inclusive definition of the clause. "It is not a little remarkable," he observed, "that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property

[65] 83 U.S. (16 Wall.) at 80–81.
[66] 94 U.S. 113, 134 (1877).
[67] 96 U.S. 97, 103–04 (1878).

without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law. But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."

A bare half-dozen years later, however, in *Hurtado v. California*,[68] the Justices gave warning of an impending modification of their views. Justice Mathews, speaking for the Court, noted that due process under the United States Constitution differed from due process in English common law in that the latter applied only to executive and judicial acts, whereas the former also applied to legislative acts. Consequently, the limits of the due process under the 14th Amendment could not be appraised solely in terms of the "sanction of settled usage" under common law. The Court then declared that "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." By this language, the states were put on notice that all types

[68] 110 U.S. 516, 528, 532, 536 (1884).

of state legislation, whether dealing with procedural or substantive rights, were now subject to the scrutiny of the Court when questions of essential justice were raised.

What induced the Court to overcome its fears of increased judicial oversight and of upsetting the balance of powers between the Federal Government and the states was state remedial social legislation, enacted in the wake of industrial expansion, and the impact of such legislation on property rights. The added emphasis on the Due Process Clause also afforded the Court an opportunity to compensate for its earlier nullification of much of the privileges or immunities clause of the Amendment. Legal theories about the relationship between the government powers and private rights were available to demonstrate the impropriety of leaving to the state legislatures the same ample range of police power they had enjoyed prior to the Civil War. In the meantime, however, the *Slaughter-House Cases* and *Munn v. Illinois* had to be overruled at least in part.

About twenty years were required to complete this process, in the course of which two strands of reasoning were developed. The first was a view advanced by Justice Field in a dissent in *Munn v. Illinois*,[69] namely, that state police power is solely a power to prevent injury to the "peace, good order, morals, and health of the community." [70] This reasoning was adopted by the Court in *Mugler v. Kansas*,[71] where, despite upholding a state alcohol regulation, the Court held that "[i]t does not at all follow that every statute enacted ostensibly for the promotion of [public health, morals or safety] is to be accepted as a legitimate exertion of the police powers of the state." The second strand, which had been espoused by Justice Bradley in his dissent in the *Slaughter-House Cases*,[72] tentatively transformed ideas embodying the social compact and natural rights

[69] 94 U.S. 113, 141–48 (1877).

[70] "It is true that the legislation which secures to all protection in their rights, and the equal use and enjoyment of their property, embraces an almost infinite variety of subjects. Whatever affects the peace, good order, morals, and health of the community, comes within its scope; and every one must use and enjoy his property subject to the restrictions which such legislation imposes. What is termed the police power of the State, which, from the language often used respecting it, one would suppose to be an undefined and irresponsible element in government, can only interfere with the conduct of individuals in their intercourse with each other, and in the use of their property, so far as may be required to secure these objects. The compensation which the owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use, or for their own services in union with it, forms no element of consideration in prescribing regulations for that purpose." 94 U.S. at 145–46.

[71] 123 U.S. 623, 661 (1887).

[72] 83 U.S. (16 Wall.) 36, 113–14, 116, 122 (1873).

into constitutionally enforceable limitations upon government.[73] The consequence was that the states in exercising their police powers could foster only those purposes of health, morals, and safety which the Court had enumerated, and could employ only such means as would not unreasonably interfere with fundamental natural rights of liberty and property. As articulated by Justice Bradley, these rights were equated with freedom to pursue a lawful calling and to make contracts for that purpose.[74]

Having narrowed the scope of the state's police power in deference to the natural rights of liberty and property, the Court proceeded to incorporate into due process theories of *laissez faire* economics, reinforced by the doctrine of Social Darwinism (as elaborated by Herbert Spencer). Thus, "liberty" became synonymous with governmental non-interference in the field of private economic relations. For instance, in *Budd v. New York*,[75] Justice Brewer declared in *dictum*: "The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government."

Next, the Court watered down the accepted maxim that a state statute must be presumed valid until clearly shown to be otherwise, by shifting focus to whether facts existed to justify a particular law.[76] The original position could be seen in earlier cases such as *Munn v. Illinois*,[77] in which the Court sustained the legislation before it by presuming that such facts existed: "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed." Ten years later, however, in *Mugler*

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[73] Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875). "There are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist . . . ."

[74] "Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all. . . . This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property right. . . . A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law." *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 116, 122 (1873) (Justice Bradley dissenting).

[75] 143 U.S. 517, 551 (1892).

[76] *See* Fletcher v. Peck, 10 U.S. (6 Cr.) 87, 128 (1810).

[77] 94 U.S. 113, 123, 182 (1877).

v. Kansas,[78] rather than presume the relevant facts, the Court sustained a statewide anti-liquor law based on the proposition that the deleterious social effects of the excessive use of alcoholic liquors were sufficiently notorious for the Court to be able to take notice of them.[79] This opened the door for future Court appraisals of the facts that had induced the legislature to enact the statute.[80]

Mugler was significant because it implied that, unless the Court found by judicial notice the existence of justifying fact, it would invalidate a police power regulation as bearing no reasonable or adequate relation to the purposes to be subserved by the latter—namely, health, morals, or safety. Interestingly, the Court found the rule of presumed validity quite serviceable for appraising state legislation affecting neither liberty nor property, but for legislation constituting governmental interference in the field of economic relations, especially labor-management relations, the Court found the principle of judicial notice more advantageous. In litigation embracing the latter type of legislation, the Court would also tend to shift the burden of proof, which had been with litigants challenging legislation, to the state seeking enforcement. Thus, the state had the task of demonstrating that a statute interfering with a natural right of liberty or property was in fact "authorized" by the Constitution, and not merely that the latter did not expressly prohibit enactment of the same. As will be discussed in detail below, this approach was used from the turn of the century through the mid-1930s to strike down numerous laws that were seen as restricting economic liberties.

As a result of the Depression, however, the *laissez faire* approach to economic regulation lost favor to the dictates of the New Deal. Thus, in 1934, the Court in *Nebbia v. New York* [81] discarded this approach to economic legislation. The modern approach is exemplified by the 1955 decision, *Williamson v. Lee Optical Co.*,[82] which upheld a statutory scheme regulating the sale of eyeglasses that favored ophthalmologists and optometrists in private professional

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[78] 123 U.S. 623 (1887).

[79] 123 U.S. at 662. "We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact . . . that . . . pauperism, and crime . . . are, in some degree, at least, traceable to this evil."

[80] The following year the Court, confronted with an act restricting the sale of oleomargarine, of which the Court could not claim a like measure of common knowledge, briefly retreated to the doctrine of presumed validity, declaring that "it does not appear upon the face of the statute, or from any of the facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law." Powell v. Pennsylvania, 127 U.S. 678, 685 (1888).

[81] 291 U.S. 502 (1934).

[82] 348 U.S. 483 (1955).

practice and disadvantaged opticians and those employed by or using space in business establishments. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134, 'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'" [83] The Court went on to assess the reasons that might have justified the legislature in prescribing the regulation at issue, leaving open the possibility that *some* regulation might be found unreasonable.[84] More recent decisions have limited this inquiry to whether the legislation is arbitrary or irrational, and have abandoned any requirement of "reasonableness." [85]

Regulation of Labor Conditions

Liberty of Contract.—One of the most important concepts used during the ascendancy of economic due process was liberty of contract. The original idea of economic liberties was advanced by Justices Bradley and Field in the *Slaughter-House Cases*,[86] and elevated to the status of accepted doctrine in *Allgeyer v. Louisiana,*[87] It was then used repeatedly during the early part of this century to strike down state and federal labor regulations. "The liberty men-

[83] 348 U.S. at 488.

[84] 348 U.S. at 487, 491.

[85] The Court has pronounced a strict "hands-off" standard of judicial review, whether of congressional or state legislative efforts to structure and accommodate the burdens and benefits of economic life. Such legislation is to be "accorded the traditional presumption of constitutionality generally accorded economic regulations" and is to be "upheld absent proof of arbitrariness or irrationality on the part of Congress." That the accommodation among interests which the legislative branch has struck "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 83–84 (1978). *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976); Hodel v. Indiana, 452 U.S. 314, 333 (1981); New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124–25 (1978); Brotherhood of Locomotive Firemen v. Chicago, R.I. & P. R.R., 393 U.S. 129 (1968); Ferguson v. Skrupa, 372 U.S. 726, 730, 733 (1963).

[86] 83 U.S. (16 Wall.) 36 (1873).

[87] 165 U.S. 578 (1897). Freedom of contract was also alluded to as a property right, as is evident in the language of the Court in Coppage v. Kansas, 236 U.S. 1, 14 (1915). "Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."

tioned in that [Fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." [88]

The Court, however, did sustain some labor regulations by acknowledging that freedom of contract was "a qualified and not an absolute right. . . . Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. . . . In dealing with the relation of the employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression." [89]

Still, the Court was committed to the principle that freedom of contract is the general rule and that legislative authority to abridge it could be justified only by exceptional circumstances. To serve this end, the Court intermittently employed the rule of judicial notice in a manner best exemplified by a comparison of the early cases of *Holden v. Hardy* [90] and *Lochner v. New York*.[91] In *Holden v. Hardy*,[92] the Court, relying on the principle of presumed validity, allowed the burden of proof to remain with those attacking a Utah act limiting the period of labor in mines to eight hours per day. Recognizing the fact that labor below the surface of the earth was attended by risk to person and to health and for these reasons had long been the subject of state intervention, the Court registered its willingness to sustain a law that the state legislature had adjudged "necessary for the preservation of health of employees," and for which there were "reasonable grounds for believing that . . . [it was] supported by the facts."

Seven years later, however, a radically altered Court was predisposed in favor of the doctrine of judicial notice. In *Lochner v.*

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[88] 165 U.S. at 589.

[89] Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549, 567, 570 (1911). *See also* Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 534 (1923).

[90] 169 U.S. 366 (1898).

[91] 198 U.S. 45 (1905).

[92] 169 U.S. 366, 398 (1898).

New York,[93] the Court found that a law restricting employment in bakeries to ten hours per day and 60 hours per week was not a true health measure, but was merely a labor regulation, and thus was an unconstitutional interference with the right of adult laborers, *sui juris*, to contract for their means of livelihood. Denying that the Court was substituting its own judgment for that of the legislature, Justice Peckham nevertheless maintained that whether the act was within the police power of the state was a "question that must be answered by the Court." Then, in disregard of the medical evidence proffered, the Justice stated: "In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. . . . It might be safely affirmed that almost all occupations more or less affect the health. . . . But are we all, on that account, at the mercy of the legislative majorities?" [94]

Justice Harlan, in dissent, asserted that the law was a health regulation, pointing to the abundance of medical testimony tending to show that the life expectancy of bakers was below average, that their capacity to resist diseases was low, and that they were peculiarly prone to suffer irritations of the eyes, lungs, and bronchial passages. He concluded that the very existence of such evidence left the reasonableness of the measure open to discussion and thus within the discretion of the legislature. "The responsibility therefor rests upon the legislators, not upon the courts. No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. . . . [L]egislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." [95]

A second dissenting opinion, written by Justice Holmes, has received the greater measure of attention as a forecast of the line of reasoning the Court was to follow some decades later. "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making

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[93] 198 U.S. 45 (1905).
[94] 198 U.S. at 59.
[95] 198 U.S. at 74 (quoting Atkin v. Kansas, 191 U.S. 207, 223 (1903)).

up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution. . . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[96]

Justice Holmes did not reject the basic concept of substantive due process, but rather the Court's presumption against economic regulation.[97] Thus, Justice Holmes whether consciously or not, was prepared to support, along with his opponents in the majority, a "perpetual censorship" over state legislation. The basic distinction, therefore, between the positions taken by Justice Peckham for the majority and Justice Holmes, for what was then the minority, was the use of the doctrine of judicial notice by the former and the doctrine of presumed validity by the latter.

Holmes' dissent soon bore fruit in *Muller v. Oregon*[98] and *Bunting v. Oregon*,[99] which allowed, respectively, regulation of hours worked by women and by men in certain industries. The doctrinal approach employed was to find that the regulation was supported by evidence despite the shift in the burden of proof entailed by application of the principle of judicial notice. Thus, counsel defending the constitutionality of social legislation developed the practice of

[96] 198 U.S. at 75–76.

[97] Thus, Justice Holmes' criticism of his colleagues was unfair, as even a "rational and fair man" would be guided by some preferences or "economic predilections."

[98] 208 U.S. 412 (1908).

[99] 243 U.S. 426 (1917).

submitting voluminous factual briefs, known as "Brandeis Briefs," [100] replete with medical or other scientific data intended to establish beyond question a substantial relationship between the challenged statute and public health, safety, or morals. Whenever the Court was disposed to uphold measures pertaining to industrial relations, such as laws limiting hours of work,[101] it generally intimated that the facts thus submitted by way of justification had been authenticated sufficiently for it to take judicial cognizance thereof. On the other hand, whenever it chose to invalidate comparable legislation, such as enactments establishing a minimum wage for women and children,[102] it brushed aside such supporting data, proclaimed its inability to perceive any reasonable connection between the statute and the legitimate objectives of health or safety, and condemned the statute as an arbitrary interference with freedom of contract.

During the great Depression, however, the *laissez faire* tenet of self-help was replaced by the belief that it is peculiarly the duty of government to help those who are unable to help themselves. To sustain this remedial legislation, the Court had to extensively revise its previously formulated concepts of "liberty" under the Due Process Clause. Thus, the Court, in overturning prior holdings and sustaining minimum wage legislation,[103] took judicial notice of the demands for relief arising from the Depression. And, in upholding state legislation designed to protect workers in their efforts to organize and bargain collectively, the Court reconsidered the scope of an employer's liberty of contract, and recognized a correlative liberty of employees that state legislatures could protect.

To the extent that it acknowledged that liberty of the individual may be infringed by the coercive conduct of private individuals no less than by public officials, the Court in effect transformed the Due Process Clause into a source of encouragement to state legislatures to intervene affirmatively to mitigate the effects of such coercion. By such modification of its views, liberty, in the constitutional sense of freedom resulting from restraint upon government, was replaced by the civil liberty which an individual enjoys by vir-

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[100] Named for attorney (later Justice) Louis Brandeis, who presented voluminous documentation to support the regulation of women's working hours in Muller v. Oregon, 208 U.S. 412 (1908).

[101] *E.g.*, Muller v. Oregon; Bunting v. Oregon.

[102] *See*, *e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[103] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Thus the National Labor Relations Act was declared not to "interfere with the normal exercise of the right of the employer to select its employees or to discharge them." However, restraint of the employer for the purpose of preventing an unjust interference with the correlative right of his employees to organize was declared not to be arbitrary. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44, 45–46 (1937).

tue of the restraints which government, in his behalf, imposes upon his neighbors.

Laws Regulating Working Conditions and Wages.—As noted, even during the *Lochner* era, the Due Process Clause was construed as permitting enactment by the states of maximum hours laws applicable to women workers [104] and to all workers in specified lines of work thought to be physically demanding or otherwise worthy of special protection.[105] Similarly, the regulation of how wages were to be paid was allowed, including the form of payment,[106] its frequency,[107] and how such payment was to be calculated.[108] And, because of the almost plenary powers of the state and its municipal subdivisions to determine the conditions for work on public projects, statutes limiting the hours of labor on public works were also upheld at a relatively early date.[109] Further, states could prohibit the employment of persons under 16 years of age in dangerous occupations and require employers to ascertain whether their employees were in fact below that age.[110]

The regulation of mines represented a further exception to the *Lochner* era's anti-discrimination tally. As such health and safety regulation was clearly within a state's police power, a state's laws providing for mining inspectors (paid for by mine owners),[111] licensing mine managers and mine examiners, and imposing liability upon

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[104] Miller v. Wilson, 236 U.S. 373 (1915) (statute limiting work to 8 hours/day, 48 hours/week); Bosley v. McLaughlin, 236 U.S. 385 (1915) (same restrictions for women working as pharmacists or student nurses). *See also* Muller v. Oregon, 208 U.S. 412 (1908) (10 hours/day as applied to work in laundries); Riley v. Massachusetts, 232 U.S. 671 (1914) (violation of lunch hour required to be posted).

[105] *See*, *e.g.*, Holden v. Hardy, 169 U.S. 366 (1898) (statute limiting the hours of labor in mines and smelters to eight hours per day); Bunting v. Oregon, 243 U.S. 426 (1917) (statute limiting to ten hours per day, with the possibility of 3 hours per day of overtime at time-and-a-half pay, work in any mill, factory, or manufacturing establishment).

[106] Statute requiring redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages did not violate liberty of contract. Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901); Dayton Coal and Iron Co. v. Barton, 183 U.S. 23 (1901); Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914).

[107] Laws requiring railroads to pay their employees semimonthly, Erie R.R. v. Williams, 233 U.S. 685 (1914), or to pay them on the day of discharge, without abatement or reduction, any funds due them, St. Louis, I. Mt. & S.P. Ry. v. Paul, 173 U.S. 404 (1899), do not violate due process.

[108] Freedom of contract was held not to be infringed by an act requiring that miners, whose compensation was fixed on the basis of weight, be paid according to coal in the mine car rather than at a certain price per ton for coal screened after it has been brought to the surface, and conditioning such payment on the presence of no greater percentage of dirt or impurities than that ascertained as unavoidable by the State Industrial Commission. Rail Coal Co. v. Ohio Industrial Comm'n, 236 U.S. 338 (1915). *See also* McLean v. Arkansas, 211 U.S. 539 (1909).

[109] Atkin v. Kansas, 191 U.S. 207 (1903).

[110] Sturges & Burn v. Beauchamp, 231 U.S. 320 (1913).

[111] St. Louis Consol. Coal Co. v. Illinois, 185 U.S. 203 (1902).

mine owners for failure to furnish a reasonably safe place for workmen, were upheld during this period.[112] Other similar regulations that were sustained included laws requiring that underground passageways meet or exceed a minimum width,[113] that boundary pillars be installed between adjoining coal properties as a protection against flood in case of abandonment,[114] and that wash houses be provided for employees.[115]

One of the more significant negative holdings of the *Lochner* era was that states could not regulate how much wages were to be paid to employees.[116] As with the other working condition and wage issues, however, concern for the welfare of women and children seemed to weigh heavily on the justices, and restrictions on minimum wages for these groups were discarded in 1937.[117] Ultimately, the reasoning of these cases was extended to more broadly based minimum wage laws, as the Court began to offer significant deference to the states to enact economic and social legislation benefitting labor.

The modern theory regarding substantive due process and wage regulation was explained by Justice Douglas in 1952 in the following terms: "Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits. . . . But the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided." [118]

The Justice further noted that "many forms of regulation reduce the net return of the enterprise. . . . Most regulations of busi-

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[112] Wilmington Mining Co. v. Fulton, 205 U.S. 60 (1907).

[113] Barrett v. Indiana, 229 U.S. 26 (1913).

[114] Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).

[115] Booth v. Indiana, 237 U.S. 391 (1915).

[116] Adkins v. Children's Hospital, 261 U.S. 525 (1923); Stettler v. O'Hara, 243 U.S. 629 (1917); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

[117] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling Adkins v. Children's Hospital, 261 U.S. 525 (1923), a Fifth Amendment case); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936).

[118] Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (sustaining a Missouri statute giving employees the right to absent themselves for four hours while the polls were open on election day without deduction of wages for their absence). The Court in *Day-Brite Lighting, Inc.* recognized that the legislation in question served as a form of wage control for men, which had previously found unconstitutional. Justice Douglas, however, wrote that "the protection of the right of suffrage under our scheme of things is basic and fundamental," and hence within the states' police power.

ness necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization. Extreme cases are conjured up where an employer is required to pay wages for a period that has no relation to the legitimate end. Those cases can await decision as and when they arise. The present law has no such infirmity. It is designed to eliminate any penalty for exercising the right of suffrage and to remove a practical obstacle to getting out the vote. The public welfare is a broad and inclusive concept. The moral, social, economic, and physical well-being of the community is one part of it; the political well-being, another. The police power which is adequate to fix the financial burden for one is adequate for the other. The judgment of the legislature that time out for voting should cost the employee nothing may be a debatable one. It is indeed conceded by the opposition to be such. But if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision. We could strike down this law only if we returned to the philosophy of the *Lochner*, *Coppage*, and *Adkins* cases." [119]

Workers' Compensation Laws.—Workers' compensation laws also evaded the ravages of *Lochner*. The Court "repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee." [120] Accordingly, a state statute that provided an exclusive system to govern the liabilities of employers for disabling injuries and death caused by accident in certain hazardous occupations,[121] irrespective of the doctrines of negligence, contributory negligence, assumption of risk, and negligence of fellow-servants, was held not to violate due process.[122] Likewise, an act that allowed an injured employee, though guilty of contributory negligence, an election of remedies be-

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[119] 342 U.S. at 424–25. *See also* Dean v. Gadsden Times Pub. Co., 412 U.S. 543 (1973) (sustaining statute providing that employee excused for jury duty should be entitled to full compensation from employer, less jury service fee).

[120] New York Cent. R.R. v. White, 243 U.S. 188, 200 (1917). "These decisions have established the propositions that the rules of law concerning the employer's responsibility for personal injury or death of an employee arising in the course of employment are not beyond alteration by legislation in the public interest; that no person has a vested right entitling him to have these any more than other rules of law remain unchanged for his benefit; and that, if we exclude arbitrary and unreasonable changes, liability may be imposed upon the employer without fault, and the rules respecting his responsibility to one employee for the negligence of another and respecting contributory negligence and assumption of risk are subject to legislative change." *Arizona Employers' Liability Cases*, 250 U.S. 400, 419–20 (1919).

[121] In determining what occupations may be brought under the designation of "hazardous," the legislature may carry the idea to the "vanishing point." Ward & Gow v. Krinsky, 259 U.S. 503, 520 (1922).

[122] Nor does it violate due process to deprive an employee or his dependents of the higher damages that, in some cases, might be rendered under these doctrines.

tween restricted recovery under a compensation law or full compensatory damages under the Employers' Liability Act, did not deprive an employer of his property without due process of law.[123] A variety of other statutory schemes have also been upheld.[124]

Even the imposition upon coal mine operators of the liability of compensating *former* employees who terminated work in the industry before passage of the law for black lung disabilities was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.[125] Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, *i.e.,* that the danger may not have been known or appreciated, or that actions might have been taken in reliance upon the current state of the law. Consequently, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster.

Collective Bargaining.—During the *Lochner* era, liberty of contract, as translated into what one Justice labeled the *Allgeyer-Lochner-Adair-Coppage* doctrine,[126] was used to strike down legislation cal-

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New York Central R.R. v. White, 243 U.S. 188 (1917); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

[123] *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919).

[124] Chicago, B. & Q. R.R. v. McGuire, 219 U.S. 549 (1911) (prohibiting contracts limiting liability for injuries and stipulating that acceptance of benefits under such contracts shall not constitute satisfaction of a claim); Alaska Packers Ass'n v. Industrial Accident Comm'n,, 294 U.S. 532 (1935) (forbidding contracts exempting employers hired-in-state from liability for injuries outside the state); Thornton v. Duffy, 254 U.S. 361 (1920) (required contribution to a state insurance fund by an employer even though employer had obtained protection from an insurance company under previous statutory scheme); Booth Fisheries v. Industrial Comm'n, 271 U.S. 208 (1926) (finding of fact of an industrial commission conclusive if supported by any evidence regardless of its preponderance, right to come under a workmen's compensation statute is optional with employer); Staten Island Ry. v. Phoenix Co., 281 U.S. 98 (1930) (wrongdoer is obliged to indemnify employer or the insurance carrier of the employer in the amount which the latter were required to contribute into special compensation funds); Sheehan Co. v. Shuler, 265 U.S. 371 (1924) (where an injured employee dies without dependents, employer or carrier required to make payments into special funds to be used for vocational rehabilitation or disability compensation of injured workers of other establishments); New York State Rys. v. Shuler, 265 U.S. 379 (1924) (same holding as above case); New York Cent. R.R. v. Bianc, 250 U.S. 596 (1919) (attorneys are not deprived of property or their liberty of contract by restriction imposed by the state on the fees they may charge in cases arising under the workmen's compensation law); Yeiser v. Dysart, 267 U.S. 540 (1925) (compensation need not be based exclusively on loss of earning power, and award authorized for injuries resulting in disfigurement of the face or head, independent of compensation for inability to work).

[125] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14–20 (1976). *But see* id. at 38 (Justice Powell concurring).

[126] Justice Black in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949). In his concurring opinion, contained in the companion case of AFL v. American Sash & Door Co., 335 U.S. 538, 543–44 (1949), Justice

culated to enhance the bargaining capacity of workers as against that already possessed by their employers.

[127] The Court did, however, on occasion sustain measures affecting the employment relationship, such as a statute requiring every corporation to furnish a departing employee a letter setting forth the nature and duration of the employee's service and the true cause for leaving.[128] In *Senn v. Tile Layers Union*,[129] however, the Court began to show a greater willingness to defer to legislative judgment as to the wisdom and need of such enactments.

The significance of *Senn* [130] was, in part, that the case upheld a statute that was not appreciably different from a statute voided five

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Frankfurter summarized the now obsolete doctrines employed by the Court to strike down state laws fostering unionization. "[U]nionization encountered the shibboleths of a premachine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of 'liberty' were equated with theories of *laissez faire*. The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. . . . The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage-earners' bargaining power. With that attitude as a premise, *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915), followed logically enough; not even *Truax v. Corrigan*, 257 U.S. 312 (1921), could be considered unexpected."

[127] In *Adair* and *Coppage* the Court voided statutes outlawing "yellow dog" contracts whereby, as a condition of obtaining employment, a worker had to agree not to join or to remain a member of a union; these laws, the Court ruled, impaired the employer's "freedom of contract"—the employer's unrestricted right to hire and fire. In *Truax*, the Court on similar grounds invalidated an Arizona statute which denied the use of injunctions to employers seeking to restrain picketing and various other communicative actions by striking employees. And in Wolff Packing Co. v. Industrial Court, 262 U.S. 522 (1923); 267 U.S. 552 (1925) and Dorchy v. Kansas, 264 U.S. 286 (1924), the Court had also ruled that a statute compelling employers and employees to submit their controversies over wages and hours to state arbitration was unconstitutional as part of a system compelling employers and employees to continue in business on terms not of their own making.

[128] Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922). Added provisions that such letters should be on plain paper selected by the employee, signed in ink and sealed, and free from superfluous figures and words, were also sustained as not amounting to any unconstitutional deprivation of liberty and property. Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922). In conjunction with its approval of this statute, the Court also sanctioned judicial enforcement of a local policy rule which rendered illegal an agreement of several insurance companies having a local monopoly of a line of insurance, to the effect that no company would employ within two years anyone who had been discharged from, or left, the service of any of the others. On the ground that the right to strike is not absolute, the Court in a similar manner upheld a statute under which a labor union official was punished for having ordered a strike for the purpose of coercing an employer to pay a wage claim of a former employee. Dorchy v. Kansas, 272 U.S. 306 (1926).

[129] 301 U.S. 486 (1937).

[130] 301 U.S. 468 (1937).

years earlier in *Truax v. Corrigan*.[131] In *Truax,* the Court had found that a statute forbidding injunctions on labor protest activities was unconstitutional as applied to a labor dispute involving picketing, libelous statements, and threats. The statute that the Court subsequently upheld in *Senn*, by contrast, authorized publicizing labor disputes, declared peaceful picketing and patrolling lawful, and prohibited the granting of injunctions against such conduct.[132] The difference between these statutes, according to the Court, was that the law in *Senn* applied to "peaceful" picketing only, whereas the law in *Truax* "was . . . applied to legalize conduct which was not simply peaceful picketing." Because the enhancement of job opportunities for members of the union was a legitimate objective, the state was held competent to authorize the fostering of that end by peaceful picketing, and the fact that the sustaining of the union in its efforts at peaceful persuasion might have the effect of preventing Senn from continuing in business as an independent entrepreneur was declared to present an issue of public policy exclusively for legislative determination.

Years later, after regulations protective of labor allowed unions to amass enormous economic power, many state legislatures attempted to control the abuse of this power, and the Court's newfound deference to state labor regulation was also applied to restrictions on unions. Thus, the Court upheld state prohibitions on racial discrimination by unions, rejecting claims that the measure interfered unlawfully with the union's right to choose its members, abridged its property rights, or violated its liberty of contract. Because the union "[held] itself out to represent the general business needs of employees" and functioned "under the protection of the State," the union was deemed to have forfeited the right to claim exemption from legislation protecting workers against discriminatory exclusion.[133]

Similarly, state laws outlawing closed shops were upheld in *Lincoln Federal Labor Union v. Northwestern Iron & Metal Company* [134] and *AFL v. American Sash & Door Co.*[135] When labor unions

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[131] 257 U.S. 312 (1921).

[132] The statute was applied to deny an injunction to a tiling contractor being picketed by a union because he refused to sign a closed shop agreement containing a provision requiring him to abstain from working in his own business as a tile layer or helper.

[133] Railway Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945). Justice Frankfurter, concurring, declared that "the insistence by individuals of their private prejudices . . . , in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." Id. at 98.

[134] 335 U.S. 525 (1949).

[135] 335 U.S. 538 (1949).

attempted to invoke freedom of contract, the Court, speaking through Justice Black, announced its refusal "to return . . . to . . . [a] due process philosophy that has been deliberately discarded. . . . The due process clause," it maintained, does not "forbid a State to pass laws clearly designed to safeguard the opportunity of nonunion workers to get and hold jobs, free from discrimination against them because they are nonunion workers." [136]

And, in *UAW v. WERB*,[137] the Court upheld the Wisconsin Employment Peace Act, which had been used to proscribe unfair labor practices by a union. In *UAW*, the union, acting after collective bargaining negotiations had become deadlocked, had attempted to coerce an employer through calling frequent, irregular, and unannounced union meetings during working hours, resulting in a slowdown in production. "No one," declared the Court, can question "the State's power to police coercion by . . . methods" that involve "considerable injury to property and intimidation of other employees by threats." [138]

Regulation of Business Enterprises: Price Controls

In examining whether the Due Process Clause allows the regulation of business prices, the Supreme Court, almost from the inception of the Fourteenth Amendment, has devoted itself to the examination of two questions: (1) whether the clause restricted such regulation to certain types of business, and (2) the nature of the regulation allowed as to those businesses.

Types of Businesses That May be Regulated.—For a brief interval following the ratification of the Fourteenth Amendment, the Supreme Court found the Due Process Clause to impose no substantive restraint on the power of states to fix rates chargeable by any

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[136] 335 U.S. at 534, 537. In a lengthy opinion, in which he registered his concurrence with both decisions, Justice Frankfurter set forth extensive statistical data calculated to prove that labor unions not only were possessed of considerable economic power but by virtue of such power were no longer dependent on the closed shop for survival. He would therefore leave to the legislatures the determination "whether it is preferable in the public interest that trade unions should be subjected to state intervention or left to the free play of social forces, whether experience has disclosed 'union unfair labor practices,' and if so, whether legislative correction is more appropriate than self-discipline and pressure of public opinion. . . ." Id. at 538, 549–50.

[137] 336 U.S. 245 (1949).

[138] 336 U.S. at 253. *See also* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (upholding state law forbidding agreements in restraint of trade as applied to union ice peddlers picketing wholesale ice distributor to induce the latter not to sell to nonunion peddlers). Other cases regulating picketing are treated under the First Amendment topics, "Picketing and Boycotts by Labor Unions" and "Public Issue Picketing and Parading," *supra*.

industry. Thus, in *Munn v. Illinois*,[139] the first of the "*Granger Cases*," maximum charges established by a state for Chicago grain elevator companies were challenged, not as being confiscatory in character, but rather as a regulation beyond the power of any state agency to impose.[140] The Court, in an opinion that was largely *dictum*, declared that the Due Process Clause did not operate as a safeguard against oppressive rates, and that, if regulation was permissible, the severity of it was within legislative discretion and could be ameliorated only by resort to the polls. Not much time elapsed, however, before the Court effected a complete withdrawal from this position, and by 1890[141] it had fully converted the Due Process Clause into a restriction on the power of state agencies to impose rates that, in a judge's estimation, were arbitrary or unreasonable. This state of affairs continued for more than fifty years.

Prior to 1934, unless a business was "affected with a public interest," control of its prices, rates, or conditions of service was viewed as an unconstitutional deprivation of liberty and property without due process of law. During the period of its application, however, the phrase, "business affected with a public interest," never acquired any precise meaning, and as a consequence lawyers were never able to identify all those qualities or attributes that invariably distinguished a business so affected from one not so affected. The most coherent effort by the Court was the following classification prepared by Chief Justice Taft:[142] "(1) Those [businesses] which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities. (2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament or Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. (3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public

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[139] 94 U.S. 113 (1877). *See also* Davidson v. New Orleans, 96 U.S. 97 (1878); Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877);

[140] The Court not only asserted that governmental regulation of rates charged by public utilities and allied businesses was within the states' police power, but added that the determination of such rates by a legislature was conclusive and not subject to judicial review or revision.

[141] Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890).

[142] Wolff Packing Co. v. Industrial Court, 262 U.S. 522, 535–36 (1923) (citations omitted).

that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest although the property continues to belong to its private owner and to be entitled to protection accordingly."

Through application of this formula, the Court sustained state laws regulating charges made by grain elevators,[143] stockyards,[144] and tobacco warehouses,[145] as well as fire insurance rates[146] and commissions paid to fire insurance agents.[147] The Court also voided statutes regulating business not "affected with a public interest," including state statutes fixing the price at which gasoline may be sold,[148] regulating the prices for which ticket brokers may resell theater tickets,[149] and limiting competition in the manufacture and sale of ice through the withholding of licenses to engage in such business.[150]

In the 1934 case of *Nebbia v. New York*,[151] however, the Court finally shelved the concept of "a business affected with a public interest,"[152] upholding, by a vote of five-to-four, a depression-induced New York statute fixing fluid milk prices. "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted

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[143] Munn v. Illinois, 94 U.S. 113 (1877); Budd v. New York, 143 U.S. 517, 546 (1892); Brass v. North Dakota ex rel. Stoesser, 153 U.S. 391 (1894).

[144] Cotting v. Kansas City Stock Yards Co., 183 U.S. 79 (1901).

[145] Townsend v. Yeomans, 301 U.S. 441 (1937).

[146] German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); Aetna Insurance Co. v. Hyde, 275 U.S. 440 (1928).

[147] O'Gorman & Young v. Hartford Ins. Co., 282 U.S. 251 (1931).

[148] Williams v. Standard Oil Co., 278 U.S. 235 (1929).

[149] Tyson & Bro. v. Banton, 273 U.S. 418 (1927).

[150] New State Ice Co. v. Liebmann, 285 U.S. 262 (1932). *See also* Adams v. Tanner, 244 U.S. 590 (1917); Weaver v. Palmer Bros., 270 U.S. 402 (1926).

[151] 291 U.S. 502 (1934).

[152] In reaching this conclusion the Court might be said to have elevated to the status of prevailing doctrine the views advanced in previous decisions by dissenting Justices. Thus, Justice Stone, dissenting in Ribnik v. McBride, 277 U.S. 350, 359–60 (1928), had declared: "Price regulation is within the State's power whenever any combination of circumstances seriously curtails the regulative force of competition so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole." In his dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262, 302–03 (1932), Justice Brandeis had also observed: "The notion of a distinct category of business 'affected with a public interest' employing property 'devoted to a public use,' rests upon historical error. . . . In my opinion, the true principle is that the State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible."

interference with individual liberty." [153] Conceding that "the dairy industry is not, in the accepted sense of the phrase, a public utility," that is, a business "affected with a public interest", the Court in effect declared that price control is to be viewed merely as an exercise by the government of its police power, and as such is subject only to the restrictions that due process imposes on arbitrary interference with liberty and property. "The due process clause makes no mention of sales or of prices. . . ." [154]

Having thus concluded that it is no longer the nature of the business that determines the validity of a price regulation, the Court had little difficulty in upholding a state law prescribing the maximum commission that private employment agencies may charge. Rejecting contentions that the need for such protective legislation had not been shown, the Court, in *Olsen v. Nebraska ex rel. Western Reference and Bond Ass'n* [155] held that differences of opinion as to the wisdom, need, or appropriateness of the legislation "suggest a choice which should be left to the States;" and that there was "no necessity for the State to demonstrate before us that evils persist despite the competition" between public, charitable, and private employment agencies.[156]

Substantive Review of Price Controls.—Ironically, private businesses, once they had been found subject to price regulation, seemed to have less protection than public entities. Thus, unlike operators of public utilities who, in return for a government grant of virtually monopolistic privileges must provide continuous service, proprietors of other businesses receive no similar special advantages and accordingly are unrestricted in their right to liquidate and close. Owners of ordinary businesses, therefore, are at liberty to escape the consequences of publicly imposed charges by dissolution, and

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[153] 291 U.S. at 502. Older decisions overturning price regulation were now viewed as resting upon this basis, *i.e.*, that due process was violated because the laws were arbitrary in their operation and effect.

[154] 291 U.S. at 531, 532. Justice McReynolds, dissenting, labeled the controls imposed by the challenged statute as a "fanciful scheme . . . to protect the farmer against undue exactions by prescribing the price at which milk disposed of by him at will may be resold!" 291 U.S. at 558. Intimating that the New York statute was as efficacious as a safety regulation that required "householders to pour oil on their roofs as a means of curbing the spread of fire when discovered in the neighborhood," Justice McReynolds insisted that "this Court must have regard to the wisdom of the enactment," and must "decide whether the means proposed have reasonable relation to something within legislative power." 291 U.S. at 556.

[155] 313 U.S. 236, 246 (1941).

[156] The older case of Ribnik v. McBride, 277 U.S. 350 (1928), which had invalidated similar legislation upon the now obsolete concept of a "business affected with a public interest," was expressly overruled. Adams v. Tanner, 244 U.S. 590 (1917), was disapproved in Ferguson v. Skrupa, 372 U.S. 726 (1963), and Tyson & Bro. v. Banton, 273 U.S. 418 (1927), was effectively overruled in Gold v. DiCarlo, 380 U.S. 520 (1965), without the Court's hearing argument on it.

have been found less in need of protection through judicial review. Thus, case law upholding challenges to price controls deals predominantly with governmentally imposed rates and charges for public utilities.

In 1886, Chief Justice Waite, in the *Railroad Commission Cases*,[157] warned that the "power to regulate is not a power to destroy, and . . . the State cannot . . . do that which in law amounts to a taking of property for public use without just compensation, or without due process of law." In other words, a confiscatory rate could not be imposed by government on a regulated entity. By treating "due process of law" and "just compensation" as equivalents,[158] the Court was in effect asserting that the imposition of a rate so low as to damage or diminish private property ceased to be an exercise of a state's police power and became one of eminent domain. Nevertheless, even this doctrine proved inadequate to satisfy public utilities, as it allowed courts to intervene only to prevent imposition of a confiscatory rate, *i.e.,* a rate so low as to be productive of a loss and to amount to taking of property without just compensation. The utilities sought nothing less than a judicial acknowledgment that courts could review the "reasonableness" of legislative rates.

Although as late as 1888 the Court doubted that it possessed the requisite power to challenge this doctrine,[159] it finally acceded to the wishes of the utilities in 1890 in *Chicago, M. & St. P. Railway v. Minnesota*.[160] In this case, the Court ruled that "[t]he question of the reasonableness of a rate . . . , involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law. . . ."

Although the Court made a last-ditch attempt to limit the ruling of *Chicago, M. & St. P. Railway v. Minnesota* to rates fixed by a commission as opposed to rates imposed by a legislature,[161] the Court in *Reagan v. Farmers' Loan & Trust Co.*[162] finally removed

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[157] 116 U.S. 307, 331 (1886).

[158] This was contrary to its earlier holding in Davidson v. New Orleans, 96 U.S. 97 (1877).

[159] Dow v. Beidelman, 125 U.S. 680 (1888).

[160] 134 U.S. 418, 458 (1890).

[161] Budd v. New York, 143 U.S. 517 (1892).

[162] 154 U.S. 362 (1894).

all lingering doubts over the scope of judicial intervention. In *Reagan*, the Court declared that, "if a carrier . . . attempted to charge a shipper an unreasonable sum," the Court, in accordance with common law principles, would pass on the reasonableness of its rates, and has "jurisdiction . . . to award the shipper any amount exacted . . . in excess of a reasonable rate . . . . The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates." [163] Reiterating virtually the same principle in *Smyth v. Ames*,[164] the Court not only obliterated the distinction between confiscatory and unreasonable rates but contributed the additional observation that the requirements of due process are not met unless a court further determines whether the rate permits the utility to earn a fair return on a fair valuation of its investment.

Early Limitations on Review.—Even while reviewing the reasonableness of rates, the Court recognized some limits on judicial review. As early as 1894, the Court asserted that "[t]he courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates . . . is unjust and unreasonable, . . . and if found so to be, to

[163] 154 U.S. at 397. Insofar as judicial intervention resulting in the invalidation of legislatively imposed rates has involved carriers, it should be noted that the successful complainant invariably has been the carrier, not the shipper.

[164] 169 U.S. 466 (1898). Of course the validity of rates prescribed by a State for services wholly within its limits must be determined wholly without reference to the interstate business done by a public utility. Domestic business should not be made to bear the losses on interstate business and vice versa. Thus a state has no power to require the hauling of logs at a loss or at rates that are unreasonable, even if a railroad receives adequate revenues from the intrastate long haul and the interstate lumber haul taken together. On the other hand, in determining whether intrastate passenger railway rates are confiscatory, all parts of the system within the state (including sleeping, parlor, and dining cars) should be embraced in the computation, and the unremunerative parts should not be excluded because built primarily for interstate traffic or not required to supply local transportation needs. *See* Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 434–35 (1913); Chicago, M. & St. P. Ry. v. Public Util. Comm'n, 274 U.S. 344 (1927); Groesbeck v. Duluth, S.S. & A. Ry., 250 U.S. 607 (1919). The maxim that a legislature cannot delegate legislative power is qualified to permit creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. To prevent a holding of invalid delegation of legislative power, the legislature must constrain the board with a certain course of procedure and certain rules of decision in the performance of its functions, with which the agency must substantially comply to validate its action. Wichita R.R. v. Public Util. Comm'n, 260 U.S. 48 (1922).

restrain its operation." [165] One can also infer from these early holdings a distinction between unreviewable fact questions that relate only to the wisdom or expediency of a rate order, and reviewable factual determinations that bear on a commission's power to act.[166]

Further, the Court placed various obstacles in the path of the complaining litigant. Thus, not only must a person challenging a rate assume the burden of proof,[167] but he must present a case of "manifest constitutional invalidity." [168] And, if, notwithstanding this effort, the question of confiscation remains in doubt, no relief will be granted.[169] Moreover, even the Court was inclined to withhold judgment on the application of a rate until its practical effect could be surmised.[170]

In the course of time this distinction solidified. Thus, the Court initially adopted the position that it would not disturb findings of fact insofar as such findings were supported by substantial evidence. For instance, in *San Diego Land Company v. National City*,[171] the Court declared that "the courts cannot, after [a legislative body] has fairly and fully investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. . . . [J]udicial interference should never occur unless the case presents, clearly and beyond all doubt, such a fla-

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[165] Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 397 (1894). And later, in 1910, the Court made a similar observation that courts may not, "under the guise of exerting judicial power, usurp merely administrative functions by setting aside" an order of the commission merely because such power was unwisely or expediently exercised. ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910). This statement, made in the context of federal ratemaking, appears to be equally applicable to judicial review of state agency actions.

[166] This distinction was accorded adequate emphasis by the Court in Louisville & Nashville R.R. v. Garrett, 231 U.S. 298, 310–13 (1913), in which it declared that "the appropriate question for the courts" is simply whether a "commission," in establishing a rate, "acted within the scope of its power" and did not violate "constitutional rights . . . by imposing confiscatory requirements." The carrier contesting the rate was not entitled to have a court also pass upon a question of fact regarding the reasonableness of a higher rate the carrier charged prior to the order of the commission. All that need concern a court, it said, is the fairness of the proceeding whereby the commission determined that the existing rate was excessive, but not the expediency or wisdom of the commission's having superseded that rate with a rate regulation of its own.

[167] Des Moines Gas Co. v. Des Moines, 238 U.S. 153 (1915).

[168] Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 452 (1913).

[169] Knoxville v. Water Co., 212 U.S. 1 (1909).

[170] Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909). However, a public utility that has petitioned a commission for relief from allegedly confiscatory rates need not await indefinitely for the commission's decision before applying to a court for equitable relief. Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926).

[171] 174 U.S. 739, 750, 754 (1899). *See also* Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 433 (1913).

grant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." And, later, in a similar case,[172] the Court expressed even more clearly its reluctance to reexamine ordinary factual determinations, writing, "we do not feel bound to reexamine and weigh all the evidence . . . or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached." [173]

These standards of review were, however, abruptly rejected by the Court in *Ohio Valley Water Co. v. Ben Avon Borough* [174] as being no longer sufficient to satisfy the requirements of due process, ushering in a long period during which courts substantively evaluated the reasonableness of rate settings. The U.S. Supreme Court in *Ben Avon* concluded that the Pennsylvania "Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment . . . ." [175] Largely on the strength of this interpretation of the applicable state statute, the Court held that, when the order

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[172] San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 441, 442 (1903). *See also* Van Dyke v. Geary, 244 U.S. 39 (1917); Georgia Ry. v. Railroad Comm'n, 262 U.S. 625, 634 (1923).

[173] Moreover, in reviewing orders of the Interstate Commerce Commission, the Court, at least in earlier years, chose to be guided by approximately the same standards it had originally formulated for examining regulations of state commissions. The following excerpt from its holding in ICC v. Union Pacific R.R., 222 U.S. 541, 547–48 (1912) represents an adequate summation of the law as it stood prior to 1920: "[Q]uestions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that . . . the rate is so low as to be confiscatory . . . ; or if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or . . . if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling . . . [The Commission's] conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision . . . can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *See also* ICC v. Illinois Cent. R.R., 215 U.S. 452, 470 (1910).

[174] 253 U.S. 287 (1920).

[175] 253 U.S. at 289 (the "question of confiscation" was the question whether the rates set by the Public Service Commission were so low as to constitute confiscation). Unlike previous confiscatory rate litigation, which had developed from rulings of lower federal courts in injunctive proceedings, this case reached the Supreme Court by way of appeal from a state appellate tribunal. In injunctive proceedings, evidence is freshly introduced, whereas in the cases received on appeal from state courts, the evidence is found within the record.

of a legislature, or of a commission, prescribing a schedule of maximum future rates is challenged as confiscatory, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." [176]

History of the Valuation Question.—For almost fifty years the Court wandered through a maze of conflicting formulas and factors for valuing public service corporation property, including "fair value," [177] "reproduction cost," [178] "prudent investment," [179] "depreciation," [180] "going concern value and good will," [181] "salvage value," [182]

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[176] 253 U.S. at 289. Without departing from the ruling previously enunciated in Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298 (1913), that the failure of a state to grant a statutory right of judicial appeal from a commission's regulation does not violate due process as long as relief is obtainable by a bill in equity for injunction, the Court also held that the alternative remedy of injunction expressly provided by state law did not afford an adequate opportunity for testing a confiscatory rate order. It conceded the principle stressed by the dissenting Justices that, "[w]here a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review." 253 U.S. at 295.

[177] Smyth v. Ames, 169 U.S. 466, 546–47 (1898) ("fair value" necessitated consideration of original cost of construction, permanent improvements, amount and market value of bonds and stock, replacement cost, probable earning capacity, and operating expenses).

[178] Various valuation cases emphasized reproduction costs, *i.e.*, the present as compared with the original cost of construction. *See*, *e.g.*, San Diego Land Co. v. National City, 174 U.S. 739, 757 (1899); San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 443 (1903).

[179] Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291–92, 302, 306–07 (1923) (Brandeis, J., concurring) (cost includes both operating expenses and capital charges, *i.e.*, interest for the use of capital, allowance for the risk incurred, funds to attract capital). This method would require "adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return." As a method of valuation, the prudent investment theory was not accorded any acceptance until the Depression of the 1930s. The sharp decline in prices that occurred during this period doubtless contributed to the loss of affection for reproduction costs. In Los Angeles Gas Co. v. Railroad Comm'n, 289 U.S. 287 (1933) and Railroad Comm'n v. Pacific Gas Co., 302 U.S. 388, 399, 405 (1938), the Court upheld respectively a valuation from which reproduction costs had been excluded and another in which historical cost served as the rate base.

[180] Knoxville v. Water Co., 212 U.S. 1, 9–10 (1909) (considering depreciation as part of cost). Notwithstanding its early recognition as an allowable item of deduction in determining value, depreciation continued to be the subject of controversy arising out of the difficulty of ascertaining it and of computing annual allowances to cover the same. Indicative of such controversy was the disagreement as to whether annual allowances shall be in such amount as will permit the replacement of equipment at current costs, *i.e.*, present value, or at original cost. In the FPC v. Hope Natural Gas Co. case, 320 U.S. 591, 606 (1944), the Court reversed United Railways v. West, 280 U.S. 234, 253–254 (1930), insofar as that holding rejected original cost as the basis of annual depreciation allowances.

and "past losses and gains," [183] only to emerge from this maze in 1944 at a point not very far removed from *Munn v. Illinois* and its deference to rate-making authorities.[184] By holding in *FPC v. Natural Gas Pipeline Co.*[185] that "[t]he Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas," and in *FPC v. Hope Natural Gas Co.*[186] that "it is the result reached not the method employed which is controlling, . . . [that] [i]t is not the theory but the impact of the rate order which counts, [and that] [i]f the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end," the Court, in effect, abdicated from the position assumed in the *Ben Avon* case.[187] Without surrendering the judicial power to declare rates unconstitutional on the basis of a substantive deprivation of due process,[188] the Court announced that it would

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[181] Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 165 (1915) (finding "going concern value" in an assembled and established plant, doing business and earning money, over one not thus advanced). Franchise value and good will, on the other hand, have been consistently excluded from valuation; the latter presumably because a utility invariably enjoys a monopoly and consumers have no choice in the matter of patronizing it. The latter proposition has been developed in the following cases: Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909); Des Moines Gas Co. v. Des Moines, 238 U.S. 153, 163–64 (1915); Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922); Los Angeles Gas Co. v. Railroad Comm'n, 289 U.S. 287, 313 (1933).

[182] Market Street Ry. v. Railroad Comm'n, 324 U.S. 548, 562, 564 (1945) (where a street-surface railroad had lost all value except for scrap or salvage it was permissible for a commission to consider the price at which the utility offered to sell its property to a citizen); Denver v. Denver Union Water Co., 246 U.S. 178 (1918) (where water company franchise has expired, but where there is no other source of supply, its plant should be valued as actually in use rather than at what the property would bring for some other use in case the city should build its own plant).

[183] FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942) ("The Constitution [does not] require that the losses of . . . [a] business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned"). Nor can past losses be used to enhance the value of the property to support a claim that rates for the future are confiscatory. Galveston Elec. Co. v. Galveston, 258 U.S. 388 (1922), any more than profits of the past can be used to sustain confiscatory rates for the future Newton v. Consolidated Gas Co., 258 U.S. 165, 175 (1922); Board of Comm'rs v. New York Tel. Co., 271 U.S. 23, 31–32 (1926).

[184] 94 U.S. 113 (1877).

[185] 315 U.S. 575, 586 (1942).

[186] 320 U.S. 591, 602 (1944). Although this and the previously cited decision arose out of controversies involving the National Gas Act of 1938, the principles laid down therein are believed to be applicable to the review of rate orders of state commissions, except insofar as the latter operate in obedience to laws containing unique standards or procedures.

[187] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

[188] In FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 599 (1942), Justices Black, Douglas, and Murphy, in a concurring opinion, proposed to travel the road all the way back to Munn v. Illinois, and deprive courts of the power to void rates simply because they deem the latter to be unreasonable. In a concurring opinion, in Driscoll v. Edison Co., 307 U.S. 104, 122 (1939), Justice Frankfurter temporarily adopted a similar position; he declared that "[t]he only relevant function of law [in rate contro-

not overturn a result it deemed to be just simply because "the method employed [by a commission] to reach that result may contain infirmities. . . . [A] Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order . . . carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." [189]

In dispensing with the necessity of observing the old formulas for rate computation, the Court did not articulate any substitute guidance for ascertaining whether a so-called end result is unreasonable. It did intimate that rate-making "involves a balancing of the investor and consumer interests," which does not, however, " 'insure that the business shall produce net revenues.' . . . From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." [190]

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versies] . . . is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process." However, in his dissent in FPC v. Hope Natural Gas Co., 320 U.S. 591, 625 (1944), he disassociated himself from this proposal, and asserted that "it was decided more than fifty years ago that the final say under the Constitution lies with the judiciary and not the legislature. Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U.S. 418 [1890]."

[189] FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944). *See also* Wisconsin v. FPC, 373 U.S. 294, 299, 317, 326 (1963), in which the Court tentatively approved an "area rate approach," that is "the determination of fair prices for gas, based on reasonable financial requirements of the industry, for . . . the various producing areas of the country," and with rates being established on an area basis rather than on an individual company basis. Four dissenters, Justices Clark, Black, Brennan, and Chief Justice Warren, labeled area pricing a "wild goose chase," and stated that the Commission had acted in an arbitrary and unreasonable manner entirely outside traditional concepts of administrative due process. Area rates were approved in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

The Court reaffirmed *Hope Natural Gas's* emphasis on the bottom line: "The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public." Duquesne Light Co. v. Barasch, 488 U.S. 299, 316 (1989) (rejecting takings challenge to Pennsylvania rule preventing utilities from amortizing costs of canceled nuclear plants).

[190] FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944) (citing Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345–46 (1892); and Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291 (1923)).

Regulation of Public Utilities and Common Carriers

In General.—Because of the nature of the business they carry on and the public's interest in it, public utilities and common carriers are subject to state regulation, whether exerted directly by legislatures or under authority delegated to administrative bodies.[191] But because the property of these entities remains under the full protection of the Constitution, it follows that due process is violated when the state regulates in a manner that infringes the right of ownership in what the Court considers to be an "arbitrary" or "unreasonable" way.[192] Thus, when a street railway company lost its franchise, the city could not simply take possession of its equipment,[193] although it could subject the company to the alternative of accepting an inadequate price for its property or of ceasing operations and removing its property from the streets.[194] Likewise, a city wanting to establish a lighting system of its own may not remove, without compensation, the fixtures of a lighting company already occupying the streets under a franchise,[195] although a city may compete with a company that has no exclusive charter.[196] However, a municipal ordinance that demanded, as a condition for placing poles and conduits in city streets, that a telegraph company carry the city's wires free of charge, and that required that conduits be moved at company expense, was constitutional.[197]

And, the fact that a state, by mere legislative or administrative fiat, cannot convert a private carrier into a common carrier will not protect a foreign corporation that has elected to enter a state that requires that it operate its local private pipe line as a common carrier. Such a foreign corporation is viewed as having waived its constitutional right to be secure against the imposition of conditions that amount to a taking of property without due process of law.[198]

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[191] Atlantic Coast Line R.R. v. Corporation Comm'n, 206 U.S. 1, 19 (1907) (citing Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877)). *See also* Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) ; Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919).

[192] Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 344 (1892); Mississippi R.R. Comm'n v. Mobile & Ohio R.R., 244 U.S. 388, 391 (1917). *See also* Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935).

[193] Cleveland Electric Ry. v. Cleveland, 204 U.S. 116 (1907).

[194] Detroit United Ry. v. Detroit, 255 U.S. 171 (1921). *See also* Denver v. New York Trust Co., 229 U.S. 123 (1913).

[195] Los Angeles v. Los Angeles Gas Corp., 251 U.S. 32 (1919).

[196] Newburyport Water Co. v. City of Newburyport, 193 U.S. 561 (1904). *See also* Skaneateles Water Co. v. Village of Skaneateles, 184 U.S. 354 (1902); Helena Water Works Co. v. Helena, 195 U.S. 383 (1904); Madera Water Works v. City of Madera, 228 U.S. 454 (1913).

[197] Western Union Tel. Co. v. Richmond, 224 U.S. 160 (1912).

[198] Pierce Oil Corp. v. Phoenix Ref. Co., 259 U.S. 125 (1922).

Compulsory Expenditures: Grade Crossings, and the Like.—Generally, the enforcement of uncompensated obedience to a regulation for the public health and safety is not an unconstitutional taking of property in violation of due process.[199] Thus, where a water company laid its lines on an ungraded street, and the applicable rule at the time of the granting of its charter compelled the company to furnish connections at its own expense to one residing on such a street, due process is not violated.[200] Or, where a gas company laid its pipes under city streets, it may validly be obligated to assume the cost of moving them to accommodate a municipal drainage system.[201] Or, railroads may be required to help fund the elimination of grade crossings, even though commercial highway users, who make no contribution whatsoever, benefit from such improvements.

Although the power of the state in this respect is not unlimited, and an "arbitrary" and "unreasonable" imposition on these businesses may be set aside, the Court's modern approach to substantive due process analysis makes this possibility far less likely than it once was. For instance, a 1935 case invalidated a requirement that railroads share 50% of the cost of grade separation, irrespective of the value of such improvements to the railroad, suggesting that railroads could not be required to subsidize competitive transportation modes.[202] But in 1953 the Court distinguished this case, ruling that the costs of grade separation improvements need not be

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[199] Norfolk Turnpike Co. v. Virginia, 225 U.S. 264 (1912) (requiring a turnpike company to suspend tolls until the road is put in good order does not violate due process of law, notwithstanding that present patronage does not yield revenue sufficient to maintain the road in proper condition); International Bridge Co. v. New York, 254 U.S. 126 (1920) (in the absence of proof that the addition will not yield a reasonable return, a railroad bridge company is not deprived of its property when it is ordered to widen its bridge by inclusion of a pathway for pedestrians and a roadway for vehicles.); Chicago, B. & Q. R.R. v. Nebraska, 170 U.S. 57 (1898) (railroads may be required to repair viaduct under which they operate); Chicago, B. & Q. Ry. v. Drainage Comm'n, 200 U.S. 561 (1906) (reconstruct a bridge or provide means for passing water for drainage through their embankment); Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67 (1915) (drainage requirements); Lake Shore & Mich. So. Ry. v. Clough, 242 U.S. 375 (1917) (drainage requirements); Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919) (requirement to sprinkle street occupied by railroad.). *But see* Chicago, St. P., Mo. & O. Ry. v. Holmberg, 282 U.S. 162 (1930) (due process violated by a requirement that an underground cattle-pass is be constructed, not as a safety measure but as a convenience to farmers).

[200] Consumers' Co. v. Hatch, 224 U.S. 148 (1912). However, if pipe and telephone lines are located on a right of way owned by a pipeline company, the latter cannot, without a denial of due process, be required to relocate such equipment at its own expense. Panhandle Eastern Pipeline Co. v. Highway Comm'n, 294 U.S. 613 (1935).

[201] New Orleans Gas Co. v. Drainage Comm'n, 197 U.S. 453 (1905).

[202] Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). *See also* Lehigh Valley R.R. v. Commissioners, 278 U.S. 24, 35 (1928) (upholding imposition of grade

allocated solely on the basis of benefits that would accrue to railroad property.[203] Although the Court cautioned that "allocation of costs must be fair and reasonable," it was deferential to local governmental decisions, stating that, in the exercise of the police power to meet transportation, safety, and convenience needs of a growing community, "the cost of such improvements *may be* allocated all to the railroads."[204]

Compellable Services.—A state may require that common carriers such as railroads provide services in a manner suitable for the convenience of the communities they serve.[205] Similarly, a primary duty of a public utility is to serve all those who desire the service it renders, and so it follows that a company cannot pick and choose to serve only those portions of its territory that it finds most profitable. Therefore, compelling a gas company to continue serving specified cities as long as it continues to do business in other parts of the state does not constitute an unconstitutional deprivation.[206] Likewise, requiring a railway to continue the service of a branch or part of a line is acceptable, even if that portion of the operation is an economic drain.[207] A company, however, cannot be compelled to operate its franchise at a loss, but must be at liberty to surrender it and discontinue operations.[208]

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crossing costs on a railroad although "near the line of reasonableness," and reiterating that "unreasonably extravagant" requirements would be struck down).

[203] Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953).

[204] 346 U.S. at 352.

[205] Atchison, T. & S. F. Ry. v. Public Utility Comm'n, 346 U.S. at 394–95 (1953). *See* Minneapolis & St. L. R.R. v. Minnesota, 193 U.S. 53 (1904) (obligation to establish stations at places convenient for patrons); Gladson v. Minnesota, 166 U.S. 427 (1897) (obligation to stop all their intrastate trains at county seats); Missouri Pac. Ry. v. Kansas, 216 U.S. 262 (1910) (obligation to run a regular passenger train instead of a mixed passenger and freight train); Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603 (1917) (obligation to furnish passenger service on a branch line previously devoted exclusively to carrying freight); Lake Erie & W.R.R. v. Public Util. Comm'n, 249 U.S. 422 (1919) (obligation to restore a siding used principally by a particular plant but available generally as a public track, and to continue, even though not profitable by itself, a sidetrack); Western & Atlantic R.R. v. Public Comm'n, 267 U.S. 493 (1925) (same); Alton R.R. v. Illinois Commerce Comm'n, 305 U.S. 548 (1939) (obligation for upkeep of a switch track leading from its main line to industrial plants.). *But see* Missouri Pacific Ry. v. Nebraska, 217 U.S. 196 (1910) (requirement, without indemnification, to install switches on the application of owners of grain elevators erected on right-of-way held void).

[206] United Gas Co. v. Railroad Comm'n, 278 U.S. 300, 308–09 (1929). *See also* New York *ex rel.* Woodhaven Gas Light Co. v. Public Serv. Comm'n, 269 U.S. 244 (1925); New York & Queens Gas Co. v. McCall, 245 U.S. 345 (1917).

[207] Missouri Pacific Ry. v. Kansas, 216 U.S. 262 (1910); Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603 (1917); Fort Smith Traction Co. v. Bourland, 267 U.S. 330 (1925).

[208] Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603, 607 (1917); Brooks-Scanlon Co. v. Railroad Comm'n, 251 U.S. 396 (1920); Railroad Comm'n v.

As the standard for regulation of a utility is whether a particular directive is reasonable, the question of whether a state order requiring the provision of services is reasonable could include a consideration of the likelihood of pecuniary loss, the nature, extent and productiveness of the carrier's intrastate business, the character of the service required, the public need for it, and its effect upon service already being rendered.[209] An example of the kind of regulation where the issue of reasonableness would require an evaluation of numerous practical and economic factors is one that requires railroads to lay tracks and otherwise provide the required equipment to facilitate the connection of separate track lines.[210]

Generally, regulation of a utility's service to commercial customers attracts less scrutiny[211] than do regulations intended to facilitate the operations of a competitor,[212] and governmental power to

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Eastern Tex. R.R., 264 U.S. 79 (1924); Broad River Co. v. South Carolina ex rel. Daniel, 281 U.S. 537 (1930).

[209] Chesapeake & Ohio Ry. v. Public Serv. Comm'n, 242 U.S. 603, 607 (1917).

[210] "Since the decision in Wisconsin, M. & P.R. Co. v. Jacobson, 179 U.S. 287 (1900), there can be no doubt of the power of a state, acting through an administrative body, to require railroad companies to make track connections. But manifestly that does not mean that a Commission may compel them to build branch lines, so as to connect roads lying at a distance from each other; nor does it mean that they may be required to make connections at every point where their tracks come close together in city, town and country, regardless of the amount of business to be done, or the number of persons who may use the connection if built. The question in each case must be determined in the light of all the facts and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. . . . If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' . . . Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the Court must consider all the facts—the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier." Washington ex rel. Oregon R.R. & Nav. Co. v. Fairchild, 224 U.S. 510, 528–29 (1912). *See also* Michigan Cent. R.R. v. Michigan R.R. Comm'n, 236 U.S. 615 (1915); Seaboard Air Line R.R. v. Georgia R.R. Comm'n, 240 U.S. 324, 327 (1916).

[211] Due process is not denied when two carriers, who wholly own and dominate a small connecting railroad, are prohibited from exacting higher charges from shippers accepting delivery over said connecting road than are collected from shippers taking delivery at the terminals of said carriers. Chicago, M. & St. P. Ry. v. Minneapolis Civic Ass'n, 247 U.S. 490 (1918). Nor are railroads denied due process when they are forbidden to exact a greater charge for a shorter distance than for a longer distance. Louisville & Nashville R.R. v. Kentucky, 183 U.S. 503, 512 (1902); Missouri Pacific Ry. v. McGrew Coal Co., 244 U.S. 191 (1917). Nor is it "unreasonable" or "arbitrary" to require a railroad to desist from demanding advance payment on merchandise received from one carrier while it accepts merchandise of the same character at the same point from another carrier without such prepayment. Wadley Southern Ry. v. Georgia, 235 U.S. 651 (1915).

[212] Although a carrier is under a duty to accept goods tendered at its station, it cannot be required, upon payment simply for the service of carriage, to accept cars

regulate in the interest of safety has long been conceded.[213] Requirements for service having no substantial relation to a utility's regulated function, however, have been voided, such as requiring railroads to maintain scales to facilitate trading in cattle, or prohibiting letting down an unoccupied upper berth on a rail car while the lower berth was occupied.[214]

Imposition of Statutory Liabilities and Penalties Upon Common Carriers.—Legislators have considerable latitude to impose legal burdens upon common carriers, as long as the carriers are not precluded from shifting such burdens. Thus, a statute may make an initial rail carrier,[215] or the connecting or delivering carrier,[216] liable to the shipper for the nondelivery of goods which results from the fault of another, as long as the carrier has a subrogated right to proceed against the carrier at fault. Similarly, a railroad may be held responsible for damages to the owner of property injured by fire caused by locomotive engines, as the statute also granted the railroad an insurable interest in such property along its route, allowing the railroad to procure insurance against such liability.[217]

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offered at an arbitrary connection point near its terminus by a competing road seeking to reach and use the former's terminal facilities. Nor may a carrier be required to deliver its cars to connecting carriers without adequate protection from loss or undue detention or compensation for their use. Louisville & Nashville R.R. v. Stock Yards Co., 212 U.S. 132 (1909). But a carrier may be compelled to interchange its freight cars with other carriers under reasonable terms, Michigan Cent. R.R. v. Michigan R.R. Comm'n, 236 U.S. 615 (1915), and to accept cars already loaded and in suitable condition for reshipment over its lines to points within the state. Chicago, M. & St. P. Ry. v. Iowa, 233 U.S. 334 (1914).

[213] The following cases all concern the operation of railroads: Railroad Co. v. Richmond, 96 U.S. 521 (1878) (prohibition against operation on certain streets); Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548 (1914) (restrictions on speed and operations in business sections); Great Northern Ry. v. Minnesota ex rel. Clara City, 246 U.S. 434 (1918) (restrictions on speed and operations in business section); Denver & R.G. R.R. v. Denver, 250 U.S. 241 (1919) (or removal of a track crossing at a thoroughfare); Nashville, C. & St. L. Ry. v. White, 278 U.S. 456 (1929) (compelling the presence of a flagman at a crossing notwithstanding that automatic devices might be cheaper and better); Nashville, C. & St. L. Ry. v. Alabama, 128 U.S. 96 (1888) (compulsory examination of employees for color blindness); Chicago, R.I. & P. Ry. v. Arkansas, 219 U.S. 453 (1911) (full crews on certain trains); St. Louis I. Mt. & So. Ry. v. Arkansas, 240 U.S. 518 (1916) (same); Missouri Pacific R.R. v. Norwood, 283 U.S. 249 (1931) (same); Firemen v. Chicago, R.I. & P.R.R., 393 U.S. 129 (1968) (same); Atlantic Coast Line R.R. v. Georgia, 234 U.S. 280 (1914) (specification of a type of locomotive headlight); Erie R.R. v. Solomon, 237 U.S. 427 (1915) (safety appliance regulations); New York, N.H. & H. R.R. v. New York, 165 U.S. 628 (1897) (prohibition on the heating of passenger cars from stoves or furnaces inside or suspended from the cars).

[214] Chicago, M. & St. P. R.R. v. Wisconsin, 238 U.S. 491 (1915).

[215] Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922). *See also* Yazoo & M.V.R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); *cf.* Adams Express Co. v. Croninger, 226 U.S. 491 (1913).

[216] Atlantic Coast Line R.R. v. Glenn, 239 U.S. 388 (1915).

[217] St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1 (1897).

Equally consistent with the requirements of due process are enactments imposing on all common carriers a penalty for failure to settle claims for freight lost or damaged in shipment within a reasonable specified period.[218]

The Court has, however, established some limits on the imposition of penalties on common carriers. During the *Lochner* era, the Court invalidated an award of $500 in liquidated damages plus reasonable attorney's fees imposed on a carrier that had collected transportation charges in excess of established maximum rates as disproportionate. The Court also noted that the penalty was exacted under conditions not affording the carrier an adequate opportunity to test the constitutionality of the rates before liability attached.[219] Where the carrier did have an opportunity to challenge the reasonableness of the rate, however, the Court indicated that the validity of the penalty imposed need not be determined by comparison with the amount of the overcharge. Inasmuch as a penalty is imposed as punishment for violation of law, the legislature may adjust its amount to the public wrong rather than the private injury, and the only limitation which the Fourteenth Amendment imposes is that the penalty prescribed shall not be "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable." [220]

Regulation of Businesses, Corporations, Professions, and Trades

Generally.—States may impose significant regulations on businesses without violating due process. "The Constitution does not guar-

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[218] Chicago & N.W. Ry. v. Nye Schneider Fowler Co., 260 U.S. 35 (1922) (penalty imposed if claimant subsequently obtained by suit more than the amount tendered by the railroad). *But see* Kansas City Ry. v. Anderson, 233 U.S. 325 (1914) (levying double damages and an attorney's fee upon a railroad for failure to pay damage claims only where the plaintiff had not demanded more than he recovered in court); St. Louis, I. Mt. & So. Ry. v. Wynne, 224 U.S. 354 (1912) (same); Chicago, M. & St. P. Ry. v. Polt, 232 U.S. 165 (1914) (same).

[219] Missouri Pacific Ry. v. Tucker, 230 U.S. 340 (1913).

[220] In accordance with this standard, a statute granting an aggrieved passenger (who recovered $100 for an overcharge of 60 cents) the right to recover in a civil suit not less than $50 nor more than $300 plus costs and a reasonable attorney's fee was upheld. St. Louis, I. Mt. & So. Ry. v. Williams, 251 U.S. 63, 67 (1919). *See also* Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885) (statute requiring railroads to erect and maintain fences and cattle guards subject to award of double damages for failure to so maintain them upheld); Minneapolis & St. L. Ry. v. Beckwith, 129 U.S. 26 (1889) (same); Chicago, B. & Q.R.R. v. Cram, 228 U.S. 70 (1913) (required payment of $10 per car per hour to owner of livestock for failure to meet minimum rate of speed for delivery upheld). *But see* Southwestern Tel. Co. v. Danaher, 238 U.S. 482 (1915) (fine of $3,600 imposed on a telephone company for suspending service of patron in arrears in accordance with established and uncontested regulations struck down as arbitrary and oppressive).

antee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. . . . Statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the State's competency." [221] Still, the fact that the state reserves the power to amend or repeal corporate charters does not support the taking of corporate property without due process of law, as termination of the corporate structure merely results in turning over corporate property to the stockholders after liquidation.[222]

Foreign (out-of-state) corporations also enjoy protection under the Due Process Clauses, but this does not grant them an unconditional right to enter another state or to continue to do business in it. Language in some early cases suggested that states had plenary power to exclude or to expel a foreign corporation.[223] This power is clearly limited by the modern doctrine of the "negative" commerce clause, which constrains states' authority to discriminate against foreign corporations in favor of local commerce. Still, it has always been acknowledged that states may subject corporate entry or continued operation to reasonable, non-discriminatory conditions. Thus, for instance, a state law that requires the filing of articles with a local official as a prerequisite to the validity of conveyances of local realty to such corporations does not violate due process.[224] In addition, statutes that require a foreign insurance company to maintain reserves computed by a specific percentage of premiums (including membership fees) received in all states,[225] or to consent to direct actions filed against it by persons injured in the host state, are valid.[226]

Laws Prohibiting Trusts, Restraint of Trade or Fraud.— Even during the period when the Court was invalidating statutes under liberty of contract principles, it recognized the right of states

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[221] Nebbia v. New York, 291 U.S. 502, 527–28 (1934). *See also* New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 106–08 (1978) (upholding regulation of franchise relationship).

[222] New Orleans Debenture Redemption Co. v. Louisiana, 180 U.S. 320 (1901).

[223] National Council U.A.M. v. State Council, 203 U.S. 151, 162–63 (1906).

[224] Munday v. Wisconsin Trust Co., 252 U.S. 499 (1920).

[225] State Farm Ins. Co. v. Duel, 324 U.S. 154 (1945).

[226] Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954). Similarly a statute requiring a foreign hospital corporation to dispose of farm land not necessary to the conduct of their business was invalid even though the hospital, because of changed economic conditions, was unable to recoup its original investment from the sale. New Orleans Debenture Redemption Co. v. Louisiana, 180 U.S. 320 (1901).

to prohibit combinations in restraint of trade.[227] Thus, states could prohibit agreements to pool and fix prices, divide net earnings, and prevent competition in the purchase and sale of grain.[228] Further, the Court held that the Fourteenth Amendment does not preclude a state from adopting a policy prohibiting competing corporations from combinations, even when such combinations were induced by good intentions and from which benefit and no injury have resulted.[229] The Court also upheld a variety of statutes prohibiting activities taken by individual businesses intended to harm competitors[230] or restrain the trade of others.[231]

Laws and ordinances tending to prevent frauds by requiring honest weights and measures in the sale of articles of general consumption have long been considered lawful exertions of the police power.[232] Thus, a prohibition on the issuance or sale by other than an authorized weigher of any weight certificate for grain weighed at any warehouse or elevator where state weighers are stationed is not unconstitutional.[233] Similarly, the power of a state to prescribe standard

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[227] *See*, *e.g.*, Grenada Lumber Co. v. Mississippi, 217 U.S. 433 (1910) (statute prohibiting retail lumber dealers from agreeing not to purchase materials from wholesalers selling directly to consumers in the retailers' localities upheld); Aikens v. Wisconsin, 195 U.S. 194 (1904) (law punishing combinations for "maliciously" injuring a rival in the same business, profession, or trade upheld).

[228] Smiley v. Kansas, 196 U.S. 447 (1905). *See* Waters Pierce Oil Co. v. Texas, 212 U.S. 86 (1909); National Cotton Oil Co. v. Texas, 197 U.S. 115 (1905), also upholding antitrust laws.

[229] International Harvester Co. v. Missouri, 234 U.S. 199 (1914). *See also* American Machine Co. v. Kentucky, 236 U.S. 660 (1915).

[230] Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912) (prohibition on intentionally destroying competition of a rival business by making sales at a lower rate, after considering distance, in one section of the State than in another upheld). *But cf.* Fairmont Co. v. Minnesota, 274 U.S. 1 (1927) (invalidating on liberty of contract grounds similar statute punishing dealers in cream who pay higher prices in one locality than in another, the Court finding no reasonable relation between the statute's sanctions and the anticipated evil).

[231] Old Dearborn Co. v. Seagram Corp., 299 U.S. 183 (1936) (prohibition of contracts requiring that commodities identified by trademark will not be sold by the vendee or subsequent vendees except at prices stipulated by the original vendor upheld); Pep Boys v. Pyroil, 299 U.S. 198 (1936) (same); Safeway Stores v. Oklahoma Grocers, 360 U.S. 334 (1959) (application of an unfair sales act to enjoin a retail grocery company from selling below statutory cost upheld, even though competitors were selling at unlawful prices, as there is no constitutional right to employ retaliation against action outlawed by a state and appellant could enjoin illegal activity of its competitors).

[232] Schmidinger v. City of Chicago, 226 U.S. 578, 588 (1913) (citing McLean v. Arkansas, 211 U.S. 539, 550 (1909)). *See* Hauge v. City of Chicago, 299 U.S. 387 (1937) (municipal ordinance requiring that commodities sold by weight be weighed by a public weighmaster within the city valid even as applied to one delivering coal from state-tested scales at a mine outside the city); Lemieux v. Young, 211 U.S. 489 (1909) (statute requiring merchants to record sales in bulk not made sin the regular course of business valid); Kidd, Dater Co. v. Musselman Grocer Co., 217 U.S. 461 (1910) (same).

[233] Merchants Exchange v. Missouri, 248 U.S. 365 (1919).

containers to protect buyers from deception as well as to facilitate trading and to preserve the condition of the merchandise is not open to question.[234]

A variety of other business regulations that tend to prevent fraud have withstood constitutional scrutiny. Thus, a state may require that the nature of a product be fairly set forth, despite the right of a manufacturer to maintain secrecy as to his compounds.[235] Or, a statute providing that the purchaser of harvesting or threshing machinery for his own use shall have a reasonable time after delivery for inspecting and testing it, and may rescind the contract if the machinery does not prove reasonably adequate, does not violate the Due Process Clause.[236] Further, in the exercise of its power to prevent fraud and imposition, a state may regulate trading in securities within its borders, require a license of those engaging in such dealing, make issuance of a license dependent on the good repute of the applicants, and permit, subject to judicial review of his findings, revocation of the license.[237]

The power to regulate also includes the power to forbid certain business practices. Thus, a state may forbid the giving of options to sell or buy any grain or other commodity at a future time.[238] It may also forbid sales on margin for future delivery,[239] and may prohibit the keeping of places where stocks, grain, and the like, are sold but not paid for at the time, unless a record of the same be made and a stamp tax paid.[240] A prohibitive license fee upon the use of trading stamps is not unconstitutional,[241] nor is imposing criminal penalties for any deductions by purchasers from the actual weight

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[234] Pacific States Co. v. White, 296 U.S. 176 (1935) (administrative order prescribing the dimensions, form, and capacity of containers for strawberries and raspberries is not arbitrary as the form and dimensions bore a reasonable relation to the protection of the buyers and the preservation in transit of the fruit); Schmidinger v. City of Chicago, 226 U.S. 578 (1913) (ordinance fixing standard sizes is not unconstitutional); Armour & Co. v. North Dakota, 240 U.S. 510 (1916) (law that lard not sold in bulk should be put up in containers holding one, three, or five pounds weight, or some whole multiple of these numbers valid); Petersen Baking Co. v. Bryan, 290 U.S. 570 (1934) (regulations that imposed a rate of tolerance for the minimum weight for a loaf of bread upheld); *But cf.* Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (tolerance of only two ounces in excess of the minimum weight per loaf is unreasonable, given finding that it was impossible to manufacture good bread without frequently exceeding the prescribed tolerance).

[235] Heath & Milligan Co. v. Worst, 207 U.S. 338 (1907); Corn Products Ref. Co. v. Eddy, 249 U.S. 427 (1919); National Fertilizer Ass'n v. Bradley, 301 U.S. 178 (1937).

[236] Advance-Rumely Co. v. Jackson, 287 U.S. 283 (1932).

[237] Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559 (1917); Merrick v. Halsey & Co., 242 U.S. 568 (1917).

[238] Booth v. Illinois, 184 U.S. 425 (1902).

[239] Otis v. Parker, 187 U.S. 606 (1903).

[240] Brodnax v. Missouri, 219 U.S. 285 (1911).

[241] Rast v. Van Deman & Lewis, 240 U.S. 342 (1916); Tanner v. Little, 240 U.S. 369 (1916); Pitney v. Washington, 240 U.S. 387 (1916).

of grain, hay, seed, or coal purchased, even when such deduction is made under a claim of custom or under a rule of a board of trade.[242]

Banking, Wage Assignments, and Garnishment.—Regulation of banks and banking has always been considered well within the police power of states, and the Fourteenth Amendment did not eliminate this regulatory authority.[243] A variety of regulations have been upheld over the years. For example, state banks are not deprived of property without due process by a statute subjecting them to assessments for a depositors' guaranty fund.[244] Also, a law requiring savings banks to turn over deposits inactive for thirty years to the state (when the depositor cannot be found), with provision for payment to the depositor or his heirs on establishment of the right, does not effect an invalid taking of the property of said banks; nor does a statute requiring banks to turn over to the protective custody of the state deposits that, depending on the nature of the deposit, have been inactive ten or twenty-five years.[245]

A state is acting clearly within its police power in fixing maximum rates of interest on money loaned within its border, and such regulation is within legislative discretion if not unreasonable or arbitrary.[246] Equally valid is a requirement that assignments of future wages as security for debts of less than $200, to be valid, must be accepted in writing by the employer, consented to by the assignors, and filed in public office. Such a requirement deprives neither the borrower nor the lender of his property without due process of law.[247]

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[242] House v. Mayes, 219 U.S. 270 (1911).

[243] Doty v. Love, 295 U.S. 64 (1935) (rights of creditors in an insolvent bank not violated by a later statute permitting re-opening under a reorganization plan approved by the court, the liquidating officer, and by three-fourths of the creditors); Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649 (1923) (Federal Reserve bank not unlawfully deprived of business rights of liberty of contract by a law which allows state banks to pay checks in exchange when presented by or through a Federal Reserve bank, post office, or express company and when not made payable otherwise by a maker).

[244] Noble State Bank v. Haskell, 219 U.S. 104 (1911); Shallenberger v. First State Bank, 219 U.S. 114 (1911); Assaria State Bank v. Dolley, 219 U.S. 121 (1911); Abie State Bank v. Bryan, 282 U.S. 765 (1931).

[245] Provident Savings Inst. v. Malone, 221 U.S. 660 (1911); Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944). When a bank conservator appointed pursuant to a new statute has all the functions of a receiver under the old law, one of which is the enforcement on behalf of depositors of stockholders' liability, which liability the conservator can enforce as cheaply as could a receiver appointed under the pre-existing statute, it cannot be said that the new statute, in suspending the right of a depositor to have a receiver appointed, arbitrarily deprives a depositor of his remedy or destroys his property without the due process of law. The depositor has no property right in any particular form of remedy. Gibbes v. Zimmerman, 290 U.S. 326 (1933).

[246] Griffith v. Connecticut, 218 U.S. 563 (1910).

[247] Mutual Loan Co. v. Martell, 222 U.S. 225 (1911).

Insurance.—Those engaged in the insurance business [248] as well as the business itself have been peculiarly subject to supervision and control.[249] Even during the *Lochner* era the Court recognized that government may fix insurance rates and regulate the compensation of insurance agents,[250] and over the years the Court has upheld a wide variety of regulation. For instance, a state may impose a fine on "any person 'who shall act in any manner in the negotiation or transaction of unlawful insurance . . . with a foreign insurance company not admitted to do business [within said State].'" [251] Or, a state may forbid life insurance companies and their agents to engage in the undertaking business and undertakers to serve as life insurance agents.[252] Further, foreign casualty and surety insurers were not deprived of due process by a Virginia law that prohibited the making of contracts of casualty or surety insurance except through registered agents, that required that such contracts applicable to persons or property in the state be countersigned by a registered local agent, and that prohibited such agents from sharing more than 50% of a commission with a nonresident broker.[253] And just as all banks may be required to contribute to a depositors' guaranty fund, so may automobile liability insurers be required to submit to the equitable apportionment among them of applicants who are in good faith entitled to, but are financially unable to, procure such insurance through ordinary methods.[254]

However, the Court has discerned some limitations to such regulations. A statute that prohibited the insured from contracting directly with a marine insurance company outside the state for coverage of property within the state was held invalid as a deprivation of liberty without due process of law.[255] For the same reason, the Court held, a state may not prevent a citizen from concluding a policy loan agreement with a foreign life insurance company at its home office whereby the policy on his life is pledged as collateral security for a cash loan to become due upon default in payment of premiums, in which case the entire policy reserve might be applied

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[248] La Tourette v. McMaster, 248 U.S. 465 (1919); Stipich v. Insurance Co., 277 U.S. 311, 320 (1928).

[249] German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914).

[250] O'Gorman & Young v. Hartford Ins. Co., 282 U.S. 251 (1931).

[251] Nutting v. Massachusetts, 183 U.S. 553, 556 (1902) (distinguishing Allgeyer v. Louisiana, 165 U.S. 578 (1897)). *See also* Hoper v. California, 155 U.S. 648 (1895).

[252] Daniel v. Family Ins. Co., 336 U.S. 220 (1949).

[253] Osborn v. Ozlin, 310 U.S. 53, 68–69 (1940). Dissenting from the conclusion, Justice Roberts declared that the plain effect of the Virginia law is to compel a nonresident to pay a Virginia resident for services that the latter does not in fact render.

[254] California Auto. Ass'n v. Maloney, 341 U.S. 105 (1951).

[255] Allgeyer v. Louisiana, 165 U.S. 578 (1897).

to discharge the indebtedness. Authority to subject such an agreement to the conflicting provisions of domestic law is not deducible from the power of a state to license a foreign insurance company as a condition of its doing business therein.[256]

A stipulation that policies of hail insurance shall take effect and become binding twenty-four hours after the hour in which an application is taken and further requiring notice by telegram of rejection of an application was upheld.[257] No unconstitutional restraint was imposed upon the liberty of contract of surety companies by a statute providing that, after enactment, any bond executed for the faithful performance of a building contract shall inure to the benefit of material men and laborers, notwithstanding any provision of the bond to the contrary.[258] Likewise constitutional was a law requiring that a motor vehicle liability policy shall provide that bankruptcy of the insured does not release the insurer from liability to an injured person.[259] There also is no denial of due process for a state to require that casualty companies, in case of total loss, pay the total amount for which the property was insured, less depreciation between the time of issuing the policy and the time of the loss, rather than the actual cash value of the property at the time of loss.[260]

Moreover, even though it had its attorney-in-fact located in Illinois, signed all its contracts there, and forwarded from there all checks in payment of losses, a reciprocal insurance association covering real property located in New York could be compelled to comply with New York regulations that required maintenance of an office in that state and the countersigning of policies by an agent resident therein.[261] Also, to discourage monopolies and to encourage rate competition, a state constitutionally may impose on all fire insurance companies connected with a tariff association fixing rates a liability or penalty to be collected by the insured of 25% in excess of actual loss or damage, stipulations in the insurance contract to the contrary notwithstanding.[262]

A state statute by which a life insurance company, if it fails to pay upon demand the amount due under a policy after death of the insured, is made liable in addition for fixed damages, reasonable in

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[256] New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918).
[257] National Ins. Co. v. Wanberg, 260 U.S. 71 (1922).
[258] Hartford Accident Co. v. Nelson Co., 291 U.S. 352 (1934).
[259] Merchants Liability Co. v. Smart, 267 U.S. 126 (1925).
[260] Orient Ins. Co. v. Daggs, 172 U.S. 577 (1899) (the statute was in effect when the contract at issue was signed).
[261] Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943).
[262] German Alliance Ins. Co. v. Hale, 219 U.S. 307 (1911). *See also* Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905).

amount, and for a reasonable attorney's fee is not unconstitutional even though payment is resisted in good faith and upon reasonable grounds.[263] It is also proper by law to cut off a defense by a life insurance company based on false and fraudulent statements in the application, unless the matter misrepresented actually contributed to the death of the insured.[264] A provision that suicide, unless contemplated when the application for a policy was made, shall be no defense is equally valid.[265] When a cooperative life insurance association is reorganized so as to permit it to do a life insurance business of every kind, policyholders are not deprived of their property without due process of law.[266] Similarly, when the method of liquidation provided by a plan of rehabilitation of a mutual life insurance company is as favorable to dissenting policyholders as would have been the sale of assets and *pro rata* distribution to all creditors, the dissenters are unable to show any taking without due process. Dissenting policyholders have no constitutional right to a particular form of remedy.[267]

Miscellaneous Businesses and Professions.—The practice of medicine, using this word in its most general sense, has long been the subject of regulation.[268] A state may exclude osteopathic physicians from hospitals maintained by it or its municipalities[269] and may regulate the practice of dentistry by prescribing qualifications that are reasonably necessary, requiring licenses, establishing a supervisory administrative board, or prohibiting certain advertising regardless of its truthfulness.[270] The Court has sustained a law establishing as a qualification for obtaining or retaining a pharmacy operating permit that one either be a registered pharmacist in good standing or that the corporation or association have a majority of its stock owned by registered pharmacists in good standing who were

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[263] Life & Casualty Co. v. McCray, 291 U.S. 566 (1934).

[264] Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243 (1906).

[265] Whitfield v. Aetna Life Ins. Co., 205 U.S. 489 (1907).

[266] Polk v. Mutual Reserve Fund, 207 U.S. 310 (1907).

[267] Neblett v. Carpenter, 305 U.S. 297 (1938).

[268] McNaughton v. Johnson, 242 U.S. 344, 349 (1917). *See* Dent v. West Virginia, 129 U.S. 114 (1889); Hawker v. New York, 170 U.S. 189 (1898); Reetz v. Michigan, 188 U.S. 505 (1903); Watson v. Maryland, 218 U.S. 173 (1910); *See also* Barsky v. Board of Regents, 347 U.S. 442 (1954), sustaining a New York law authorizing suspension for six months of the license of a physician who had been convicted of crime in any jurisdiction, in this instance, contempt of Congress under 2 U.S.C. § 192. Justices Black, Douglas, and Frankfurter dissented.

[269] Collins v. Texas, 223 U.S. 288 (1912); Hayman v. Galveston, 273 U.S. 414 (1927).

[270] Semler v. Dental Examiners, 294 U.S. 608, 611 (1935). *See also* Douglas v. Noble, 261 U.S. 165 (1923); Graves v. Minnesota, 272 U.S. 425, 427 (1926).

actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy.[271]

Although statutes requiring pilots to be licensed[272] and setting reasonable competency standards (*e.g.*, that railroad engineers pass color blindness tests) have been sustained,[273] an act making it a misdemeanor for a person to act as a railway passenger conductor without having had two years' experience as a freight conductor or brakeman was invalidated as not rationally distinguishing between those competent and those not competent to serve as conductor.[274] An act imposing license fees for operating employment agencies and prohibiting them from sending applicants to an employer who has not applied for labor does not deny due process of law.[275] Also, a state law prohibiting operation of a "debt pooling" or a "debt adjustment" business except as an incident to the legitimate practice of law is a valid exercise of legislative discretion.[276]

The Court has also upheld a variety of other licensing or regulatory legislation applicable to places of amusement,[277] grain elevators,[278] detective agencies,[279] the sale of cigarettes[280] or cosmetics,[281] and the resale of theater tickets.[282] Restrictions on advertising have also been upheld, including absolute bans on the advertising of cigarettes[283] or the use of a representation of the United States

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[271] North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973). In the course of the decision, the Court overruled Liggett Co. v. Baldridge, 278 U.S. 105 (1928), in which it had voided a law forbidding a corporation to own any drug store, unless all its stockholders were licensed pharmacists, as applied to a foreign corporation, all of whose stockholders were not pharmacists, which sought to extend its business in the state by acquiring and operating therein two additional stores.

[272] Olsen v. Smith, 195 U.S. 332 (1904).

[273] Nashville, C. & St. L. R.R. v. Alabama, 128 U.S. 96 (1888).

[274] Smith v. Texas, 233 U.S. 630 (1914). *See* DeVeau v. Braisted, 363 U.S. 144, 157–60 (1960), sustaining a New York law barring from office in a longshoremen's union persons convicted of a felony and not thereafter pardoned or granted a good conduct certificate from a parole board.

[275] Brazee v. Michigan, 241 U.S. 340 (1916). With four Justices dissenting, the Court in Adams v. Tanner, 244 U.S. 590 (1917), struck down a state law absolutely prohibiting maintenance of private employment agencies. Commenting on the "constitutional philosophy" thereof in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535 (1949), Justice Black stated that Olsen v. Nebraska ex rel. Western Reference and Bond Ass'n, 313 U.S. 236 (1941), "clearly undermined *Adams v. Tanner*."

[276] Ferguson v. Skrupa, 372 U.S. 726 (1963).

[277] Western Turf Ass'n v. Greenberg, 204 U.S. 359 (1907).

[278] W.W. Cargill Co. v. Minnesota, 180 U.S. 452 (1901).

[279] Lehon v. Atlanta, 242 U.S. 53 (1916).

[280] Gundling v. Chicago, 177 U.S. 183, 185 (1900).

[281] Bourjois, Inc. v. Chapman, 301 U.S. 183 (1937).

[282] Weller v. New York, 268 U.S. 319 (1925).

[283] Packer Corp. v. Utah, 285 U.S. 105 (1932).

flag on an advertising medium.[284] Similarly constitutional were prohibitions on the solicitation by a layman of the business of collecting and adjusting claims,[285] the keeping of private markets within six squares of a public market,[286] the keeping of billiard halls except in hotels,[287] or the purchase by junk dealers of wire, copper, and other items, without ascertaining the seller's right to sell.[288]

Protection of State Resources

Oil and Gas.—A state may prohibit conduct that leads to the waste of natural resources.[289] Thus, for instance, where there is a limited market for natural gas acquired attendant to oil production or where the pumping of oil and gas from one location may limit the ability of others to recover oil from a large reserve, a state may require that production of oil be limited or prorated among producers.[290] Generally, whether a system of proration is fair is a question for administrative and not judicial judgment.[291] On the other

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[284] Halter v. Nebraska, 205 U.S. 34 (1907).

[285] McCloskey v. Tobin, 252 U.S. 107 (1920).

[286] Natal v. Louisiana, 139 U.S. 621 (1891).

[287] Murphy v. California, 225 U.S. 623 (1912).

[288] Rosenthal v. New York, 226 U.S. 260 (1912). The Court also upheld a state law forbidding (1) solicitation of the sale of frames, mountings, or other optical appliances, (2) solicitation of the sale of eyeglasses, lenses, or prisms by use of advertising media, (3) retailers from leasing, or otherwise permitting anyone purporting to do eye examinations or visual care to occupy space in a retail store, and (4) anyone, such as an optician, to fit lenses, or replace lenses or other optical appliances, except upon written prescription of an optometrist or ophthalmologist licensed in the state is not invalid. A state may treat all who deal with the human eye as members of a profession that should refrain from merchandising methods to obtain customers, and that should choose locations that reduce the temptations of commercialism; a state may also conclude that eye examinations are so critical that every change in frame and duplication of a lens should be accompanied by a prescription. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[289] Cities Service Co. v. Peerless Co., 340 U.S. 179 (1950) (sustaining orders of the Oklahoma Corporation Commission fixing a minimum price for gas and requiring one producer to buy gas from another producer in the same field at a dictated price, based on a finding that low field prices for natural gas were resulting in economic and physical waste); Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190 (1950).

[290] This can be done regardless of whether the benefit is to the owners of oil and gas in a common reservoir or because of the public interests involved. Thompson v. Consolidated Gas Co., 300 U.S. 55, 76–77 (1937) (citing Ohio Oil Co. v. Indiana (No. 1), 177 U.S. 190 (1900)); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Oklahoma v. Kansas Natural Gas Co., 221 U.S. 229 (1911). Thus, the Court upheld against due process challenge a statute that defined waste as including, in addition to its ordinary meaning, economic waste, surface waste, and production in excess of transportation or marketing facilities or reasonable market demands, and which limited each producer's share to a prorated portion of the total production that can be taken from the common source without waste. Champlin Rfg. Co. v. Corporation Comm'n, 286 U.S. 210 (1932).

[291] Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940) (evaluating whether proration based on hourly potential is as fair as one based upon estimated recoverable reserves or some other combination of factors). *See also* Railroad

hand, where the evidence showed that an order prorating allowed production among several wells was actually intended to compel pipeline owners to furnish a market to those who had no pipeline connections, the order was held void as a taking of private property for private benefit.[292]

A state may act to conserve resources even if it works to the economic detriment of the producer. Thus, a state may forbid certain uses of natural gas, such as the production of carbon black, where the gas is burned without fully using the heat therein for other manufacturing or domestic purposes. Such regulations were sustained even where the carbon black was more valuable than the gas from which it was extracted, and notwithstanding the fact that the producer had made significant investment in a plant for the manufacture of carbon black.[293] Likewise, for the purpose of regulating and adjusting coexisting rights of surface owners to underlying oil and gas, it is within the power of a state to prohibit the operators of wells from allowing natural gas, not conveniently necessary for other purposes, to come to the surface unless its lifting power was used to produce the greatest proportional quantity of oil.[294]

Protection of Property and Agricultural Crops.—Special precautions may be required to avoid or compensate for harm caused by extraction of natural resources. Thus, a state may require the filing of a bond to secure payment for damages to any persons or property resulting from an oil and gas drilling or production operation.[295] On the other hand, in *Pennsylvania Coal Co. v. Mahon*,[296] a Pennsylvania statute that forbade the mining of coal under private dwellings or streets of cities by a grantor that had reserved the right to mine was viewed as too restrictive on the use of private property and hence a denial of due process and a "taking" without compensation.[297] Years later, however, a quite similar Pennsylvania statute was upheld, the Court finding that the new law no longer involved merely a balancing of private economic interests, but instead promoted such "important public interests" as conserva-

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Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941); Railroad Comm'n v. Humble Oil & Ref. Co., 311 U.S. 578 (1941).

[292] Thompson v. Consolidated Gas Co., 300 U.S. 55 (1937).

[293] Walls v. Midland Carbon Co., 254 U.S. 300 (1920). *See also* Henderson Co. v. Thompson, 300 U.S. 258 (1937).

[294] Bandini Co. v. Superior Court, 284 U.S. 8 (1931).

[295] Gant v. Oklahoma City, 289 U.S. 98 (1933) (statute requiring bond of $200,000 per well-head, such bond to be executed, not by personal sureties, but by authorized bonding company).

[296] 260 U.S. 393 (1922).

[297] The "taking" jurisprudence that has stemmed from the Pennsylvania Coal Co. v. Mahon is discussed, *supra*, at "Regulatory Takings," under the Fifth Amendment.

tion, protection of water supplies, and preservation of land values for taxation.[298]

A statute requiring the destruction of cedar trees within two miles of apple orchards in order to prevent damage to the orchards caused by cedar rust was upheld as not unreasonable even in the absence of compensation. Apple growing being one of the principal agricultural pursuits in Virginia and the value of cedar trees throughout the state being small as compared with that of apple orchards, the state was constitutionally competent to require the destruction of one class of property in order to save another which, in the judgment of its legislature, was of greater value to the public.[299] Similarly, Florida was held to possess constitutional authority to protect the reputation of one of its major industries by penalizing the delivery for shipment in interstate commerce of citrus fruits so immature as to be unfit for consumption.[300]

Water, Fish, and Game.—A statute making it unlawful for a riparian owner to divert water into another state was held not to deprive the property owner of due process. "The constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . What it has it may keep and give no one a reason for its will."[301] This holding has since been disapproved, but on interstate commerce rather than due process grounds.[302] States may, however, enact and enforce a variety of conservation measures for the protection of watersheds.[303]

Similarly, a state has sufficient control over fish and wild game found within its boundaries[304] so that it may regulate or prohibit

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[298] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488 (1987). The Court in *Pennsylvania Coal* had viewed that case as relating to a "a single private house." 260 U.S. at 413. Also distinguished from *Pennsylvania Coal* was a challenge to an ordinance prohibiting sand and gravel excavation near the water table and imposing a duty to refill any existing excavation below that level. The ordinance was upheld; the fact that it prohibited a business that had been conducted for over 30 years did not give rise to a taking in the absence of proof that the land could not be used for other legitimate purposes. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

[299] Miller v. Schoene, 276 U.S. 272, 277, 279 (1928).

[300] Sligh v. Kirkwood, 237 U.S. 52 (1915).

[301] Hudson County Water Co. v. McCarter,, 209 U.S. 349, 356–57 (1908).

[302] Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982). *See also* City of Altus v. Carr, 255 F. Supp. 828 (W.D. Tex.), *aff'd per curiam*, 385 U.S. 35 (1966).

[303] *See*, *e.g.*, Perley v. North Carolina, 249 U.S. 510 (1919) (upholding law requiring the removal of timber refuse from the vicinity of a watershed to prevent the spread of fire and consequent damage to such watershed).

[304] Bayside Fish Co. v. Gentry, 297 U.S. 422, 426 (1936).

fishing and hunting.[305] For the effective enforcement of such restrictions, a state may also forbid the possession within its borders of special instruments of violations, such as nets, traps, and seines, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor.[306] The Court has also upheld a state law restricting a commercial reduction plant from accepting more fish than it could process without spoilage in order to conserve fish found within its waters, even allowing the application of such restriction to fish imported into the state from adjacent international waters.[307]

The Court's early decisions rested on the legal fiction that the states owned the fish and wild game within their borders, and thus could reserve these possessions for use by their own citizens.[308] The Court soon backed away from the ownership fiction,[309] and in *Hughes v. Oklahoma* [310] it formally overruled prior case law, indicating that state conservation measures discriminating against out-of-state persons were to be measured under the Commerce Clause. Although a state's "concerns for conservation and protection of wild animals" were still a "legitimate" basis for regulation, these concerns could not justify disproportionate burdens on interstate commerce.[311]

Subsequently, in the context of recreational rather than commercial activity, the Court reached a result more deferential to state authority, holding that access to recreational big game hunting is not within the category of rights protected by the Privileges or Immunities Clause, and that consequently a state could charge out-of-staters significantly more than in-staters for a hunting license.[312] Suffice it to say that similar cases involving a state's efforts to reserve its fish and game for its own inhabitants are likely to be challenged under commerce or privileges or immunities principles, rather than under substantive due process.

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[305] Manchester v. Massachusetts, 139 U.S. 240 (1891); Geer v. Connecticut, 161 U.S. 519 (1896).

[306] Miller v. McLaughlin, 281 U.S. 261, 264 (1930).

[307] Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936). *See also* New York ex rel. Silz v. Hesterberg, 211 U.S. 31 (1908) (upholding law proscribing possession during the closed season of game imported from abroad).

[308] Geer v. Connecticut, 161 U.S. 519, 529 (1896).

[309] *See*, *e.g.*, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (invalidating Louisiana statute prohibiting transportation outside the state of shrimp taken in state waters, unless the head and shell had first been removed); Toomer v. Witsell, 334 U.S. 385 (1948) (invalidating law discriminating against out-of-state commercial fishermen); Douglas v. Seacoast Products, Inc., 431 U.S. 265, 284 (1977) (state could not discriminate in favor of its residents against out-of-state fishermen in federally licensed ships).

[310] 441 U.S. 322 (1979) (formally overruling *Geer*).

[311] 441 U.S. at 336, 338–39.

[312] Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978).

Ownership of Real Property: Rights and Limitations

Zoning and Similar Actions.—It is now well established that states and municipalities have the police power to zone land for designated uses. Zoning authority gained judicial recognition early in the 20th century. Initially, an analogy was drawn to public nuisance law, so that states and their municipal subdivisions could declare that specific businesses, although not nuisances *per se*, were nuisances in fact and in law in particular circumstances and in particular localities.[313] Thus, a state could declare the emission of dense smoke in populous areas a nuisance and restrain it, even though this affected the use of property and subjected the owner to the expense of compliance.[314] Similarly, the Court upheld an ordinance that prohibited brick making in a designated area, even though the specified land contained valuable clay deposits which could not profitably be removed for processing elsewhere, was far more valuable for brick making than for any other purpose, had been acquired before it was annexed to the municipality, and had long been used as a brickyard.[315]

With increasing urbanization came a broadening of the philosophy of land-use regulation to protect not only health and safety but also the amenities of modern living.[316] Consequently, the Court has recognized the power of government, within the loose confines of the Due Process Clause, to zone in many ways and for many purposes. Governments may regulate the height of buildings,[317] establish building setback requirements,[318] preserve open spaces (through density controls and restrictions on the numbers of houses),[319] and preserve historic structures.[320] The Court will generally uphold a challenged land-use plan unless it determines that either the overall plan is arbitrary and unreasonable with no substantial relation to the public health, safety, or general welfare,[321] or that the plan

[313] Reinman v. City of Little Rock, 237 U.S. 171 (1915) (location of a livery stable within a thickly populated city "is well within the range of the power of the state to legislate for the health and general welfare"). *See also* Fischer v. St. Louis, 194 U.S. 361 (1904) (upholding restriction on location of dairy cow stables); Bacon v. Walker, 204 U.S. 311 (1907) (upholding restriction on grazing of sheep near habitations).

[314] Northwestern Laundry v. Des Moines, 239 U.S. 486 (1916). For a case embracing a rather special set of facts, *see* Dobbins v. Los Angeles, 195 U.S. 223 (1904).

[315] Hadacheck v. Sebastian, 239 U.S. 394 (1915).

[316] *Cf. Developments in the Law: Zoning*, 91 HARV. L. REV. 1427 (1978).

[317] Welch v. Swasey, 214 U.S. 91 (1909).

[318] Gorieb v. Fox, 274 U.S. 603 (1927).

[319] Agins v. City of Tiburon, 447 U.S. 255 (1980).

[320] Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[321] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Zahn v. Board of Pub. Works, 274 U.S. 325 (1927); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Cusack Co. v. City of Chicago, 242 U.S. 526 (1917); St. Louis Poster Adv. Co. v. City of St. Louis, 249 U.S. 269 (1919).

as applied amounts to a taking of property without just compensation.[322]

Applying these principles, the Court has held that the exclusion of apartment houses, retail stores, and billboards from a "residential district" in a village is a permissible exercise of municipal power.[323] Similarly, a housing ordinance in a community of single-family dwellings, in which any number of related persons (blood, adoption, or marriage) could occupy a house but only two unrelated persons could do so, was sustained in the absence of any showing that it was aimed at the deprivation of a "fundamental interest."[324] Such a fundamental interest, however, was found to be implicated in *Moore v. City of East Cleveland*[325] by a "single family" zoning ordinance which defined a "family" to exclude a grandmother who had been living with her two grandsons of different children. Similarly, black persons cannot be forbidden to occupy houses in blocks where the greater number of houses are occupied by white persons, or vice versa.[326]

In one aspect of zoning—the degree to which such decisions may be delegated to private persons—the Court has not been consistent. Thus, for instance, it invalidated a city ordinance which conferred the power to establish building setback lines upon the owners of two thirds of the property abutting any street.[327] Or, in another case, it struck down an ordinance that permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of the owners of two-thirds of the property within 400 feet of the proposed facility.[328] In a decision falling chronologically between these two, however, the Court sustained an ordinance that permitted property owners to waive a municipal restriction prohibiting the construction of billboards.[329]

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[322] *See*, *e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and discussion of "Regulatory Taking" under the Fifth Amendment, *supra*

[323] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[324] Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

[325] 431 U.S. 494 (1977). A plurality of the Court struck down the ordinance as a violation of substantive due process, an infringement of family living arrangements which are a protected liberty interest, id. at 498–506, while Justice Stevens concurred on the ground that the ordinance was arbitrary and unreasonable. Id. at 513. Four Justices dissented. Id. at 521, 531, 541.

[326] Buchanan v. Warley, 245 U.S. 60 (1917).

[327] Eubank v. City of Richmond, 226 U.S. 137 (1912).

[328] Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928). In a later case, the Court held that the zoning power may not be delegated to a church. Larkin v. Grendel's Den, 459 U.S. 116 (1982) (invalidating under the Establishment Clause a state law permitting any church to block issuance of a liquor license for a facility to be operated within 500 feet of the church).

[329] Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917). The Court thought the case different from *Eubank*, because in that case the ordinance established no

In its most recent decision, the Court upheld a city charter provision permitting a petition process by which a citywide referendum could be held on zoning changes and variances. The provision required a 55% approval vote in the referendum to sustain the commission's decision, and the Court distinguished between delegating such authority to a small group of affected landowners and the people's retention of the ultimate legislative power in themselves which for convenience they had delegated to a legislative body.[330]

Estates, Succession, Abandoned Property.—The Due Process Clause does not prohibit a state from varying the rights of those receiving benefits under intestate laws. Thus, the Court held that the rights of an estate were not impaired where a New York Decedent Estate Law granted a surviving spouse the right to take as in intestacy, despite the fact that the spouse had waived any right to her husband's estate before the enactment of the law. Because rights of succession to property are of statutory creation, the Court explained, New York could have conditioned any further exercise of testamentary power upon the giving of right of election to the surviving spouse regardless of any waiver, however formally executed.[331]

Even after the creation of a testamentary trust, a state retains the power to devise new and reasonable directions to the trustee to meet new conditions arising during its administration. For instance, the Great Depression resulted in the default of numerous mortgages which were held by trusts, which had the affect of putting an unexpected accumulation of real property into those trusts. Under these circumstance, the Court upheld the retroactive application of a statute reallocating distribution within these trusts, even where the administration of the estate had already begun, and the new statute had the effect of taking away a remainderman's right to judicial review of the trustee's computation of income.[332]

The states have significant discretion to regulate abandoned property. For instance, states have several jurisdictional bases to allow for the lawful application of escheat and abandoned property laws to out-of-state corporations. Thus, application of New York's Aban-

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rule but gave the force of law to the decision of a narrow segment of the community, whereas in *Cusack* the ordinance barred the erection of any billboards but permitted the prohibition to be modified by the persons most affected. Id. at 531.

[330] City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976). Such referenda do, however, raise equal protection problems. *See*, *e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967).

[331] Irving Trust Co. v. Day, 314 U.S. 556, 564 (1942).

[332] Demorest v. City Bank Co., 321 U.S. 36, 47–48 (1944). Under the peculiar facts of the case, however, the remainderman's right had been created by judicial rules promulgated after the death of the decedent, so the case is not precedent for a broad rule of retroactivity.

doned Property Law to New York residents' life insurance policies, even when issued by foreign corporations, did not deprive such companies of property without due process, where the insured persons had continued to be New York residents and the beneficiaries were resident at the maturity date of the policies. The relationship between New York and its residents who abandon claims against foreign insurance companies, and between New York and foreign insurance companies doing business therein, is sufficiently close to give New York jurisdiction.[333] Or, in *Standard Oil Co. v. New Jersey*,[334] a divided Court held that due process is not violated by a state statute escheating shares of stock in a domestic corporation, including unpaid dividends, even though the last known owners were nonresidents and the stock was issued and the dividends held in another state. The state's power over the debtor corporation gives it power to seize the debts or demands represented by the stock and dividends.

A state's wide discretion to define abandoned property and dispose of abandoned property can be seen in *Texaco v. Short*,[335] which upheld an Indiana statute that terminated interests in coal, oil, gas, or other minerals that had not been used in twenty years, and that provided for reversion to the owner of the interest out of which the mining interests had been carved. The "use" of a mineral interest that could prevent its extinction included the actual or attempted extraction of minerals, the payment of rents or royalties, and any payment of taxes. Indeed, merely filing a claim with the local recorder would preserve the interest.[336] The statute provided no notice to owners of interests, however, save for its own publication; nor did it require surface owners to notify owners of mineral interests that the interests were about to expire.[337] By a narrow margin, the Court sustained the statute, holding that the state's interest in encouraging production, securing timely notices of property ownership, and settling property titles provided a basis for enact-

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[333] Connecticut Ins. Co. v. Moore, 333 U.S. 541 (1948). Justices Jackson and Douglas dissented on the ground that New York was attempting to escheat unclaimed funds not actually or constructively located in New York, and which were the property of beneficiaries who may never have been citizens or residents of New York.

[334] 341 U.S. 428 (1951).

[335] 454 U.S. 516 (1982).

[336] With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office.

[337] The act provided a grace period and specified several actions which were sufficient to avoid extinguishment. With respect to interests existing at the time of enactment, the statute provided a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office.

ment, and finding that due process did not require any actual notice to holders of unused mineral interests.[338] The state "may impose on an owner of a mineral interest the burden of using that interest or filing a current statement of interests" and it may similarly "impose on him the lesser burden of keeping informed of the use or nonuse of his own property."[339]

Health, Safety, and Morals

Health.—Even under the narrowest concept of the police power as limited by substantive due process, it was generally conceded that states could exercise the power to protect the public health, safety, and morals.[340] For instance, an ordinance for incineration of garbage and refuse at a designated place as a means of protecting public health is not a taking of private property without just compensation, even though such garbage and refuse may have some elements of value for certain purposes.[341] Or, compelling property owners to connect with a publicly maintained system of sewers and enforcing that duty by criminal penalties does not violate the Due Process Clause.[342]

There are few constitutional restrictions on the extensive state regulations on the production and distribution of food and drugs.[343] Statutes forbidding or regulating the manufacture of oleomargarine have been upheld,[344] as have statutes ordering the destruction of unsafe food[345] or confiscation of impure milk,[346] notwithstanding that, in the latter cases, such articles had a value for purposes other than food. There also can be no question of the authority of the state, in the interest of public health and welfare, to forbid the sale of drugs by itinerant vendors[347] or the sale of spectacles by an establishment where a physician or optometrist is not in charge.[348] Nor is it any longer possible to doubt the validity of state regula-

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[338] Generally, property owners are charged with maintaining knowledge of the legal conditions of property ownership.

[339] 454 U.S. at 538. The four dissenters thought that some specific notice was required for persons holding before enactment. Id. at 540.

[340] *See*, *e.g.*, Mugler v. Kansas, 123 U.S. 623, 661 (1887), and the discussion, *supra,* under "The Development of Substantive Due Process."

[341] California Reduction Co. v. Sanitary Works, 199 U.S. 306 (1905).

[342] Hutchinson v. City of Valdosta, 227 U.S. 303 (1913).

[343] "The power of the State to . . . prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established." Sligh v. Kirkwood, 237 U.S. 52, 59–60 (1915).

[344] Powell v. Pennsylvania, 127 U.S. 678 (1888); Magnano v. Hamilton, 292 U.S. 40 (1934).

[345] North American Storage Co. v. City of Chicago, 211 U.S. 306 (1908).

[346] Adams v. City of Milwaukee, 228 U.S. 572 (1913).

[347] Baccus v. Louisiana, 232 U.S. 334 (1914).

[348] Roschen v. Ward, 279 U.S. 337 (1929).

tions pertaining to the administration, sale, prescription, and use of dangerous and habit-forming drugs.[349]

Equally valid as police power regulations are laws forbidding the sale of ice cream not containing a reasonable proportion of butter fat,[350] of condensed milk made from skimmed milk rather than whole milk,[351] or of food preservatives containing boric acid.[352] Similarly, a statute intended to prevent fraud and deception by prohibiting the sale of "filled milk" (milk to which has been added any fat or oil other than a milk fat) is valid, at least where such milk has the taste, consistency, and appearance of whole milk products. The Court reasoned that filled milk is inferior to whole milk in its nutritional content and cannot be served to children as a substitute for whole milk without producing a dietary deficiency.[353]

Even before the passage of the 21st Amendment, which granted states the specific authority to regulate alcoholic beverages, the Supreme Court had found that the states have significant authority in this regard.[354] A state may declare that places where liquor is manufactured or kept are common nuisances,[355] and may even subject an innocent owner to the forfeiture of his property if he allows others to use it for the illegal production or transportation of alcohol.[356]

Safety.—Regulations designed to promote public safety are also well within a state's authority. For instance, various measures designed to reduce fire hazards have been upheld. These include municipal ordinances that prohibit the storage of gasoline within 300

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[349] Minnesota ex rel. Whipple v. Martinson, 256 U.S. 41, 45 (1921).

[350] Hutchinson Ice Cream Co. v. Iowa, 242 U.S. 153 (1916).

[351] Hebe Co. v. Shaw, 248 U.S. 297 (1919).

[352] Price v. Illinois, 238 U.S. 446 (1915).

[353] Sage Stores Co. v. Kansas, 323 U.S. 32 (1944). Where health or fraud are not an issue, however, police power may be more limited. Thus, a statute forbidding the sale of bedding made with shoddy materials, even if sterilized and therefore harmless to health, was held to be arbitrary and therefore invalid. Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

[354] "[O]n account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment." Crane v. Campbell, 245 U.S. 304, 307 (1917), citing Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874); Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878); Mugler v. Kansas, 123 U.S. 623 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Purity Extract Co. v. Lynch, 226 U.S. 192 (1912); Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917); Seaboard Air Line Ry. v. North Carolina, 245 U.S. 298 (1917). *See also* Kidd v. Pearson, 128 U.S. 1 (1888); Barbour v. Georgia, 249 U.S. 454 (1919).

[355] Mugler v. Kansas, 123 U.S. 623, 671 (1887).

[356] Hawes v. Georgia, 258 U.S. 1 (1922); Van Oster v. Kansas, 272 U.S. 465 (1926).

feet of any dwelling,[357] require that all gas storage tanks with a capacity of more than ten gallons be buried at least three feet under ground,[358] or prohibit washing and ironing in public laundries and wash houses within defined territorial limits from 10 p.m. to 6 a.m.[359] A city's demolition and removal of wooden buildings erected in violation of regulations was also consistent with the Fourteenth Amendment.[360] Construction of property in full compliance with existing laws, however, does not confer upon the owner an immunity against exercise of the police power. Thus, a 1944 amendment to a Multiple Dwelling Law, requiring installation of automatic sprinklers in lodging houses of non-fireproof construction, can be applied to a lodging house constructed in 1940, even though compliance entails an expenditure of $7,500 on a property worth only $25,000.[361]

States exercise extensive regulation over transportation safety. Although state highways are used primarily for private purposes, they are public property, and the use of a highway for financial gain may be prohibited by the legislature or conditioned as it sees fit.[362] Consequently, a state may reasonably provide that intrastate carriers who have furnished adequate, responsible, and continuous service over a given route from a specified date in the past shall be entitled to licenses as a matter of right, but that issuance to those whose service began later shall depend upon public convenience and necessity.[363] A state may require private contract carriers for hire to obtain a certificate of convenience and necessity, and decline to grant one if the service of common carriers is impaired thereby. A state may also fix minimum rates applicable to such private carriers, which are not less than those prescribed for common carriers, as a valid as a means of conserving highways.[364] In the absence of legislation by Congress, a state may, to protect public safety, deny an interstate motor carrier the use of an already congested highway.[365]

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[357] Pierce Oil Corp. v. Hope, 248 U.S. 498 (1919).

[358] Standard Oil Co. v. Marysville, 279 U.S. 582 (1929).

[359] Barbier v. Connolly, 113 U.S. 27 (1885); Soon Hing v. Crowley, 113 U.S. 703 (1885).

[360] Maguire v. Reardon, 225 U.S. 271 (1921).

[361] Queenside Hills Co. v. Saxl, 328 U.S. 80 (1946).

[362] Stephenson v. Binford, 287 U.S. 251 (1932).

[363] Stanley v. Public Utilities Comm'n, 295 U.S. 76 (1935).

[364] Stephenson v. Binford, 287 U.S. 251 (1932). But any attempt to convert private carriers into common carriers, Michigan Pub. Utils. Comm'n v. Duke, 266 U.S. 570 (1925), or to subject them to the burdens and regulations of common carriers, without expressly declaring them to be common carriers, violates due process. Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926); Smith v. Cahoon, 283 U.S. 553 (1931).

[365] Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933).

In exercising its authority over its highways, a state is not limited to the raising of revenue for maintenance and reconstruction or to regulating the manner in which vehicles shall be operated, but may also prevent the wear and hazards due to excessive size of vehicles and weight of load.[366] No less constitutional is a municipal traffic regulation that forbids the operation in the streets of any advertising vehicle, excepting vehicles displaying business notices or advertisements of the products of the owner and not used mainly for advertising; and such regulation may be validly enforced to prevent an express company from selling advertising space on the outside of its trucks.[367] A state may also provide that a driver who fails to pay a judgment for negligent operation shall have his license and registration suspended for three years, unless, in the meantime, the judgment is satisfied or discharged.[368] Compulsory automobile insurance is so plainly valid as to present no federal constitutional question.[369]

Morality.—Legislatures have wide discretion in regulating "immoral" activities. Thus, legislation suppressing prostitution [370] or gambling [371] will be upheld by the Court as within the police power of a state. Accordingly, a state statute may provide that judgment against a party to recover illegal gambling winnings may be enforced by a lien on the property of the owner of the building where the gambling transaction was conducted when the owner knowingly consented to the gambling.[372] Similarly, a court may order a car used in an act of prostitution forfeited as a public nuisance, even if this works a deprivation on an innocent joint owner of the car.[373] For

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[366] Accordingly, a statute limiting to 7,000 pounds the net load permissible for trucks is not unreasonable. Sproles v. Binford, 286 U.S. 374 (1932).

[367] Because it is the judgment of local authorities that such advertising affects public safety by distracting drivers and pedestrians, courts are unable to hold otherwise in the absence of evidence refuting that conclusion. Railway Express Agency v. New York, 336 U.S. 106 (1949).

[368] Reitz v. Mealey, 314 U.S. 33 (1941); Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962). *But see* Perez v. Campbell, 402 U.S. 637 (1971). Procedural due process must, of course be observed. Bell v. Burson, 402 U.S. 535 (1971). A nonresident owner who loans his automobile in another state, by the law of which he is immune from liability for the borrower's negligence and who was not in the state at the time of the accident, is not subjected to any unconstitutional deprivation by a law thereof, imposing liability on the owner for the negligence of one driving the car with the owner's permission. Young v. Masci, 289 U.S. 253 (1933).

[369] *Ex parte* Poresky, 290 U.S. 30 (1933). *See also* Packard v. Banton, 264 U.S. 140 (1924); Sprout v. City of South Bend, 277 U.S. 163 (1928); Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).

[370] L'Hote v. New Orleans, 177 U.S. 587 (1900).

[371] Ah Sin v. Wittman, 198 U.S. 500 (1905).

[372] Marvin v. Trout, 199 U.S. 212 (1905).

[373] Bennis v. Michigan, 516 U.S. 442 (1996).

the same reason, lotteries, including those operated under a legislative grant, may be forbidden, regardless of any particular equities.[374]

Vested and Remedial Rights

As the Due Process Clause protects against arbitrary deprivation of "property," privileges or benefits that constitute property are entitled to protection.[375] Because an existing right of action to recover damages for an injury is property, that right of action is protected by the clause.[376] Thus, where repeal of a provision that made directors liable for moneys embezzled by corporate officers was applied retroactively, it deprived certain creditors of their property without due process of law.[377] A person, however, has no constitutionally protected property interest in any particular form of remedy and is guaranteed only the preservation of a substantial right to redress by an effective procedure.[378]

Similarly, a statute creating an additional remedy for enforcing liability does not, as applied to stockholders then holding stock, violate due process.[379] Nor does a law that lifts a statute of limitations and makes possible a suit, previously barred, for the value of certain securities. "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression . . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment."[380]

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[374] Stone v. Mississippi, 101 U.S. 814 (1880); Douglas v. Kentucky, 168 U.S. 488 (1897).

[375] *See*, *e.g.*, Snowden v. Hughes, 321 U.S. 1 (1944) (right to become a candidate for state office is a privilege only, hence an unlawful denial of such right is not a denial of a right of "property"). Cases under the equal protection clause now mandate a different result. *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 75 (1978) (seeming to conflate due process and equal protection standards in political rights cases).

[376] Angle v. Chicago, St. Paul, M. & D. Ry., 151 U.S. 1 (1894).

[377] Coombes v. Getz, 285 U.S. 434, 442, 448 (1932).

[378] Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (limitation of common-law liability of private industry nuclear accidents in order to encourage development of energy a rational action, especially when combined with congressional pledge to take necessary action in event of accident; whether limitation would have been of questionable validity in absence of pledge uncertain but unlikely).

[379] Shriver v. Woodbine Bank, 285 U.S. 467 (1932).

[380] Chase Securities Corp. v. Donaldson, 325 U.S. 304, 315–16 (1945).

State Control over Local Units of Government

The Fourteenth Amendment does not deprive a state of the power to determine what duties may be performed by local officers, and whether they shall be appointed or popularly elected.[381] Nor does a statute requiring cities to indemnify owners of property damaged by mobs or during riots result in an unconstitutional deprivation of the property, even when the city could not have prevented the violence.[382] Likewise, a person obtaining a judgment against a municipality for damages resulting from a riot is not deprived of property without due process of law by an act that so limits the municipality's taxing power as to prevent collection of funds adequate to pay it. As long as the judgment continues as an existing liability, no unconstitutional deprivation is experienced.[383]

Local units of government obliged to surrender property to other units newly created out of the territory of the former cannot successfully invoke the Due Process Clause,[384] nor may taxpayers allege any unconstitutional deprivation as a result of changes in their tax burden attendant upon the consolidation of contiguous municipalities.[385] Nor is a statute requiring counties to reimburse cities of the first class but not cities of other classes for rebates allowed for prompt payment of taxes in conflict with the Due Process Clause.[386]

Taxing Power

Generally.—It was not contemplated that the adoption of the Fourteenth Amendment would restrain or cripple the taxing power of the states.[387] When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers,[388] and the Court will refrain from condemning a tax solely on the ground that it is excessive.[389] Nor can the constitutionality of taxation be made to

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[381] Soliah v. Heskin, 222 U.S. 522 (1912); City of Trenton v. New Jersey, 262 U.S. 182 (1923). The Equal Protection Clause has been used, however, to limit a state's discretion with regard to certain matters. *See* "Fundamental Interests: The Political Process," *infra*.

[382] City of Chicago v. Sturges, 222 U.S. 313 (1911).

[383] Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 289 (1883).

[384] Michigan ex rel. Kies v. Lowrey, 199 U.S. 233 (1905).

[385] Hunter v. Pittsburgh, 207 U.S. 161 (1907).

[386] Stewart v. Kansas City, 239 U.S. 14 (1915).

[387] Tonawanda v. Lyon, 181 U.S. 389 (1901); Cass Farm Co. v. Detroit, 181 U.S. 396 (1901). Rather, the purpose of the amendment was to extend to the residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as was afforded against Congress by the Fifth Amendment. Southwestern Oil Co. v. Texas, 217 U.S. 114, 119 (1910).

[388] Fox v. Standard Oil Co., 294 U.S. 87, 99 (1935).

[389] Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). *See also* Kelly v. City of Pittsburgh, 104 U.S. 78 (1881); Chapman v. Zobelein, 237 U.S. 135 (1915); Alaska

depend upon the taxpayer's enjoyment of any special benefits from use of the funds raised by taxation.[390]

Theoretically, public moneys cannot be expended for other than public purposes. Some early cases applied this principle by invalidating taxes judged to be imposed to raise money for purely private rather than public purposes.[391] However, modern notions of public purpose have expanded to the point where the limitation has little practical import.[392] Whether a use is public or private, although ultimately a judicial question, "is a practical question addressed to the law-making department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court."[393]

The authority of states to tax income is "universally recognized."[394] Years ago the Court explained that "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its ben-

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Fish Co. v. Smith, 255 U.S. 44 (1921); Magnano Co. v. Hamilton, 292 U.S. 40 (1934); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[390] Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937). A taxpayer, therefore, cannot contest the imposition of an income tax on the ground that, in operation, it returns to his town less income tax than he and its other inhabitants pay. Dane v. Jackson, 256 U.S. 589 (1921).

[391] Loan Association v. Topeka, 87 U.S. (20 Wall.) 655 (1875) (voiding tax employed by city to make a substantial grant to a bridge manufacturing company to induce it to locate its factory in the city). *See also* City of Parkersburg v. Brown, 106 U.S. 487 (1882) (private purpose bonds not authorized by state constitution).

[392] Taxes levied for each of the following purposes have been held to be for a public use: a city coal and fuel yard, Jones v. City of Portland, 245 U.S. 217 (1917), a state bank, a warehouse, an elevator, a flour mill system, homebuilding projects, Carmichael v. Southern Coal & Coke Co., 300 U.S. 644 (1937), a society for preventing cruelty to animals (dog license tax), Nicchia v. New York, 254 U.S. 228 (1920), a railroad tunnel, Milheim v. Moffat Tunnel Dist., 262 U.S. 710 (1923), books for school children attending private as well as public schools, Cochran v. Louisiana Bd. of Educ., 281 U.S. 370 (1930), and relief of unemployment, Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 515 (1937).

[393] In applying the Fifth Amendment Due Process Clause the Court has said that discretion as to what is a public purpose "belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." Helvering v. Davis, 301 U.S. 619, 640 (1937); United States v. Butler, 297 U.S. 1, 67 (1936). That payment may be made to private individuals is now irrelevant. *Carmichael*, 301 U.S. at 518. *Cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (sustaining tax imposed on mine companies to compensate workers for black lung disabilities, including those contracting disease before enactment of tax, as way of spreading cost of employee liabilities).

[394] New York ex rel. Cohn v. Graves, 300 U.S. 308, 313 (1937).

efits."[395] Also, a tax on income is not constitutionally suspect because retroactive. The routine practice of making taxes retroactive for the entire year of the legislative session in which the tax is enacted has long been upheld,[396] and there are also situations in which courts have upheld retroactive application to the preceding year or two.[397]

A state also has broad tax authority over wills and inheritance. A state may apply an inheritance tax to the transmission of property by will or descent, or to the legal privilege of taking property by devise or descent,[398] although such tax must be consistent with other due process considerations.[399] Thus, an inheritance tax law, enacted after the death of a testator but before the distribution of his estate, constitutionally may be imposed on the shares of legatees, notwithstanding that under the law of the state in effect on the date of such enactment, ownership of the property passed to the legatees upon the testator's death.[400] Equally consistent with due process is a tax on an *inter vivos* transfer of property by deed intended to take effect upon the death of the grantor.[401]

The taxation of entities that are franchises within the jurisdiction of the governing body raises few concerns. Thus, a city ordinance imposing annual license taxes on light and power companies does not violate the Due Process Clause merely because the city

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[395] 300 U.S. at 313. *See also* Shaffer v. Carter, 252 U.S. 37, 49–52 (1920); and Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) (states may tax the income of nonresidents derived from property or activity within the state).

[396] *See*, *e.g.*, Stockdale v. Insurance Companies, 87 U.S. (20 Wall.) 323 (1874); United States v. Hudson, 299 U.S. 498 (1937); United States v. Darusmont, 449 U.S. 292 (1981).

[397] Welch v. Henry, 305 U.S. 134 (1938) (upholding imposition in 1935 of tax liability for 1933 tax year; due to the scheduling of legislative sessions, this was the legislature's first opportunity to adjust revenues after obtaining information of the nature and amount of the income generated by the original tax). Because "[t]axation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract," the Court explained, "its retroactive imposition does not necessarily infringe due process." Id. at 146–47.

[398] Stebbins v. Riley, 268 U.S. 137, 140, 141 (1925).

[399] When remainders indisputably vest at the time of the creation of a trust and a succession tax is enacted thereafter, the imposition of the tax on the transfer of such remainder is unconstitutional. Coolidge v. Long, 282 U.S. 582 (1931). The Court has noted that insofar as retroactive taxation of vested gifts has been voided, the justification therefor has been that "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the [retroactive] statute later made the taxable event . . . . Taxation . . . of a gift which . . . [the donor] might well have refrained from making had he anticipated the tax . . . [is] thought to be so arbitrary . . . as to be a denial of due process." Welch v. Henry, 305 U.S. 134, 147 (1938). But where the remaindermen's interests are contingent and do not vest until the donor's death subsequent to the adoption of the statute, the tax is valid. Stebbins v. Riley, 268 U.S. 137 (1925).

[400] Cahen v. Brewster, 203 U.S. 543 (1906).

[401] Keeney v. New York, 222 U.S. 525 (1912).

has entered the power business in competition with such companies.[402] Nor does a municipal charter authorizing the imposition upon a local telegraph company of a tax upon the lines of the company within its limits at the rate at which other property is taxed but upon an arbitrary valuation per mile, deprive the company of its property without due process of law, inasmuch as the tax is a mere franchise or privilege tax.[403]

States have significant discretion in how to value real property for tax purposes. Thus, assessment of properties for tax purposes over real market value is allowed as merely another way of achieving an increase in the rate of property tax, and does not violate due process.[404] Likewise, land subject to mortgage may be taxed for its full value without deduction of the mortgage debt from the valuation.[405]

A state also has wide discretion in how to apportion real property tax burdens. Thus, a state may defray the entire expense of creating, developing, and improving a political subdivision either from funds raised by general taxation, by apportioning the burden among the municipalities in which the improvements are made, or by creating (or authorizing the creation of) tax districts to meet sanctioned outlays.[406] Or, where a state statute authorizes municipal authorities to define the district to be benefitted by a street improvement and to assess the cost of the improvement upon the property within the district in proportion to benefits, their action in establishing the district and in fixing the assessments on included property, cannot, if not arbitrary or fraudulent, be reviewed under the Fourteenth Amendment upon the ground that other property benefitted by the improvement was not included.[407]

On the other hand, when the benefit to be derived by a railroad from the construction of a highway will be largely offset by the loss of local freight and passenger traffic, an assessment upon

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[402] Puget Sound Co. v. Seattle, 291 U.S. 619 (1934).

[403] New York Tel. Co. v. Dolan, 265 U.S. 96 (1924).

[404] Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

[405] Paddell v. City of New York, 211 U.S. 446 (1908).

[406] Hagar v. Reclamation Dist., 111 U.S. 701 (1884).

[407] Butters v. City of Oakland, 263 U.S. 162 (1923). It is also proper to impose a special assessment for the preliminary expenses of an abandoned road improvement, even though the assessment exceeds the amount of the benefit which the assessors estimated the property would receive from the completed work. Missouri Pacific R.R. v. Road District, 266 U.S. 187 (1924). *See also* Roberts v. Irrigation Dist., 289 U.S. 71 (1933) (an assessment to pay the general indebtedness of an irrigation district is valid, even though in excess of the benefits received). Likewise a levy upon all lands within a drainage district of a tax of twenty-five cents per acre to defray preliminary expenses does not unconstitutionally take the property of landowners within that district who may not be benefitted by the completed drainage plans. Houck v. Little River Dist., 239 U.S. 254 (1915).

such railroad violates due process,[408] whereas any gains from increased traffic reasonably expected to result from a road improvement will suffice to sustain an assessment thereon.[409] Also the fact that the only use made of a lot abutting on a street improvement is for a railway right of way does not make invalid, for lack of benefits, an assessment thereon for grading, curbing, and paving.[410] However, when a high and dry island was included within the boundaries of a drainage district from which it could not be benefitted directly or indirectly, a tax imposed on the island land by the district was held to be a deprivation of property without due process of law.[411] Finally, a state may levy an assessment for special benefits resulting from an improvement already made [412] and may validate an assessment previously held void for want of authority.[413]

Jurisdiction to Tax

Generally.—The operation of the Due Process Clause as a jurisdictional limitation on the taxing power of the states has been an issue in a variety of different contexts, but most involve one of two basic questions. First, is there a sufficient relationship between the state exercising taxing power and the object of the exercise of that power? Second, is the degree of contact sufficient to justify the state's imposition of a particular obligation? Illustrative of the factual settings in which such issues arise are 1) determining the scope of the business activity of a multi-jurisdictional entity that is subject to a state's taxing power; 2) application of wealth transfer taxes to gifts or bequests of nonresidents; 3) allocation of the income of multi-jurisdictional entities for tax purposes; 4) the scope of state authority to tax income of nonresidents; and 5) collection of state use taxes.

The Court's opinions in these cases have often discussed due process and dormant commerce clause issues as if they were indistinguishable.[414] A later decision, *Quill Corp. v. North Dakota*,[415] however, used a two-tier analysis that found sufficient contact to satisfy due process but not dormant commerce clause requirements. In *Quill*,[416] the Court struck down a state statute requiring an out-of-state mail order company with neither outlets nor sales represen-

[408] Road Dist. v. Missouri Pac. R.R., 274 U.S. 188 (1927).
[409] Kansas City Ry. v. Road Dist., 266 U.S. 379 (1924).
[410] Louisville & Nashville R.R. v. Barber Asphalt Co., 197 U.S. 430 (1905).
[411] Myles Salt Co. v. Iberia Drainage Dist., 239 U.S. 478 (1916).
[412] Wagner v. Baltimore, 239 U.S. 207 (1915).
[413] Charlotte Harbor Ry. v. Welles, 260 U.S. 8 (1922).
[414] For discussion of the relationship between the taxation of interstate commerce and the dormant commerce clause, *see* Taxation, *supra*.
[415] 504 U.S. 298 (1992).
[416] 504 U.S. 298 (1992).

tatives in the state to collect and transmit use taxes on sales to state residents, but did so based on Commerce Clause rather than due process grounds. Taxation of an interstate business does not offend due process, the Court held, if that business "purposefully avails itself of the benefits of an economic market in the [taxing] State . . . even if it has no physical presence in the State."[417] Thus, *Quill* may be read as implying that the more stringent Commerce Clause standard subsumes due process jurisdictional issues, and that consequently these due process issues need no longer be separately considered.[418] This interpretation has yet to be confirmed, however, and a detailed review of due process precedents may prove useful.

Real Property.—Even prior to the ratification of the Fourteenth Amendment, it was a settled principle that a state could not tax land situated beyond its limits. Subsequently elaborating upon that principle, the Court has said that, "we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by a court."[419] Insofar as a tax payment may be viewed as an exaction for the maintenance of government in consideration of protection afforded, the logic sustaining this rule is self-evident.

Tangible Personalty.—A state may tax tangible property located within its borders (either directly through an *ad valorem* tax or indirectly through death taxes) irrespective of the residence of the owner.[420] By the same token, if tangible personal property makes only occasional incursions into other states, its permanent situs re-

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[417] The Court had previously held that the requirement in terms of a benefit is minimal. Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), (quoting Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 521–23 (1937)). It is satisfied by a "minimal connection" between the interstate activities and the taxing State and a rational relationship between the income attributed to the State and the intrastate values of the enterprise. Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436–37 (1980); Moorman Mfg. Co. v. Bair, 437 U.S. 267, 272–73 (1978). *See especially* Standard Pressed Steel Co. v. Department of Revenue, 419 U.S. 560, 562 (1975); National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551 (1977).

[418] A physical presence within the state is necessary, however, under the Commerce Clause analysis applicable to taxation of mail order sales. *See* Quill Corp. v. North Dakota, 504 U.S. at 309–19 (refusing to overrule the Commerce Clause ruling in National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 756 (1967)). *See also* Trinova Corp. v. Michigan Dep't of Treasury, 498 U.S. 358 (1991) (neither the Commerce Clause nor the Due Process Clause is violated by application of a business tax, measured on a value added basis, to a company that manufactures goods in another state, but that operates a sales office and conducts sales within state).

[419] Union Transit Co. v. Kentucky, 199 U.S. 194, 204 (1905). *See also* Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[420] Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910); Frick v. Pennsylvania, 268 U.S. 473 (1925); Blodgett v. Silberman, 277 U.S. 1 (1928).

mains in the state of origin, and, subject to certain exceptions, is taxable only by the latter.[421] The ancient maxim, *mobilia sequuntur personam*, which originated when personal property consisted in the main of articles appertaining to the person of the owner, yielded in modern times to the "law of the place where the property is kept and used." The tendency has been to treat tangible personal property as "having a situs of its own for the purpose of taxation, and correlatively to . . . exempt [it] at the domicile of its owner."[422]

Thus, when rolling stock is permanently located and used in a business outside the boundaries of a domiciliary state, the latter has no jurisdiction to tax it.[423] Further, vessels that merely touch briefly at numerous ports never acquire a taxable situs at any one of them, and are taxable in the domicile of their owners or not at all.[424] Thus, where airplanes are continually in and out of a state during the course of a tax year, the entire fleet may be taxed by the domicile state.[425]

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[421] New York ex rel. New York Cent. R.R. v. Miller, 202 U.S. 584 (1906).

[422] Wheeling Steel Corp. v. Fox, 298 U.S. 193, 209–10 (1936); Union Transit Co. v. Kentucky, 199 U.S. 194, 207 (1905); Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933).

[423] Union Transit Co. v. Kentucky, 199 U.S. 194 (1905). Justice Black, in Central R.R. v. Pennsylvania, 370 U.S. 607, 619–20 (1962), had his "doubts about the use of the Due Process Clause to strike down state tax laws. The modern use of due process to invalidate state taxes rests on two doctrines: (1) that a State is without 'jurisdiction to tax' property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited. Nothing in the language or the history of the Fourteenth Amendment, however, indicates any intention to establish either of these two doctrines. . . . And in the first case [Railroad Co. v. Jackson, 74 U.S. (7 Wall.) 262 (1869)] striking down a state tax for lack of jurisdiction to tax after the passage of that Amendment neither the Amendment nor its Due Process Clause . . . was even mentioned." He also maintained that Justice Holmes shared this view in Union Transit Co. v. Kentucky, 199 U.S. at 211.

[424] Southern Pacific Co. v. Kentucky, 222 U.S. 63 (1911). Ships operating wholly on the waters within one state, however, are taxable there and not at the domicile of the owners. Old Dominion Steamship Co. v. Virginia, 198 U.S. 299 (1905).

[425] Noting that an entire fleet of airplanes of an interstate carrier were "never continuously without the [domiciliary] State during the whole tax year," that such airplanes also had their "home port" in the domiciliary state, and that the company maintained its principal office therein, the Court sustained a personal property tax applied by the domiciliary state to all the airplanes owned by the taxpayer. Northwest Airlines v. Minnesota, 322 U.S. 292, 294–97 (1944). No other state was deemed able to accord the same protection and benefits as the taxing state in which the taxpayer had both its domicile and its business situs. Union Transit Co. v. Kentucky, 199 U.S. 194 (1905), which disallowed the taxing of tangibles located permanently outside the domicile state, was held to be inapplicable. 322 U.S. at 295 (1944). Instead, the case was said to be governed by New York *ex rel.* New York Cent. R.R. v. Miller, 202 U.S. 584, 596 (1906). As to the problem of multiple taxation of such airplanes, which had in fact been taxed proportionately by other states, the Court declared that the "taxability of any part of this fleet by any other state, than Minnesota, in view of the taxability of the entire fleet by that state, is not now before us." Justice Jackson, in a concurring opinion, would treat Minnesota's right to tax as exclusively of any similar right elsewhere.

Conversely, a nondomiciliary state, although it may not tax property belonging to a foreign corporation that has never come within its borders, may levy a tax on movables that are regularly and habitually used and employed in that state. Thus, although the fact that cars are loaded and reloaded at a refinery in a state outside the owner's domicile does not fix the situs of the entire fleet in that state, the state may nevertheless tax the number of cars that on the average are found to be present within its borders.[426] But no property of an interstate carrier can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the state.[427] Or, a state property tax on railroads, which is measured by gross earnings apportioned to mileage, is constitutional unless it exceeds what would be legitimate as an ordinary tax on the property valued as part of a going concern or is relatively higher than taxes on other kinds of property.[428]

Intangible Personalty.—To determine whether a state may tax intangible personal property, the Court has applied the fiction *mobilia sequuntur personam* (movable property follows the person) and has also recognized that such property may acquire, for tax purposes, a permanent business or commercial situs. The Court, however, has never clearly disposed of the issue whether multiple personal property taxation of intangibles is consistent with due process. In the case of corporate stock, however, the Court has obliquely acknowledged that the owner thereof may be taxed at his own domicile, at the commercial situs of the issuing corporation, and at the latter's domicile. Constitutional lawyers speculated whether the Court would sustain a tax by all three jurisdictions, or by only two of them. If the latter, the question would be which two—the state of the com-

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[426] Johnson Oil Co. v. Oklahoma, 290 U.S. 158 (1933). Moreover, in assessing that part of a railroad within its limits, a state need not treat it as an independent line valued as if it was operated separately from the balance of the railroad. The state may ascertain the value of the whole line as a single property and then determine the value of the part within on a mileage basis, unless there be special circumstances which distinguish between conditions in the several states. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894).

[427] Wallace v. Hines, 253 U.S. 66 (1920). For example, the ratio of track mileage within the taxing state to total track mileage cannot be employed in evaluating that portion of total railway property found in the state when the cost of the lines in the taxing state was much less than in other states and the most valuable terminals of the railroad were located in other states. *See also* Fargo v. Hart, 193 U.S. 490 (1904); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919).

[428] Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929). If a tax reaches only revenues derived from local operations, the fact that the apportionment formula does not result in mathematical exactitude is not a constitutional defect. Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940).

mercial situs and of the issuing corporation's domicile, or the state of the owner's domicile and that of the commercial situs.[429]

Thus far, the Court has sustained the following personal property taxes on intangibles: (1) a debt held by a resident against a nonresident, evidenced by a bond of the debtor and secured by a mortgage on real estate in the state of the debtor's residence;[430] (2) a mortgage owned and kept outside the state by a nonresident but on land within the state;[431] (3) investments, in the form of loans to a resident, made by a resident agent of a nonresident creditor;[432] (4) deposits of a resident in a bank in another state, where he carries on a business and from which these deposits are derived, but belonging absolutely to him and not used in the business ;[433] (5) membership owned by a nonresident in a domestic exchange, known as a chamber of commerce;[434] (6) membership by a resident in a stock exchange located in another state;[435] (7) stock held by a resident in a foreign corporation that does no business and has no property within the taxing state;[436] (8) stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing state;[437] (9) shares owned by nonresi-

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[429] Howard, *State Jurisdiction to Tax Intangibles: A Twelve Year Cycle*, 8 MO. L. REV. 155, 160–62 (1943); Rawlins, *State Jurisdiction to Tax Intangibles: Some Modern Aspects*, 18 TEX. L. REV. 196, 314–15 (1940).

[430] Kirtland v. Hotchkiss, 100 U.S. 491, 498 (1879).

[431] Savings Society v. Multnomah County, 169 U.S. 421 (1898).

[432] Bristol v. Washington County, 177 U.S. 133, 141 (1900).

[433] These deposits were allowed to be subjected to a personal property tax in the city of his residence, regardless of whether or not they are subject to tax in the state where the business is carried onFidelity & Columbia Trust Co. v. Louisville, 245 U.S. 54 (1917). The tax is imposed for the general advantage of living within the jurisdiction (benefit-protection theory), and may be measured by reference to the riches of the person taxed.

[434] Rogers v. Hennepin County, 240 U.S. 184 (1916).

[435] Citizens Nat'l Bank v. Durr, 257 U.S. 99, 109 (1921). "Double taxation" the Court observed "by one and the same State is not" prohibited "by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interest falling within the jurisdiction of both, forbidden."

[436] Hawley v. Malden, 232 U.S. 1, 12 (1914). The Court attached no importance to the fact that the shares were already taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the stock owner was domiciled, or at any rate did not find it necessary to pass upon the validity of the latter two taxes. The present levy was deemed to be tenable on the basis of the benefit-protection theory, namely, "the economic advantages realized through the protection at the place . . . [of business situs] of the ownership of rights in intangibles. . . ." The Court also added that "undoubtedly the State in which a corporation is organized may . . . [tax] all of its shares whether owned by residents or nonresidents."

[437] First Bank Corp. v. Minnesota, 301 U.S. 234, 241 (1937). The shares represent an aliquot portion of the whole corporate assets, and the property right so represented arises where the corporation has its home, and is therefore within the taxing jurisdiction of the State, notwithstanding that ownership of the stock may also be a taxable subject in another State.

dent shareholders in a domestic corporation, the tax being assessed on the basis of corporate assets and payable by the corporation either out of its general fund or by collection from the shareholder;[438](10) dividends of a corporation distributed ratably among stockholders regardless of their residence outside the state;[439] (11) the transfer within the taxing state by one nonresident to another of stock certificates issued by a foreign corporation;[440] and (12) promissory notes executed by a domestic corporation, although payable to banks in other states.[441]

The following personal property taxes on intangibles have been invalidated:(1) debts evidenced by notes in safekeeping within the taxing state, but made and payable and secured by property in a second state and owned by a resident of a third state;[442] (2) a tax, measured by income, levied on trust certificates held by a resident, representing interests in various parcels of land (some inside the state and some outside), the holder of the certificates, though without a voice in the management of the property, being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale.[443]

The Court also invalidated a property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another state and as to which the beneficiary had neither control nor possession, apart from the receipt of income therefrom.[444] However, a personal property tax may be collected on one-half of the value of the corpus of a trust from a resident who is one of the two trustees thereof, not withstanding that the trust was created by the will of a resident of another state in respect of intangible property located in the latter state, at least where it does not appear that the trustee is exposed to the danger of other *ad valorem* taxes in another state.[445] The first case, *Brooke*

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[438] Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938).

[439] The Court found that all stockholders were the ultimate beneficiaries of the corporation's activities within the taxing State, were protected by the latter, and were thus subject to the State's jurisdiction. International Harvester Co. v. Department of Taxation, 322 U.S. 435 (1944). This tax, though collected by the corporation, is on the transfer to a stockholder of his share of corporate dividends within the taxing State and is deducted from said dividend payments. Wisconsin Gas Co. v. United States, 322 U.S. 526 (1944).

[440] New York *ex rel.* Hatch v. Reardon, 204 U.S. 152 (1907).

[441] Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931). These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution in the latter which took place in the taxing State.

[442] Buck v. Beach, 206 U.S. 392 (1907).

[443] Senior v. Braden, 295 U.S. 422 (1935).

[444] Brooke v. City of Norfolk, 277 U.S. 27 (1928).

[445] Greenough v. Tax Assessors, 331 U.S. 486, 496–97 (1947).

v. Norfolk,[446] is distinguishable by virtue of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Also different is *Safe Deposit & Trust Co. v. Virginia*,[447] where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control.

A state in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the corporation's bank deposits and accounts receivable even though the deposits are outside the state and the accounts receivable arise from manufacturing activities in another state. Similarly, a nondomiciliary state in which a foreign corporation did business can tax the "corporate excess" arising from property employed and business done in the taxing state.[448] On the other hand, when the foreign corporation transacts only interstate commerce within a state, any excise tax on such excess is void, irrespective of the amount of the tax.[449]

Also a domiciliary state that imposes no franchise tax on a stock fire insurance corporation may assess a tax on the full amount of paid-in capital stock and surplus, less deductions for liabilities, notwithstanding that such domestic corporation concentrates its executive, accounting, and other business offices in New York, and maintains in the domiciliary state only a required registered office at which local claims are handled. Despite "the vicissitudes which the so-called 'jurisdiction-to-tax' doctrine has encountered," the presumption persists that intangible property is taxable by the state of origin.[450]

A property tax on the capital stock of a domestic company, however, the appraisal of which includes the value of coal mined in the

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[446] 277 U.S. 27 (1928).

[447] 280 U.S. 83 (1929).

[448] Adams Express Co. v. Ohio, 165 U.S. 194 (1897).

[449] Alpha Cement Co. v. Massachusetts, 268 U.S. 203 (1925). A domiciliary State, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this "corporate excess" arose from property located and business done in another State and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936). *See also* Memphis Gas Co. v. Beeler, 315 U.S. 649, 652 (1942).

[450] Newark Fire Ins. Co. v. State Board, 307 U.S. 313, 324 (1939). Although the eight Justices affirming this tax were not in agreement as to the reasons to be assigned in justification of this result, the holding appears to be in line with the dictum uttered by Chief Justice Stone in Curry v. McCanless, 307 U.S. 357, 368 (1939), to the effect that the taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles.

taxing state but located in another state awaiting sale, deprives the corporation of its property without due process of law.[451] Also void for the same reason is a state tax on the franchise of a domestic ferry company that includes in the valuation of the tax the worth of a franchise granted to the company by another state.[452]

Transfer (Inheritance, Estate, Gift) Taxes.—As a state has authority to regulate transfer of property by wills or inheritance, it may base its succession taxes upon either the transmission or receipt of property by will or by descent.[453] But whatever may be the justification of their power to levy such taxes, since 1905 the states have consistently found themselves restricted by the rule in *Union Transit Co. v. Kentucky*,[454] which precludes imposition of transfer taxes upon tangible which are permanently located or have an actual *situs* outside the state.

In the case of intangibles, however, the Court has oscillated in upholding, then rejecting, and again sustaining the levy by more than one state of death taxes upon intangibles. Until 1930, transfer taxes upon intangibles by either the domiciliary or the *situs* (but nondomiciliary) state, were with rare exceptions approved. Thus, in *Bullen v. Wisconsin*,[455] the domiciliary state of the creator of a trust was held competent to levy an inheritance tax on an out-of-state trust fund consisting of stocks, bonds, and notes, as the settlor reserved the right to control disposition and to direct payment of income for life. The Court reasoned that such reserved powers were the equivalent to a fee in the property. It took cognizance of the fact that the state in which these intangibles had their situs had also taxed the trust.[456]

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[451] Delaware, L. & W.P.R.R. v. Pennsylvania, 198 U.S. 341 (1905).

[452] Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[453] Stebbins v. Riley, 268 U.S. 137, 140–41 (1925).

[454] 199 U.S. 194 (1905) (property taxes). The rule was subsequently reiterated in 1925 in Frick v. Pennsylvania, 268 U.S. 473 (1925). *See also* Treichler v. Wisconsin, 338 U.S. 251 (1949); City Bank Farmers' Trust Co. v. Schnader, 293 U.S. 112 (1934). In State Tax Comm'n v. Aldrich, 316 U.S. 174, 185 (1942), however, Justice Jackson, in dissent, asserted that a reconsideration of this principle had become timely.

[455] 240 U.S. 635, 631 (1916). A decision rendered in 1926 which is seemingly in conflict was Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567 (1926), in which North Carolina was prevented from taxing the exercise of a power of appointment through a will executed therein by a resident, when the property was a trust fund in Massachusetts created by the will of a resident of the latter State. One of the reasons assigned for this result was that by the law of Massachusetts the property involved was treated as passing from the original donor to the appointee. However, this holding was overruled in Graves v. Schmidlapp, 315 U.S. 657 (1942).

[456] Levy of an inheritance tax by a nondomiciliary State was also sustained on similar grounds in Wheeler v. New York, 233 U.S. 434 (1914) wherein it was held that the presence of a negotiable instrument was sufficient to confer jurisdiction upon the State seeking to tax its transfer.

On the other hand, the mere ownership by a foreign corporation of property in a nondomiciliary state was held insufficient to support a tax by that state on the succession to shares of stock in that corporation owned by a nonresident decedent.[457] Also against the trend was *Blodgett v. Silberman*,[458] in which the Court defeated collection of a transfer tax by the domiciliary state by treating coins and bank notes deposited by a decedent in a safe deposit box in another state as tangible property.[459]

In the course of about two years following the Depression, the Court handed down a group of four decisions that placed the stamp of disapproval upon multiple transfer taxes and—by inference—other multiple taxation of intangibles.[460] The Court found that "practical considerations of wisdom, convenience and justice alike dictate the desirability of a uniform rule confining the jurisdiction to impose death transfer taxes as to intangibles to the State of the [owner's] domicile."[461] Thus, the Court proceeded to deny the right of nondomiciliary states to tax intangibles, rejecting jurisdictional claims founded upon such bases as control, benefit, protection or situs. During this interval, 1930–1932, multiple transfer taxation of intangibles came to be viewed, not merely as undesirable, but as so arbitrary and unreasonable as to be prohibited by the Due Process Clause.

The Court has expressly overruled only one of these four decisions condemning multiple succession taxation of intangibles. In 1939, in *Curry v. McCanless*, the Court announced a departure from "[t]he doctrine, of recent origin, that the Fourteenth Amendment precludes the taxation of any interest in the same intangible in more than one state . . . ."[462] Taking cognizance of the fact that this doctrine had never been extended to the field of income taxation or consistently applied in the field of property taxation, the Court declared that a correct interpretation of constitutional requirements would dictate the following conclusions: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use

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[457] Rhode Island Trust Co. v. Doughton, 270 U.S. 69 (1926).

[458] 277 U.S. 1 (1928).

[459] The Court conceded, however, that the domiciliary State could tax the transfer of books and certificates of indebtedness found in that safe deposit box as well as the decedent's interest in a foreign partnership.

[460] First Nat'l Bank v. Maine, 284 U.S. 312 (1932); Beidler v. South Carolina Tax Comm'n, 282 U.S. 1 (1930); Baldwin v. Missouri, 281 U.S. 586 (1930); Farmers Loan Co. v. Minnesota, 280 U.S. 204 (1930).

[461] First National Bank v. Maine, 284 U.S. 312, 330–31 (1932).

[462] 307 U.S. 357, 363 (1939).

and enjoyment of rights in intangibles measured by their value. . . . But when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains . . . . [However], the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax . . . ." [463]

In accordance with this line of reasoning, the domicile of a decedent (Tennessee) and the state where a trust received securities conveyed from the decedent by will (Alabama) were both allowed to impose a tax on the transfer of these securities. "In effecting her purposes, the testatrix brought some of the legal interests which she created within the control of one state by selecting a trustee there and others within the control of the other state by making her domicile there. She necessarily invoked the aid of the law of both states, and her legatees, before they can secure and enjoy the benefits of succession, must invoke the law of both." [464]

On the authority of *Curry v. McCanless*, the Court, in *Pearson v. McGraw*,[465] sustained the application of an Oregon transfer tax to intangibles handled by an Illinois trust company, although the property was never physically present in Oregon. Jurisdiction to tax was viewed as dependent, not on the location of the property in the state, but on the fact that the owner was a resident of Oregon. In *Graves v. Elliott*,[466] the Court upheld the power of New York, in computing its estate tax, to include in the gross estate of a domiciled decedent the value of a trust of bonds managed in Colorado by a Colorado trust company and already taxed on its transfer by Colorado, which trust the decedent had established while in Colorado and concerning which he had never exercised any of his reserved powers of revocation or change of beneficiaries. It was observed that "the power of disposition of property is the equivalent of ownership. It is a potential source of wealth and its exercise in

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[463] 307 U.S. at 366, 367, 368.

[464] 307 U.S. at 372. These statements represented a belated adoption of the views advanced by Chief Justice Stone in dissenting or concurring opinions that he filed in three of the four decisions during 1930–1932. By the line of reasoning taken in these opinions, if protection or control was extended to, or exercised over, intangibles or the person of their owner, then as many states as afforded such protection or were capable of exerting such dominion should be privileged to tax the transfer of such property. On this basis, the domiciliary state would invariably qualify as a state competent to tax as would a nondomiciliary state, so far as it could legitimately exercise control or could be shown to have afforded a measure of protection that was not trivial or insubstantial.

[465] 308 U.S. 313 (1939).

[466] 307 U.S. 383 (1939).

the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power. The relinquishment at death, in consequence of the non-exercise in life, of a power to revoke a trust created by a decedent is likewise an appropriate subject of taxation." [467]

The costliness of multiple taxation of estates comprising intangibles can be appreciably aggravated if one or more states find that the decedent died domiciled within its borders. In such cases, contesting states may discover that the assets of the estate are insufficient to satisfy their claims. Thus, in *Texas v. Florida*,[468] the State of Texas filed an original petition in the Supreme Court against three other states who claimed to be the domicile of the decedent, noting that the portion of the estate within Texas alone would not suffice to discharge its own tax, and that its efforts to collect its tax might be defeated by adjudications of domicile by the other states. The Supreme Court disposed of this controversy by sustaining a finding that the decedent had been domiciled in Massachusetts, but intimated that thereafter it would take jurisdiction in like situations only in the event that an estate was valued less than the total of the demands of the several states, so that the latter were confronted with a prospective inability to collect.

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[467] 307 U.S. at 386. Consistent application of the principle enunciated in Curry v. McCanless is also discernible in two later cases in which the Court sustained the right of a domiciliary state to tax the transfer of intangibles kept outside its boundaries, notwithstanding that "in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose legal protection they enjoy." Graves v. Schmidlapp, 315 U.S. 657, 661 (1942). In this case, an estate tax was levied upon the value of the subject of a general testamentary power of appointment effectively exercised by a resident donee over intangibles held by trustees under the will of a nonresident donor of the power. Viewing the transfer of interest in the intangibles by exercise of the power of appointment as the equivalent of ownership, the Court quoted the statement in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 429 (1819), that the power to tax "is an incident of sovereignty, and is coextensive with that to which it is an incident." 315 U.S. at 660. Again, in Central Hanover Bank Co. v. Kelly, 319 U.S. 94 (1943), the Court approved a New Jersey transfer tax imposed on the occasion of the death of a New Jersey grantor of an irrevocable trust despite the fact that it was executed in New York, the securities were located in New York, and the disposition of the corpus was to two nonresident sons.

[468] 306 U.S. 398 (1939). Resort to the Supreme Court's original jurisdiction was necessary because in Worcester County Co. v. Riley, 302 U.S. 292 (1937), the Court, proceeding on the basis that inconsistent determinations by the courts of two states as to the domicile of a taxpayer do not raise a substantial federal constitutional question, held that the Eleventh Amendment precluded a suit by the estate of the decedent to establish the correct state of domicile. In California v. Texas, 437 U.S. 601 (1978), a case on all points with Texas v. Florida, the Court denied leave to file an original action to adjudicate a dispute between the two states about the actual domicile of Howard Hughes, a number of Justices suggesting that *Worcester County* no longer was good law. Subsequently, the Court reaffirmed *Worcester County*, Cory v. White, 457 U.S. 85 (1982), and then permitted an original action to proceed, California v. Texas, 457 U.S. 164 (1982), several Justices taking the position that neither *Worcester County* nor Texas v. Florida was any longer viable.

Corporate Privilege Taxes.—A domestic corporation may be subjected to a privilege tax graduated according to paid-up capital stock, even though the stock represents capital not subject to the taxing power of the state, because the tax is levied not on property but on the privilege of doing business in corporate form.[469] However, a state cannot tax property beyond its borders under the guise of taxing the privilege of doing an intrastate business. Therefore, a license tax based on the authorized capital stock of an out-of-state corporation is void,[470] even though there is a maximum fee,[471] unless the tax is apportioned based on property interests in the taxing state.[472] On the other hand, a fee collected only once as the price of admission to do intrastate business is distinguishable from a tax and accordingly may be levied on an out-of-state corporation based on the amount of its authorized capital stock.[473]

A municipal license tax imposed on a foreign corporation for goods sold within and without the state, but manufactured in the city, is not a tax on business transactions or property outside the city and therefore does not violate the Due Process Clause.[474] But a state lacks jurisdiction to extend its privilege tax to the gross receipts of a foreign contracting corporation for fabricating equipment outside the taxing state, even if the equipment is later installed in the taxing state. Unless the activities that are the subject of the tax are carried on within its territorial limits, a state is not competent to impose such a privilege tax.[475]

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[469] Kansas City Ry. v. Kansas, 240 U.S. 227 (1916); Kansas City, M. & B.R.R. v. Stiles, 242 U.S. 111 (1916). Similarly, the validity of a franchise tax, imposed on a domestic corporation engaged in foreign maritime commerce and assessed upon a proportion of the total franchise value equal to the ratio of local business done to total business, is not impaired by the fact that the total value of the franchise was enhanced by property and operations carried on beyond the limits of the state. Schwab v. Richardson, 263 U.S. 88 (1923).

[470] Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910); Pullman Co. v. Kansas, 216 U.S. 56 (1910); Looney v. Crane Co., 245 U.S. 178 (1917); International Paper Co. v. Massachusetts, 246 U.S. 135 (1918).

[471] Cudahy Co. v. Hinkle, 278 U.S. 460 (1929).

[472] An example of such an apportioned tax is a franchise tax based on such proportion of outstanding capital stock as is represented by property owned and used in business transacted in the taxing state. St. Louis S.W. Ry. v. Arkansas, 235 U.S. 350 (1914).

[473] Atlantic Refining Co. v. Virginia, 302 U.S. 22 (1937).

[474] American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919). Nor does a state license tax on the production of electricity violate the due process clause because it may be necessary, to ascertain, as an element in its computation, the amounts delivered in another jurisdiction. Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932). A tax on chain stores, at a rate per store determined by the number of stores both within and without the state is not unconstitutional as a tax in part upon things beyond the jurisdiction of the state.

[475] James v. Dravo Contracting Co., 302 U.S. 134 (1937).

Individual Income Taxes.—A state may tax annually the entire net income of resident individuals from whatever source received,[476] as jurisdiction is founded upon the rights and privileges incident to domicile. A state may also tax the portion of a nonresident's net income that derives from property owned by him within its borders, and from any business, trade, or profession carried on by him within its borders.[477] This state power is based upon the state's dominion over the property he owns, or over activity from which the income derives, and from the obligation to contribute to the support of a government that secures the collection of such income. Accordingly, a state may tax residents on income from rents of land located outside the state; from interest on bonds physically outside the state and secured by mortgage upon lands physically outside the state;[478] and from a trust created and administered in another state and not directly taxable to the trustee.[479] Further, the fact that another state has lawfully taxed identical income in the hands of trustees operating in that state does not necessarily destroy a domiciliary state's right to tax the receipt of income by a resident beneficiary.[480]

Corporate Income Taxes: Foreign Corporations.—A tax based on the income of a foreign corporation may be determined by allocating to the state a proportion of the total,[481] unless the income attributed to the state is out of all appropriate proportion to the business transacted in the state.[482] Thus, a franchise tax on a for-

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[476] Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932).

[477] Shaffer v. Carter, 252 U.S. 37 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

[478] New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

[479] Maguire v. Trefy, 253 U.S. 12 (1920).

[480] Guaranty Trust Co. v. Virginia, 305 U.S. 19, 23 (1938). Likewise, even though a nonresident does no business in a state, the state may tax the profits realized by the nonresident upon his sale of a right appurtenant to membership in a stock exchange within its borders. New York ex rel. Whitney v. Graves, 299 U.S. 366 (1937).

[481] Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); Bass, Ratcliff & Gretton Ltd. v. Tax Comm'n, 266 U.S. 271 (1924). The Court has recently considered and expanded the ability of the states to use apportionment formulae to allocate to each state for taxing purposes a fraction of the income earned by an integrated business conducted in several states as well as abroad. Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980); Exxon Corp. v. Department of Revenue, 447 U.S. 207 (1980). *Exxon* refused to permit a unitary business to use separate accounting techniques that divided its profits among its various functional departments to demonstrate that a state's formulary apportionment taxes extraterritorial income improperly. Moorman Mfg. Co. v. Bair, 437 U.S. at 276–80, implied that a showing of actual multiple taxation was a necessary predicate to a due process challenge but might not be sufficient.

[482] Evidence may be submitted that tends to show that a state has applied a method that, although fair on its face, operates so as to reach profits that are in no sense attributable to transactions within its jurisdiction. Hans Rees' Sons v. North Carolina, 283 U.S. 123 (1931).

eign corporation may be measured by income, not just from business within the state, but also on net income from interstate and foreign business.[483] Because the privilege granted by a state to a foreign corporation of carrying on business supports a tax by that state, it followed that a Wisconsin privilege dividend tax could be applied to a Delaware corporation despite its having its principal offices in New York, holding its meetings and voting its dividends in New York, and drawing its dividend checks on New York bank accounts. The tax could be imposed on the "privilege of declaring and receiving dividends" out of income derived from property located and business transacted in Wisconsin, equal to a specified percentage of such dividends, the corporation being required to deduct the tax from dividends payable to resident and nonresident shareholders.[484]

Insurance Company Taxes.—A privilege tax on the gross premiums received by a foreign life insurance company at its home office for business written in the state does not deprive the company of property without due process,[485] but such a tax is invalid if the company has withdrawn all its agents from the state and has ceased to do business there, merely continuing to receive the renewal premiums at its home office.[486] Also violating due process is a state insurance premium tax imposed on a nonresident firm doing business in the taxing jurisdiction, where the firm obtained the coverage of property within the state from an unlicenced out-of-state insurer that consummated the contract, serviced the policy, and collected the premiums outside that taxing jurisdiction.[487] However, a tax may be imposed upon the privilege of entering and engaging in business in a state, even if the tax is a percentage of the "annual premiums to be paid throughout the life of the policies issued." Under

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[483] Matson Nav. Co. v. State Board, 297 U.S. 441 (1936).

[484] Wisconsin v. J.C. Penney Co., 311 U.S. 435, 448–49 (1940). Dissenting, Justice Roberts, along with Chief Justice Hughes and Justices McReynolds and Reed, stressed the fact that the use and disbursement by the corporation at its home office of income derived from operations in many states does not depend on and cannot be controlled by, any law of Wisconsin. The act of disbursing such income as dividends, he contended is "one wholly beyond the reach of Wisconsin's sovereign power, one which it cannot effectively command, or prohibit or condition." The assumption that a proportion of the dividends distributed is paid out of earnings in Wisconsin for the year immediately preceding payment is arbitrary and not borne out by the facts. Accordingly, "if the exaction is an income tax in any sense it is such upon the stockholders (many of whom are nonresidents) and is obviously bad." *See also* Wisconsin v. Minnesota Mining Co., 311 U.S. 452 (1940).

[485] Equitable Life Society v. Pennsylvania, 238 U.S. 143 (1915).

[486] Provident Savings Ass'n v. Kentucky, 239 U.S. 103 (1915).

[487] State Bd. of Ins. v. Todd Shipyards, 370 U.S. 451 (1962).

this kind of tax, a state may continue to collect even after the company's withdrawal from the state.[488]

A state may lawfully extend a tax to a foreign insurance company that contracts with an automobile sales corporation in a third state to insure customers of the automobile sales corporation against loss of cars purchased through the automobile sales corporation, insofar as the cars go into the possession of a purchaser within the taxing state.[489] On the other hand, a foreign corporation admitted to do a local business, which insures its property with insurers in other states who are not authorized to do business in the taxing state, cannot constitutionally be subjected to a 5% tax on the amount of premiums paid for such coverage.[490] Likewise a Connecticut life insurance corporation, licensed to do business in California, which negotiated reinsurance contracts in Connecticut, received payment of premiums on such contracts in Connecticut, and was liable in Connecticut for payment of losses claimed under such contracts, cannot be subjected by California to a privilege tax measured by gross premiums derived from such contracts, notwithstanding that the contracts reinsured other insurers authorized to do business in California and protected policies effected in California on the lives of California residents. The tax cannot be sustained whether as laid on property, business done, or transactions carried on, within California, or as a tax on a privilege granted by that state.[491]

Procedure in Taxation

Generally.—The Supreme Court has never decided exactly what due process is required in the assessment and collection of general taxes. Although the Court has held that "notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential" for imposition of special taxes, it has also ruled that laws

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[488] Continental Co. v. Tennessee, 311 U.S. 5, 6 (1940).

[489] Palmetto Ins. Co. v. Connecticut, 272 U.S. 295 (1926).

[490] St. Louis Compress Co. v. Arkansas, 260 U.S. 346 (1922).

[491] Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938). When policy loans to residents are made by a local agent of a foreign insurance company, in the servicing of which notes are signed, security taken, interest collected, and debts are paid within the State, such credits are taxable to the company, notwithstanding that the promissory notes evidencing such credits are kept at the home office of the insurer. Metropolitan Life Ins. Co. v. City of New Orleans, 205 U.S. 395 (1907). But when a resident policyholder's loan is merely charged against the reserve value of his policy, under an arrangement for extinguishing the debt and interest thereon by deduction from any claim under the policy, such credit is not taxable to the foreign insurance company. Orleans Parish v. New York Life Ins. Co., 216 U.S. 517 (1910). Premiums due from residents on which an extension has been granted by foreign companies also are credits on which the latter may be taxed by the State of the debtor's domicile. Liverpool & L. & G. Ins. Co. v. Orleans Assessors, 221 U.S. 346 (1911). The mere fact that the insurers charge these premiums to local agents and give no credit directly to policyholders does not enable them to escape this tax.

for assessment and collection of general taxes stand upon a different footing and are to be construed with the utmost liberality, even to the extent of acknowledging that no notice whatever is necessary.[492] Due process of law as applied to taxation does not mean judicial process;[493] neither does it require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain.[494] Due process is satisfied if a taxpayer is given an opportunity to test the validity of a tax at any time before it is final, whether before a board having a quasi-judicial character, or before a tribunal provided by the state for such purpose.[495]

Notice and Hearing in Relation to Taxes.—"Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally, specific taxes on things, or persons, or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the tax-payer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard, or bushel, or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping a hotel or a restaurant, or selling liquors, or cigars, or clothes, he has only to pay the amount required by law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the state, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it."[496]

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[492] Turpin v. Lemon, 187 U.S. 51, 58 (1902); Glidden v. Harrington, 189 U.S. 255 (1903).

[493] McMillen v. Anderson, 95 U.S. 37, 42 (1877).

[494] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 239 (1890).

[495] Hodge v. Muscatine County, 196 U.S. 276 (1905).

[496] Hagar v. Reclamation Dist., 111 U.S. 701, 709–10 (1884).

Notice and Hearing in Relation to Assessments.—"But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceedings by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."[497]

Nevertheless, it has never been considered necessary to the validity of a tax that the party charged shall have been present, or had an opportunity to be present, in some tribunal when he was assessed.[498] Where a tax board has its time of sitting fixed by law and where its sessions are not secret, no obstacle prevents the appearance of any one before it to assert a right or redress a wrong and in the business of assessing taxes, this is all that can be reasonably asked.[499] Nor is there any constitutional command that notice of an assessment as well as an opportunity to contest it be given in advance of the assessment. It is enough that all available defenses may be presented to a competent tribunal during a suit to collect the tax and before the demand of the state for remittance becomes final.[500]

However, when assessments based on the enjoyment of a special benefit are made by a political subdivision, a taxing board or court, the property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into that determination.[501] The hearing need not amount to a judicial

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[497] 111 U.S. at 710.

[498] McMillen v. Anderson, 95 U.S. 37, 42 (1877).

[499] *State Railroad Tax Cases*, 92 U.S. 575, 610 (1876).

[500] Nickey v. Mississippi, 292 U.S. 393, 396 (1934). *See also* Clement Nat'l Bank v. Vermont, 231 U.S. 120 (1913). A hearing before judgment, with full opportunity to submit evidence and arguments being all that can be adjudged vital, it follows that rehearings and new trials are not essential to due process of law. Pittsburgh C.C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894). One hearing is sufficient to constitute due process, Michigan Central R.R. v. Powers, 201 U.S. 245, 302 (1906), and the requirements of due process are also met if a taxpayer, who had no notice of a hearing, does receive notice of the decision reached there and is privileged to appeal it and, on appeal, to present evidence and be heard on the valuation of his property. Pittsburgh C.C. & St. L. Ry. v. Board of Pub. Works, 172 U.S. 32, 45 (1898).

[501] St. Louis & K.C. Land Co. v. Kansas City, 241 U.S. 419, 430 (1916); Paulsen v. Portland, 149 U.S. 30, 41 (1893); Bauman v. Ross, 167 U.S. 548, 590 (1897).

inquiry,[502] although a mere opportunity to submit objections in writing, without the right of personal appearance, is not sufficient.[503] Generally, if an assessment for a local improvement is made in accordance with a fixed rule prescribed by legislative act, the property owner is not entitled to be heard in advance on the question of benefits.[504] On the other hand, if the area of the assessment district was not determined by the legislature, a landowner does have the right to be heard respecting benefits to his property before it can be included in the improvement district and assessed, but due process is not denied if, in the absence of actual fraud or bad faith, the decision of the agency vested with the initial determination of benefits is made final.[505] The owner has no constitutional right to be heard in opposition to the launching of a project which may end in assessment, and once his land has been duly included within a benefit district, the only privilege which he thereafter enjoys is to a hearing upon the apportionment, that is, the amount of the tax which he has to pay.[506]

More specifically, where the mode of assessment resolves itself into a mere mathematical calculation, there is no necessity for a hearing.[507] Statutes and ordinances providing for the paving and grading of streets, the cost thereof to be assessed on the front foot rule, do not, by their failure to provide for a hearing or review of assessments, generally deprive a complaining owner of property without due process of law.[508] In contrast, when an attempt is made to cast upon particular property a certain proportion of the construc-

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[502] Tonawanda v. Lyon, 181 U.S. 389, 391 (1901).

[503] Londoner v. City of Denver, 210 U.S. 373 (1908).

[504] Withnell v. Ruecking Constr. Co., 249 U.S. 63, 68 (1919); Browning v. Hooper, 269 U.S. 396, 405 (1926). Likewise, the committing to a board of county supervisors of authority to determine, without notice or hearing, when repairs to an existing drainage system are necessary cannot be said to deny due process of law to landowners in the district, who, by statutory requirement, are assessed for the cost thereof in proportion to the original assessment. Breiholz v. Board of Supervisors, 257 U.S. 118 (1921).

[505] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 168, 175 (1896); Browning v. Hooper, 269 U.S. 396, 405 (1926).

[506] Utley v. Petersburg, 292 U.S. 106, 109 (1934); French v. Barber Asphalt Paving Co., 181 U.S. 324, 341 (1901). *See also* Soliah v. Heskin, 222 U.S. 522 (1912). Nor can he rightfully complain because the statute renders conclusive, after a hearing, the determination as to apportionment by the same body which levied the assessment. Hibben v. Smith, 191 U.S. 310, 321 (1903).

[507] Hancock v. Muskogee, 250 U.S. 454, 458 (1919). Likewise, a taxpayer does not have a right to a hearing before a state board of equalization preliminary to issuance by it of an order increasing the valuation of all property in a city by 40 percent. Bi-Metallic Co. v. Colorado, 239 U.S. 441 (1915).

[508] City of Detroit v. Parker, 181 U.S. 399 (1901).

tion cost of a sewer not calculated by any mathematical formula, the taxpayer has a right to be heard.[509]

Collection of Taxes.—States may undertake a variety of methods to collect taxes. For instance, collection of an inheritance tax may be expedited by a statute requiring the sealing of safe deposit boxes for at least ten days after the death of the renter and obliging the lessor to retain assets found therein sufficient to pay the tax that may be due the state.[510] A state may compel retailers to collect such gasoline taxes from consumers and, under penalty of a fine for delinquency, to remit monthly the amounts thus collected.[511] In collecting personal income taxes, most states require employers to deduct and withhold the tax from the wages of employees.[512]

States may also use various procedures to collect taxes from prior tax years. To reach property that has escaped taxation, a state may tax estates of decedents for a period prior to death and grant proportionate deductions for all prior taxes that the personal representative can prove to have been paid.[513] In addition, the Court found no violation of property rights when a state asserts a prior lien against trucks repossessed by a vendor from a carrier (1) accruing from the operation by the carrier of trucks not sold by the vendors, either before or during the time the carrier operated the vendors' trucks, or (2) arising from assessments against the carrier, after the trucks were repossessed, but based upon the carrier's operations preceding such repossession. Such lien need not be limited to trucks owned by the carrier because the wear on the highways occasioned by the carrier's operation is in no way altered by the vendor's retention of title.[514]

As a state may provide in advance that taxes will bear interest from the time they become due, it may with equal validity stipulate that taxes which have become delinquent will bear interest from the time the delinquency commenced. Further, a state may adopt new remedies for the collection of taxes and apply these remedies

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[509] Paulsen v. Portland, 149 U.S. 30, 38 (1893).

[510] National Safe Deposit Co. v. Stead, 232 U.S. 58 (1914).

[511] Pierce Oil Corp. v. Hopkins, 264 U.S. 137 (1924). Likewise, a tax on the tangible personal property of a nonresident owner may be collected from the custodian or possessor of such property, and the latter, as an assurance of reimbursement, may be granted a lien on such property. Carstairs v. Cochran, 193 U.S. 10 (1904); Hannis Distilling Co. v. Baltimore, 216 U.S. 285 (1910).

[512] The duty thereby imposed on the employer has never been viewed as depriving him of property without due process of law, nor has the adjustment of his system of accounting been viewed as an unreasonable regulation of the conduct of business. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).

[513] Bankers Trust Co. v. Blodgett, 260 U.S. 647 (1923).

[514] International Harvester Corp. v. Goodrich, 350 U.S. 537 (1956).

to taxes already delinquent.[515] After liability of a taxpayer has been fixed by appropriate procedure, collection of a tax by distress and seizure of his person does not deprive him of liberty without due process of law.[516] Nor is a foreign insurance company denied due process of law when its personal property is distrained to satisfy unpaid taxes.[517]

The requirements of due process are fulfilled by a statute which, in conjunction with affording an opportunity to be heard, provides for the forfeiture of titles to land for failure to list and pay taxes thereon for certain specified years.[518] No less constitutional, as a means of facilitating collection, is an *in rem* proceeding, to which the land alone is made a party, whereby tax liens on land are foreclosed and all preexisting rights or liens are eliminated by a sale under a decree.[519] On the other hand, although the conversion of an unpaid special assessment into both a personal judgment against the owner as well as a charge on the land is consistent with the Fourteenth Amendment,[520] a judgment imposing personal liability against a nonresident taxpayer over whom the state court acquired no jurisdiction is void.[521] Apart from such restraints, however, a state is free to adopt new remedies for the collection of taxes and even to apply new remedies to taxes already delinquent.[522]

Sufficiency and Manner of Giving Notice.—Notice of tax assessments or liabilities, insofar as it is required, may be either personal, by publication, by statute fixing the time and place of hearing,[523] or by delivery to a statutorily designated agent.[524] As regards land, "where the State . . . [desires] to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are 'so minded,' to ascertain that it is to be subjected to sale to answer for taxes, and to

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[515] League v. Texas, 184 U.S. 156 (1902).

[516] Palmer v. McMahon, 133 U.S. 660, 669 (1890).

[517] Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905).

[518] King v. Mullins, 171 U.S. 404 (1898); Chapman v. Zobelein, 237 U.S. 135 (1915).

[519] Leigh v. Green, 193 U.S. 79 (1904).

[520] Davidson v. City of New Orleans, 96 U.S. 97, 107 (1878).

[521] Dewey v. City of Des Moines, 173 U.S. 193 (1899).

[522] League v. Texas, 184 U.S. 156, 158 (1902). *See also* Straus v. Foxworth, 231 U.S. 162 (1913).

[523] Londoner v. City of Denver, 210 U.S. 373 (1908). *See also Kentucky Railroad Tax Cases*, 115 U.S. 321, 331 (1885); Winona & St. Peter Land Co. v. Minnesota, 159 U.S. 526, 537 (1895); Merchants Bank v. Pennsylvania, 167 U.S. 461, 466 (1897); Glidden v. Harrington, 189 U.S. 255 (1903).

[524] A state statute may designate a corporation as the agent of a nonresident stockholder to receive notice and to represent him in proceedings for correcting assessment. Corry v. Baltimore, 196 U.S. 466, 478 (1905).

appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the Fourteenth Amendment. . . .” In fact, compliance with statutory notice requirements combined with actual notice to owners of land can be sufficient in an *in rem* case, even if there are technical defects in such notice.[525]

Whether statutorily required notice is sufficient may vary with the circumstances. Thus, where a taxpayer was not legally competent, no guardian had been appointed and town officials were aware of these facts, notice of a foreclosure was defective, even though the tax delinquency was mailed to her, published in local papers, and posted in the town post office.[526] On the other hand, due process was not denied to appellants who were unable to avert foreclosure on certain trust lands (based on liens for unpaid water charges) because their own bookkeeper failed to inform them of the receipt of mailed notices.[527]

Sufficiency of Remedy.—When no other remedy is available, due process is denied by a judgment of a state court withholding a decree in equity to enjoin collection of a discriminatory tax.[528] Requirements of due process are similarly violated by a statute that limits a taxpayer’s right to challenge an assessment to cases of fraud or corruption,[529] and by a state tribunal that prevents the recovery of taxes imposed in violation of the Constitution and laws of the United States by invoking a state law that allows suits to recover taxes alleged to have been assessed illegally only if the taxes had been paid at the time and in the manner provided by such law.[530] In the case of a tax held unconstitutional as a discrimination against

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[525] Leigh v. Green, 193 U.S. 79, 92–93 (1904). Thus, an assessment for taxes and a notice of sale when such taxes are delinquent will be sustained as long as there is a description of the land and the owner knows that the property so described is his, even if that description is not technically correct. Ontario Land Co. v. Yordy, 212 U.S. 152 (1909). Where tax proceedings are *in rem*, owners are bound to take notice thereof, and to pay taxes on their property, even if the land is assessed to unknown or other persons. Thus, if an owner stands by and sees his property sold for delinquent taxes, he is not thereby wrongfully deprived of his property. Id. *See also* Longyear v. Toolan, 209 U.S. 414 (1908).

[526] Covey v. Town of Somers, 351 U.S. 141 (1956).

[527] Nelson v. New York City, 352 U.S. 103 (1956). This conclusion was unaffected by the disparity between the value of the land taken and the amount owed the city. Having issued appropriate notices, the city cannot be held responsible for the negligence of the bookkeeper and the managing trustee in overlooking arrearages on tax bills, nor is it obligated to inquire why appellants regularly paid real estate taxes on their property.

[528] Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673 (1930).

[529] Central of Georgia Ry. v. Wright, 207 U.S. 127 (1907).

[530] Carpenter v. Shaw, 280 U.S. 363 (1930). *See also* Ward v. Love County, 253 U.S. 17 (1920). In this as in other areas, the state must provide procedural safeguards against imposition of an unconstitutional tax. These procedures need not apply *predeprivation*, but a state that denies predeprivation remedy by requiring that tax payments be made before objections are heard must provide a *postdeprivation*

interstate commerce and not invalidated in its entirety, the state has several alternatives for equalizing incidence of the tax: it may pay a refund equal to the difference between the tax paid and the tax that would have been due under rates afforded to in-state competitors; it may assess and collect back taxes from those competitors; or it may combine the two approaches.[531]

Laches.—Persons failing to avail themselves of an opportunity to object and be heard cannot thereafter complain of assessments as arbitrary and unconstitutional.[532] Likewise a car company that failed to report its gross receipts, as required by statute, has no further right to contest the state comptroller's estimate of those receipts and his adding to his estimate the 10 percent penalty permitted by law.[533]

Eminent Domain

The Due Process Clause of the Fourteenth Amendment has been held to require that when a state or local governmental body, or a private body exercising delegated power, takes private property it must provide just compensation and take only for a public purpose. Applicable principles are discussed under the Fifth Amendment.[534]

Fundamental Rights (Noneconomic Substantive Due Process)

A counterpart to the now-discredited economic substantive due process, noneconomic substantive due process is still vital today. The concept has come to include disparate lines of cases, and various labels have been applied to the rights protected, including "fundamental rights," "privacy rights," "liberty interests" and "incorporated rights." The binding principle of these cases is that they involve rights so fundamental that the courts must subject any legislation infringing on them to close scrutiny. This analysis, criticized by some for being based on extra-constitutional precepts of natural law,[535] serves as the basis for some of the most significant constitutional

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remedy. McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990). *See also* Reich v. Collins, 513 U.S. 106 (1994) (violation of due process to hold out a post-deprivation remedy for unconstitutional taxation and then, after the disputed taxes had been paid, to declare that no such remedy exists); Newsweek, Inc. v. Florida Dep't of Revenue, 522 U.S. 442 (1998) *(per curiam)* (violation of due process to limit remedy to one who pursued pre-payment of tax, where litigant reasonably relied on apparent availability of post-payment remedy).

[531] Carpenter v. Shaw, 280 U.S. 363 (1930).

[532] Farncomb v. Denver, 252 U.S. 7 (1920).

[533] Pullman Co. v. Knott, 235 U.S. 23 (1914).

[534] *See* analysis under "National Eminent Domain Power," Fifth Amendment, *supra*.

[535] *See*, *e.g.*, Raoul Berger,Government by Judiciary: The Transformation of the Fourteenth Amendment (Cambridge: 1977).

holdings of our time. For instance, the application of the Bill of Rights to the states, seemingly uncontroversial today, is based not on constitutional text, but on noneconomic substantive due process and the "incorporation" of fundamental rights.[536] Other noneconomic due process holdings, however, such as the cases establishing the right of a woman to have an abortion,[537] remain controversial.

Determining Noneconomic Substantive Due Process Rights.—More so than other areas of law, noneconomic substantive due process seems to have started with few fixed precepts. Were the rights being protected property rights (and thus really protected by economic due process) or were they individual liberties? What standard of review needed to be applied? What were the parameters of such rights once identified? For instance, did a right of "privacy" relate to protecting physical spaces such as one's home, or was it related to the issue of autonomy to make private, intimate decisions? Once a right was identified, often using abstract labels, how far could such an abstraction be extended? Did protecting the "privacy" of the decisions whether to have a family also include the right to make decisions regarding sexual intimacy? Although many of these issues have been resolved, others remain.

One of the earliest formulations of noneconomic substantive due process was the right to privacy. This right was first proposed by Samuel Warren and Louis Brandeis in an 1890 Harvard Law Review article[538] as a unifying theme to various common law protections of the "right to be left alone," including the developing laws of nuisance, libel, search and seizure, and copyright. According to the authors, "the right to life has come to mean the right to enjoy life,—the right to be let alone . . . . This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature."

The concepts put forth in this article, which appeared to relate as much to private intrusions on persons as to intrusions by government, reappeared years later in a dissenting opinion by Justice

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[536] *See* Bill of Rights, "Fourteenth Amendment," *supra*.
[537] *See* Roe v. Wade, 410 U.S. 113, 164 (1973).
[538] Warren and Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193 (1890).

Brandeis regarding the Fourth Amendment.[539] Then, in the 1920s, at the heyday of economic substantive due process, the Court ruled in two cases that, although nominally involving the protection of property, foreshadowed the rise of the protection of noneconomic interests. In *Meyer v. Nebraska*,[540] the Court struck down a state law forbidding schools from teaching any modern foreign language to any child who had not successfully finished the eighth grade. Two years later, in *Pierce v. Society of Sisters*,[541] the Court declared it unconstitutional to require public school education of children aged eight to sixteen. The statute in *Meyer* was found to interfere with the property interest of the plaintiff, a German teacher, in pursuing his occupation, while the private school plaintiffs in *Pierce* were threatened with destruction of their businesses and the values of their properties.[542] Yet in both cases the Court also permitted the plaintiffs to represent the interests of parents and children in the assertion of other noneconomic forms of "liberty."

"Without doubt," Justice McReynolds said in *Meyer*, liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[543] The right of the parents to have their children instructed in a foreign language was "within the liberty of the [Fourteenth] Amendment."[544] *Meyer* was then relied on in *Pierce* to assert that the statute there "unreasonably interferes with the

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[539] *See* Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting) (arguing against the admissibility in criminal trials of secretly taped telephone conversations). In *Olmstead*, Justice Brandeis wrote: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment." 277 U.S. at 478.

[540] 262 U.S. 390 (1923). Justices Holmes and Sutherland entered a dissent, applicable to *Meyer*, in Bartels v. Iowa, 262 U.S. 404, 412 (1923).

[541] 268 U.S. 510 (1925).

[542] Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 531, 533, 534 (1928). The Court has subsequently made clear that these cases dealt with "a complete prohibition of the right to engage in a calling," holding that "a brief interruption" did not constitute a constitutional violation. Conn v. Gabbert, 526 U.S. 286, 292 (1999) (search warrant served on attorney prevented attorney from assisting client appearing before a grand jury).

[543] 262 U.S. at 399.

[544] 262 U.S. at 400.

liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." [545]

Although the Supreme Court continued to define noneconomic liberty broadly in *dicta*,[546] this new concept was to have little impact for decades.[547] Finally, in 1967, in *Loving v. Virginia*,[548] the Court held that a statute prohibiting interracial marriage denied substantive due process. Marriage was termed "one of the 'basic civil rights of man'" and a "fundamental freedom." "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and the classification of marriage rights on a racial basis was "unsupportable." Further development of this line of cases was slowed by the expanded application of the Bill of Rights to the states, which afforded the Court an alternative ground to void state policies.[549]

Despite the Court's increasing willingness to overturn state legislation, the basis and standard of review that the Court would use to review infringements on "fundamental freedoms" were not always clear. In *Poe v. Ullman*,[550] for instance, the Court dismissed as non-justiciable a suit challenging a Connecticut statute banning the use of contraceptives, even by married couples. In dissent, however, Justice Harlan advocated the application of a due process standard of reasonableness—the same lenient standard he would have

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[545] 268 U.S. at 534–35.

[546] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (marriage and procreation are among "the basic civil rights of man"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (care and nurture of children by the family are within "the private realm of family life which the state cannot enter").

[547] *E.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905); Zucht v. King, 260 U.S. 174 (1922) (allowing compulsory vaccination); Buck v. Bell, 274 U.S. 200 (1927) (allowing sexual sterilization of inmates of state institutions found to be afflicted with hereditary forms of insanity or imbecility); Minnesota v. Probate Court *ex rel.* Pearson, 309 U.S. 270 (1940) (allowing institutionalization of habitual sexual offenders as psychopathic personalities).

[548] 388 U.S. 1, 12 (1967).

[549] Indeed, in Griswold v. Connecticut, 381 U.S. 479, 482 (1965), Justice Douglas reinterpreted *Meyer* and *Pierce* as having been based on the First Amendment. Note also that in Epperson v. Arkansas, 393 U.S. 97, 105 (1968), and Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 506–07 (1969), Justice Fortas for the Court approvingly noted the due process basis of *Meyer* and *Pierce* while deciding both cases on First Amendment grounds.

[550] 367 U.S. 497, 522, 539–45 (1961). Justice Douglas, also dissenting, relied on a due process analysis, which began with the texts of the first eight Amendments as the basis of fundamental due process and continued into the "emanations" from this as also protected. Id. at 509.

applied to test economic legislation.[551] Applying a lengthy analysis, Justice Harlan concluded that the statute in question infringed upon a fundamental liberty without the showing of a justification which would support the intrusion. Yet, when the same issue returned to the Court in *Griswold v. Connecticut*,[552] a majority of the Justices rejected reliance on substantive due process[553] and instead decided it on another basis—that the statute was an invasion of privacy, which was a non-textual "penumbral" ri[554] ght protected by a matrix of constitutional provisions. Not only was this right to be protected again governmental intrusion, but there was apparently little or no consideration to be given to what governmental interests might justify such an intrusion upon the marital bedroom.

The apparent lack of deference to state interests in *Griswold* was borne out in the early abortion cases, discussed in detail below, which required the showing of a "compelling state interest" to interfere with a woman's right to terminate a pregnancy.[555] Yet, in other contexts, the Court appears to have continued to use a "reasonableness" standard.[556] More recently, the Court has complicated the issue further (again in the abortion context) by the addition of yet another standard, "undue burden."[557]

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[551] According to Justice Harlan, due process is limited neither to procedural guarantees nor to the rights enumerated in the first eight Amendments of the Bill of Rights, but is rather "a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions." The liberty protected by the clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." 367 U.S. at 542, 543.

[552] 381 U.S. 479 (1965).

[553] "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." Griswold v. Connecticut, 381 U.S. at 482 (opinion of Court by Justice Douglas).

[554] The analysis, while reminiscent of the "right to privacy" first suggested by Warren and Brandeis, still approached the matter in reliance on substantive due process cases. It should be noted that the separate concurrences of Justices Harlan and White were specifically based on substantive due process, 381 U.S. at 499, 502, which indicates that the majority's position was intended to be something different. Justice Goldberg, on the other hand, in concurrence, would have based the decision on the Ninth Amendment. 381 U.S. at 486–97. *See* analysis under the Ninth Amendment, "Rights Retained By the People," *supra*.

[555] *See* Roe v. Wade, 410 U.S. 113 (1973).

[556] When the Court began to extend "privacy" rights to unmarried person through the equal protection clause, it seemed to rely upon a view of rationality and reasonableness not too different from Justice Harlan's dissent in Poe v. Ullman. Eisenstadt v. Baird, 405 U.S. 438 (1972), is the principal case. *See also* Stanley v. Illinois, 405 U.S. 645 (1972).

[557] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

A further problem confronting the Court is how such abstract rights, once established, are to be delineated. For instance, the constitutional protections afforded to marriage, family, and procreation in *Griswold* have been extended by the Court to apply to married and unmarried couples alike.[558] However, in *Bowers v. Hardwick*,[559] the Court majority rejected a challenge to a Georgia sodomy law despite the fact that it prohibited types of intimate activities engaged in by married as well as unmarried couples.[560] Then, in *Lawrence v. Texas*,[561] the Supreme Court reversed itself, holding that a Texas statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violates the Due Process Clause.

More broadly, in *Washington v. Glucksberg*, the Court, in an effort to guide and "restrain" a court's determination of the scope of substantive due process rights, held that the concept of "liberty" protected under the Due Process Clause should first be understood to protect only those rights that are "deeply rooted in this Nation's history and tradition."[562] Moreover, the Court in *Glucksberg* required a "careful description" of fundamental rights that would be grounded in specific historical practices and traditions that serve as "crucial guideposts for responsible decisionmaking."[563] However, the Court, in *Obergefell v. Hodges* largely departed from *Glucksberg*'s formulation for assessing fundamental rights in holding that the Due Process Clause required states to license and recognize marriages between two people of the same sex.[564] Instead, the *Obergefell* Court recognized that fundamental rights do not "come from an-

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[558] *See*, *e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972). "If under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 405 U.S. at 453.

[559] 478 U.S. 186 (1986).

[560] The Court upheld the statute only as applied to the plaintiffs, who were homosexuals, 478 U.S. at 188 (1986), and thus rejected an argument that there is a "fundamental right of homosexuals to engage in acts of consensual sodomy." Id. at 192–93. In a dissent, Justice Blackmun indicated that he would have evaluated the statute as applied to both homosexual and heterosexual conduct, and thus would have resolved the broader issue not addressed by the Court—whether there is a general right to privacy and autonomy in matters of sexual intimacy. Id. at 199–203 (Justice Blackmun dissenting, joined by Justices Brennan, Marshall and Stevens).

[561] 539 U.S. 558 (2003) (overruling *Bowers*).

[562] *See* 521 U.S. 702, 720–21 (1997).

[563] *See id.* at 721 (internal citations and quotations omitted).

[564] *See* 576 U.S. ___, No. 14–556, slip op. at 18 (2015).

cient sources alone" and instead must be viewed in light of evolving social norms and in a "comprehensive" manner.[565] For the *Obergefell* Court, the two-part test relied on in *Glucksberg*—relying on history as a central guide for constitutional liberty protections and requiring a "careful description" of the right in question—was "inconsistent" with the approach taken in cases discussing certain fundamental rights, including the rights to marriage and intimacy, and would result in rights becoming stale, as "received practices could serve as their own continued justification and new groups could not invoke rights once denied."[566]

Similar disagreement over the appropriate level of generality for definition of a liberty interest was evident in *Michael H. v. Gerald D.*, involving the rights of a biological father to establish paternity and associate with a child born to the wife of another man.[567] While recognizing the protection traditionally afforded a father, Justice Scalia, joined only by Chief Justice Rehnquist in this part of the plurality decision, rejected the argument that a non-traditional familial connection (*i.e.* the relationship between a father and the offspring of an adulterous relationship) qualified for constitutional protection, arguing that courts should limit consideration to "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[568] Dissenting Justice Brennan, joined by two others, rejected the emphasis on tradition, and argued instead that the Court should "ask whether the specific parent-child relationship under consideration is close enough to the interests that we already have protected [as] an aspect of 'liberty.'"[569]

Abortion.—In *Roe v. Wade*,[570] the Court established a right of personal privacy protected by the Due Process Clause that includes the right of a woman to determine whether or not to bear a child. In doing so, the Court dramatically increased judicial oversight of

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[565] *See id.* at 18–19.

[566] *See id.* at 18.

[567] 491 U.S. 110 (1989). Five Justices agreed that a liberty interest was implicated, but the Court ruled that California's procedures for establishing paternity did not unconstitutionally impinge on that interest.

[568] 491 U.S. at 128 n.6.

[569] 491 U.S. at 142.

[570] 410 U.S. 113, 164 (1973). A companion case was Doe v. Bolton, 410 U.S. 179 (1973). The opinion by Justice Blackman was concurred in by Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Chief Justice Burger. Justices White and Rehnquist dissented, id. at 171, 221, arguing that the Court should follow the traditional due process test of determining whether a law has a rational relation to a valid state objective and that so judged the statute was valid. Justice Rehnquist was willing to consider an absolute ban on abortions even when the mother's life is in jeopardy to be a denial of due process, 410 U.S. at 173, while Justice White left the issue open. 410 U.S. at 223.

legislation under the privacy line of cases, striking down aspects of abortion-related laws in practically all the states, the District of Columbia, and the territories. To reach this result, the Court first undertook a lengthy historical review of medical and legal views regarding abortion, finding that modern prohibitions on abortion were of relatively recent vintage and thus lacked the historical foundation which might have preserved them from constitutional review.[571] Then, the Court established that the word "person" as used in the Due Process Clause and in other provisions of the Constitution did not include the unborn, and therefore the unborn lacked federal constitutional protection.[572] Finally, the Court summarily announced that the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action" includes "a right of personal privacy, or a guarantee of certain areas or zones of privacy"[573] and that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[574]

It was also significant that the Court held this right of privacy to be "fundamental" and, drawing upon the strict standard of review found in equal protection litigation, held that the Due Process Clause required that any limits on this right be justified only by a "compelling state interest" and be narrowly drawn to express only the legitimate state interests at stake.[575] Assessing the possible interests of the states, the Court rejected justifications relating to the promotion of morality and the protection of women from the medical hazards of abortions as unsupported in the record and ill-served by the laws in question. Further, the state interest in protecting the life of the fetus was held to be limited by the lack of a social consensus with regard to the issue of when life begins. Two valid state interests were, however, recognized. "[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"[576]

Because medical data indicated that abortion prior to the end of the first trimester is relatively safe, the mortality rate being lower than the rates for normal childbirth, and because the fetus has no

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[571] 410 U.S. at 129–47.
[572] 410 U.S. at 156–59.
[573] 410 U.S. at 152–53.
[574] 410 U.S. at 152–53.
[575] 410 U.S. at 152, 155–56. The "compelling state interest" test in equal protection cases is reviewed under "The New Standards: Active Review," *infra*.
[576] 410 U.S. at 147–52, 159–63.

capability of meaningful life outside the mother's womb, the Court found that the state has no "compelling interest" in the first trimester and "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." [577] In the intermediate trimester, the danger to the woman increases and the state may therefore regulate the abortion procedure "to the extent that the regulation reasonably relates to the preservation and protection of maternal health," but the fetus is still not able to survive outside the womb, and consequently the actual decision to have an abortion cannot be otherwise impeded.[578] "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." [579]

Thus, the Court concluded that "(a) for the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician; (b) for the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health; (c) for the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Further, in a companion case, the Court struck down three procedural provisions relating to a law that did allow some abortions.[580] These regulations required that an abortion be performed in a hospital accredited by a private accrediting organization, that the operation be approved by the hospital staff abortion committee, and that the performing physician's judgment be confirmed by the independent examination of the patient by two other licensed phy-

[577] 410 U.S. at 163.

[578] 410 U.S. at 163.

[579] 410 U.S. at 163–64. A fetus becomes "viable" when it is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id. at 160 (footnotes omitted).

[580] Doe v. Bolton, 410 U.S. 179 (1973).

sicians. These provisions were held not to be justified by the state's interest in maternal health because they were not reasonably related to that interest.[581] But a clause making the performance of an abortion a crime except when it is based upon the doctor's "best clinical judgment that an abortion is necessary" was upheld against vagueness attack and was further held to benefit women seeking abortions on the grounds that the doctor could use his best clinical judgment in light of all the attendant circumstances.[582]

After *Roe*, various states attempted to limit access to this newly found right, such as by requiring spousal or parental consent to obtain an abortion.[583] The Court, however, held that (1) requiring spousal consent was an attempt by the state to delegate a veto power over the decision of the woman and her doctor that the state itself could not exercise,[584] (2) that no significant state interests justified the imposition of a blanket parental consent requirement as a condition of the obtaining of an abortion by an unmarried minor during the first 12 weeks of pregnancy,[585] and (3) that a criminal provision requiring the attending physician to exercise all care and

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[581] 410 U.S. at 192–200. In addition, a residency provision was struck down as violating the privileges and immunities clause of Article IV, § 2. Id. at 200. *See* analysis under "State Citizenship: Privileges and Immunities," *supra*.

[582] 410 U.S. at 191–92. "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Id. at 192. Presumably this discussion applies to the Court's holding in *Roe* that even in the third trimester the woman may not be forbidden to have an abortion if it is necessary to preserve her health as well as her life, 410 U.S. at 163–64, a holding that is unelaborated in the opinion. *See also* United States v. Vuitch, 402 U.S. 62 (1971).

[583] Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See also* Bellotti v. Baird, 443 U.S. 622 (1979) (parental consent to minor's abortion); Colautti v. Franklin, 439 U.S. 379 (1979) (imposition on doctor's determination of viability of fetus and obligation to take life-saving steps); Singleton v. Wulff, 428 U.S. 106 (1976) (standing of doctors to litigate right of patients to Medicaid-financed abortions); Bigelow v. Virginia, 421 U.S. 809 (1975) (ban on newspaper ads for abortions); Connecticut v. Menillo, 423 U.S. 9 (1975) (state ban on performance of abortion by "any person" may constitutionally be applied to prosecute nonphysicians performing abortions).

[584] Planned Parenthood v. Danforth, 428 U.S. 52, 67–72 (1976). The Court recognized the husband's interests and the state interest in promoting marital harmony. But the latter was deemed not served by the requirement, and, since when the spouses disagree on the abortion decision one has to prevail, the Court thought the person who bears the child and who is the more directly affected should be the one to prevail. Justices White and Rehnquist and Chief Justice Burger dissented. Id. at 92.

[585] 428 U.S. at 72–75. Minors have rights protected by the Constitution, but the states have broader authority to regulate their activities than those of adults. Here, the Court perceived no state interest served by the requirement that overcomes the woman's right to make her own decision; it emphasized that it was not holding that every minor, regardless of age or maturity, could give effective consent for an abortion. Justice Stevens joined the other dissenters on this part of the holding. Id. at 101. In Bellotti v. Baird, 443 U.S. 622 (1979), eight Justices agreed that a parental consent law, applied to a mature minor found to be capable of making, and having

diligence to preserve the life and health of the fetus without regard to the stage of viability was inconsistent with *Roe*.[586] The Court sustained provisions that required the woman's written consent to an abortion with assurances that it is informed and freely given, and the Court also upheld mandatory reporting and recordkeeping for public health purposes with adequate assurances of confidentiality. Another provision that barred the use of the most commonly used method of abortion after the first 12 weeks of pregnancy was declared unconstitutional because, in the absence of another comparably safe technique, it did not qualify as a reasonable protection of maternal health and it instead operated to deny the vast majority of abortions after the first 12 weeks.[587]

In other rulings applying *Roe*, the Court struck down some requirements and upheld others. A requirement that all abortions performed after the first trimester be performed in a hospital was invalidated as imposing "a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and [at least during the first few weeks of the second trimester] safe abortion procedure."[588] The Court held, however, that a state may require that abortions be performed in hospitals *or* licensed outpatient clinics, as long as licensing standards do not "depart from accepted medi-

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made, an informed and reasonable decision to have an abortion, was void but split on the reasoning. Four Justices would hold that neither parents nor a court could be given an absolute veto over a mature minor's decision, while four others would hold that if parental consent is required the state must afford an expeditious access to court to review the parental determination and set it aside in appropriate cases. In H. L. v. Matheson, 450 U.S. 398 (1981), the Court upheld, as applied to an unemancipated minor living at home and dependent on her parents, a statute requiring a physician, "if possible," to notify the parents or guardians of a minor seeking an abortion. The decisions leave open a variety of questions, addressed by some concurring and dissenting Justices, dealing with when it would not be in the minor's best interest to avoid notifying her parents and with the alternatives to parental notification and consent. In two 1983 cases the Court applied the Bellotti v. Baird standard for determining whether judicial substitutes for parental consent requirements permit a pregnant minor to demonstrate that she is sufficiently mature to make her own decision on abortion. *Compare* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (no opportunity for case-by-case determinations); *with* Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983) (adequate individualized consideration).

[586] Planned Parenthood v. Danforth, 428 U.S. 52, 81–84 (1976). A law requiring a doctor, subject to penal sanction, to determine if a fetus is viable or may be viable and to take steps to preserve the life and health of viable fetuses was held to be unconstitutionally vague. Colautti v. Franklin, 439 U.S. 379 (1979).

[587] Planned Parenthood v. Danforth, 428 U.S. 52, 75–79 (1976).

[588] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 438 (1983); *Accord*, Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983). The Court in *Akron* relied on evidence that "dilation and evacuation" (D&E) abortions performed in clinics cost less than half as much as hospital abortions, and that common use of the D&E procedure had "increased dramatically" the safety of second trimester abortions in the 10 years since Roe v. Wade. 462 U.S. at 435–36.

cal practice." [589] Various "informed consent" requirements were struck down as intruding upon the discretion of the physician, and as being aimed at discouraging abortions rather than at informing the pregnant woman's decision.[590] The Court also invalidated a 24-hour waiting period following a woman's written, informed consent.[591]

On the other hand, the Court upheld a requirement that tissue removed in clinic abortions be submitted to a pathologist for examination, because the same requirements were imposed for in-hospital abortions and for almost all other in-hospital surgery.[592] The Court also upheld a requirement that a second physician be present at abortions performed after viability in order to assist in saving the life of the fetus.[593] Further, the Court refused to extend *Roe* to require states to pay for abortions for the indigent, holding that neither due process nor equal protection requires government to use public funds for this purpose.[594]

The equal protection discussion in the public funding case bears closer examination because of its significance for later cases. The equal protection question arose because public funds were being made available for medical care to indigents, including costs attendant to childbirth, but not for expenses associated with abortions. Admittedly, discrimination based on a non-suspect class such as indigents does not generally compel strict scrutiny. However, the question arose as to whether such a distinction impinged upon the right to abortion, and thus should be subjected to heightened scrutiny. The Court rejected this argument and used a rational basis test, noting that

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[589] Simopoulos v. Virginia, 462 U.S. 506, 516 (1983).

[590] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 444–45 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). In *City of Akron*, the Court explained that while the state has a legitimate interest in ensuring that the woman's consent is informed, it may not demand of the physician "a recitation of an inflexible list of information" unrelated to the particular patient's health, and, for that matter, may not demand that the physician rather than some other qualified person render the counseling. *City of Akron*, 462 U.S. 416, 448–49 (1983).

[591] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 450–51 (1983). *But see* Hodgson v. Minnesota, 497 U.S. 417 (1990) (upholding a 48-hour waiting period following notification of parents by a minor).

[592] Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 486–90 (1983).

[593] 462 U.S. at 482–86, 505.

[594] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980). *See also* Beal v. Doe, 432 U.S. 438 (1977) (states are not required by federal law to fund abortions); Harris v. McRae, 448 U.S. at 306–11 (same). The state restriction in *Maher*, 432 U.S. at 466, applied to nontherapeutic abortions, whereas the federal law barred funding for most medically necessary abortions as well, a distinction the Court deemed irrelevant, *Harris*, 448 U.S. at 323, although it provided Justice Stevens with the basis for reaching different results. Id. at 349 (dissenting).

the condition that was a barrier to getting an abortion—indigency—was not created or exacerbated by the government.

In reaching this finding the Court held that, while a state-created obstacle need not be absolute to be impermissible, it must at a minimum "unduly burden" the right to terminate a pregnancy. And, the Court held, to allocate public funds so as to further a state interest in normal childbirth does not create an absolute obstacle to obtaining and does not unduly burden the right.[595] What is interesting about this holding is that the "undue burden" standard was to take on new significance when the Court began raising questions about the scope and even the legitimacy of *Roe*.

Although the Court expressly reaffirmed *Roe v. Wade* in 1983,[596] its 1989 decision in *Webster v. Reproductive Health Services*[597] signaled the beginning of a retrenchment. *Webster* upheld two aspects of a Missouri statute regulating abortions: a prohibition on the use of public facilities and employees to perform abortions not necessary to save the life of the mother; and a requirement that a physician, before performing an abortion on a fetus she has reason to believe has reached a gestational age of 20 weeks, make an actual viability determination.[598] This retrenchment was also apparent in

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[595] "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there." *Maher*, 432 U.S. at 469–74 (the quoted sentence is at 474); *Harris*, 448 U.S. at 321–26. Justices Brennan, Marshall, and Blackmun dissented in both cases and Justice Stevens joined them in *Harris*. Applying the same principles, the Court held that a municipal hospital could constitutionally provide hospital services for indigent women for childbirth but deny services for abortion. Poelker v. Doe, 432 U.S. 519 (1977).

[596] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419–20 (1983). In refusing to overrule Roe v. Wade, the Court merely cited the principle of *stare decisis*. Justice Powell's opinion of the Court was joined by Chief Justice Burger, and by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, joined by Justices White and Rehnquist, dissented, voicing disagreement with the trimester approach and suggesting instead that throughout pregnancy the test should be the same: whether state regulation constitutes "unduly burdensome interference with [a woman's] freedom to decide whether to terminate her pregnancy." 462 U.S. at 452, 461. In the 1986 case of Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), Justice White, joined by Justice Rehnquist, advocated overruling of Roe v. Wade, Chief Justice Burger thought Roe v. Wade had been extended to the point where it should be reexamined, and Justice O'Connor repeated misgivings expressed in her *Akron* dissent.

[597] 492 U.S. 490 (1989).

[598] The Court declined to rule on several other aspects of Missouri's law, including a preamble stating that life begins at conception, and a prohibition on the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion.

two 1990 cases in which the Court upheld both one-parent and two-parent notification requirements.[599]

Webster, however, exposed a split in the Court's approach to *Roe v. Wade*. The plurality opinion by Chief Justice Rehnquist, joined in that part by Justices White and Kennedy, was highly critical of *Roe*, but found no occasion to overrule it. Instead, the plurality's approach sought to water down *Roe* by applying a less stringent standard of review. For instance, the plurality found the viability testing requirement valid because it "permissibly furthers the State's interest in protecting potential human life."[600] Justice O'Connor, however, concurred in the result based on her view that the requirement did not impose "an undue burden" on a woman's right to an abortion, while Justice Scalia's concurrence urged that *Roe* be overruled outright. Thus, when a Court majority later invalidated a Minnesota procedure requiring notification of both parents without judicial bypass, it did so because it did "not reasonably further any legitimate state interest."[601]

Roe was not confronted more directly in *Webster* because the viability testing requirement, as characterized by the plurality, merely asserted a state interest in protecting potential human life after viability, and hence did not challenge *Roe's* 'trimester framework.[602] Nonetheless, a majority of Justices appeared ready to reject a strict trimester approach. The plurality asserted a compelling state interest in protecting human life throughout pregnancy, rejecting the notion that the state interest "should come into existence only at the point of viability;"[603] Justice O'Connor repeated her view that the trimester approach is "problematic;"[604] and, as mentioned, Justice Scalia would have done away with *Roe* altogether.

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[599] Ohio's requirement that one parent be notified of a minor's intent to obtain an abortion, or that the minor use a judicial bypass procedure to obtain the approval of a juvenile court, was approved. Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990). And, while the Court ruled that Minnesota's requirement that both parents be notified was invalid standing alone, the statute was saved by a judicial bypass alternative. Hodgson v. Minnesota, 497 U.S. 417 (1990).

[600] 492 U.S. at 519–20. Dissenting Justice Blackmun, joined by Justices Brennan and Marshall, argued that this "permissibly furthers" standard "completely disregards the irreducible minimum of *Roe* . . . that a woman has a limited fundamental constitutional right to decide whether to terminate a pregnancy," and instead balances "a lead weight" (the State's interest in fetal life) against a "feather" (a woman's liberty interest). Id. at 555, 556 n.11.

[601] Hodgson v. Minnesota, 497 U.S. 417, 450 (1990).

[602] 492 U.S. at 521. Concurring Justice O'Connor agreed that "no decision of this Court has held that the State may not directly promote its interest in potential life when viability is possible." Id. at 528.

[603] 492 U.S. at 519.

[604] 492 U.S. at 529. Previously, dissenting in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983), Justice O'Connor had suggested that

Three years later, however, the Court invoked principles of *stare decisis* to reaffirm *Roe's* "essential holding," although it had by now abandoned the trimester approach and adopted Justice O'Connor's "undue burden" test and *Roe's* "essential holding."[605] According to the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[606] the right to abortion has three parts. "First is a recognition of the right of a woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."

This restatement of *Roe's* essentials, recognizing a legitimate state interest in protecting fetal life throughout pregnancy, necessarily eliminated the rigid trimester analysis permitting almost no regulation in the first trimester. Viability, however, still marked "the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions,"[607] but less burdensome regulations could be applied before viability. "What is at stake," the three-Justice plurality asserted, "is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exer-

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the *Roe* trimester framework "is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."

[605] It was a new alignment of Justices that restated and preserved *Roe*. Joining Justice O'Connor in a jointly authored opinion adopting and applying Justice O'Connor's "undue burden" analysis were Justices Kennedy and Souter. Justices Blackmun and Stevens joined parts of the plurality opinion, but dissented from other parts. Justice Stevens would not have abandoned trimester analysis, and would have invalidated the 24-hour waiting period and aspects of the informed consent requirement. Justice Blackmun, author of the Court's opinion in *Roe*, asserted that "the right to reproductive choice is entitled to the full protection afforded by this Court before *Webster*," id. at 923, and would have invalidated all of the challenged provisions. Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, would have overruled *Roe* and upheld all challenged aspects of the Pennsylvania law.

[606] 505 U.S. 833, 846 (1992).

[607] 505 U.S. 833, 860 (1992).

cise of the right to choose." Thus, unless an undue burden is imposed, states may adopt measures "designed to persuade [a woman] to choose childbirth over abortion." [608]

Casey did, however, overturn earlier decisions striking down informed consent and 24-hour waiting periods.[609] Given the state's legitimate interests in protecting the life of the unborn and the health of the potential mother, and applying "undue burden" analysis, the three-Justice plurality found these requirements permissible.[610]After The Court also upheld application of an additional requirement that women under age 18 obtain the consent of one parent or avail themselves of a judicial bypass alternative.

On the other hand, the Court [611] distinguished Pennsylvania's spousal notification provision as constituting an undue burden on a woman's right to choose an abortion. "A State may not give to a man the kind of dominion over his wife that parents exercise over their children" (and that men exercised over their wives at common law).[612] Although there was an exception for a woman who believed that notifying her husband would subject her to bodily injury, this exception was not broad enough to cover other forms of abusive retaliation, *e.g.*, psychological intimidation, bodily harm to children, or financial deprivation. To require a wife to notify her husband in spite of her fear of such abuse would unduly burden the wife's liberty to decide whether to bear a child.

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[608] 505 U.S. at 877–78. Application of these principles in *Casey* led the Court to uphold overrule some precedent, but to invalidate arguably the most restrictive provision. The four provisions challenged which were upheld included a narrowed definition of "medical emergency" (which controlled exemptions from the Act's limitations), record keeping and reporting requirements, an informed consent and 24-hour waiting period requirement; and a parental consent requirement, with possibility for judicial bypass, applicable to minors. The provisions which was invalidated as an undue burden on a woman's right to an abortion was a spousal notification requirement.

[609] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (invalidating "informed consent" and 24-hour waiting period); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (invalidating informed consent requirement).

[610] Requiring informed consent for medical procedures was found to be both commonplace and reasonable, and, in the absence of any evidence of burden, the state could require that information relevant to informed consent be provided by a physician rather than an assistant. The 24-hour waiting period was approved both in theory (it being reasonable to assume "that important decisions will be more informed and deliberate if they follow some period of reflection") and in practice (in spite of "troubling" findings of increased burdens on poorer women who must travel significant distances to obtain abortions, and on all women who must twice rather than once brave harassment by anti-abortion protesters). 505 U.S. at 885–87.

[611] The plurality Justices were joined in this part of their opinion by Justices Blackmun and Stevens.

[612] 505 U.S. at 898.

The passage of various state laws restricting so-called "partial birth abortions" gave observers an opportunity to see if the "undue burden" standard was in fact likely to lead to a major curtailment of the right to obtain an abortion. In *Stenberg v. Carhart*,[613] the Court reviewed a Nebraska statute that forbade "partially delivering vaginally a living unborn child before killing the unborn child and completing the delivery." Although the state argued that the statute was directed only at an infrequently used procedure referred to as an "intact dilation and excavation," the Court found that the statute could be interpreted to include the far more common procedure of "dilation and excavation."[614] The Court also noted that the prohibition appeared to apply to abortions performed by these procedures throughout a pregnancy, including before viability of the fetus, and that the sole exception in the statute was to allow an abortion that was necessary to preserve the life of the mother.[615] Thus, the statute brought into question both the distinction maintained in *Casey* between pre-viability and post-viability abortions, and the oft-repeated language from *Roe* that provides that abortion restrictions must contain exceptions for situations where there is a threat to either the life or the health of a pregnant woman.[616] The Court, however, reaffirmed the central tenets of its previous abortion decisions, striking down the Nebraska law because its possible application to pre-viability abortions was too broad, and the exception for threats to the life of the mother was too narrow.[617]

Only seven years later, however, the Supreme Court decided *Gonzales v. Carhart*,[618] which, although not formally overruling *Stenberg*, appeared to signal a change in how the Court would analyze limitations on abortion procedures. Of perhaps greatest significance is that *Gonzales* was the first case in which the Court upheld a statutory prohibition on a particular method of abortion. In *Gonzales*, the Court, by a 5–4 vote,[619] upheld a federal criminal statute that

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[613] 530 U.S. 914 (2000).

[614] 530 U.S. at 938–39.

[615] The Nebraska law provided that such procedures could be performed where "necessary to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself." Neb. Rev. Stat. Ann. § 28–328(1).

[616] Roe v. Wade, 410 U.S. 113, 164 (1973).

[617] As to the question of whether an abortion statute that is unconstitutional in some instances should be struck down in application only or in its entirety, *see* Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320 (2006) (challenge to parental notification restrictions based on lack of emergency health exception remanded to determine legislative intent regarding severability of those applications).

[618] 550 U.S. 124 (2007).

[619] Justice Kennedy wrote the majority opinion, joined by Justices Roberts, Scalia, Thomas, and Alito, while Justice Ginsberg authored a dissenting opinion, which was

prohibited an overt act to "kill" a fetus where it had been intentionally "deliver[ed] . . . [so that] in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." [620] The Court distinguished this federal statute from the Nebraska statute that it had struck down in *Stenberg*, holding that the federal statute applied only to the intentional performance of the less-common "intact dilation and excavation." The Court found that the federal statute was not unconstitutionally vague because it provided "anatomical landmarks" that provided doctors with a reasonable opportunity to know what conduct it prohibited.[621] Further, the scienter requirement (that delivery of the fetus to these landmarks before fetal demise be intentional) was found to alleviate vagueness concerns.[622]

In a departure from the reasoning of *Stenberg*, the Court held that the failure of the federal statute to provide a health exception [623] was justified by congressional findings that such a procedure was not necessary to protect the health of a mother. Noting that the Court has given "state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty," the Court held that, at least in the context of a facial challenge, such an exception was not needed where "[t]here is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women." [624] The Court did, however, leave open the possibility that as-applied challenges could still be made in individual cases.[625]

As in *Stenberg*, the prohibition considered in *Gonzales* extended to the performance of an abortion before the fetus was viable, thus directly raising the question of whether the statute imposed an "undue burden" on the right to obtain an abortion. Unlike

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joined by Justices Steven, Souter and Breyer. Justice Thomas also filed a concurring opinion, joined by Justice Scalia, calling for overruling *Casey* and *Roe*.

[620] 18 U.S.C. § 1531(b)(1)(A). The penalty imposed on a physician for a violation of the statute was fines and/or imprisonment for not more than 2 years. In addition, the physician could be subject to a civil suit by the father (or maternal grandparents, where the mother is a minor) for money damages for all injuries, psychological and physical, occasioned by the violation of this section, and statutory damages equal to three times the cost of the partial-birth abortion.

[621] 550 U.S. at 150.

[622] 550 U.S. at 148–150.

[623] As in *Stenberg*, the statute provided an exception for threats to the life of a woman.

[624] 550 U.S. at 162. Arguably, this holding overruled *Stenberg* insofar as *Stenberg* had allowed a facial challenge to the failure of Nebraska to provide a health exception to its prohibition on intact dilation and excavation abortions. 530 U.S. at 929–38.

[625] 550 U.S. at 168.

the statute in *Stenberg*, however, the ban in *Gonzales* was limited to the far less common "intact dilation and excavation" procedure, and consequently did not impose the same burden as the Nebraska statute. The Court also found that there was a "rational basis" for the limitation, including governmental interests in the expression of "respect for the dignity of human life," "protecting the integrity and ethics of the medical profession," and the creation of a "dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."[626]

The Court revisited the question of whether particular restrictions place a "substantial obstacle" in the path of women seeking a pre-viability abortion and constitute an "undue burden" on abortion access in its 2016 decision in *Whole Woman's Health v. Hellerstedt*.[627] At issue in *Whole Woman's Health* was a Texas law that required (1) physicians performing or inducing abortions to have active admitting privileges at a hospital located not more than thirty miles from the facility; and (2) the facility itself to meet the minimum standards for ambulatory surgical centers under Texas law.[628] Texas asserted that these requirements served various purposes related to women's health and the safety of abortion procedures, including ensuring that women have easy access to a hospital should complications arise during an abortion procedure and that abortion facilities meet heightened health and safety standards.[629]

In reviewing Texas's law, the *Whole Woman's Health* Court began by clarifying the underlying "undue burden" standard established in *Casey*. First, the Court noted that the relevant standard from *Casey* requires that courts engage in a balancing test to determine whether a law amounts to an unconstitutional restriction on abortion access by considering the "burdens a law imposes on abortion access together with the benefits those laws confer."[630] As a consequence, the *Whole Woman's Health* articulation of the undue burden standard necessarily requires that courts "consider the existence or nonexistence of medical benefits" when considering whether a regulation constitutes an undue burden.[631] In such a consideration, a reviewing court, when evaluating an abortion regulation purporting to protect woman's health, may need to closely scrutinize (1) the relative value of the protections afforded under the new

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[626] 550 U.S. at 160.
[627] 579 U.S. ___, No. 15–274, slip op. (2016).
[628] *Id.* at 1–2.
[629] *Id.* at 22.
[630] *Id.* at 19.
[631] *Id.*

law when compared to those prior to enactment[632] and (2) health regulations with respect to comparable medical procedures.[633] Second, the *Whole Woman's Health* decision rejected the argument that judicial scrutiny of abortion regulations was akin to rational basis review, concluding that courts should not defer to legislatures when resolving questions of medical uncertainty that arise with respect to abortion regulations.[634] Instead, the Court found that reviewing courts are permitted to place "considerable weight upon evidence and argument presented in judicial proceedings" when evaluating legislation under the undue burden standard, notwithstanding contrary conclusions by the legislature.[635]

Applying these standards, the *Whole Woman's Health* Court viewed the alleged benefits of the Texas requirements as inadequate to justify the challenged provisions under the precedent of *Casey*, given both the burdens they imposed upon women's access to abortion and the benefits provided.[636] Specifically as to the admitting privileges requirement, the Court determined that nothing in the underlying record showed that this requirement "advanced Texas's legitimate interest in protecting women's health" in any significant way as compared to Texas's previous requirement that abortion clinics have a "working arrangement" with a doctor with admitting privileges.[637] In particular, the Court rejected the argument that the admitting privileges requirements were justified to provide an "extra layer" of protection against abusive and unsafe abortion facilities, as the Court concluded that "[d]etermined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations."[638] On the contrary, in the Court's view, the evidentiary record suggested that the admitting-privileges requirement placed a substantial obstacle in the path of women's access to abortion because (1) of the temporal proximity between the imposition of the requirement and the closing of

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[632] *Id.* at 22, 28–30 (reviewing the state of the law prior to the enactment of the abortion regulation to determine whether there was a "significant health-related problem that the new law helped to cure.").

[633] *Id.* at 30 (comparing the health risks associated with abortion relative to other medical procedures).

[634] *Id.* at 20.

[635] *See id.* (noting that in *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007), the Court maintained that courts have an "independent constitutional duty" to review factual findings when reviewing legislation as inconsistent with abortion rights).

[636] *Id.* at 19 (quoting and citing Planned Parenthood v. Casey, 505 U.S. 833, 877–78 (1992) (plurality opinion)).

[637] *Id.* at 23.The Court further noted that Texas had admitted it did not know of a "single instance" where the requirement would have helped "even one woman" obtain "better treatment." *Id.*

[638] *Id.* at 27.

a number of clinics once the requirement was enforced;[639] and (2) the necessary consequence of the requirement of foreclosing abortion providers from obtaining such privileges for reasons having "nothing to do with ability to perform medical procedures."[640] In the view of the Court, the resulting facility closures that the Court attributed to the first challenged requirement meant fewer doctors, longer wait times, and increased crowding for women at the remaining facilities, and the closures also increased driving distances to an abortion clinic for some women, amounting to an undue burden.[641]

Similarly as to the surgical-center requirement, the *Whole Woman's Health* Court viewed the record as evidencing that the requirement "provides no benefits" in the context of abortions produced through medication and was "inappropriate" as to surgical abortions.[642] In so doing, the Court also noted disparities between the treatment of abortion facilities and facilities providing other medical procedures, such as colonoscopies, which the evidence suggested had greater risks than abortions.[643] The Court viewed the underlying record as demonstrating that the surgical-center requirement would also have further reduced the number of abortion facilities in Texas to seven or eight and, in so doing, would have burdened women's access to abortion in the same way as the admitting-privileges requirement (e.g., creating crowding, increasing driving distances).[644] Ultimately, the Court struck down the two provisions in the Texas law, concluding that the regulations in question imposed an undue burden on a "large fraction" of women for whom the provisions are an "actual" restriction.[645]

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[639] *Id.* at 24.

[640] Specifically, the Court noted that hospitals typically condition admitting privileges based on the number admissions a doctor has to a hospital—policies that, because of the safety of abortion procedures, meant that providers likely would be unable to obtain and maintain such privileges. *Id.* at 25.

[641] Id. at 26. The Court noted that increased driving distances are not necessarily an undue burden, but in this case viewed them as "one additional burden" which, when taken together with the other burdens—and the "virtual absence of any health benefit"—lead to the conclusion that the admitting-privileges requirement constitutes an undue burden. *Id.*

[642] *Id.* at 30.

[643] *Id.* at 30–31.

[644] *Id.* at 32, 35–36.

[645] *Id.* at 39. In so concluding, the *Whole Woman's Health* Court appears to have clarified that the burden for a plaintiff to establish that an abortion restriction is unconstitutional on its face (as opposed to unconstitutional as applied in a particular circumstance) is to show that the law would be unconstitutional with respect to a "large fraction" of women for whom the provisions are relevant. *Id.* (rejecting Texas's argument that the regulations in question would not affect most women of reproductive age in Texas); *cf.* United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount

Privacy after Roe: Informational Privacy, Privacy of the Home or Personal Autonomy?.—The use of strict scrutiny to review intrusions on personal liberties in *Roe v. Wade* seemed to portend the Court's striking down many other governmental restraints upon personal activities. These developments have not occurred, however, as the Court has been relatively cautious in extending the right to privacy. Part of the reason that the Court may have been slow to extend the rationale of *Roe* to other contexts was that "privacy" or the right "to be let alone" appears to encompass a number of different concepts arising from different parts of the Constitution, and the same combination of privacy rights and competing governmental interests are not necessarily implicated in other types of "private" conduct.

For instance, the term "privacy" itself seems to encompass at least two different but related issues. First, it relates to protecting against disclosure of personal information to the outside world, *i.e.,* the right of individuals to determine how much and what information about themselves is to be revealed to others.[646] Second, it relates inward toward notions of personal autonomy, *i.e.,* the freedom of individuals to perform or not perform certain acts or subject themselves to certain experiences.[647] These dual concepts, here referred to as "informational privacy" and "personal autonomy," can easily arise in the same case, as government regulation of personal behavior can limit personal autonomy, while investigating and prosecuting such behavior can expose it to public scrutiny. Unfortunately, some of the Court's cases identified violations of a right of privacy without necessarily making this distinction clear. While the main thrust of the Court's fundamental-rights analysis appears to emphasize the personal autonomy aspect of privacy, now often phrased as "liberty" interests, a clear analytical framework for parsing of these two concepts in different contexts has not yet been established.

Another reason that "privacy" is difficult to define is that the right appears to arise from multiple sources. For instance, the Court first identified issues regarding informational privacy as specifically tied to various provisions of Bill of Rights, including the First and Fourth Amendments. In *Griswold v. Connecticut*,[648] however, Justice Douglas found an independent right of privacy in the "pen-

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successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

[646] For instance, Justice Douglas's asked rhetorically in *Griswold*: "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." 381 U.S. at 486.

[647] Whalen v. Roe, 429 U.S. 589, 598–600 (1977).

[648] 381 U.S. 479 (1965).

umbras" of these and other constitutional provisions. Although the parameters and limits of the right to privacy were not well delineated by that decision, which struck down a statute banning married couples from using contraceptives, the right appeared to be based on the notion that the government should not be allowed to gather information about private, personal activities.[649] However, years later, when the closely related abortion cases were decided, the right to privacy being discussed was now characterized as a "liberty interest" protected under the Due Process Clause of the Fourteenth Amendment,[650] and the basis for the right identified was more consistent with a concern for personal autonomy.

After *Griswold*, the Court had several opportunities to address and expand on the concept of Fourteenth Amendment informational privacy, but instead it returned to Fourth and Fifth Amendment principles to address official regulation of personal information.[651] For example, in *United States v. Miller*,[652] the Court, in evaluating the right of privacy of depositors to restrict government access to cancelled checks maintained by the bank, relied on whether there was an expectation of privacy under the Fourth Amendment.[653] Also, the Court has held that First Amendment itself affords some limitation upon governmental acquisition of information, although only where the exposure of such information would violate freedom of association or the like.[654]

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[649] The predominant concern flowing through the several opinions in Griswold v. Connecticut is the threat of forced disclosure about the private and intimate lives of persons through the pervasive surveillance and investigative efforts that would be needed to enforce such a law; moreover, the concern was not limited to the pressures such investigative techniques would impose on the confines of the Fourth Amendment's search and seizure clause, but also included techniques that would have been within the range of permissible investigation.

[650] Roe v. Wade, 410 U.S. 113, 153 (1973). *See* id. at 167–71 (Justice Stewart concurring). Justice Douglas continued to deny that substantive due process is the basis of the decisions. Doe v. Bolton, 410 U.S. 179, 209, 212 n.4 (1973) (concurring).

[651] *E.g.*, California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974). *See also* Laird v. Tatum, 408 U.S. 1 (1972); United States v. United States District Court, 407 U.S. 297 (1972); United States v. Dionisio, 410 U.S. 1 (1973); Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

[652] 425 U.S. 435 (1976). *See also* Fisher v. United States, 425 U.S. 391, 401 (1976); Paul v. Davis, 424 U.S. 693, 712–13 (1976); United States v. Bisceglia, 420 U.S. 141 (1975).

[653] The Bank Secrecy Act required the banks to retain cancelled checks. The Court held that the checks were business records of the bank in which the depositors had no expectation of privacy and therefore there was no Fourth Amendment standing to challenge government legal process directed to the bank, and this status was unchanged by the fact that the banks kept the records under government mandate in the first place.

[654] *See* Buckley v. Valeo, 424 U.S. 1, 60–82 (1976); Whalen v. Roe, 429 U.S. 589, 601 n.27, 604 n.32 (1977); United States v. Miller, 425 U.S. 435, 444 n.6 (1976). The Court continues to reserve the question of the "[s]pecial problems of privacy which

Similarly, in *Fisher v. United States*,[655] the Court held that the Fifth Amendment's Self-incrimination Clause did not prevent the IRS from obtaining income tax records prepared by accountants and in the hands of either the taxpayer or his attorney, no matter how incriminating, because the Amendment only protects against compelled testimonial self-incrimination. The Court noted that it "has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence that, in the Court's view, did not involve compelled testimonial self-incrimination of some sort."[656] Furthermore, it wrote, "[w]e cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment."[657]

So what remains of informational privacy? A cryptic opinion in *Whalen v. Roe*[658] may indicate the Court's continuing willingness to recognize privacy interests as independent constitutional rights. At issue was a state's pervasive regulation of prescription drugs with abuse potential, and a centralized computer record-keeping system through which prescriptions, including patient identification, could be stored. The scheme was attacked on the basis that it invaded privacy interests against disclosure and privacy interests involving autonomy of persons in choosing whether to have the medication. The Court appeared to agree that both interests are protected, but because the scheme was surrounded with extensive security protection against disclosure beyond that necessary to achieve the purposes of the program it was not thought to "pose a sufficiently grievous threat to either interest to establish a constitutional violation."[659] Lower court cases have raised substantial questions as to whether

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might be presented by subpoena of a personal diary." Fisher v. United States, 425 U.S. 391, 401 n.7 (1976).

[655] 425 U.S. 391 (1976).

[656] 425 U.S. at 399.

[657] 425 U.S. at 401.

[658] 429 U.S. 589 (1977).

[659] 429 U.S. at 598–604. The Court cautioned that it had decided nothing about the privacy implications of the accumulation and disclosure of vast amounts of information in data banks. Safeguarding such information from disclosure "arguably has its roots in the Constitution," at least "in some circumstances," the Court seemed to indicate. Id. at 605. *Compare* id. at 606 (Justice Brennan concurring). What the Court's careful circumscription of the privacy issue through balancing does to the concept is unclear after Nixon v. Administrator of General Services, 433 U.S. 425, 455–65 (1977) (stating that an invasion of privacy claim "cannot be considered in abstract [and]

this case established a "fundamental right" to informational privacy, and instead found that some as yet unspecified balancing test or intermediate level of scrutiny was at play.[660]

More than two decades after *Whalen*, the Court remains ambivalent about whether such a privacy right exists. In its 2011 decision in *NASA v. Nelson*, the Supreme Court unanimously ruled against 28 NASA workers who argued that the extensive background checks required to work at NASA facilities violated their constitutional privacy rights.[661] In so doing, the Court assumed without deciding that a right to informational privacy could be protected by the Constitution and instead held that the right does not prevent the government from asking reasonable questions in light of the government's interest as an employer and in light of the statutory protections that provide meaningful checks against unwarranted disclosures.[662] As a result, the questions about the scope of the right to informational privacy suggested by *Whalen* remain.

The Court has also briefly considered yet another aspect of privacy—the idea that certain personal activities that were otherwise unprotected could obtain some level of constitutional protection by being performed in particular private locations, such as the home. In *Stanley v. Georgia*,[663] the Court held that the government may not make private possession of obscene materials for private use a crime. Normally, investigation and apprehension of an individual for possessing pornography in the privacy of the home would raise obvious First Amendment free speech and the Fourth Amendment search and seizure issues. In this case, however, the material was obscenity, unprotected by the First Amendment, and the police had a valid search warrant, obviating Fourth Amendment concerns.[664] Nonetheless, the Court based its decision upon a person's protected right to receive what information and ideas he wishes, which derives from the "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy,"[665] and from the failure of the state to either justify protecting

. . . must be weighed against the public interest"). But see id. at 504, 525–36 (Chief Justice Burger dissenting), and 545 n.1 (Justice Rehnquist dissenting).

[660] *See, e.g.,* Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978) (". . . we believe that the balancing test, more common to due process claims, is appropriate here.").

[661] *See* 562 U.S. 134 (2011).

[662] *Id*. at 148–56.

[663] 394 U.S. 557 (1969).

[664] In fact, the Court passed over a subsidiary Fourth Amendment issue that was available for decision in favor of a broader resolution. 394 U.S. at 569–72. (Stewart, J., concurring).

[665] 394 U.S. at 564–65.

an individual from himself or to show empirical proof of such activity harming society.[666]

The potential significance of *Stanley* was enormous, as any number of illegal personal activities, such as drug use or illegal sex acts, could arguably be practiced in the privacy of one's home with little apparent effect on others. *Stanley*, however, was quickly restricted to the particular facts of the case, namely possession of obscenity in the home.[667] In *Paris Adult Theatre I v. Slaton*,[668] which upheld the government's power to prevent the showing of obscene material in an adult theater, the Court recognized that governmental interests in regulating private conduct could include the promotion of individual character and public morality, and improvement of the quality of life and "tone" of society. "It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. . . . [Many laws are enacted] to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition."[669]

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[666] The rights noted by the Court were held superior to the interests Georgia asserted to override them. That is, first, the state was held to have no authority to protect an individual's mind from the effects of obscenity, to promote the moral content of one's thoughts. Second, the state's assertion that exposure to obscenity may lead to deviant sexual behavior was rejected on the basis of a lack of empirical support and, more important, on the basis that less intrusive deterrents were available. Thus, a right to be free of governmental regulation in this area was clearly recognized.

[667] United States v. Reidel, 402 U.S. 351, 354–56 (1971) (no right to distribute obscene material for private use); United States v. Thirty-seven Photographs, 402 U.S. 363, 375–76 (1971) (no right to import obscene material for private use); United States v. 12 200–Ft. Reels of Film, 413 U.S. 123 (1973) (no right to acquire obscene material for private use); Osborne v. Ohio, 495 U.S. 103, 109–111 (1990) (no right to possess child pornography in the home).

[668] 413 U.S. 49 (1973).

[669] 413 U.S. at 64. Similar themes can be found in Roe v. Wade, 410 U.S. 113, 148 (1972), decided the year before. Because the Court had determined that the right to obtain an abortion constituted a protected "liberty," the State was required to justify its proscription by a compelling interest. Departing from a *laissez faire*, "free will" approach to individual autonomy, the Court recognized protecting the health of the mother as a valid interest. The Court also mentioned but did not rule upon a state interest in protecting morality. The Court was referring not to the morality of abortion, but instead to the promotion of sexual morality through making abortion unavailable. Roe v. Wade, 410 U.S. 113, 148 (1972).

Furthermore, continued the Court in *Paris Adult Theatre I*, "[o]ur Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always beyond state regulation is a step we are unable to take. . . . The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society.'" [670]

Ultimately, the idea that acts should be protected not because of what they are, but because of where they are performed, may have begun and ended with *Stanley*. The limited impact of *Stanley* was reemphasized in *Bowers v. Hardwick*.[671] The Court in *Bowers*, finding that there is no protected right to engage in homosexual sodomy in the privacy of the home, held that *Stanley* did not implicitly create protection for "voluntary sexual conduct [in the home] between consenting adults." [672] Instead, the Court found *Stanley* "firmly grounded in the First Amendment," [673] and noted that extending the reasoning of that case to homosexual conduct would result in protecting all voluntary sexual conduct between consenting adults, including adultery, incest, and other sexual crimes. Although *Bowers* has since been overruled by *Lawrence v. Texas* [674] based on precepts of personal autonomy, the latter case did not appear to signal the resurrection of the doctrine of protecting activities occurring in private places.

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[670] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57–63, 63–64, 68–69 (1973); *see also* id. at 68 n.15. Although it denied a privacy right to view obscenity in a theater, the Court recognized that, in order to protect otherwise recognized autonomy rights, the privacy right might need to be expanded to a variety of different locations: "[T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 n.13 (1973). Thus, arguably, the constitutional protection of places (as opposed to activities) arises not because of any inherent privacy of the location, but because the protected activities normally take place in those locales.

[671] 478 U.S. 186 (1986).

[672] 478 U.S. at 195–96. Dissenting, Justice Blackmun challenged the Court's characterization of *Stanley*, suggesting that it had rested as much on the Fourth as on the First Amendment, and that "the right of an individual to conduct intimate relationships in . . . his or her own home [is] at the heart of the Constitution's protection of privacy." Id. at 207–08.

[673] 478 U.S. 186, 195 (1986).

[674] 539 U.S. 558 (2003).

So, what of the expansion of the right to privacy under the rubric of personal autonomy? The Court speaking in *Roe* in 1973 made it clear that, despite the importance of its decision, the protection of personal autonomy was limited to a relatively narrow range of behavior. "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942); contraception, *Eisenstadt v. Baird*, 405 U.S. at 453–54; id. at 460, 463–65 (White, J., concurring in result); family relationships, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer v. Nebraska*, supra."[675]

Despite the limiting language of *Roe*, the concept of privacy still retained sufficient strength to occasion major constitutional decisions. For instance, in the 1977 case of *Carey v. Population Services Int'l*,[676] recognition of the "constitutional protection of individual autonomy in matters of childbearing" led the Court to invalidate a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[677] The Court sig-

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[675] Roe v. Wade, 410 U.S. 113, 152 (1973).

[676] 431 U.S. 678 (1977).

[677] 431 U.S. at 684–91. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackmun, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court's general principles. Id. at 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id. at 703. Chief Justice Burger, id. at 702, and Justice Rehnquist, id. at 717, dissented.

The limitation of the number of outlets to adults "imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and was unjustified by any interest put forward by the state. The prohibition on sale to minors was judged not by the compelling state interest test, but instead by inquiring whether the restrictions serve "any significant state interest . . . that is not present in the case of an adult." This test is "apparently less rigorous" than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The attempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors' sexual activity, the Court even more doubted, because the State presented no evidence, that limiting access would deter minors from engaging in sexual activity. Id. at 691–99. This

nificantly extended the *Griswold-Baird* line of cases so as to make the "decision whether or not to beget or bear a child" a "constitutionally protected right of privacy" interest that government may not burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn to express only that interest or interests.

For a time, the limits of the privacy doctrine were contained by the 1986 case of *Bowers v. Hardwick*,[678] where the Court by a 5–4 vote roundly rejected the suggestion that the privacy cases protecting "family, marriage, or procreation" extend protection to private consensual homosexual sodomy,[679] and also rejected the more comprehensive claim that the privacy cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription." [680] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibited the practice.[681] The privacy of the home does not protect all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults." [682] Interestingly, Justice Blackmun, in dissent, was

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portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id. at 702, 703, 712, each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id. at 702, 717.

[678] 478 U.S. 186 (1986). The Court's opinion was written by Justice White, and joined by Chief Justice Burger and by Justices Powell, Rehnquist, and O'Connor. The Chief Justice and Justice Powell added brief concurring opinions. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens, and Justice Stevens, joined by Justices Brennan and Marshall, added a separate dissenting opinion.

[679] "[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy." 478 U.S. at 190–91.

[680] Justice White's opinion for the Court in *Hardwick* sounded the same opposition to "announcing rights not readily identifiable in the Constitution's text" that underlay his dissents in the abortion cases. 478 U.S. at 191. The Court concluded that there was no "fundamental right [of] homosexuals to engage in acts of consensual sodomy," as homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." 478 U.S. at 191–92.

[681] 478 U.S. at 191–92. Chief Justice Burger's brief concurring opinion amplified this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." Id. at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). Id.

[682] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." 478 U.S. at 195–96. Dissenting Justices Blackmun (id. at 209 n.4) and Stevens (id. at 217–18) suggested that these crimes are readily distinguishable.

most critical of the Court's framing of the issue as one of homosexual sodomy, as the sodomy statute at issue was not so limited.[683]

Yet, *Lawrence v. Texas*,[684] by overruling *Bowers*, brought the outer limits of noneconomic substantive due process into question by once again using the language of "privacy" rights. Citing the line of personal autonomy cases starting with *Griswold*, the Court found that sodomy laws directed at homosexuals "seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[685]

Although it quarreled with the Court's finding in *Bowers v. Hardwick* that the proscription against homosexual behavior had "ancient roots," *Lawrence* did not attempt to establish that such behavior was in fact historically condoned. This raises the question as to what limiting principles are available in evaluating future arguments based on personal autonomy. Although the Court seems to recognize that a state may have an interest in regulating personal relationships where there is a threat of "injury to a person or abuse of an institution the law protects,"[686] it also seems to reject reliance on historical notions of morality as guides to what personal relationships are to be protected.[687] Thus, the parameters for regulation of sexual conduct remain unclear.

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[683] 478 U.S. at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. *See* id. at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomy by married couples, and that Georgia had not justified selective application to homosexuals. Id. at 219. Justice Blackmun would instead have addressed the issue more broadly as to whether the law violated an individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he asserted, but instead stand for the broader principle of individual autonomy and choice in matters of sexual intimacy. 478 U.S. at 204–06. This position was rejected by the majority, however, which held that the thrust of the fundamental right of privacy in this area is one functionally related to "family, marriage, or procreation." 478 U.S. at 191. *See also* Paul v. Davis, 424 U.S. 693, 713 (1976).

[684] 539 U.S. 558 (2003).

[685] 539 U.S. at 567.

[686] 539 U.S. at 567.

[687] The Court noted with approval Justice Stevens' dissenting opinion in Bowers v. Hardwick, stating "that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack." 539 U.S. at 577–78, *citing* Bowers v. Hardwick, 478 U.S. at 216.

For instance, the extent to which the government may regulate the sexual activities of minors has not been established.[688] Analysis of this questions is hampered, however, because the Court has still not explained what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty, and how indeed these factors vary significantly enough from other human relationships. The Court's observation in *Roe v. Wade* "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[689] provides little elucidation.[690]

Despite the Court's decision in *Lawrence*, there is a question as to whether the development of noneconomic substantive due process will proceed under an expansive right of "privacy" or under the more limited "liberty" set out in *Roe*. There still appears to be a tendency to designate a right or interest as a right of privacy when the Court has already concluded that it is valid to extend an existing precedent of the privacy line of cases. Because much of this protection is also now settled to be a "liberty" protected under the due process clauses, however, the analytical significance of denominating the particular right or interest as an element of privacy seems open to question.

Family Relationships.— Starting with *Meyer* and *Pierce,*[691] the Court has held that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[692] For instance, the right to

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[688] The Court reserved this question in *Carey*, 431 U.S. at 694 n.17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id. at 702, 703, 712.

[689] Roe v. Wade, 410 U.S. 113, 152 (1973). The language is quoted in full in *Carey*, 431 U.S. at 684–85.

[690] In the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests—"compelling" interest justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is not its social significance but is whether it is "explicitly or implicitly guaranteed by the Constitution." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973). That this limitation has not been honored with respect to equal protection analysis or due process analysis can be easily discerned. *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978) (opinion of Court), *with* id. at 391 (Justice Stewart concurring), and id. at 396 (Justice Powell concurring).

[691] Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1928).

[692] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality). Unlike the liberty interest in property, which derives from early statutory law, these liberties spring instead from natural law traditions, as they are "intrinsic human rights." Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977). These rights, however, do not extend to all close relationships. Bowers v. Hardwick, 478 U.S. 186 (1986) (same sex relationships).

marry is a fundamental right protected by the Due Process Clause,[693] and only "reasonable regulations" of marriage may be imposed.[694] Thus, the Court has held that a state may not deny the right to marry to someone who has failed to meet a child support obligation, as the state already has numerous other means for exacting compliance with support obligations.[695] In fact, any regulation that affects the ability to form, maintain, dissolve, or resolve conflicts within a family is subject to rigorous judicial scrutiny.

In 2015, in *Obergefell v. Hodges*, the Supreme Court clarified that the "right to marry" applies with "equal force" to same-sex couples, as it does to opposite-sex couples, holding that the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.[696] In so holding, the Court recognized marriage as being an institution of "both continuity and change," and, as a consequence, recent shifts in public attitudes respecting gay individuals and more specifically same-sex marriage necessarily informed the Court's conceptualization of the right to marry.[697] More broadly, the *Obergefell* Court recognized that the right to marry is grounded in four "principles and traditions." These involve the concepts that (1) marriage (and choosing whom to marry) is inherent to individual autonomy protected by the Constitution; (2) marriage is fundamental to supporting a union of committed individuals; (3) marriage safeguards children and families; and (4) marriage is essential to the nation's social order, because it is at the heart of many legal benefits.[698] With this conceptualization of the right to marry in mind, the Court found no difference between same- and opposite-sex couples with respect to any of the right's four central principles, concluding that a denial of marital recognition to same-sex couples ultimately "demean[ed]" and "stigma[tized]" those couples and any children resulting from such partnerships.[699] Given this conclusion, the Court held that, while limiting marriage to opposite-sex couples may have once seemed "natural," such a limitation was

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[693] Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974); Zablocki v. Redhail, 434 U.S. 374, 383–87 (1978).

[694] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[695] Zablocki v. Redhail, 434 U.S. 374 (1978). The majority of the Court deemed the statute to fail under equal protection, whereas Justices Stewart and Powell found a violation of due process. Id. at 391, 396. *Compare* Califano v. Jobst, 434 U.S. 47 (1977).

[696] *See* 576 U.S. ___, No. 14–556, slip op. at 12 (2015).

[697] *See id.* at 6–10.

[698] *See id.* at 12–16.

[699] *See id.* at 17.

inconsistent with the right to marriage inherent in the "liberty" of the person as protected by the Fourteenth Amendment.[700] The open question that remains respecting the substantive due process right to marriage post-*Obergefell* is whether the right of marriage, as broadly envisioned by the Court in the 2015 case, can extend to protect and require state recognition of other committed, autonomous relationships, such as polyamorous relationships.[701]

There is also a constitutional right to live together as a family,[702] and this right is not limited to the nuclear family. Thus, a neighborhood that is zoned for single-family occupancy, and that defines "family" so as to prevent a grandmother from caring for two grandchildren of different children, was found to violate the Due Process Clause.[703] And the concept of "family" may extend beyond the biological relationship to the situation of foster families, although the Court has acknowledged that such a claim raises complex and novel questions, and that the liberty interests may be limited.[704] On the other hand, the Court has held that the presumption of legitimacy accorded to a child born to a married woman living

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[700] *See id.* at 17–18. The Court also grounded its *Obergefell* decision in the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 19 ("The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."). For a discussion of *Obergefell*'s equal protection holding, *see infra* Fourteenth Amendment: Equal Protection of the Laws: The New Equal Protection: Sexual Orientation.

[701] *See, e.g.*, *Obergefell*, slip op. at 20 (Roberts, C.J., dissenting) ("It is striking how much of the majority's reasoning would apply with equal force to the claim of a fundamental right to plural marriage."); *but see* Joanna L. Grossman & Lawrence M. Friedman, *Is Three Still a Crowd? Polygamy and the Law After* Obergefell v. Hodges, VERDICT (July 7, 2015), *available at* https://verdict.justia.com/2015/07/07/is-three-still-a-crowd-polygamy-and-the-law-after-obergefell-v-hodges ("*Obergefell* did not really open the door to plural marriages."). For an extended debate on whether the right to marry protects plural marriages, compare Ronald C. Den Otter, *Three May Not Be a Crowd: The Case for a Constitutional Right to Plural Marriage*, 64 EMORY L.J. 1977 (2015), with John Witte, Jr., *Why Two in One Flesh? The Western Case for Monogamy Over Polygamy*, 64 EMORY L.J. 1675 (2015).

[702] "If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'" Smith v. Organization of Foster Families, 431 U.S. 816, 862–63 (1977) (Justice Stewart concurring), *cited with approval in* Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

[703] Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion). The fifth vote, decisive to the invalidity of the ordinance, was on other grounds. Id. at 513.

[704] Smith v. Organization of Foster Families, 431 U.S. 816 (1977). As the Court noted, the rights of a natural family arise independently of statutory law, whereas the ties that develop between a foster parent and a foster child arise as a result of state-ordered arrangement. As these latter liberty interests arise from positive law, they are subject to the limited expectations and entitlements provided under those laws. Further, in some cases, such liberty interests may not be recognized without derogation of the substantive liberty interests of the natural parents. Although *Smith*

with her husband is valid even to defeat the right of the child's biological father to establish paternity and visitation rights.[705]

The Court has merely touched upon but not dealt definitively with the complex and novel questions raised by possible conflicts between parental rights and children's rights.[706] The Court has, however, imposed limits on the ability of a court to require that children be made available for visitation with grandparents and other third parties. In *Troxel v. Granville*,[707] the Court evaluated a Washington State law that allowed "any person" to petition a court "at any time" to obtain visitation rights whenever visitation "may serve the best interests" of a child. Under this law, a child's grandparents were awarded more visitation with a child than was desired by the sole surviving parent. A plurality of the Court, noting the "fundamental rights of parents to make decisions concerning the care, custody and control of their children," [708] reversed this decision, noting the lack of deference to the parent's wishes and the contravention of the traditional presumption that a fit parent will act in the best interests of a child.

Liberty Interests of People with Mental Disabilities: Civil Commitment and Treatment.—The recognition of liberty rights for people with mental disabilities who are involuntarily committed or who voluntarily seek commitment to public institutions is potentially a major development in substantive due process. The states, pursuant to their *parens patriae* power, have a substantial interest in institutionalizing persons in need of care, both for the protection of such people themselves and for the protection of others.[709] A state, however, "cannot constitutionally confine without more a nondanger-

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does not define the nature of the interest of foster parents, it would appear to be quite limited and attenuated. Id. at 842–47. In a conflict between natural and foster families, a court is likely to defer to a typical state process which makes such decisions based on the best interests of the child. *See* Quilloin v. Walcott, 434 U.S. 246 (1978).

[705] Michael H. v. Gerald D., 491 U.S. 110 (1989). There was no opinion of the Court. A majority of Justices (Brennan, Marshall, Blackmun, Stevens, White) was willing to recognize that the biological father has a liberty interest in a relationship with his child, but Justice Stevens voted with the plurality (Scalia, Rehnquist, O'Connor, Kennedy) because he believed that the statute at issue adequately protected that interest.

[706] The clearest conflict to date was presented by state law giving a veto to parents over their minor children's right to have an abortion. Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Planned Parenthood v. Casey, 503 U.S. 833 (1992). *See also* Parham v. J. R., 442 U.S. 584 (1979) (parental role in commitment of child for treatment of mental illness).

[707] 530 U.S. 57 (2000).

[708] 530 U.S. at 66.

[709] These principles have no application to persons not held in custody by the state. DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (no due process violation for failure of state to protect an abused child from his parent,

ous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." [710] Moreover, a person who is constitutionally confined "enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." [711] Influential lower court decisions have also found a significant right to treatment [712] or "habilitation," [713] although the Supreme Court's approach in this area has been tentative.

For instance, in *Youngberg v. Romeo*, the Court recognized a liberty right to "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." [714] Although the lower court had agreed that residents at a state mental hospital are entitled to "such treatment as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit," [715] the Supreme Court found that the plaintiff had reduced his claim to "training related to safety and freedom from restraints." [716] But the Court's concern for feder-

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even when the social service agency had been notified of possible abuse, and possibility had been substantiated through visits by social worker).

[710] O'Connor v. Donaldson, 422 U.S. 563, 576 (1975). *See* Jackson v. Indiana, 406 U.S. 715 (1972); Vitek v. Jones, 445 U.S. 480, 491–94 (1980).

[711] Youngberg v. Romeo, 457 U.S. 307, 324 (1982). Thus, personal security constitutes a "historic liberty interest" protected substantively by the due process clause. Ingraham v. Wright, 430 U.S. 651, 673 (1977) (liberty interest in being free from undeserved corporal punishment in school); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979) (Justice Powell concurring) ("Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental actions").

[712] In Jackson v. Indiana, 406 U.S. 715, 738 (1972), the Court had said that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Reasoning that if commitment is for treatment and betterment of individuals, it must be accompanied by adequate treatment, several lower courts recognized a due process right. *E.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala), *enforced*, 334 F. Supp. 1341 (1971), *supplemented*, 334 F. Supp. 373 and 344 F. Supp. 387 (M.D.Ala. 1972), *aff'd in part, reserved in part, and remanded sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975).

[713] "The word 'habilitation,' . . . is commonly used to refer to programs for the mentally-retarded because mental retardation is . . . a learning disability and training impairment rather than an illness. [T]he principal focus of habilitation is upon training and development of needed skills." Youngberg v. Romeo, 457 U.S. 307, 309 n.1 (1982) (quoting amicus brief for American Psychiatric Association; ellipses and brackets supplied by the Court).

[714] Youngberg v. Romeo, 457 U.S. 307, 319 (1982).

[715] 457 U.S. at 318 n.23.

[716] 457 U.S. at 317–18. Concurring, Justices Blackmun, Brennan, and O'Connor, argued that due process guaranteed patients at least that training necessary to prevent them from losing the skills they entered the institution with. Id. at 325. Chief Justice Burger rejected any protected interest in training. Id. at 329. The Court had

alism, its reluctance to approve judicial activism in supervising institutions, and its recognition of the budgetary constraints associated with state provision of services caused it to hold that lower federal courts must defer to professional decision-making to determine what level of care was adequate. Professional decisions are presumptively valid and liability can be imposed "only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[717] Presumably, however, the difference between liability for damages and injunctive relief will still afford federal courts considerable latitude in enjoining institutions to better their services in the future, even if they cannot award damages for past failures.[718]

The Court's resolution of a case involving persistent sexual offenders suggests that state civil commitment systems, besides confining the dangerously mentally ill, may also act to incapacitate persons predisposed to engage in specific criminal behaviors. In *Kansas v. Hendricks*,[719] the Court upheld a Kansas law that allowed civil commitment without a showing of "mental illness," so that a defendant diagnosed as a pedophile could be committed based on his having a "mental abnormality" that made him "likely to engage in acts of sexual violence." Although the Court minimized the use of this expanded nomenclature,[720] the concept of "mental abnormality" appears both more encompassing and less defined than the concept of "mental illness." It is unclear how, or whether, the Court would distinguish this case from the indefinite civil commitment of other re-

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also avoided a decision on a right to treatment in O'Connor v. Donaldson, 422 U.S. 563, 573 (1975), vacating and remanding a decision recognizing the right and thereby depriving the decision of precedential value. Chief Justice Burger expressly rejected the right there also. Id. at 578. But just four days later the Court denied certiorari to another panel decision from the same circuit that had relied on the circuit's *Donaldson* decision to establish such a right, leaving the principle alive in that circuit. Burnham v. Department of Public Health, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975). *See also* Allen v. Illinois, 478 U.S. 364, 373 (1986) (dictum that person civilly committed as "sexually dangerous person" might be entitled to protection under the self-incrimination clause if he could show that his confinement "is essentially identical to that imposed upon felons with no need for psychiatric care").

[717] 457 U.S. at 323.

[718] *E.g.*, Ohlinger v. Watson, 652 F. 2d 775, 779 (9th Cir. 1980); Welsch v. Likins, 550 F.2d 1122, 1132 (8th Cir. 1977). Of course, lack of funding will create problems with respect to injunctive relief as well. *Cf.* New York State Ass'n for Retarded Children v. Carey, 631 F.2d 162, 163 (2d Cir. 1980). The Supreme Court has limited the injunctive powers of the federal courts in similar situations.

[719] 521 U.S. 346 (1997).

[720] 521 U.S. at 359. *But see* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (holding that a state can not hold a person suffering from a personality disorder without clear and convincing proof of a mental illness).

cidivists such as drug offenders. A subsequent opinion does seem to narrow the *Hendricks* holding so as to require an additional finding that the defendant would have difficulty controlling his or her behavior.[721]

Still other issues await exploration.[722] Additionally, federal legislation is becoming extensive,[723] and state legislative and judicial development of law is highly important because the Supreme Court looks to this law as one source of the interests that the Due Process Clause protects.[724]

"Right to Die".—Although the popular term "right to die" has been used to describe the debate over end-of-life decisions, the underlying issues include a variety of legal concepts, some distinct and some overlapping. For instance, "right to die" could include issues of suicide, passive euthanasia (allowing a person to die by refusal or withdrawal of medical intervention), assisted suicide (providing a person the means of committing suicide), active euthanasia (killing another), and palliative care (providing comfort care which accelerates the death process). Recently, a new category has been suggested—physician-assisted suicide—that appears to be an uncertain blend of assisted suicide or active euthanasia undertaken by a licensed physician.

There has been little litigation of constitutional issues surrounding suicide generally, although Supreme Court *dicta* seems to favor the notion that the state has a constitutionally defensible interest in preserving the lives of healthy citizens.[725] On the other hand, the right of a seriously ill person to terminate life-sustaining medical treatment has been addressed, but not squarely faced. In *Cruzan v. Director, Missouri Department of Health*,[726] the Court, rather than directly addressing the issue, "assume[d]" that "a competent per-

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[721] Kansas v. Crane, 534 U.S. 407 (2002).

[722] *See Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974). In Mills v. Rogers, 457 U.S. 291 (1982), the Court had before it the issue of the due process right of committed mental patients at state hospitals to refuse administration of antipsychotic drugs. An intervening decision of the state's highest court had measurably strengthened the patients' rights under both state and federal law and the Court remanded for reconsideration in light of the state court decision. *See also* Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981).

[723] Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. 94–103, 89 Stat. 486, as amended, 42 U.S.C. §§ 6000 *et seq.*, as to which *see* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981); Mental Health Systems Act, 94 Stat. 1565, 42 U.S.C. §§ 9401 *et seq.*

[724] *See*, *e.g.*, Mills v. Rogers, 457 U.S. 291, 299–300 (1982). On the question of procedural due process rights that apply to civil commitments, see "The Problem of Civil Commitment," *infra*.

[725] Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 280 (1990) ("We do not think that a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death").

[726] 497 U.S. 261 (1990).

son [has] a constitutionally protected right to refuse lifesaving hydration and nutrition." [727] More importantly, however, a majority of the Justices separately declared that such a liberty interest exists.[728] Yet, it is not clear how actively the Court would seek to protect this right from state regulation.

In *Cruzan,* which involved a patient in a persistent vegetative state, the Court upheld a state requirement that there must be "clear and convincing evidence" of a patient's previously manifested wishes before nutrition and hydration could be withdrawn. Despite the existence of a presumed due process right, the Court held that a state is not required to follow the judgment of the family, the guardian, or "anyone but the patient herself" in making this decision.[729] Thus, in the absence of clear and convincing evidence that the patient had expressed an interest not to be sustained in a persistent vegetative state, or that she had expressed a desire to have a surrogate make such a decision for her, the state may refuse to allow withdrawal of nutrition and hydration.[730]

Despite the Court's acceptance of such state requirements, the implications of the case are significant. First, the Court appears, without extensive analysis, to have adopted the position that refusing nutrition and hydration is the same as refusing other forms of medical treatment. Also, the Court seems ready to extend such right not only to terminally ill patients, but also to severely incapacitated patients whose condition has stabilized.[731] However, the Court made clear in a subsequent case, *Washington v. Glucksberg,*[732] that it intends to draw a line between withdrawal of medical treatment and more active forms of intervention.

In *Glucksberg*, the Supreme Court rejected an argument that the Due Process Clause provides a terminally ill individual the right to seek and obtain a physician's aid in committing suicide. Review-

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[727] 497 U.S. at 279.

[728] *See* 497 U.S. at 287 (O'Connor, concurring); id. at 304–05 (Brennan, joined by Marshall and Blackmun, dissenting); id. at 331 (Stevens, dissenting).

[729] 497 U.S. at 286.

[730] "A State is entitled to guard against potential abuses" that can occur if family members do not protect a patient's best interests, and "may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and [instead] simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." 497 U.S. at 281–82.

[731] There was testimony that the patient in *Cruzan* could be kept "alive" for about 30 years if nutrition and hydration were continued.

[732] 521 U.S. 702 (1997). In the companion case of Vacco v. Quill, 521 U.S. 793 (1997), the Court also rejected an argument that a state which prohibited assisted suicide but which allowed termination of medical treatment resulting in death unreasonably discriminated against the terminally ill in violation of the Equal Protection Clause of the Fourteenth Amendment.

ing a challenge to a state statutory prohibition against assisted suicide, the Court noted that it moves with "utmost care" before breaking new ground in the area of liberty interests.[733] The Court pointed out that suicide and assisted suicide have long been disfavored by the American judicial system, and courts have consistently distinguished between passively allowing death to occur and actively causing such death. The Court rejected the applicability of *Cruzan* and other liberty interest cases,[734] noting that while many of the interests protected by the Due Process Clause involve personal autonomy, not all important, intimate, and personal decisions are so protected. By rejecting the notion that assisted suicide is constitutionally protected, the Court also appears to preclude constitutional protection for other forms of intervention in the death process, such as suicide or euthanasia.[735]

PROCEDURAL DUE PROCESS: CIVIL

Generally

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.[736] Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved.[737] One of the basic criteria used to establish whether due process is satisfied is whether such procedure was historically required in like circumstances.

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[733] 521 U.S. at 720.

[734] *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding a liberty interest in terminating pregnancy).

[735] A passing reference by Justice O'Connor in a concurring opinion in *Glucksberg* and its companion case Vacco v. Quill may, however, portend a liberty interest in seeking pain relief, or "palliative" care. *Glucksberg* and *Vacco*, 521 U.S. at 736–37 (Justice O'Connor, concurring).

[736] Thus, where a litigant had the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result. Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).

[737] Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884). "Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law." Id. at 708; *Accord*, Hurtado v. California, 110 U.S. 516, 537 (1884).

Relevance of Historical Use.—The requirements of due process are determined in part by an examination of the settled usages and modes of proceedings of the common and statutory law of England during pre-colonial times and in the early years of this country.[738] In other words, the antiquity of a legal procedure is a factor weighing in its favor. However, it does not follow that a procedure settled in English law and adopted in this country is, or remains, an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be "fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment."[739] Fortunately, the states are not tied down by any provision of the Constitution to the practice and procedure that existed at the common law, but may avail themselves of the wisdom gathered by the experience of the country to make changes deemed to be necessary.[740]

Non-Judicial Proceedings.—A court proceeding is not a requisite of due process.[741] Administrative and executive proceedings are not judicial, yet they may satisfy the Due Process Clause.[742] Moreover, the Due Process Clause does not require *de novo* judicial review of the factual conclusions of state regulatory agencies,[743] and may not require judicial review at all.[744] Nor does the Fourteenth Amendment prohibit a state from conferring judicial functions upon non-judicial bodies, or from delegating powers to a court that are legislative in nature.[745] Further, it is up to a state to determine to

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[738] Twining v. New Jersey, 211 U.S. 78, 101 (1908); Brown v. New Jersey, 175 U.S. 172, 175 (1899). "A process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country." Hurtado v. California, 110 U.S. at 529.

[739] *Twining*, 211 U.S. at 101.

[740] Hurtado v. California, 110 U.S. 516, 529 (1884); Brown v. New Jersey, 175 U.S. 172, 175 (1899); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 244 (1944).

[741] Ballard v. Hunter, 204 U.S. 241, 255 (1907); Palmer v. McMahon, 133 U.S. 660, 668 (1890).

[742] For instance, proceedings to raise revenue by levying and collecting taxes are not necessarily judicial proceedings, yet their validity is not thereby impaired. McMillen v. Anderson, 95 U.S. 37, 41 (1877).

[743] Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941) (oil field proration order). *See also* Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940) (courts should not second-guess regulatory commissions in evaluating expert testimony).

[744] *See*, *e.g.*, Moore v. Johnson, 582 F.2d 1228, 1232 (9th Cir. 1978) (upholding the preclusion of judicial review of decisions of the Veterans Administration regarding veterans' benefits).

[745] State statutes vesting in a parole board certain judicial functions, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), or conferring discretionary power upon administrative boards to grant or withhold permission to carry on a trade, New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552, 562 (1905), or vesting in a probate court authority to appoint park commissioners and establish park districts, Ohio v. Akron

what extent its legislative, executive, and judicial powers should be kept distinct and separate.[746]

The Requirements of Due Process.—Although due process tolerates variances in procedure "appropriate to the nature of the case,"[747] it is nonetheless possible to identify its core goals and requirements. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."[748] Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests.[749] The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

(1) Notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[750] This may include an obligation, upon learning that an attempt at notice has failed, to take "reasonable followup measures" that may be available.[751] In addition, notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the depri-

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Park Dist., 281 U.S. 74, 79 (1930), are not in conflict with the Due Process Clause and present no federal question.

[746] Carfer v. Caldwell, 200 U.S. 293, 297 (1906).

[747] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[748] Carey v. Piphus, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

[749] Fuentes v. Shevin, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. Carey v. Piphus, 435 U.S. 247, 266–67 (1978); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Nelson v. Adams, 529 U.S. 460 (2000) (amendment of judgement to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute).

[750] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See also* Richards v. Jefferson County, 517 U.S. 793 (1996) (res judicata may not apply where taxpayer who challenged a county's occupation tax was not informed of prior case and where taxpayer interests were not adequately protected).

[751] Jones v. Flowers, 547 U.S. 220, 235 (2006) (state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed"; the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so).

vation of his interest.[752] Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it.[753] Such notice, however, need not describe the legal procedures necessary to protect one's interest if such procedures are otherwise set out in published, generally available public sources.[754]

(2) Hearing. "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest."[755] This right is a "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment . . . ."[756] Thus, the notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[757]

(3) Impartial Tribunal. Just as in criminal and quasi-criminal cases,[758] an impartial decisionmaker is an essential right in civil proceedings as well.[759] "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."[760] Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board's effort would redound to

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[752] Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

[753] Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Robinson v. Hanrahan, 409 U.S. 38 (1974); Greene v. Lindsey, 456 U.S. 444 (1982).

[754] City of West Covina v. Perkins, 525 U.S. 234 (1999).

[755] Mathews v. Eldridge, 424 U.S. 319, 333 (1976). "Parties whose rights are to be affected are entitled to be heard." Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

[756] Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972). *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170–71 (1951) (Justice Frankfurter concurring).

[757] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[758] Tumey v. Ohio, 273 U.S. 510 (1927)); *In re* Murchison, 349 U.S. 133 (1955).

[759] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[760] Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Schweiker v. McClure, 456 U.S. 188, 195 (1982).

the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.[761]

There is, however, a "presumption of honesty and integrity in those serving as adjudicators," [762] so that the burden is on the objecting party to show a conflict of interest or some other specific reason for disqualification of a specific officer or for disapproval of the system. Thus, combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician's suspension, may raise substantial concerns, but does not by itself establish a violation of due process.[763] The Court has also held that the official or personal stake that school board members had in a decision to fire teachers who had engaged in a strike against the school system in violation of state law was not such so as to disqualify them.[764] Sometimes, to ensure an impartial tribunal, the Due Process Clause requires a judge to recuse himself from a case. In *Caperton v. A. T. Massey Coal Co., Inc.*, the Court noted that "most matters relating to judicial disqualification [do] not rise to a constitutional level," and that "matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion." [765] The Court added, however, that "[t]he early and leading case on the subject" had "concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has 'a direct, personal, substantial, pecuniary interest' in a case." [766] In addition, although "[p]ersonal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause,'" there "are circum-

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[761] Gibson v. Berryhill, 411 U.S. 564 (1973). Or, the conduct of deportation hearings by a person who, while he had not investigated the case heard, was also an investigator who must judge the results of others' investigations just as one of them would some day judge his, raised a substantial problem which was resolved through statutory construction). Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[762] Schweiker v. McClure, 456 U.S. 188, 195 (1982); Withrow v. Larkin, 421 U.S. 35, 47 (1975); United States v. Morgan, 313 U.S. 409, 421 (1941).

[763] Withrow v. Larkin, 421 U.S. 35 (1975). Where an administrative officer is acting in a prosecutorial, rather than judicial or quasi-judicial role, an even lesser standard of impartiality applies. Marshall v. Jerrico, 446 U.S. 238, 248–50 (1980) (regional administrator assessing fines for child labor violations, with penalties going into fund to reimburse cost of system of enforcing child labor laws). But "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." Id. at 249.

[764] Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976). *Compare* Arnett v. Kennedy, 416 U.S. 134, 170 n.5 (1974) (Justice Powell), *with* id. at 196–99 (Justice White), and 216 (Justice Marshall).

[765] 556 U.S. ___, No. 08–22, slip op. at 6 (2009) (citations omitted).

[766] 556 U.S. ___, No. 08–22, slip op. at 6, quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927).

stances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" [767] These circumstances include "where a judge had a financial interest in the outcome of a case" or "a conflict arising from his participation in an earlier proceeding." [768] In such cases, "[t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" [769] In *Caperton*, a company appealed a jury verdict of $50 million, and its chairman spent $3 million to elect a justice to the Supreme Court of Appeals of West Virginia at a time when "[i]t was reasonably foreseeable . . . that the pending case would be before the newly elected justice." [770] This $3 million was more than the total amount spent by all other supporters of the justice and three times the amount spent by the justice's own committee. The justice was elected, declined to recuse himself, and joined a 3-to-2 decision overturning the jury verdict. The Supreme Court, in a 5-to-4 opinion written by Justice Kennedy, "conclude[d] that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." [771]

Subsequently, in *Williams v. Pennsylvania*, the Court found that the right of due process was violated when a judge on the Pennsylvania Supreme Court—who participated in case denying post-conviction relief to a prisoner convicted of first-degree murder and sentenced to death—had, in his former role as a district attorney, given approval to seek the death penalty in the prisoner's case.[772] Relying on *Caperton*, which the Court viewed as having set forth an "objective standard" that requires recusal when the likelihood of bias on the part of the judge is "too high to be constitutionally

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[767] 556 U.S. ___, No. 08–22, slip op. at 6 (citations omitted).
[768] 556 U.S. ___, No. 08–22, slip op. at 7, 9.
[769] 556 U.S. ___, No. 08–22, slip op. at 11 (citations omitted).
[770] 556 U.S. ___, No. 08–22, slip op. at 15.
[771] 556 U.S. ___, No. 08–22, slip op. at 14. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, dissented, asserting that "a 'probability of bias' cannot be defined in any limited way," "provides no guidance to judges and litigants about when recusal will be constitutionally required," and "will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be." Slip. op. at 1 (Roberts, C.J., dissenting). The majority countered that "[t]he facts now before us are extreme in any measure." Slip op. at 17.
[772] 579 U.S. ___, No. 15–5040, slip op. at 1 (2016).

tolerable,"[773] the *Williams* Court specifically held that there is an impermissible risk of actual bias when a judge had previously had a "significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case."[774] The Court based its holding, in part, on earlier cases which had found impermissible bias occurs when the same person serves as both "accuser" and "adjudicator" in a case, which the Court viewed as having happened in *Williams*.[775] It also reasoned that authorizing another person to seek the death penalty represents "significant personal involvement" in a case,[776] and took the view that the involvement of multiple actors in a case over many years "only heightens"—rather than mitigates—the "need for objective rules preventing the operation of bias that otherwise might be obscured."[777] As a remedy, the case was remanded for reevaluation by the reconstituted Pennsylvania Supreme Court, notwithstanding the fact that the judge in question did not cast the deciding vote, as the *Williams* Court viewed the judge's participation in the multi-member panel's deliberations as sufficient to taint the public legitimacy of the underlying proceedings and constitute reversible error.[778]

(4) Confrontation and Cross-Examination. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[779] Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but

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[773] *Id.* (internal quotations omitted).

[774] *Id.* at 5–6.

[775] *Id.* at 6 (citing *In re Murchison*, 349 U.S. 133, 136–37 (1955)). The Court also noted that "[n]o attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision." *Id.* at 7.

[776] *Id.* at 9. *See also id.* at 10 (noting that the judge in this case had highlighted the number of capital cases in which he participated when campaigning for judicial office).

[777] *Id.* at 8.

[778] *Id.* at 12–13. Likewise, the Court rejected the argument that remanding the case would not cure the underlying due process violation because the disqualified judge's views might still influence his former colleagues, as an "inability to guarantee complete relief for a constitutional violation . . . does not justify withholding a remedy altogether." *Id.* at 14.

[779] Goldberg v. Kelly, 397 U.S. 254, 269 (1970). *See also* ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93–94 (1913). *Cf.* § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d).

also in all types of cases where administrative . . . actions were under scrutiny." [780]

(5) Discovery. The Court has never directly confronted this issue, but in one case it did observe in *dictum* that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." [781] Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference has recommended that all do so.[782] There appear to be no cases, however, holding they must, and there is some authority that they cannot absent congressional authorization.[783]

(6) Decision on the Record. Although this issue arises principally in the administrative law area,[784] it applies generally. "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." [785]

(7) Counsel. In *Goldberg v. Kelly*, the Court held that a government agency must permit a welfare recipient who has been denied benefits to be represented by and assisted by counsel.[786] In the years since, the Court has struggled with whether civil litigants in court and persons before agencies who could not afford retained counsel should have counsel appointed and paid for, and the matter seems far from settled. The Court has established a presumption that an indigent does not have the right to appointed counsel unless his

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[780] Greene v. McElroy, 360 U.S. 474, 496–97 (1959). *But see* Richardson v. Perales, 402 U.S. 389 (1971) (where authors of documentary evidence are known to petitioner and he did not subpoena them, he may not complain that agency relied on that evidence). *Cf.* Mathews v. Eldridge, 424 U.S. 319, 343–45 (1976).

[781] Greene v. McElroy, 360 U.S. 474, 496 (1959), *quoted with approval in* Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

[782] Recommendations and Reports of the Administrative Conference of the United States 571 (1968–1970).

[783] FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964).

[784] The exclusiveness of the record is fundamental in administrative law. *See* § 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(e). However, one must show not only that the agency used *ex parte* evidence but that he was prejudiced thereby. Market Street R.R. v. Railroad Comm'n, 324 U.S. 548 (1945) (agency decision supported by evidence in record, its decision sustained, disregarding *ex parte* evidence).

[785] Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (citations omitted).

[786] 397 U.S. 254, 270–71 (1970).

"physical liberty" is threatened.[787] Moreover, that an indigent may have a right to appointed counsel in some civil proceedings where incarceration is threatened does not mean that counsel must be made available in all such cases. Rather, the Court focuses on the circumstances in individual cases, and may hold that provision of counsel is not required if the state provides appropriate alternative safeguards.[788]

Though the calculus may vary, cases not involving detention also are determined on a case-by-case basis using a balancing standard.[789]

For instance, in a case involving a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized the parent's interest as "an extremely important one." The Court, however, also noted the state's strong interest in protecting the welfare of children. Thus, as the interest in correct fact-finding was strong on both sides, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no "specially troublesome" substantive or procedural issues had been raised, the litigant did not have a right to appointed counsel.[790] In other due process cases involving parental rights, the Court has held that due process requires special state attention to parental rights.[791] Thus,

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[787] Lassiter v. Department of Social Services, 452 U.S. 18 (1981). The Court purported to draw this rule from Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no *per se* right to counsel in probation revocation proceedings). To introduce this presumption into the balancing, however, appears to disregard the fact that the first factor of Mathews v. Eldridge, 424 U.S. 319 (1976), upon which the Court (and dissent) relied, relates to the importance of the interest to the person claiming the right. Thus, at least in this context, the value of the first *Eldridge* factor is diminished. The Court noted, however, that the Mathews v. Eldridge standards were drafted in the context of the generality of cases and were not intended for case-by-case application. *Cf.* 424 U.S. at 344 (1976).

[788] Turner v. Rogers, 564 U.S. ___, No. 10–10, slip op. (2011). The *Turner* Court denied an indigent defendant appointed counsel in a civil contempt proceeding to enforce a child support order, even though the defendant faced incarceration unless he showed an inability to pay the arrearages. The party opposing the defendant in the case was not the state, but rather the unrepresented custodial parent, nor was the case unusually complex. A five-Justice majority, though denying a right to counsel, nevertheless reversed the contempt order because it found that the procedures followed remained inadequate.

[789] 452 U.S. at 31–32. The balancing decision is to be made initially by the trial judge, subject to appellate review. Id. at 32

[790] 452 U.S. at 27–31. The decision was a five-to-four, with Justices Stewart, White, Powell, and Rehnquist and Chief Justice Burger in the majority, and Justices Blackmun, Brennan, Marshall, and Stevens in dissent. Id. at 35, 59.

[791] *See*, *e.g.*, Little v. Streater, 452 U.S. 1 (1981) (indigent entitled to state-funded blood testing in a paternity action the state required to be instituted); Santosky v. Kramer, 455 U.S. 745 (1982) (imposition of higher standard of proof in case involving state termination of parental rights).

it would appear likely that in other parental right cases, a right to appointed counsel could be established.

The Procedure That Is Due Process

The Interests Protected: "Life, Liberty and Property".—The language of the Fourteenth Amendment requires the provision of due process when an interest in one's "life, liberty or property" is threatened.[792] Traditionally, the Court made this determination by reference to the common understanding of these terms, as embodied in the development of the common law.[793] In the 1960s, however, the Court began a rapid expansion of the "liberty" and "property" aspects of the clause to include such non-traditional concepts as conditional property rights and statutory entitlements. Since then, the Court has followed an inconsistent path of expanding and contracting the breadth of these protected interests. The "life" interest, on the other hand, although often important in criminal cases, has found little application in the civil context.

The Property Interest.—The expansion of the concept of "property rights" beyond its common law roots reflected a recognition by the Court that certain interests that fall short of traditional property rights are nonetheless important parts of people's economic well-being. For instance, where household goods were sold under an installment contract and title was retained by the seller, the possessory interest of the buyer was deemed sufficiently important to require procedural due process before repossession could occur.[794] In addition, the loss of the use of garnished wages between the time of garnishment and final resolution of the underlying suit was deemed a sufficient property interest to require some form of determination

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[792] Morrissey v. Brewer, 408 U.S. 471, 481 (1982). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972). Developments under the Fifth Amendment's Due Process Clause have been interchangeable. *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974).

[793] For instance, at common law, one's right of life existed independently of any formal guarantee of it and could be taken away only by the state pursuant to the formal processes of law, and only for offenses deemed by a legislative body to be particularly heinous. One's liberty, generally expressed as one's freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures. One's ownership of lands, chattels, and other properties, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally understood in Anglo-American countries.

[794] Fuentes v. Shevin, 407 U.S. 67 (1972) (invalidating replevin statutes which authorized the authorities to seize goods simply upon the filing of an ex parte application and the posting of bond).

that the garnisher was likely to prevail.[795] Furthermore, the continued possession of a driver's license, which may be essential to one's livelihood, is protected; thus, a license should not be suspended after an accident for failure to post a security for the amount of damages claimed by an injured party without affording the driver an opportunity to raise the issue of liability.[796]

A more fundamental shift in the concept of property occurred with recognition of society's growing economic reliance on government benefits, employment, and contracts,[797] and with the decline of the "right-privilege" principle. This principle, discussed previously in the First Amendment context,[798] was pithily summarized by Justice Holmes in dismissing a suit by a policeman protesting being fired from his job: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [799] Under this theory, a finding that a litigant had no "vested property interest" in government employment,[800] or that some form of public assistance was "only" a privilege,[801] meant that no procedural due process was required before depriving a person of that interest.[802] The reasoning was that, if a government was under no obligation to provide something, it could choose to provide it subject to whatever conditions or procedures it found appropriate.

The conceptual underpinnings of this position, however, were always in conflict with a line of cases holding that the government could not require the diminution of constitutional rights as a condition for receiving benefits. This line of thought, referred to as the "unconstitutional conditions" doctrine, held that, "even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, it may not do so on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." [803]

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[795] Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

[796] Bell v. Burson, 402 U.S. 535 (1971). *Compare* Dixon v. Love, 431 U.S. 105 (1977), *with* Mackey v. Montrym, 443 U.S. 1 (1979). *But see* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) (no liberty interest in worker's compensation claim where reasonableness and necessity of particular treatment had not yet been resolved).

[797] *See* Laurence Tribe, American Constitutional Law 685 (2d. ed) (1988).

[798] Tribe, *supra*, at 1084–90.

[799] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E.2d 517, 522 (1892).

[800] Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court,* 314 U.S. 918 (1951); Adler v. Board of Educ., 342 U.S. 485 (1952).

[801] Flemming v. Nestor, 363 U.S. 603 (1960).

[802] Barsky v. Board of Regents, 347 U.S. 442 (1954).

[803] Perry v. Sindermann, 408 U.S. 593, 597 (1972). *See* Speiser v. Randall, 357 U.S. 513 (1958).

Nonetheless, the two doctrines coexisted in an unstable relationship until the 1960s, when the right-privilege distinction started to be largely disregarded.[804]

Concurrently with the virtual demise of the "right-privilege" distinction, there arose the "entitlement" doctrine, under which the Court erected a barrier of procedural—but not substantive—protections[805] against erroneous governmental deprivation of something it had within its discretion bestowed. Previously, the Court had limited due process protections to constitutional rights, traditional rights, common law rights and "natural rights." Now, under a new "positivist" approach, a protected property or liberty interest might be found based on any positive governmental statute or governmental practice that gave rise to a legitimate expectation. Indeed, for a time it appeared that this positivist conception of protected rights was going to displace the traditional sources.

As noted previously, the advent of this new doctrine can be seen in *Goldberg v. Kelly*,[806] in which the Court held that, because termination of welfare assistance may deprive an eligible recipient of the means of livelihood, the government must provide a pretermination evidentiary hearing at which an initial determination of the validity of the dispensing agency's grounds for termination may be made. In order to reach this conclusion, the Court found that such benefits "are a matter of statutory entitlement for persons qualified to receive them."[807] Thus, where the loss or reduction of a benefit or privilege was conditioned upon specified grounds, it was found that the recipient had a property interest entitling him to proper procedure before termination or revocation.

At first, the Court's emphasis on the importance of the statutory rights to the claimant led some lower courts to apply the Due Process Clause by assessing the weights of the interests involved and the harm done to one who lost what he was claiming. This ap-

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[804] *See* William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). Much of the old fight had to do with imposition of conditions on admitting corporations into a state. *Cf.* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 656–68 (1981) (reviewing the cases). The right-privilege distinction is not, however, totally moribund. *See* Buckley v. Valeo, 424 U.S. 1, 108–09 (1976) (sustaining as qualification for public financing of campaign agreement to abide by expenditure limitations otherwise unconstitutional); Wyman v. James, 400 U.S. 309 (1971).

[805] This means that Congress or a state legislature could still simply take away part or all of the benefit. Richardson v. Belcher, 404 U.S. 78 (1971); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 174 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432–33 (1982).

[806] 397 U.S. 254 (1970).

[807] 397 U.S. at 261–62. *See also* Mathews v. Eldridge, 424 U.S. 319 (1976) (Social Security benefits).

proach, the Court held, was inappropriate. "[W]e must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." [808] To have a property interest in the constitutional sense, the Court held, it was not enough that one has an abstract need or desire for a benefit or a unilateral expectation. He must rather "have a legitimate claim of entitlement" to the benefit. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." [809]

Consequently, in *Board of Regents v. Roth*, the Court held that the refusal to renew a teacher's contract upon expiration of his one-year term implicated no due process values because there was nothing in the public university's contract, regulations, or policies that "created any legitimate claim" to reemployment.[810] By contrast, in *Perry v. Sindermann*,[811] a professor employed for several years at a public college was found to have a protected interest, even though his employment contract had no tenure provision and there was no statutory assurance of it.[812] The "existing rules or understandings"

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[808] Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972).

[809] 408 U.S. at 577. Although property interests often arise by statute, the Court has also recognized interests established by state case law. Thus, where state court holdings required that private utilities terminate service only for cause (such as nonpayment of charges), then a utility is required to follow procedures to resolve disputes about payment or the accuracy of charges prior to terminating service. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

[810] 436 U.S. at 576–78. The Court also held that no liberty interest was implicated, because in declining to rehire Roth the state had not made any charges against him or taken any actions that would damage his reputation or stigmatize him. 436 at 572–75. For an instance of protection accorded a claimant on the basis of such an action, see Codd v. Vegler. *See also* Bishop v. Wood, 426 U.S. 341, 347–50 (1976); Vitek v. Jones, 445 U.S. 480, 491–94 (1980); Board of Curators v. Horowitz, 435 U.S. 78, 82–84 (1978).

[811] 408 U.S. 593 (1972). *See* Leis v. Flynt, 439 U.S. 438 (1979) (finding no practice or mutually explicit understanding creating interest).

[812] 408 U.S. at 601–03 (1972). In contrast, a statutory assurance was found in Arnett v. Kennedy, 416 U.S. 134 (1974), where the civil service laws and regulations allowed suspension or termination "only for such cause as would promote the efficiency of the service." 416 U.S. at 140. On the other hand, a policeman who was a "permanent employee" under an ordinance which appeared to afford him a continuing position subject to conditions subsequent was held not to be protected by the Due Process Clause because the federal district court interpreted the ordinance as providing only employment at the will and pleasure of the city, an interpretation that the Supreme Court chose not to disturb. Bishop v. Wood, 426 U.S. 341 (1976). "On its face," the Court noted, "the ordinance on which [claimant relied] may fairly be read as conferring" both "a property interest in employment . . . [and] an enforceable expectation of continued public employment." 426 U.S. at 344–45 (1976). The

were deemed to have the characteristics of tenure, and thus provided a legitimate expectation independent of any contract provision.[813]

The Court has also found "legitimate entitlements" in a variety of other situations besides employment. In *Goss v. Lopez*,[814] an Ohio statute provided for both free education to all residents between five and 21 years of age and compulsory school attendance; thus, the state was deemed to have obligated itself to accord students some due process hearing rights prior to suspending them, even for such a short period as ten days. "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." [815] The Court is highly deferential, however, to school dismissal decisions based on academic grounds.[816]

The further one gets from traditional precepts of property, the more difficult it is to establish a due process claim based on entitlements. In *Town of Castle Rock v. Gonzales*,[817] the Court considered whether police officers violated a constitutionally protected property interest by failing to enforce a restraining order obtained by an estranged wife against her husband, despite having probable cause to believe the order had been violated. While noting statutory language that required that officers either use "every reasonable means to enforce [the] restraining order" or "seek a warrant for the arrest of the restrained person," the Court resisted equating this language with the creation of an enforceable right, noting a long-standing tradition of police discretion coexisting with apparently man-

district court's decision had been affirmed by an equally divided appeals court and the Supreme Court deferred to the presumed greater expertise of the lower court judges in reading the ordinance. 426 U.S. at 345 (1976).

[813] 408 U.S. at 601.

[814] 419 U.S. 565 (1975). *Cf.* Carey v. Piphus, 435 U.S. 247 (1978) (measure of damages for violation of procedural due process in school suspension context). *See also* Board of Curators v. Horowitz, 435 U.S. 78 (1978) (whether liberty or property interest implicated in academic dismissals and discipline, as contrasted to disciplinary actions).

[815] Goss v. Lopez, 419 U.S. at 574. *See also* Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license); O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) (statutory entitlement of nursing home residents protecting them in the enjoyment of assistance and care).

[816] Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985). Although the Court "assume[d] the existence of a constitutionally protectible property interest in . . . continued enrollment" in a state university, this limited constitutional right is violated only by a showing that dismissal resulted from "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." 474 U.S. at 225.

[817] 545 U.S. 748 (2005).

datory arrest statutes.[818] Finally, the Court even questioned whether finding that the statute contained mandatory language would have created a property right, as the wife, with no criminal enforcement authority herself, was merely an indirect recipient of the benefits of the governmental enforcement scheme.[819]

In *Arnett v. Kennedy*,[820] an incipient counter-revolution to the expansion of due process was rebuffed, at least with respect to entitlements. Three Justices sought to qualify the principle laid down in the entitlement cases and to restore in effect much of the right-privilege distinction, albeit in a new formulation. The case involved a federal law that provided that employees could not be discharged except for cause, and the Justices acknowledged that due process rights could be created through statutory grants of entitlements. The Justices, however, observed that the same law specifically withheld the procedural protections now being sought by the employees. Because "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest," [821] the employee would have to "take the bitter with the sweet." [822] Thus, Congress (and by analogy state legislatures) could qualify the conferral of an interest by limiting the process that might otherwise be required.

But the other six Justices, although disagreeing among themselves in other respects, rejected this attempt to formulate the issue. "This view misconceives the origin of the right to procedural due process," Justice Powell wrote. "That right is conferred not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." [823] Yet, in *Bishop v. Wood*,[824] the Court accepted a district court's finding that a policeman held his position "at will" despite

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[818] 545 U.S. at 759. The Court also noted that the law did not specify the precise means of enforcement required; nor did it guarantee that, if a warrant were sought, it would be issued. Such indeterminancy is not the "hallmark of a duty that is mandatory." Id. at 763.

[819] 545 U.S. at 764–65.

[820] 416 U.S. 134 (1974).

[821] 416 U.S. at 155 (Justices Rehnquist and Stewart and Chief Justice Burger).

[822] 416 U.S. at 154.

[823] 416 U.S. 167 (Justices Powell and Blackmun concurring). *See* 416 U.S. at 177 (Justice White concurring and dissenting), 203 (Justice Douglas dissenting), 206 (Justices Marshall, Douglas, and Brennan dissenting).

[824] 426 U.S. 341 (1976). A five-to-four decision, the opinion was written by Justice Stevens, replacing Justice Douglas, and was joined by Justice Powell, who had disagreed with the theory in *Arnett*. *See* id. at 350, 353 n.4, 355 (dissenting opinions). The language is ambiguous and appears at different points to adopt both positions. *But see* id. at 345, 347.

language setting forth conditions for discharge. Although the majority opinion was couched in terms of statutory construction, the majority appeared to come close to adopting the three-Justice *Arnett* position, so much so that the dissenters accused the majority of having repudiated the majority position of the six Justices in *Arnett*. And, in *Goss v. Lopez*,[825] Justice Powell, writing in dissent but using language quite similar to that of Justice Rehnquist in *Arnett*, seemed to indicate that the right to public education could be qualified by a statute authorizing a school principal to impose a ten-day suspension.[826]

Subsequently, however, the Court held squarely that, because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse action." Indeed, any other conclusion would allow the state to destroy virtually any state-created property interest at will.[827] A striking application of this analysis is found in *Logan v. Zimmerman Brush Co.*,[828] in which a state antidiscrimination law required the enforcing agency to convene a fact-finding conference within 120 days of the filing of the complaint. Inadvertently, the Commission scheduled the hearing after the expiration of the 120 days and the state courts held the requirement to be jurisdictional, necessitating dismissal of the complaint. The Court noted that various older cases had clearly established that causes of action were property, and, in any event, Logan's claim was an entitlement grounded in state law and thus could only be removed "for cause." This property interest existed independently of the 120-day time period and could not simply be taken away by agency action or inaction.[829]

The Liberty Interest.—With respect to liberty interests, the Court has followed a similarly meandering path. Although the traditional concept of liberty was freedom from physical restraint, the Court has expanded the concept to include various other protected interests, some statutorily created and some not.[830] Thus, in *Ingraham*

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[825] 419 U.S. 565, 573–74 (1975). *See* id. at 584, 586–87 (Justice Powell dissenting).

[826] 419 U.S. at 584, 586–87 (Justice Powell dissenting).

[827] Vitek v. Jones, 445 U.S. 480, 491 (1980). *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

[828] 455 U.S. 422 (1982).

[829] 455 U.S. at 428–33 A different majority of the Court also found an equal protection denial. 455 U.S. at 438.

[830] These procedural liberty interests should not, however, be confused with substantive liberty interests, which, if not outweighed by a sufficient governmental interest, may not be intruded upon regardless of the process followed. *See* "Fundamental Rights (Noneconomic Due Process)," *supra*.

v. Wright,[831] the Court unanimously agreed that school children had a liberty interest in freedom from wrongfully or excessively administered corporal punishment, whether or not such interest was protected by statute. "The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."[832]

The Court also appeared to have expanded the notion of "liberty" to include the right to be free of official stigmatization, and found that such threatened stigmatization could in and of itself require due process.[833] Thus, in *Wisconsin v. Constantineau*,[834] the Court invalidated a statutory scheme in which persons could be labeled "excessive drinkers," without any opportunity for a hearing and rebuttal, and could then be barred from places where alcohol was served. The Court, without discussing the source of the entitlement, noted that the governmental action impugned the individual's reputation, honor, and integrity.[835]

But, in *Paul v. Davis*,[836] the Court appeared to retreat from recognizing damage to reputation alone, holding instead that the liberty interest extended only to those situations where loss of one's reputation also resulted in loss of a statutory entitlement. In *Davis*, the police had included plaintiff's photograph and name on a list of "active shoplifters" circulated to merchants without an opportunity for notice or hearing. But the Court held that "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather, his interest in reputation is simply one of a

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[831] 430 U.S. 651 (1977).

[832] 430 U.S. at 673. The family-related liberties discussed under substantive due process, as well as the associational and privacy ones, no doubt provide a fertile source of liberty interests for procedural protection. *See* Armstrong v. Manzo, 380 U.S. 545 (1965) (natural father, with visitation rights, must be given notice and opportunity to be heard with respect to impending adoption proceedings); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father could not simply be presumed unfit to have custody of his children because his interest in his children warrants deference and protection). See also Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Little v. Streater, 452 U.S. 1 (1981); Lassiter v. Department of Social Services, 452 U.S. 18 (1981); Santosky v. Kramer, 455 U.S. 745 (1982).

[833] Board of Regents v. Roth, 408 U.S. 564, 569–70 (1972); Goss v. Lopez, 419 U.S. 565 (1975).

[834] 400 U.S. 433 (1971).

[835] *But see* Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003) (posting of accurate information regarding sex offenders on state Internet website does not violate due process as the site does not purport to label the offenders as presently dangerous).

[836] 424 U.S. 693 (1976).

number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interest by means of damage actions." [837] Thus, unless the government's official defamation has a specific negative effect on an entitlement, such as the denial to "excessive drinkers" of the right to obtain alcohol that occurred in *Constantineau*, there is no protected liberty interest that would require due process.

A number of liberty interest cases that involve statutorily created entitlements involve prisoner rights, and are dealt with more extensively in the section on criminal due process. However, they are worth noting here. In *Meachum v. Fano*,[838] the Court held that a state prisoner was not entitled to a fact-finding hearing when he was transferred to a different prison in which the conditions were substantially less favorable to him, because (1) the Due Process Clause liberty interest by itself was satisfied by the initial valid conviction, which had deprived him of liberty, and (2) no state law guaranteed him the right to remain in the prison to which he was initially assigned, subject to transfer for cause of some sort. As a prisoner could be transferred for any reason or for no reason under state law, the decision of prison officials was not dependent upon any state of facts, and no hearing was required.

In *Vitek v. Jones*,[839] by contrast, a state statute permitted transfer of a prisoner to a state mental hospital for treatment, but the transfer could be effectuated only upon a finding, by a designated physician or psychologist, that the prisoner "suffers from a mental disease or defect" and "cannot be given treatment in that facility." Because the transfer was conditioned upon a "cause," the establishment of the facts necessary to show the cause had to be done through fair procedures. Interestingly, however, the *Vitek* Court also held that the prisoner had a "residuum of liberty" in being free from the different confinement and from the stigma of involuntary commitment for mental disease that the Due Process Clause protected. Thus, the Court has recognized, in this case and in the cases involving

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[837] Here the Court, 424 U.S. at 701–10, distinguished *Constantineau* as being a "reputation-plus" case. That is, it involved not only the stigmatizing of one posted but it also "deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry." 424 U.S. at 708. How the state law positively did this the Court did not explain. But, of course, the reputation-plus concept is now well-settled. *See* discussion below. *See also* Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Siegert v. Gilley, 500 U.S. 226 (1991); Paul v. Davis, 424 U.S. 693, 711–12 (1976). In a later case, the Court looked to decisional law and the existence of common-law remedies as establishing a protected property interest. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9–12 (1978).

[838] 427 U.S. 215 (1976). *See also* Montanye v. Haymes, 427 U.S. 236 (1976).

[839] 445 U.S. 480 (1980).

revocation of parole or probation,[840] a liberty interest that is separate from a statutory entitlement and that can be taken away only through proper procedures.

But, with respect to the possibility of parole or commutation or otherwise more rapid release, no matter how much the expectancy matters to a prisoner, in the absence of some form of positive entitlement, the prisoner may be turned down without observance of procedures.[841] Summarizing its prior holdings, the Court recently concluded that two requirements must be present before a liberty interest is created in the prison context: the statute or regulation must contain "substantive predicates" limiting the exercise of discretion, and there must be explicit "mandatory language" requiring a particular outcome if substantive predicates are found.[842] In an even more recent case, the Court limited the application of this test to those circumstances where the restraint on freedom imposed by the state creates an "atypical and significant hardship."[843]

Proceedings in Which Procedural Due Process Need Not Be Observed.—Although due notice and a reasonable opportunity to be heard are two fundamental protections found in almost all systems of law established by civilized countries,[844] there are certain proceedings in which the enjoyment of these two conditions has not been deemed to be constitutionally necessary. For instance, persons adversely affected by a law cannot challenge its validity on the ground that the legislative body that enacted it gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no consideration to particular points of view. "Where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public

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[840] Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[841] Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998); Jago v. Van Curen, 454 U.S. 14 (1981). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (due process applies to forfeiture of good-time credits and other positivist granted privileges of prisoners).

[842] Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459–63 (1989) (prison regulations listing categories of visitors who may be excluded, but not creating a right to have a visitor admitted, contain "substantive predicates" but lack mandatory language).

[843] Sandin v. Conner, 515 U.S. 472, 484 (1995) (30-day solitary confinement not atypical "in relation to the ordinary incidents of prison life"); Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship").

[844] Twining v. New Jersey, 211 U.S. 78, 110 (1908); Jacob v. Roberts, 223 U.S. 261, 265 (1912).

acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." [845]

Similarly, when an administrative agency engages in a legislative function, as, for example, when it drafts regulations of general application affecting an unknown number of persons, it need not afford a hearing prior to promulgation.[846] On the other hand, if a regulation, sometimes denominated an "order," is of limited application, that is, it affects an identifiable class of persons, the question whether notice and hearing is required and, if so, whether it must precede such action, becomes a matter of greater urgency and must be determined by evaluating the various factors discussed below.[847]

One such factor is whether agency action is subject to later judicial scrutiny.[848] In one of the initial decisions construing the Due Process Clause of the Fifth Amendment, the Court upheld the authority of the Secretary of the Treasury, acting pursuant to statute, to obtain money from a collector of customs alleged to be in arrears. The Treasury simply issued a distress warrant and seized the collector's property, affording him no opportunity for a hearing, and requiring him to sue for recovery of his property. While acknowledging that history and settled practice required proceedings in which pleas, answers, and trials were requisite before property could be taken, the Court observed that the distress collection of debts due the crown had been the exception to the rule in England and was of long usage in the United States, and was thus sustainable.[849]

In more modern times, the Court upheld a procedure under which a state banking superintendent, after having taken over a closed bank and issuing notices to stockholders of their assessment, could

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[845] Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915). *See also* Bragg v. Weaver, 251 U.S. 57, 58 (1919). *Cf.* Logan v. Zimmerman Brush Co., 445 U.S. 422, 432–33 (1982).

[846] United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

[847] 410 U.S. at 245 (distinguishing between rule-making, at which legislative facts are in issue, and adjudication, at which adjudicative facts are at issue, requiring a hearing in latter proceedings but not in the former). *See* Londoner v. City of Denver, 210 U.S. 373 (1908).

[848] "It is not an indispensable requirement of due process that every procedure affecting the ownership or disposition of property be exclusively by judicial proceeding. Statutory proceedings affecting property rights which, by later resort to the courts, secures to adverse parties an opportunity to be heard, suitable to the occasion, do not deny due process." Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 246–47 (1944).

[849] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

issue execution for the amounts due, subject to the right of each stockholder to contest his liability for such an assessment by an affidavit of illegality. The fact that the execution was issued in the first instance by a governmental officer and not from a court, followed by personal notice and a right to take the case into court, was seen as unobjectionable.[850]

It is a violation of due process for a state to enforce a judgment against a party to a proceeding without having given him an opportunity to be heard sometime before final judgment is entered.[851] With regard to the presentation of every available defense, however, the requirements of due process do not necessarily entail affording an opportunity to do so before entry of judgment. The person may be remitted to other actions initiated by him[852] or an appeal may suffice. Accordingly, a surety company, objecting to the entry of a judgment against it on a supersedeas bond, without notice and an opportunity to be heard on the issue of liability, was not denied due process where the state practice provided the opportunity for such a hearing by an appeal from the judgment so entered. Nor could the company found its claim of denial of due process upon the fact that it lost this opportunity for a hearing by inadvertently pursuing the wrong procedure in the state courts.[853] On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was held to have been deprived of his rights without due process of law.[854]

When Process Is Due.—The requirements of due process, as has been noted, depend upon the nature of the interest at stake, while the form of due process required is determined by the weight of that interest balanced against the opposing interests.[855] The cur-

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[850] Coffin Brothers & Co. v. Bennett, 277 U.S. 29 (1928).

[851] Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 476 (1918); Baker v. Baker, Eccles & Co., 242 U.S. 294, 403 (1917); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900).

[852] Lindsey v. Normet, 405 U.S. 56, 65–69 (1972). However, if one would suffer too severe an injury between the doing and the undoing, he may avoid the alternative means. Stanley v. Illinois, 405 U.S. 645, 647 (1972).

[853] American Surety Co. v. Baldwin, 287 U.S. 156 (1932). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429–30, 432–33 (1982).

[854] Saunders v. Shaw, 244 U.S. 317 (1917).

[855] "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970), (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341

rently prevailing standard is that formulated in *Mathews v. Eldridge*,[856] which concerned termination of Social Security benefits. "Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

The termination of welfare benefits in *Goldberg v. Kelly*,[857] which could have resulted in a "devastating" loss of food and shelter, had required a pre-deprivation hearing. The termination of Social Security benefits at issue in *Mathews* would require less protection, however, because those benefits are not based on financial need and a terminated recipient would be able to apply for welfare if need be. Moreover, the determination of ineligibility for Social Security benefits more often turns upon routine and uncomplicated evaluations of data, reducing the likelihood of error, a likelihood found significant in *Goldberg*. Finally, the administrative burden and other societal costs involved in giving Social Security recipients a pre-termination hearing would be high. Therefore, a post-termination hearing, with full retroactive restoration of benefits, if the claimant prevails, was found satisfactory.[858]

Application of the *Mathews* standard and other considerations brought some noteworthy changes to the process accorded debtors and installment buyers. Earlier cases, which had focused upon the interests of the holders of the property in not being unjustly deprived of the goods and funds in their possession, leaned toward requiring pre-deprivation hearings. Newer cases, however, look to the interests of creditors as well. "The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." [859]

U.S. 123, 168 (1951) (Justice Frankfurter concurring)). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 894–95 (1961).

[856] 424 U.S. 319, 335 (1976).

[857] 397 U.S. 254, 264 (1970).

[858] Mathews v. Eldridge, 424 U.S. 319, 339–49 (1976).

[859] Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1975). *See also* id. at 623 (Justice Powell concurring), 629 (Justices Stewart, Douglas, and Marshall dissenting). Justice White, who wrote *Mitchell* and included the balancing language in his dis-

Thus, *Sniadach v. Family Finance Corp.*,[860] which mandated pre-deprivation hearings before wages may be garnished, has apparently been limited to instances when wages, and perhaps certain other basic necessities, are in issue and the consequences of deprivation would be severe.[861] *Fuentes v. Shevin*,[862] which struck down a replevin statute that authorized the seizure of property (here household goods purchased on an installment contract) simply upon the filing of an *ex parte* application and the posting of bond, has been limited,[863] so that an appropriately structured *ex parte* judicial determination before seizure is sufficient to satisfy due process.[864] Thus, laws authorizing sequestration, garnishment, or other seizure of property of an alleged defaulting debtor need only require that (1) the creditor furnish adequate security to protect the debtor's interest, (2) the creditor make a specific factual showing before a neutral officer or magistrate, not a clerk or other such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) an opportunity be assured for an adversary hearing promptly

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sent in Fuentes v. Shevin, 407 U.S. 67, 99–100 (1972), did not repeat it in North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975), but it presumably underlies the reconciliation of *Fuentes* and *Mitchell* in the latter case and the application of *Di-Chem*.

[860] 395 U.S. 337 (1969).

[861] North Georgia Finishing v. Di-Chem, 419 U.S. 601, 611 n.2 (1975) (Justice Powell concurring). The majority opinion draws no such express distinction, *see* id. at 605–06, rather emphasizing that *Sniadach-Fuentes* do require observance of *some* due process procedural guarantees. *But see* Mitchell v. W.T. Grant Co., 416 U.S. 600, 614 (1974) (opinion of Court by Justice White emphasizing the wages aspect of the earlier case).

[862] 407 U.S. (1972).

[863] *Fuentes* was an extension of the *Sniadach* principle to all "significant property interests" and thus mandated pre-deprivation hearings. *Fuentes* was a decision of uncertain viability from the beginning, inasmuch as it was four-to-three; argument had been heard prior to the date Justices Powell and Rehnquist joined the Court, hence neither participated in the decision. *See Di-Chem*, 419 U.S. at 616–19 (Justice Blackmun dissenting); *Mitchell*, 416 U.S. at 635–36 (1974) (Justice Stewart dissenting).

[864] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing v. Di-Chem, 419 U.S. 601 (1975). More recently, the Court has applied a variant of the Mathews v. Eldridge formula in holding that Connecticut's prejudgment attachment statute, which "fail[ed] to provide a preattachment hearing without at least requiring a showing of some exigent circumstance," operated to deny equal protection. Connecticut v. Doehr, 501 U.S. 1, 18 (1991). "[T]he relevant inquiry requires, as in *Mathews*, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to *Mathews*, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." 501 U.S. at 11.

after seizure to determine the merits of the controversy, with the burden of proof on the creditor.[865]

Similarly, applying the *Mathews v. Eldridge* standard in the context of government employment, the Court has held, albeit by a combination of divergent opinions, that the interest of the employee in retaining his job, the governmental interest in the expeditious removal of unsatisfactory employees, the avoidance of administrative burdens, and the risk of an erroneous termination combine to require the provision of some minimum pre-termination notice and opportunity to respond, followed by a full post-termination hearing, complete with all the procedures normally accorded and back pay if the employee is successful.[866] Where the adverse action is less than termination of employment, the governmental interest is significant, and where reasonable grounds for such action have been established separately, then a prompt hearing held after the adverse action may be sufficient.[867] In other cases, hearings with even minimum procedures may be dispensed with when what is to be established is so pro forma or routine that the likelihood of error is very small.[868] In a case dealing with negligent state failure to observe a procedural deadline, the Court held that the claimant was

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[865] Mitchell v. W.T. Grant Co., 416 U.S. at 615–18 (1974) and at 623 (Justice Powell concurring). *See also* Arnett v. Kennedy, 416 U.S. 134, 188 (1974) (Justice White concurring in part and dissenting in part). Efforts to litigate challenges to seizures in actions involving two private parties may be thwarted by findings of "no state action," but there often is sufficient participation by state officials in transferring possession of property to constitute state action and implicate due process. *Compare* Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (no state action in warehouseman's sale of goods for nonpayment of storage, as authorized by state law), *with* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (state officials' joint participation with private party in effecting prejudgment attachment of property); *and* Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988) (probate court was sufficiently involved with actions activating time bar in "nonclaim" statute).

[866] Arnett v. Kennedy, 416 U.S. 134, 170–71 (1974) (Justice Powell concurring), and 416 U.S. at 195–96 (Justice White concurring in part and dissenting in part); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (discharge of state government employee). In Barry v. Barchi, 443 U.S. 55 (1979), the Court held that the state interest in assuring the integrity of horse racing carried on under its auspices justified an interim suspension without a hearing once it established the existence of certain facts, provided that a prompt judicial or administrative hearing would follow suspension at which the issues could be determined was assured. *See also* FDIC v. Mallen, 486 U.S. 230 (1988) (strong public interest in the integrity of the banking industry justifies suspension of indicted bank official with no pre-suspension hearing, and with 90-day delay before decision resulting from post-suspension hearing).

[867] Gilbert v. Homar, 520 U.S. 924 (1997) (no hearing required prior to suspension without pay of tenured police officer arrested and charged with a felony).

[868] *E.g.*, Dixon v. Love, 431 U.S. 105 (1977) (when suspension of driver's license is automatic upon conviction of a certain number of offenses, no hearing is required because there can be no dispute about facts).

entitled to a hearing with the agency to pass upon the merits of his claim prior to dismissal of his action.[869]

In *Brock v. Roadway Express, Inc.*,[870] a Court plurality applied a similar analysis to governmental regulation of private employment, determining that an employer may be ordered by an agency to reinstate a "whistle-blower" employee without an opportunity for a full evidentiary hearing, but that the employer is entitled to be informed of the substance of the employee's charges, and to have an opportunity for informal rebuttal. The principal difference with the *Mathews v. Eldridge* test was that here the Court acknowledged two conflicting private interests to weigh in the equation: that of the employer "in controlling the makeup of its workforce" and that of the employee in not being discharged for whistleblowing. Whether the case signals a shift away from evidentiary hearing requirements in the context of regulatory adjudication will depend on future developments.[871]

A delay in retrieving money paid to the government is unlikely to rise to the level of a violation of due process. In *City of Los Angeles v. David*,[872] a citizen paid a $134.50 impoundment fee to retrieve an automobile that had been towed by the city. When he subsequently sought to challenge the imposition of this impoundment fee, he was unable to obtain a hearing until 27 days after his car had been towed. The Court held that the delay was reasonable, as the private interest affected—the temporary loss of the use of the money—could be compensated by the addition of an interest payment to any refund of the fee. Further factors considered were that a 30-day delay was unlikely to create a risk of significant factual errors, and that shortening the delay significantly would be administratively burdensome for the city.

In another respect, the balancing standard of *Mathews* has resulted in states' having wider flexibility in determining what process is required. For instance, in an alteration of previously existing law, no hearing is required if a state affords the claimant an adequate alternative remedy, such as a judicial action for damages

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[869] Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

[870] 481 U.S. 252 (1987). Justice Marshall's plurality opinion was joined by Justices Blackmun, Powell, and O'Connor; Chief Justice Rehnquist and Justice Scalia joined Justice White's opinion taking a somewhat narrower view of due process requirements but supporting the plurality's general approach. Justices Brennan and Stevens would have required confrontation and cross-examination.

[871] For analysis of the case's implications, *see* Rakoff, *Brock v. Roadway Express, Inc., and the New Law of Regulatory Due Process*, 1987 SUP. CT. REV. 157.

[872] 538 U.S. 715 (2003).

or breach of contract.[873] Thus, the Court, in passing on the infliction of corporal punishment in the public schools, held that the existence of common-law tort remedies for wrongful or excessive administration of punishment, plus the context in which the punishment was administered (*i.e.*, the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonableness in punishment), made reasonably assured the probability that a child would not be punished without cause or excessively.[874] The Court did not, however, inquire about the availability of judicial remedies for such violations in the state in which the case arose.[875]

The Court has required greater protection from property deprivations resulting from operation of established state procedures than from those resulting from random and unauthorized acts of state employees,[876] and presumably this distinction still holds. Thus, the Court has held that post-deprivation procedures would not satisfy due process if it is "the state system itself that destroys a complainant's property interest." [877] Although the Court briefly entertained the theory that a negligent (*i.e.*, non-willful) action by a state official was sufficient to invoke due process, and that a post-deprivation hearing regarding such loss was required,[878] the Court

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[873] *See*, *e.g.*, Lujan v. G & G Fire Sprinklers, Inc., 523 U.S. 189 (2001) (breach of contract suit against state contractor who withheld payment to subcontractor based on state agency determination of noncompliance with Labor Code sufficient for due process purposes).

[874] Ingraham v. Wright, 430 U.S. 651, 680–82 (1977).

[875] Ingraham v. Wright, 430 U.S. 651, 680–82 (1977). In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19–22 (1987), involving cutoff of utility service for non-payment of bills, the Court rejected the argument that common-law remedies were sufficient to obviate the pre-termination hearing requirement.

[876] Logan v. Zimmerman Brush Co., 455 U.S. at 435–36 (1982). The Court emphasized that a post-deprivation hearing regarding harm inflicted by a state procedure would be inadequate. "That is particularly true where, as here, the State's only post-termination process comes in the form of an independent tort action. Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole." 455 U.S. 422, 436–37.

[877] 455 U.S. at 436.

[878] More expressly adopting the tort remedy theory, the Court in Parratt v. Taylor, 451 U.S. 527 (1981), held that the loss of a prisoner's mail-ordered goods through the negligence of prison officials constituted a deprivation of property, but that the state's post-deprivation tort-claims procedure afforded adequate due process. When a state officer or employee acts negligently, the Court recognized, there is no way that the state can provide a pre-termination hearing; the real question, therefore, is what kind of post-deprivation hearing is sufficient. When the action complained of is the result of the unauthorized failure of agents to follow established procedures and there is no contention that the procedures themselves are inadequate, the Due Process Clause is satisfied by the provision of a judicial remedy which the claimant must initiate. 451 U.S. at 541, 543–44. It should be noted that *Parratt* was a prop-

subsequently overruled this holding, stating that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." [879]

In "rare and extraordinary situations," where summary action is necessary to prevent imminent harm to the public, and the private interest infringed is reasonably deemed to be of less importance, government can take action with no notice and no opportunity to defend, subject to a later full hearing.[880] Examples are seizure of contaminated foods or drugs or other such commodities to protect the consumer,[881] collection of governmental revenues,[882] and the seizure of enemy property in wartime.[883] Thus, citing national security interests, the Court upheld an order, issued without notice and an opportunity to be heard, excluding a short-order cook employed by a concessionaire from a Naval Gun Factory, but the basis of the five-to-four decision is unclear.[884] On the one hand, the Court was ambivalent about a right-privilege distinction; [885] on the other hand, it contrasted the limited interest of the cook—barred from the base, she was still free to work at a number of the concessionaire's other premises—with the government's interest in conducting a high-security program.[886]

Jurisdiction

Generally.—Jurisdiction may be defined as the power of a government to create legal interests, and the Court has long held that the Due Process Clause limits the abilities of states to exercise this

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erty loss case, and thus may be distinguished from liberty cases, where a tort remedy, by itself, may not be adequate process. *See* Ingraham v. Wright, 430 U.S. at 680–82.

[879] Daniels v. Williams, 474 U.S. 327, 328 (1986) (involving negligent acts by prison officials). Hence, there is no requirement for procedural due process stemming from such negligent acts and no resulting basis for suit under 42 U.S.C. § 1983 for deprivation of rights deriving from the Constitution. Prisoners may resort to state tort law in such circumstances, but neither the Constitution nor § 1983 provides a federal remedy.

[880] Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971). *See* Parratt v. Taylor, 451 U.S. 527, 538–40 (1981). Of course, one may waive his due process rights, though as with other constitutional rights, the waiver must be knowing and voluntary. D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972). *See also* Fuentes v. Shevin, 407 U.S. 67, 94–96 (1972).

[881] North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950). *See also* Fahey v. Mallonee, 332 U.S. 245 (1948). *Cf.* Mackey v. Montrym, 443 U.S. 1, 17–18 (1979).

[882] Phillips v. Commissioner, 283 U.S. 589, 597 (1931).

[883] Central Union Trust Co. v. Garvan, 254 U.S. 554, 566 (1921).

[884] Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

[885] 367 U.S. at 894, 895, 896 (1961).

[886] 367 U.S. at 896–98. *See* Goldberg v. Kelly, 397 U.S. 254, 263 n.10 (1970); Board of Regents v. Roth, 408 U.S. 564, 575 (1972); Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (plurality opinion), and 416 U.S. at 181–183 (Justice White concurring in part and dissenting in part).

power.[887] In the famous case of *Pennoyer v. Neff*,[888] the Court enunciated two principles of jurisdiction respecting the states in a federal system[889]: first, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and second, "no State can exercise direct jurisdiction and authority over persons or property without its territory."[890] Over a long period of time, however, the mobility of American society and the increasing complexity of commerce led to attenuation of the second principle of *Pennoyer*, and consequently the Court established the modern standard of obtaining jurisdiction based upon the nature and the quality of contacts that individuals and corporations have with a state.[891]

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[887] Scott v. McNeal, 154 U.S. 34, 64 (1894).

[888] 95 U.S. 714 (1878).

[889] Although these two principles were drawn from the writings of Joseph Story refining the theories of continental jurists, Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252–62, the constitutional basis for them was deemed to be in the Due Process Clause of the Fourteenth Amendment. Pennoyer v. Neff, 95 U.S. 714, 733–35 (1878). The Due Process Clause and the remainder of the Fourteenth Amendment had not been ratified at the time of the entry of the state-court judgment giving rise to the case. This inconvenient fact does not detract from the subsequent settled use of this constitutional foundation. *Pennoyer* denied full faith and credit to the judgment because the state lacked jurisdiction.

[890] 95 U.S. at 722. The basis for the territorial concept of jurisdiction promulgated in *Pennoyer* and modified over the years is two-fold: a concern for "fair play and substantial justice" involved in requiring defendants to litigate cases against them far from their "home" or place of business. International Shoe Co. v. Washington, 326 U.S. 310, 316, 317 (1945); Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm., 339 U.S. 643, 649 (1950); Shaffer v. Heitner, 433 U.S. 186, 204 (1977), and, more important, a concern for the preservation of federalism. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); Hanson v. Denckla, 357 U.S. 235, 251 (1958). The Framers, the Court has asserted, while intending to tie the States together into a Nation, "also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980). Thus, the federalism principle is preeminent. "[T]he Due Process Clause 'does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." 444 U.S. at 294 (internal quotation from International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

[891] International Shoe Co. v. Washington, 326 U.S. 310 (1945)). As the Court explained in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), "[w]ith this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980)). The first principle, that a

This "minimum contacts" test, consequently, permits state courts to obtain power over out-of-state defendants.

In Personam Proceedings Against Individuals.—How jurisdiction is determined depends on the nature of the suit being brought. If a dispute is directed against a person, not property, the proceedings are considered *in personam*, and jurisdiction must be established over the defendant's person in order to render an effective decree.[892] Generally, presence within the state is sufficient to create personal jurisdiction over an individual, if process is served.[893] In the case of a resident who is absent from the state, domicile alone is deemed to be sufficient to keep him within reach of the state courts for purposes of a personal judgment, and process can be obtained by means of appropriate, substituted service or by actual personal service on the resident outside the state.[894] However, if the defendant, although technically domiciled there, has left the state with no intention to return, service by publication, as compared to a summons left at his last and usual place of abode where his family continued to reside, is inadequate, because it is not reasonably calculated to give actual notice of the proceedings and opportunity to be heard.[895]

With respect to a nonresident, it is clearly established that no person can be deprived of property rights by a decree in a case in which he neither appeared nor was served or effectively made a party.[896] The early cases held that the process of a court of one state could not run into another and summon a resident of that state to respond to proceedings against him, when neither his person nor

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State may assert jurisdiction over anyone or anything physically within its borders, no matter how briefly there—the so-called "transient" rule of jurisdiction—McDonald v. Mabee, 243 U.S. 90, 91 (1917), remains valid, although in Shaffer v. Heitner, 433 U.S. 186, 204 (1977), the Court's *dicta* appeared to assume it is not.

[892] National Exchange Bank v. Wiley, 195 U.S. 257, 270 (1904); Iron Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463, 471 (1905).

[893] McDonald v. Mabee, 243 U.S. 90, 91 (1917). *Cf.* Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913). The rule has been strongly criticized but persists. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956). But in Burnham v. Superior Court, 495 U.S. 604 (1990), the Court held that service of process on a nonresident physically present within the state satisfies due process regardless of the duration or purpose of the nonresident's visit.

[894] Milliken v. Meyer, 311 U.S. 457 (1940).

[895] McDonald v. Mabee, 243 U.S. 90 (1917).

[896] Rees v. City of Watertown, 86 U.S. (19 Wall.) 107 (1874); Coe v. Armour Fertilizer Works, 237 U.S. 413, 423 (1915); Griffin v. Griffin, 327 U.S. 220 (1946).

his property was within the jurisdiction of the court rendering the judgment.[897] This rule, however, has been attenuated in a series of steps.

Consent has always been sufficient to create jurisdiction, even in the absence of any other connection between the litigation and the forum. For example, the appearance of the defendant for any purpose other than to challenge the jurisdiction of the court was deemed a voluntary submission to the court's power,[898] and even a special appearance to deny jurisdiction might be treated as consensual submission to the court.[899] The concept of "constructive consent" was then seized upon as a basis for obtaining jurisdiction. For instance, with the advent of the automobile, States were permitted to engage in the fiction that the use of their highways was conditioned upon the consent of drivers to be sued in state courts for accidents or other transactions arising out of such use. Thus, a state could designate a state official as a proper person to receive service of process in such litigation, and establishing jurisdiction required only that the official receiving notice communicate it to the person sued.[900]

Although the Court approved of the legal fiction that such jurisdiction arose out of consent, the basis for jurisdiction was really the state's power to regulate acts done in the state that were dangerous to life or property.[901] Because the state did not really have the ability to prevent nonresidents from doing business in their state,[902] this extension was necessary in order to permit states to assume jurisdiction over individuals "doing business" within the state. Thus,

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[897] Sugg v. Thornton, 132 U.S. 524 (1889); Riverside Mills v. Menefee, 237 U.S. 189, 193 (1915); Hess v. Pawloski, 274 U.S. 352, 355 (1927). *See also* Harkness v. Hyde, 98 U.S. 476 (1879); Wilson v. Seligman, 144 U.S. 41 (1892).

[898] Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230 (1900); Western Loan & Savings Co. v. Butte & Boston Min. Co., 210 U.S. 368 (1908); Houston v. Ormes, 252 U.S. 469 (1920). *See also* Adam v. Saenger, 303 U.S. 59 (1938) (plaintiff suing defendants deemed to have consented to jurisdiction with respect to counterclaims asserted against him).

[899] State legislation which provides that a defendant who comes into court to challenge the validity of service upon him in a personal action surrenders himself to the jurisdiction of the court, but which allows him to dispute where process was served, is constitutional and does not deprive him of property without due process of law. In such a situation, the defendant may ignore the proceedings as wholly ineffective, and attack the validity of the judgment if and when an attempt is made to take his property thereunder. If he desires, however, to contest the validity of the court proceedings and he loses, it is within the power of a state to require that he submit to the jurisdiction of the court to determine the merits. York v. Texas, 137 U.S. 15 (1890); Kauffman v. Wootters, 138 U.S. 285 (1891); Western Life Indemnity Co. v. Rupp, 235 U.S. 261 (1914).

[900] Hess v. Pawloski, 274 U.S. 352 (1927); Wuchter v. Pizzutti, 276 U.S. 13 (1928); Olberding v. Illinois Cent. R.R., 346 U.S. 338, 341 (1953).

[901] Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).

[902] 274 U.S. at 355. *See* Flexner v. Farson, 248 U.S. 289, 293 (1919).

the Court soon recognized that "doing business" within a state was itself a sufficient basis for jurisdiction over a nonresident individual, at least where the business done was exceptional enough to create a strong state interest in regulation, and service could be effectuated within the state on an agent appointed to carry out the business.[903]

The culmination of this trend, established in *International Shoe Co. v. Washington*,[904] was the requirement that there be "minimum contacts" with the state in question in order to establish jurisdiction. The outer limit of this test is illustrated by *Kulko v. Superior Court*,[905] in which the Court held that California could not obtain personal jurisdiction over a New York resident whose sole relevant contact with the state was to send his daughter to live with her mother in California.[906] The argument was made that the father had "caused an effect" in the state by availing himself of the benefits and protections of California's laws and by deriving an economic benefit in the lessened expense of maintaining the daughter in New York. The Court explained that, "[l]ike any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."[907] Although the Court noted that the "effects" test had been accepted as a test of contacts when wrongful activity outside a state causes injury within the state or when commercial activity affects state residents, the Court found that these factors were not present in this case, and any economic benefit to Kulko was derived in New York and not in California.[908] As with many such cases, the decision was narrowly limited to its facts and does little to clarify the standards applicable to state jurisdiction over nonresidents.

Walden v. Fiore further articulated what "minimum contacts" are necessary to create jurisdiction as a result of the relationship between the defendant, the forum, and the litigation.[909] In *Walden*, the plaintiffs, who were residents of Nevada, sued a law enforcement officer in federal court in Nevada as a result of an incident

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[903] Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[904] 326 U.S. 310, 316 (1945).

[905] 436 U.S. 84 (1978).

[906] Kulko had visited the state twice, seven and six years respectively before initiation of the present action, his marriage occurring in California on the second visit, but neither the visits nor the marriage was sufficient or relevant to jurisdiction. 436 U.S. at 92–93.

[907] 436 U.S. at 92.

[908] 436 U.S. at 96–98.

[909] 571 U.S. ___, No. 12–574, slip op. (2014). This type of "jurisdiction" is often referred to as "specific jurisdiction."

that occurred in an airport in Atlanta as the plaintiffs were attempting to board a connecting flight from Puerto Rico to Las Vegas. The Court held that the court in Nevada lacked jurisdiction because of insufficient contacts between the officer and the state relative to the alleged harm, as no part of the officer's conduct occurred in Nevada. In so holding, the Court emphasized that the minimum contacts inquiry should not focus on the resulting injury to the plaintiffs; instead, the proper question is whether the defendant's conduct connects him to the forum in a meaningful way.[910]

Suing Out-of-State (Foreign) Corporations.—A curious aspect of American law is that a corporation has no legal existence outside the boundaries of the state chartering it.[911] Thus, the basis for state court jurisdiction over an out-of-state ("foreign") corporation has been even more uncertain than that with respect to individuals. Before *International Shoe Co. v. Washington*,[912] it was asserted that, because a corporation could not carry on business in a state without the state's permission, the state could condition its permission upon the corporation's consent to submit to the jurisdiction of the state's courts, either by appointment of someone to receive process or in the absence of such designation, by accepting service upon corporate agents authorized to operate within the state.[913] Further, by doing business in a state, the corporation was deemed to be present there and thus subject to service of process and suit.[914] This theoretical corporate presence conflicted with the idea of corporations having no existence outside their state of incorporation, but it was nonetheless accepted that a corporation "doing business" in a state to a sufficient degree was "present" for service of process upon its agents in the state who carried out that business.[915]

Presence alone, however, does not expose a corporation to all manner of suits through the exercise of general jurisdiction. Only corporations, whose continuous and systematic affiliations with a forum make them "essentially at home" there, are broadly ame-

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[910] *Id.* at 6–8.

[911] *Cf.* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).

[912] 326 U.S. 310 (1945).

[913] Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); St. Clair v. Cox, 196 U.S. 350 (1882); Commercial Mutual Accident Co. v. Davis, 213 U.S. 245 (1909); Simon v. Southern Ry., 236 U.S. 115 (1915); Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U.S. 93 (1917).

[914] Presence was first independently used to sustain jurisdiction in International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), although the possibility was suggested as early as St. Clair v. Cox, 106 U.S. 350 (1882). *See also* Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917) (Justice Brandeis for Court).

[915] *E.g.*, Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1913).

nable to suit.[916] Without the protection of such a rule, foreign corporations would be exposed to the manifest hardship and inconvenience of defending, in any state in which they happened to be carrying on business, suits for torts wherever committed and claims on contracts wherever made.[917] And if the corporation stopped doing business in the forum state before suit against it was commenced, it might well escape jurisdiction altogether.[918] In early cases, the issue of the degree of activity and, in particular, the degree of solicitation that was necessary to constitute doing business by a foreign corporation, was much disputed and led to very particularistic holdings.[919] In the absence of enough activity to constitute doing business, the mere presence of an agent, officer, or stockholder, who could be served, within a state's territorial limits was not sufficient to enable the state to exercise jurisdiction over the foreign corporation.[920]

The touchstone in jurisdiction cases was recast by *International Shoe Co. v. Washington* and its "minimum contacts" analysis.[921] International Shoe, an out-of-state corporation, had not been issued a license to do business in the State of Washington, but it systematically and continuously employed a sales force of Washington residents to solicit therein and thus was held amenable to suit

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[916] Daimler AG v. Bauman, 571 U.S. ___, No. 11–965, slip op. at 8 (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 920 (2011)) (holding Daimler Chrysler, a German public stock company, could not be subject to suit in California with respect to acts taken in Argentina by Argentinian subsidiary of Daimler, notwithstanding the fact that Daimler Chrysler had a U.S. subsidiary that did business in California).

[917] *E.g.*, Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984); Davis v. Farmers Co-operative Co., 262 U.S. 312 (1923); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923); Simon v. S. Ry., 236 U.S. 115, 129–30 (1915); Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907); Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907). Continuous operations were sometimes sufficiently substantial and of a nature to warrant assertions of jurisdiction. St. Louis S.W. Ry. Co. v. Alexander, 227 U.S. 218 (1913); *see also* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 922 (2011) (distinguishing application of stream-of-commerce analysis in specific cases of in-state injury from the degree of presence a corporation must maintain in a state to be amenable to general jurisdiction there).

[918] Robert Mitchell Furn. Co. v. Selden Breck Constr. Co., 257 U.S. 213 (1921); Chipman, Ltd. v. Thomas B. Jeffery Co., 251 U.S. 373, 379 (1920). Jurisdiction would continue, however, if a state had conditioned doing business on a firm's agreeing to accept service through state officers should it and its agent withdraw. Washington *ex rel.* Bond & Goodwin & Tucker v. Superior Court, 289 U.S. 361, 364 (1933).

[919] Solicitation of business alone was inadequate to constitute "doing business," *Green*, 205 U.S. at 534, but when connected with other activities could suffice to confer jurisdiction. Int'l Harvester Co. v. Kentucky, 234 U.S. 579 (1914). Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141–42 (2d Cir. 1930) (Hand, J., providing survey of cases).

[920] *E.g.*, Riverside Mills v. Menefee, 237 U.S. 189, 195 (1915); Conley v. Mathieson Alkali Works, 190 U.S. 406 (1903); Goldey v. Morning News, 156 U.S. 518 (1895); *but see* Conn. Mut. Life Ins. Co. v. Spratley, 172 U.S. 602 (1899).

[921] 326 U.S. 310 (1945).

in Washington for unpaid unemployment compensation contributions for such salesmen. The Court deemed a notice of assessment served personally upon one of the local sales solicitors, and a copy of the assessment sent by registered mail to the corporation's principal office in Missouri, sufficient to apprise the corporation of the proceeding.

To reach this conclusion, the Court not only overturned prior holdings that mere solicitation of business does not constitute a sufficient contact to subject a foreign corporation to a state's jurisdiction,[922] but also rejected the "presence" test as begging the question to be decided. "The terms 'present' or 'presence,'" according to Chief Justice Stone, "are used merely to symbolize those activities of the corporation's agent within the State which courts will deem to be sufficient to satisfy the demands of due process. . . . Those demands may be met by such contacts of the corporation with the State of the forum as make it reasonable, in the context of our federal system . . . , to require the corporation to defend the particular suit which is brought there; [and] . . . that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'. . . . An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection."[923] As to the scope of application to be accorded this "fair play and substantial justice" doctrine, the Court concluded that "so far as . . . [corporate] obligations arise out of or are connected with activities within the State, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."[924]

Extending this logic, a majority of the Court ruled that an out-of-state association selling mail order insurance had developed sufficient contacts and ties with Virginia residents so that the state could institute enforcement proceedings under its Blue Sky Law by forwarding notice to the company by registered mail, notwithstanding that the Association solicited business in Virginia solely through recommendations of existing members and was represented therein by no agents whatsoever.[925] The Due Process Clause was declared

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[922] This departure was recognized by Justice Rutledge subsequently in Nippert v. City of Richmond, 327 U.S. 416, 422 (1946). Because International Shoe, in addition to having its agents solicit orders, also permitted them to rent quarters for the display of merchandise, the Court could have used International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), to find it was "present" in the state.

[923] International Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

[924] 326 U.S. at 319.

[925] Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643 (1950). The decision was 5-to-4 with one of the majority Justices also contributing a

not to "forbid a State to protect its citizens from such injustice" of having to file suits on their claims at a far distant home office of such company, especially in view of the fact that such suits could be more conveniently tried in Virginia where claims of loss could be investigated.[926]

Likewise, the Court reviewed a California statute which subjected foreign mail order insurance companies engaged in contracts with California residents to suit in California courts, and which had authorized the petitioner to serve a Texas insurer by registered mail only.[927] The contract between the company and the insured specified that Austin, Texas, was the place of "making" and the place where liability should be deemed to arise. The company mailed premium notices to the insured in California, and he mailed his premium payments to the company in Texas. Acknowledging that the connection of the company with California was tenuous—it had no office or agents in the state and no evidence had been presented that it had solicited anyone other than the insured for business—the Court sustained jurisdiction on the basis that the suit was on a contract which had a substantial connection with California. "The contract was delivered in California, the premiums were mailed there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." [928]

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concurring opinion. Id. at 651 (Justice Douglas). The possible significance of the concurrence is that it appears to disagree with the implication of the majority opinion, id. at 647–48, that a state's legislative jurisdiction and its judicial jurisdiction are coextensive. Id. at 652–53 (distinguishing between the use of the state's judicial power to enforce its legislative powers and the judicial jurisdiction when a private party is suing). *See* id. at 659 (dissent).

[926] 339 U.S. at 647–49. The holding in Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140 (1923), that a similar mail order insurance company could not be viewed as doing business in the forum state and that the circumstances under which its contracts with forum state citizens, executed and to be performed in its state of incorporation, were consummated could not support an implication that the foreign company had consented to be sued in the forum state, was distinguished rather than formally overruled. 339 U.S. at 647. In any event, *Benn* could not have survived McGee v. International Life Ins. Co., 355 U.S. 220 (1957), below.

[927] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[928] 355 U.S. at 223. The Court also noticed the proposition that the insured could not bear the cost of litigation away from home as well as the insurer. *See also* Perkins v. Benguet Consolidating Mining Co., 342 U.S. 437 (1952), a case too atypical on its facts to permit much generalization but which does appear to verify the implication of *International Shoe* that *in personam* jurisdiction may attach to a corporation even where the cause of action does not arise out of the business done by defendant in the forum state, as well as to state, in *dictum*, that the mere presence of a corporate official within the state on business of the corporation would suffice to create jurisdiction if the claim arose out of that business and service were made on him within the state. 342 U.S. at 444–45. The Court held that the state could, but was

In making this decision, the Court noted that "[l]ooking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." [929] However, in *Hanson v. Denckla*, decided during the same Term, the Court found *in personam* jurisdiction lacking for the first time since *International Shoe Co. v. Washington*, pronouncing firm due process limitations. In *Hanson*,[930] the issue was whether a Florida court considering a contested will obtained jurisdiction over corporate trustees of disputed property through use of ordinary mail and publication. The will had been entered into and probated in Florida, the claimants were resident in Florida and had been personally served, but the trustees, who were indispensable parties, were resident in Delaware. Noting the trend in enlarging the ability of the states to obtain in personam jurisdiction over absent defendants, the Court denied the exercise of nationwide in personam jurisdiction by states, saying that "it would be a mistake to assume that th[e] trend [to expand the reach of state courts] heralds the eventual demise of all restrictions on the personal jurisdiction of state courts." [931]

The Court recognized in *Hanson* that Florida law was the most appropriate law to be applied in determining the validity of the will and that the corporate defendants might be little inconvenienced by having to appear in Florida courts, but it denied that either circumstance satisfied the Due Process Clause. The Court noted that due process restrictions do more than guarantee immunity from inconvenient or distant litigation, in that "[these restrictions] are consequences of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has the 'minimum contacts' with that State that are a prerequisite to its exercise of power over him." The only contacts the corporate de-

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not required to, assert jurisdiction over a corporation owning gold and silver mines in the Philippines but temporarily (because of the Japanese occupation) carrying on a part of its general business in the forum state, including directors' meetings, business correspondence, banking, and the like, although it owned no mining properties in the state.

[929] McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957). An exception exists with respect to *in personam* jurisdiction in domestic relations cases, at least in some instances. *E.g.*, Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957) (holding that sufficient contacts afforded Nevada *in personam* jurisdiction over a New York resident wife for purposes of dissolving the marriage but Nevada did not have jurisdiction to terminate the wife's claims for support).

[930] 357 U.S. 235 (1958). The decision was 5-to-4. *See* 357 U.S. at 256 (Justice Black dissenting), 262 (Justice Douglas dissenting).

[931] 357 U.S. at 251. In dissent, Justice Black observed that "of course we have not reached the point where state boundaries are without significance and I do not mean to suggest such a view here." 357 U.S. at 260.

fendants had in Florida consisted of a relationship with the individual defendants. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . . The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case."[932]

The Court continued to apply *International Shoe* principles in diverse situations. Thus, circulation of a magazine in a state was an adequate basis for that state to exercise jurisdiction over an out-of-state corporate magazine publisher in a libel action. The fact that the plaintiff did not have "minimum contacts" with the forum state was not dispositive since the relevant inquiry is the relations among the defendant, the forum, and the litigation.[933] Or, damage done to the plaintiff's reputation in his home state caused by circulation of a defamatory magazine article there may justify assertion of jurisdiction over the out-of-state authors of such article, despite the lack of minimum contact between the authors (as opposed to the publishers) and the state.[934] Further, though there is no *per se* rule that a contract with an out-of-state party automatically establishes jurisdiction to enforce the contract in the other party's forum, a franchisee who has entered into a franchise contract with an out-of-state corporation may be subject to suit in the corporation's home state where the overall circumstances (contract terms themselves, course

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[932] 357 U.S. at 251, 253–54. Upon an analogy of choice of law and *forum non conveniens*, Justice Black argued that the relationship of the nonresident defendants and the subject of the litigation to the Florida made Florida the natural and constitutional basis for asserting jurisdiction. 357 U.S. at 251, 258–59. The Court has numerous times asserted that contacts sufficient for the purpose of designating a particular state's law as appropriate may be insufficient for the purpose of asserting jurisdiction. *See* Shaffer v. Heitner, 433 U.S. 186, 215 (1977); Kulko v. Superior Court, 436 U.S. 84, 98 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294–95 (1980). On the due process limits on choice of law decisions, *see* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

[933] Keeton v. Hustler Magazine, 465 U.S. 770 (1984) (holding as well that the forum state may apply "single publication rule" making defendant liable for nationwide damages).

[934] Calder v. Jones, 465 U.S. 783 (1984) (jurisdiction over reporter and editor responsible for defamatory article which they knew would be circulated in subject's home state).

of dealings) demonstrate a deliberate reaching out to establish contacts with the franchisor in the franchisor's home state.[935]

The Court has continued to wrestle over when a state may adjudicate a products liability claim for an injury occurring within it, at times finding the defendant's contacts with the place of injury to be too attenuated to support its having to mount a defense there. In *World-Wide Volkswagen Corp. v. Woodson*,[936] the Court applied its "minimum contacts" test to preclude the assertion of jurisdiction over two foreign corporations that did no business in the forum state. Plaintiffs had sustained personal injuries in Oklahoma in an accident involving an alleged defect in their automobile. The car had been purchased the previous year in New York, the plaintiffs were New York residents at time of purchase, and the accident had occurred while they were driving through Oklahoma on their way to a new residence in Arizona. Defendants were the automobile retailer and its wholesaler, both New York corporations that did no business in Oklahoma. The Court found no circumstances justifying assertion by Oklahoma courts of jurisdiction over defendants. The Court found that the defendants (1) carried on no activity in Oklahoma, (2) closed no sales and performed no services there, (3) availed themselves of none of the benefits of the state's laws, (4) solicited no business there either through salespersons or through advertising reasonably calculated to reach the state, and (5) sold no cars to Oklahoma residents or indirectly served or sought to serve the Oklahoma market. Although it might have been foreseeable that the automobile would travel to Oklahoma, foreseeability was held to be relevant only insofar as "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[937] The Court in *World-Wide Volkswagen Corp.* contrasted the facts of the case with the instance of a corporation "deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[938]

In *Asahi Metal Industry Co. v. Superior Court*,[939] the Court addressed more closely how jurisdiction flows with products down-

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[935] Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). *But cf.* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984) (purchases and training within state, both unrelated to cause of action, are insufficient to justify general *in personam* jurisdiction).

[936] 444 U.S. 286 (1980).

[937] 444 U.S. at 297.

[938] 444 U.S. at 298.

[939] 480 U.S. 102 (1987). In *Asahi*, a California resident sued, *inter alia*, a Taiwanese tire tube manufacturer for injuries caused by a blown-out motorcycle tire. After plaintiff and the tube manufacturer settled the case, which had been filed in

stream. The Court identified two standards for limiting jurisdiction even as products proceed to foreseeable destinations. The more general standard harked back to the fair play and substantial justice doctrine of *International Shoe* and requires balancing the respective interests of the parties, the prospective forum state, and alternative fora. All the Justices agreed with the legitimacy of this test in assessing due process limits on jurisdiction.[940] However, four Justices would also apply a more exacting test: A defendant who placed a product in the stream of commerce knowing that the product might eventually be sold in a state will be subject to jurisdiction there only if the defendant also had purposefully acted to avail itself of the state's market. According to Justice O'Connor, who wrote the opinion espousing this test, a defendant subjected itself to jurisdiction by targeting or serving customers in a state through, for example, direct advertising, marketing through a local sales agent, or establishing channels for providing regular advice to local customers. Action, not expectation, is key.[941] In *Asahi*, the state was found to lack jurisdiction under both tests cited.

Doctrinal differences on the due process touchstones in stream-of-commerce cases became more critical to the outcome in *J. McIntyre Machinery, Ltd. v. Nicastro*.[942] Justice Kennedy, writing for a four-Justice plurality, asserted that it is a defendant's purposeful availment of the forum state that makes jurisdiction consistent with traditional notions of fair play and substantial justice. The question is not so much the fairness of a state reaching out to bring a foreign defendant before its courts as it is a matter of a foreign defendant having acted within a state so as to bring itself within the state's limited authority. Thus, a British machinery manufacturer who targeted the U.S. market generally through engaging a nationwide distributor and attending trade shows, among other means, could not be sued in New Jersey for an industrial accident that occurred in

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California, the tube manufacturer sought indemnity in the California courts against Asahi Metal, the Japanese supplier of the tube's valve assembly.

[940] All the Justices also agreed that due process considerations foreclosed jurisdiction in *Asahi*, even though Asahi Metal could have foreseen that some of its valve assemblies would end up incorporated into tire tubes sold in the United States. Three of the *Asahi* Justices had been dissenters in World-Wide Volkswagen Corp. v. Woodson. Of the three dissenters, Justice Brennan had argued that the "minimum contacts" test was obsolete and that jurisdiction should be predicated upon the balancing of the interests of the forum state and plaintiffs against the actual burden imposed on defendant, 444 U.S. at 299, while Justices Marshall and Blackmun had applied the test and found jurisdiction because of the foreseeability of defendants that a defective product of theirs might cause injury in a distant state and because the defendants had entered into an interstate economic network. 444 U.S. at 313.

[941] 480 U.S. at 109–113 (1987). Agreeing with Justice O'Connor on this test were Chief Justice Rehnquist and Justices Powell and Scalia.

[942] 564 U.S. ___, No. 09–1343, slip op. (2011).

the state. Even though at least one of its machines (and perhaps as many as four) were sold to New Jersey concerns, the defendant had not purposefully targeted the New Jersey market through, for example, establishing an office, advertising, or sending employees.[943] Writing in dissent for herself and two other Justices, Justice Ginsburg concluded that it was reasonable and fair, and therefore consistent with due process requirements, for New Jersey to claim jurisdiction to adjudicate the case locally because the defendant manufacturer had promoted its products in the United States and established a national distribution system. "On what sensible view of the allocation of adjudicatory authority," the dissent rhetorically asked, "could the place of [the plaintiff's] injury within the United States be deemed off limits for his products liability claim against a foreign manufacturer who targeted the United States (including all the States that constitute the Nation) as the territory it sought to develop?" [944] Concurring with the plurality, Justice Breyer emphasized the outcome lay in stream-of-commerce precedents that held isolated or infrequent sales could not support jurisdiction. At the same time, Justice Breyer cautioned against adoption of the plurality's strict active availment of the forum rule, especially because the Court had yet to consider due process requirements in the context of evolving business models, modern e-commerce in particular.[945]

Actions In Rem: Proceeding Against Property.—In an *in rem* action, which is an action brought directly against a property interest, a state can validly proceed to settle controversies with regard to rights or claims against tangible or intangible property within its borders, notwithstanding that jurisdiction over the defendant was never established.[946] Unlike jurisdiction *in personam*, a judgment entered by a court with *in rem* jurisdiction does not bind the defendant personally but determines the title to or status of the only property in question.[947] Proceedings brought to register title to land,[948]

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[943] 564 U.S. ___, No. 09–1343, slip op. (2011) (Kennedy, Roberts, Scalia and Thomas).

[944] 564 U.S. ___, No. 09–1343, slip op. at 6–7 (2011) (Ginsburg, Sotomayor and Kagan dissenting).

[945] 564 U.S. ___, No. 09–1343, slip op. (2011) (Breyer and Alito concurring).

[946] Accordingly, by reason of its inherent authority over titles to land within its territorial confines, a state court could proceed to judgment respecting the ownership of such property, even though it lacked a constitutional competence to reach claimants of title who resided beyond its borders. Arndt v. Griggs, 134 U.S. 316, 321 (1890); Grannis v. Ordean, 234 U.S. 385 (1914); Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917).

[947] Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 348 (1850).

[948] American Land Co. v. Zeiss, 219 U.S. 47 (1911); Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76, 55 N.E. 812, 814 (Chief Justice Holmes), appeal dismissed, 179 U.S. 405 (1900).

to condemn [949] or confiscate [950] real or personal property, or to administer a decedent's estate [951] are typical in rem actions. Due process is satisfied by seizure of the property (the "*res*") and notice to all who have or may have interests therein.[952] Under prior case law, a court could acquire *in rem* jurisdiction over nonresidents by mere constructive service of process,[953] under the theory that property was always in possession of its owners and that seizure would afford them notice, because they would keep themselves apprized of the state of their property. It was held, however, that this fiction did not satisfy the requirements of due process, and, whatever the nature of the proceeding, that notice must be given in a manner that actually notifies the person being sought or that has a reasonable certainty of resulting in such notice.[954]

Although the Court has now held "that all assertions of state-court jurisdiction must be evaluated according to the ['minimum contacts'] standards set forth in *International Shoe Co. v. Washington*," [955] it does not appear that this will appreciably change the result for *in rem* jurisdiction over property. "[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses

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[949] Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559 (1889).

[950] *The Confiscation Cases*, 87 U.S. (20 Wall.) 92 (1874).

[951] Clarke v. Clarke, 178 U.S. 186 (1900); Riley v. New York Trust Co., 315 U.S. 343 (1942).

[952] Pennoyer v. Neff, 95 U.S. 714 (1878). Predeprivation notice and hearing may be required if the property is not the sort that, given advance warning, could be removed to another jurisdiction, destroyed, or concealed. United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (notice to owner required before seizure of house by government).

[953] Arndt v. Griggs, 134 U.S. 316 (1890); Ballard v. Hunter, 204 U.S. 241 (1907); Security Savings Bank v. California, 263 U.S. 282 (1923).

[954] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962); Robinson v. Hanrahan, 409 U.S. 38 (1972).

[955] 433 U.S. 186 (1977).

will be found in the State."[956] Thus, for "true" *in rem* actions, the old results are likely to still prevail.

Quasi in Rem: Attachment Proceedings.—If a defendant is neither domiciled nor present in a state, he cannot be served personally, and any judgment in money obtained against him would be unenforceable. This does not, however, prevent attachment of a defendant's property within the state. The practice of allowing a state to attach a non-resident's real and personal property situated within its borders to satisfy a debt or other claim by one of its citizens goes back to colonial times. Attachment is considered a form of *in rem* proceeding sometimes called "*quasi in rem,*" and under *Pennoyer v. Neff*[957] an attachment could be implemented by obtaining a writ against the local property of the defendant and giving notice by publication.[958] The judgement was then satisfied from the property attached, and if the attached property was insufficient to satisfy the claim, the plaintiff could go no further.[959]

This form of proceeding raised many questions. Of course, there were always instances in which it was fair to subject a person to suit on his property located in the forum state, such as where the property was related to the matter sued over.[960] In others, the question was more disputed, as in the famous New York Court of Appeals case of *Seider v. Roth*,[961] in which the property subject to attachment was the contractual obligation of the defendant's insurance company to defend and pay the judgment. But, in *Harris v. Balk*,[962]

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[956] 433 U.S. at 207–08 (footnotes omitted). The Court also suggested that the state would usually have jurisdiction in cases such as those arising from injuries suffered on the property of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that controversy. Id.

[957] 95 U.S. 714 (1878). *Cf.* Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917); Corn Exch. Bank v. Commissioner, 280 U.S. 218, 222 (1930); Endicott Co. v. Encyclopedia Press, 266 U.S. 285, 288 (1924).

[958] The theory was that property is always in possession of an owner, and that seizure of the property will inform him. This theory of notice was disavowed sooner than the theory of jurisdiction. See "Actions in Rem: Proceedings Against Property", *supra*.

[959] Other, *quasi in rem* actions, which are directed against persons, but ultimately have property as the subject matter, such as probate, Goodrich v. Ferris, 214 U.S. 71, 80 (1909), and garnishment of foreign attachment proceedings, Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917); Harris v. Balk, 198 U.S. 215 (1905), might also be prosecuted to conclusion without requiring the presence of all parties in interest. The jurisdictional requirements for rendering a valid divorce decree are considered under the Full Faith and Credit Clause, Art. I, § 1.

[960] Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P. 2d 960 (1957), *appeal dismissed*, 357 U.S. 569 (1958) (debt seized in California was owed to a New Yorker, but it had arisen out of transactions in California involving the New Yorker and the California plaintiff).

[961] 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312 (1966).

[962] 198 U.S. 215 (1905).

the facts of the case and the establishment of jurisdiction through *quasi in rem* proceedings raised the issue of fairness and territoriality. The claimant was a Maryland resident who was owed a debt by Balk, a North Carolina resident. The Marylander ascertained, apparently adventitiously, that Harris, a North Carolina resident who owed Balk an amount of money, was passing through Maryland, and the Marylander attached this debt. Balk had no notice of the action and a default judgment was entered, after which Harris paid over the judgment to the Marylander. When Balk later sued Harris in North Carolina to recover on his debt, Harris argued that he had been relieved of any further obligation by satisfying the judgment in Maryland, and the Supreme Court sustained his defense, ruling that jurisdiction had been properly obtained and the Maryland judgment was thus valid.[963]

Subsequently, *Harris v. Balk* was overruled by *Shaffer v. Heitner*,[964] in which the Court rejected the Delaware state court's jurisdiction, holding that the "minimum contacts" test of *International Shoe* applied to all *in rem* and *quasi in rem* actions. The case involved a Delaware sequestration statute under which plaintiffs were authorized to bring actions against nonresident defendants by attaching their "property" within Delaware, the property here consisting of shares of corporate stock and options to stock in the defendant corporation. The stock was considered to be in Delaware because that was the state of incorporation, but none of the certificates representing the seized stocks were physically present in Delaware. The reason for applying the same test as is applied in *in personam* cases, the Court said, "is simple and straightforward. It is premised on recognition that '[t]he phrase 'judicial jurisdiction' over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing."[965] Thus, "[t]he recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.'"[966]

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[963] *Compare* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916) (action purportedly against property within state, proceeds of an insurance policy, was really an *in personam* action against claimant and, claimant not having been served, the judgment is void). *But see* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961).

[964] 433 U.S. 186 (1977).

[965] 433 U.S. at 207 (internal quotation from RESTATEMENT (SECOND) OF CONFLICT OF LAWS 56, Introductory Note (1971)).

[966] 433 U.S. at 207. The characterization of actions *in rem* as being not actions against a *res* but against persons with interests merely reflects Justice Holmes' insight in Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76–77, 55 N.E., 812, 814, *appeal dismissed*, 179 U.S. 405 (1900).

A further tightening of jurisdictional standards occurred in *Rush v. Savchuk*.[967] The plaintiff was injured in a one-car accident in Indiana while a passenger in a car driven by defendant. Plaintiff later moved to Minnesota and sued defendant, still resident in Indiana, in state court in Minnesota. There were no contacts between the defendant and Minnesota, but defendant's insurance company did business there and plaintiff garnished the insurance contract, signed in Indiana, under which the company was obligated to defend defendant in litigation and indemnify him to the extent of the policy limits. The Court refused to permit jurisdiction to be grounded on the contract; the contacts justifying jurisdiction must be those of the defendant engaging in purposeful activity related to the forum.[968] *Rush* thus resulted in the demise of the controversial *Seider v. Roth* doctrine, which lower courts had struggled to save after *Shaffer v. Heitner*.[969]

Actions in Rem: Estates, Trusts, Corporations.—Generally, probate will occur where the decedent was domiciled, and, as a probate judgment is considered *in rem*, a determination as to assets in that state will be determinative as to all interested persons.[970] Insofar as the probate affects real or personal property beyond the state's boundaries, however, the judgment is *in personam* and can bind only parties thereto or their privies.[971] Thus, the Full Faith and Credit Clause would not prevent an out-of-state court in the state where the property is located from reconsidering the first court's finding of domicile, which could affect the ultimate disposition of the property.[972]

The difficulty of characterizing the existence of the *res* in a particular jurisdiction is illustrated by the *in rem* aspects of *Hanson v.*

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[967] 444 U.S. 320 (1980).

[968] 444 U.S. at 328–30. In dissent, Justices Brennan and Stevens argued that what the state courts had done was the functional equivalent of direct-action statutes. Id. at 333 (Justice Stevens); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980) (Justice Brennan). The Court, however, refused so to view the Minnesota garnishment action, saying that "[t]he State's ability to exert its power over the 'nominal defendant' is analytically prerequisite to the insurer's entry into the case as a garnishee." Id. at 330–31. Presumably, the comment is not meant to undermine the validity of such direct-action statutes, which was upheld in Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954), a choice-of-law case rather than a jurisdiction case.

[969] *See* O'Conner v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978), *cert. denied*, 439 U.S. 1034 (1978).

[970] Goodrich v. Ferris, 214 U.S. 71, 80 (1909); McCaughey v. Lyall, 224 U.S. 558 (1912).

[971] Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917); Riley v. New York Trust Co., 315 U.S. 343 (1942).

[972] 315 U.S. at 353.

Denckla.[973] As discussed earlier,[974] the decedent created a trust with a Delaware corporation as trustee,[975] and the Florida courts had attempted to assert both *in personam* and *in rem* jurisdiction over the Delaware corporation. Asserting the old theory that a court's *in rem* jurisdiction "is limited by the extent of its power and by the coordinate authority of sister States,"[976] *i.e.,* whether the court has jurisdiction over the thing, the Court thought it clear that the trust assets that were the subject of the suit were located in Delaware and thus the Florida courts had no *in rem* jurisdiction. The Court did not expressly consider whether the *International Shoe* test should apply to such *in rem* jurisdiction, as it has now held it generally must, but it did briefly consider whether Florida's interests arising from its authority to probate and construe the domiciliary's will, under which the foreign assets might pass, were a sufficient basis of *in rem* jurisdiction and decided they were not.[977] The effect of *International Shoe* in this area is still to be discerned.

The reasoning of the *Pennoyer*[978] rule, that seizure of property and publication was sufficient to give notice to nonresidents or absent defendants, has also been applied in proceedings for the forfeiture of abandoned property. If all known claimants were personally served and all claimants who were unknown or nonresident were given constructive notice by publication, judgments in these proceedings were held binding on all.[979] But, in *Mullane v. Central Hanover Bank & Trust Co.*,[980] the Court, while declining to characterize the proceeding as *in rem* or *in personam*, held that a bank managing a common trust fund in favor of nonresident as well as resident beneficiaries could not obtain a judicial settlement of accounts if the only notice was publication in a local paper. Although such notice by publication was sufficient as to beneficiaries whose interests or

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[973] 357 U.S. 235 (1957).

[974] The *in personam* aspect of this decision is considered *supra*.

[975] She reserved the power to appoint the remainder, after her reserved life estate, either by testamentary disposition or by *inter vivos* instrument. After she moved to Florida, she executed a new will and a new power of appointment under the trust, which did not satisfy the requirements for testamentary disposition under Florida law. Upon her death, dispute arose as to whether the property passed pursuant to the terms of the power of appointment or in accordance with the residuary clause of the will.

[976] 357 U.S. at 246.

[977] 357 U.S. at 247–50. The four dissenters, Justices Black, Burton, Brennan, and Douglas, believed that the transfer in Florida of $400,000 made by a domiciliary and affecting beneficiaries, almost all of whom lived in that state, gave rise to a sufficient connection with Florida to support an adjudication by its courts of the effectiveness of the transfer. 357 U.S. at 256, 262.

[978] *See* discussion of *Pennoyer*, *supra*.

[979] Hamilton v. Brown, 161 U.S. 256 (1896); Security Savings Bank v. California, 263 U.S. 282 (1923). *See also* Voeller v. Neilston Co., 311 U.S. 531 (1941).

[980] 339 U.S. 306 (1950).

addresses were unknown to the bank, the Court held that it was feasible to make serious efforts to notify residents and nonresidents whose whereabouts were known, such as by mailing notice to the addresses on record with the bank.[981]

Notice: Service of Process.—Before a state may legitimately exercise control over persons and property, the state's jurisdiction must be perfected by an appropriate service of process that is effective to notify all parties of proceedings that may affect their rights.[982] Personal service guarantees actual notice of the pendency of a legal action, and has traditionally been deemed necessary in actions styled *in personam*.[983] But "certain less rigorous notice procedures have enjoyed substantial acceptance throughout our legal history; in light of this history and the practical obstacles to providing personal service in every instance," the Court in some situations has allowed the use of procedures that "do not carry with them the same certainty of actual notice that inheres in personal service."[984] But, whether the action be *in rem* or *in personam*, there is a constitutional minimum; due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[985]

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[981] A related question is which state has the authority to escheat a corporate debt. *See* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71 (1961); Texas v. New Jersey, 379 U.S. 674 (1965). Where a state seeks to escheat intangible corporate property such as uncollected debt, the Court found that the multiplicity of states with a possible interest made a "contacts" test unworkable. Citing ease of administration rather than logic or jurisdiction, the Court held that the authority to take the uncollected claims against a corporation by escheat would be based on whether the last known address on the company's books for the each creditor was in a particular state.

[982] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). "There . . . must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant." Omni Capital Int'l v. Rudolph Wolff & Co., 484 U.S. 97 (1987).

[983] McDonald v. Mabee, 243 U.S. 90, 92 (1971).

[984] Greene v. Lindsey, 456 U.S. 444, 449 (1982). *See* Dusenbery v. United States, 534 U.S. 161 (2001) (upholding a notice of forfeiture that was delivered by certified mail to the mailroom of a prison where the individual to be served was incarcerated, even though the individual himself did not sign for the letter).

[985] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Thus, in Jones v. Flowers, 547 U.S. 220 (2006), the Court held that, after a state's certified letter, intended to notify a property owner that his property would be sold unless he satisfied a tax delinquency, was returned by the post office marked "unclaimed," the state should have taken additional reasonable steps to notify the property owner, as it would have been practicable for it to have done so. And, in Greene v. Lindsey, 456 U.S. 444 (1982), the Court held that, in light of substantial evidence

The use of mail to convey notice, for instance, has become quite established,[986] especially for assertion of *in personam* jurisdiction extraterritorially upon individuals and corporations having "minimum contacts" with a forum state, where various "long-arm" statutes authorize notice by mail.[987] Or, in a class action, due process is satisfied by mail notification of out-of-state class members, giving such members the opportunity to "opt out" but with no requirement that inclusion in the class be contingent upon affirmative response.[988] Other service devices and substitutions have been pursued and show some promise of further loosening of the concept of territoriality even while complying with minimum due process standards of notice.[989]

Power of the States to Regulate Procedure

Generally.—As long as a party has been given sufficient notice and an opportunity to defend his interest, the Due Process Clause of the Fourteenth Amendment does not generally mandate the particular forms of procedure to be used in state courts.[990] The states may regulate the manner in which rights may be enforced and wrongs

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that notices posted on the doors of apartments in a housing project in an eviction proceeding were often torn down by children and others before tenants ever saw them, service by posting did not satisfy due process. Without requiring service by mail, the Court observed that the mails "provide an 'efficient and inexpensive means of communication' upon which prudent men will ordinarily rely in the conduct of important affairs." Id. at 455 (citations omitted). *See also* Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) (personal service or notice by mail is required for mortgagee of real property subject to tax sale, Tulsa Professional Collection Servs. v. Pope, 485 U.S. 478 (1988) (notice by mail or other appropriate means to reasonably ascertainable creditors of probated estate).

[986] *E.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); *Travelers Health Ass'n ex rel. State Corp. Comm'n*, 339 U.S. 643 (1950).

[987] *See*, *e.g.*, G.D. Searle & Co. v. Cohn, 455 U.S. 404, 409–12 (1982) (discussing New Jersey's "long-arm" rule, under which a plaintiff must make every effort to serve process upon someone within the state and then, only if "after diligent inquiry and effort personal service cannot be made" within the state, "service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office."). *Cf.* Velmohos v. Maren Engineering Corp., 83 N.J. 282, 416 A.2d 372 (1980), *vacated and remanded*, 455 U.S. 985 (1982).

[988] Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

[989] *E.g.*, Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) (authorizing direct action against insurance carrier rather than against the insured).

[990] Holmes v. Conway, 241 U.S. 624, 631 (1916); Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230, 236 (1900). A state "is free to regulate procedure of its courts in accordance with it own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); West v. Louisiana, 194 U.S. 258, 263 (1904); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897); Jordan v. Massachusetts, 225 U.S. 167, 176, (1912). The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them and to deny access to its courts is also subject to restrictions imposed by the Contract, Full Faith and Credit,

remedied,[991] and may create courts and endow them with such jurisdiction as, in the judgment of their legislatures, seems appropriate.[992] Whether legislative action in such matters is deemed to be wise or proves efficient, whether it works a particular hardship on a particular litigant, or perpetuates or supplants ancient forms of procedure, are issues that ordinarily do not implicate the Fourteenth Amendment. The function of the Fourteenth Amendment is negative rather than affirmative[993] and in no way obligates the states to adopt specific measures of reform.[994]

Commencement of Actions.—A state may impose certain conditions on the right to institute litigation. Access to the courts has been denied to persons instituting stockholders' derivative actions unless reasonable security for the costs and fees incurred by the corporation is first tendered.[995] But, foreclosure of all access to the courts, through financial barriers and perhaps through other means as well, is subject to federal constitutional scrutiny and must be justified by reference to a state interest of suitable importance. Thus, where a state has monopolized the avenues of settlement of disputes between persons by prescribing judicial resolution, and where the dispute involves a fundamental interest, such as marriage and

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and Privileges and Immunities Clauses of the Constitution. Angel v. Bullington, 330 U.S. 183 (1947).

[991] Insurance Co. v. Glidden Co., 284 U.S. 151, 158 (1931); Iowa Central Ry. v. Iowa, 160 U.S. 389, 393 (1896); Honeyman v. Hanan, 302 U.S. 375 (1937). *See also* Lindsey v. Normet, 405 U.S. 56 (1972).

[992] Cincinnati Street Ry. v. Snell, 193 U.S. 30, 36 (1904).

[993] Some recent decisions, however, have imposed some restrictions on state procedures that require substantial reorientation of process. While this is more generally true in the context of criminal cases, in which the appellate process and post-conviction remedial process have been subject to considerable revision in the treatment of indigents, some requirements have also been imposed in civil cases. Boddie v. Connecticut, 401 U.S. 371 (1971); Lindsey v. Normet, 405 U.S. 56, 74–79 (1972); Santosky v. Kramer, 455 U.S. 745 (1982). Review has, however, been restrained with regard to details. *See, e.g.*, Lindsey v. Normet, 405 U.S. at 64–69.

[994] Ownbey v. Morgan, 256 U.S. 94, 112 (1921). Thus the Fourteenth Amendment does not constrain the states to accept modern doctrines of equity, or adopt a combined system of law and equity procedure, or dispense with all necessity for form and method in pleading, or give untrammeled liberty to amend pleadings. Note that the Supreme Court did once grant review to determine whether due process required the states to provide some form of post-conviction remedy to assert federal constitutional violations, a review that was mooted when the state enacted such a process. Case v. Nebraska, 381 U.S. 336 (1965). When a state, however, through its legal system exerts a monopoly over the pacific settlement of private disputes, as with the dissolution of marriage, due process may well impose affirmative obligations on that state. Boddie v. Connecticut, 401 U.S. 371, 374–77 (1971).

[995] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Nor did the retroactive application of this statutory requirement to actions pending at the time of its adoption violate due process as long as no new liability for expenses incurred before enactment was imposed thereby and the only effect thereof was to stay such proceedings until the security was furnished.

its dissolution, the state may not deny access to those persons unable to pay its fees.[996]

Older cases, which have not been questioned by more recent ones, held that a state, as the price of opening its tribunals to a nonresident plaintiff, may exact the condition that the nonresident stand ready to answer all cross actions filed and accept any *in personam* judgments obtained by a resident defendant through service of process or appropriate pleading upon the plaintiff's attorney of record.[997] For similar reasons, a requirement of the performance of a chemical analysis as a condition precedent to a suit to recover for damages resulting to crops from allegedly deficient fertilizers, while allowing other evidence, was not deemed arbitrary or unreasonable.[998]

Amendment of pleadings is largely within the discretion of the trial court, and unless a gross abuse of discretion is shown, there is no ground for reversal. Accordingly, where the defense sought to be interposed is without merit, a claim that due process would be denied by rendition of a foreclosure decree without leave to file a supplementary answer is utterly without foundation.[999]

Defenses.—Just as a state may condition the right to institute litigation, so may it establish terms for the interposition of certain defenses. It may validly provide that one sued in a possessory action cannot bring an action to try title until after judgment is rendered and after he has paid that judgment.[1000] A state may limit the defense in an action to evict tenants for nonpayment of rent to the issue of payment and leave the tenants to other remedial actions at law on a claim that the landlord had failed to maintain the premises.[1001] A state may also provide that the doctrines of contributory negligence, assumption of risk, and fellow servant do not bar recovery in certain employment-related accidents. No person has a vested right in such defenses.[1002] Similarly, a nonresident defendant in a suit begun by foreign attachment, even though he has no

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[996] Boddie v. Connecticut, 401 U.S. 371 (1971). *See also* Little v. Streater, 452 U.S. 1 (1981) (state-mandated paternity suit); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (parental status termination proceeding); Santosky v. Kramer, 455 U.S. 745 (1982) (permanent termination of parental custody).

[997] Young Co. v. McNeal-Edwards Co., 283 U.S. 398 (1931); Adam v. Saenger, 303 U.S. 59 (1938).

[998] Jones v. Union Guano Co., 264 U.S. 171 (1924).

[999] Sawyer v. Piper, 189 U.S. 154 (1903).

[1000] Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915).

[1001] Lindsey v. Normet, 405 U.S. 56, 64–69 (1972). *See also* Bianchi v. Morales, 262 U.S. 170 (1923) (upholding mortgage law providing for summary foreclosure of a mortgage without allowing any defense except payment)..

[1002] Bowersock v. Smith, 243 U.S. 29, 34 (1917); Chicago, R.I. & P. Ry. v. Cole, 251 U.S. 54, 55 (1919); Herron v. Southern Pacific Co., 283 U.S. 91 (1931). *See also* Martinez v. California, 444 U.S. 277, 280–83 (1980) (state interest in fashioning its

resources or credit other than the property attached, cannot challenge the validity of a statute which requires him to give bail or security for the discharge of the seized property before permitting him an opportunity to appear and defend.[1003]

Costs, Damages, and Penalties.—What costs are allowed by law is for the court to determine; an erroneous judgment of what the law allows does not deprive a party of his property without due process of law.[1004] Nor does a statute providing for the recovery of reasonable attorney's fees in actions on small claims subject unsuccessful defendants to any unconstitutional deprivation.[1005] Congress may, however, severely restrict attorney's fees in an effort to keep an administrative claims proceeding informal.[1006]

Equally consistent with the requirements of due process is a statutory procedure whereby a prosecutor of a case is adjudged liable for costs, and committed to jail in default of payment thereof, whenever the court or jury, after according him an opportunity to present evidence of good faith, finds that he instituted the prosecution without probable cause and from malicious motives.[1007] Also, as a reasonable incentive for prompt settlement without suit of just demands of a class receiving special legislative treatment, such as common carriers and insurance companies together with their patrons, a state may permit harassed litigants to recover penalties in the form of attorney's fees or damages.[1008]

By virtue of its plenary power to prescribe the character of the sentence which shall be awarded against those found guilty of crime, a state may provide that a public officer embezzling public money shall, notwithstanding that he has made restitution, suffer not only imprisonment but also pay a fine equal to double the amount embezzled, which shall operate as a judgment for the use of persons

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own tort law permits it to provide immunity defenses for its employees and thus defeat recovery).

[1003] Ownbey v. Morgan, 256 U.S. 94 (1921).

[1004] Ballard v. Hunter, 204 U.S. 241, 259 (1907).

[1005] Missouri, Kansas & Texas Ry. v. Cade, 233 U.S. 642, 650 (1914).

[1006] Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (limitation of attorneys' fees to $10 in veterans benefit proceedings does not violate claimants' Fifth Amendment due process rights absent a showing of probability of error in the proceedings that presence of attorneys would sharply diminish). *See also* United States Dep't of Labor v. Triplett, 494 U.S. 715 (1990) (upholding regulations under the Black Lung Benefits Act prohibiting contractual fee arrangements).

[1007] Lowe v. Kansas, 163 U.S. 81 (1896). Consider, however, the possible bearing of Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (statute allowing jury to impose costs on acquitted defendant, but containing no standards to guide discretion, violates due process).

[1008] Yazoo & Miss. R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912); Chicago & Northwestern Ry. v. Nye Schneider Fowler Co., 260 U.S. 35, 43–44 (1922); Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 139 (1921); Life & Casualty Co. v. McCray, 291 U.S. 566 (1934).

whose money was embezzled. Whatever this fine is called, whether a penalty, or punishment, or civil judgment, it comes to the convict as the result of his crime.[1009] On the other hand, when appellant, by its refusal to surrender certain assets, was adjudged in contempt for frustrating enforcement of a judgment obtained against it, dismissal of its appeal from the first judgment was not a penalty imposed for the contempt, but merely a reasonable method for sustaining the effectiveness of the state's judicial process.[1010]

To deter careless destruction of human life, a state may allow punitive damages to be assessed in actions against employers for deaths caused by the negligence of their employees,[1011] and may also allow punitive damages for fraud perpetrated by employees.[1012] Also constitutional is the traditional common law approach for measuring punitive damages, granting the jury wide but not unlimited discretion to consider the gravity of the offense and the need to deter similar offenses.[1013] The Court has indicated, however, that, although the Excessive Fines Clause of the Eighth Amendment "does not apply to awards of punitive damages in cases between private parties,"[1014] a "grossly excessive" award of punitive damages violates substantive due process, as the Due Process Clause limits the amount of punitive damages to what is "reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence."[1015] These limits may be discerned by a court by examining the degree of reprehensibility of the act, the ratio between the punitive award and plaintiff's actual or potential harm, and the legis-

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[1009] Coffey v. Harlan County, 204 U.S. 659, 663, 665 (1907).

[1010] National Union v. Arnold, 348 U.S. 37 (1954) (the judgment debtor had refused to post a supersedeas bond or to comply with reasonable orders designed to safeguard the value of the judgment pending decision on appeal).

[1011] Pizitz Co. v. Yeldell, 274 U.S. 112, 114 (1927).

[1012] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

[1013] Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (finding sufficient constraints on jury discretion in jury instructions and in post-verdict review). *See also* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (striking down a provision of the Oregon Constitution limiting judicial review of the amount of punitive damages awarded by a jury).

[1014] Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989).

[1015] BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996) (holding that a $2 million judgment for failing to disclose to a purchaser that a "new" car had been repainted was grossly excessive in relation to the state's interest, as only a few of the 983 similarly repainted cars had been sold in that same state); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (holding that a $145 million judgment for refusing to settle an insurance claim was excessive as it included consideration of conduct occurring in other states). *But see* TXO Corp. v. Alliance Resources, 509 U.S. 443 (1993) (punitive damages of $10 million for slander of title does not violate the Due Process Clause even though the jury awarded actual damages of only $19,000).

lative sanctions provided for comparable misconduct.[1016] In addition, the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . ." [1017]

Statutes of Limitation.—A statute of limitations does not deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce the right by suit. By the same token, a state may shorten an existing period of limitation, provided a reasonable time is allowed for bringing an action after the passage of the statute and before the bar takes effect. What is a reasonable period, however, is dependent on the nature of the right and particular circumstances.[1018]

Thus, where a receiver for property is appointed 13 years after the disappearance of the owner and notice is made by publication, it is not a violation of due process to bar actions relative to that property after an interval of only one year after such appointment.[1019] When a state, by law, suddenly prohibits all actions to contest tax deeds which have been of record for two years unless they are brought within six months after its passage, no unconstitutional deprivation is effected.[1020] No less valid is a statute which provides that when a person has been in possession of wild lands under a recorded deed continuously for 20 years and had paid taxes thereon during the same, and the former owner in that interval pays nothing, no action to recover such land shall be entertained unless commenced within 20 years, or before the expiration of five years following enactment of said provision.[1021] Similarly, an amendment to a workmen's compensation act, limiting to three years the time within which a case may be reopened for readjustment of compensation on account of aggravation of a disability, does not deny due

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[1016] BMW v. Gore, 517 U.S. at 574–75 (1996). The Court has suggested that awards exceeding a single-digit ratio between punitive and compensatory damages would be unlikely to pass scrutiny under due process, and that the greater the compensatory damages, the less this ratio should be. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 424 (2003).

[1017] Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007) (punitive damages award overturned because trial court had allowed jury to consider the effect of defendant's conduct on smokers who were not parties to the lawsuit).

[1018] Wheeler v. Jackson, 137 U.S. 245, 258 (1890); Kentucky Union Co. v. Kentucky, 219 U.S. 140, 156 (1911). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (discussing discretion of states in erecting reasonable procedural requirements for triggering or foreclosing the right to an adjudication).

[1019] Blinn v. Nelson, 222 U.S. 1 (1911).

[1020] Turner v. New York, 168 U.S. 90, 94 (1897).

[1021] Soper v. Lawrence Brothers, 201 U.S. 359 (1906). Nor is a former owner who had not been in possession for five years after and fifteen years before said enactment thereby deprived of property without due process.

process to one who sustained his injury at a time when the statute contained no limitation. A limitation is deemed to affect the remedy only, and the period of its operation in this instance was viewed as neither arbitrary nor oppressive.[1022]

Moreover, a state may extend as well as shorten the time in which suits may be brought in its courts and may even entirely remove a statutory bar to the commencement of litigation. Thus, a repeal or extension of a statute of limitations affects no unconstitutional deprivation of property of a debtor-defendant in whose favor such statute had already become a defense. "A right to defeat a just debt by the statute of limitation . . . [is not] a vested right," such as is protected by the Constitution. Accordingly no offense against the Fourteenth Amendment is committed by revival, through an extension or repeal, of an action on an implied obligation to pay a child for the use of her property,[1023] or a suit to recover the purchase price of securities sold in violation of a Blue Sky Law,[1024] or a right of an employee to seek, on account of the aggravation of a former injury, an additional award out of a state-administered fund.[1025]

However, for suits to recover real and personal property, when the right of action has been barred by a statute of limitations and title as well as real ownership have become vested in the defendant, any later act removing or repealing the bar would be void as attempting an arbitrary transfer of title.[1026] Also unconstitutional is the application of a statute of limitation to extend a period that parties to a contract have agreed should limit their right to remedies under the contract. "When the parties to a contract have expressly agreed upon a time limit on their obligation, a statute which invalidates . . . [said] agreement and directs enforcement of the contract after . . . [the agreed] time has expired" unconstitutionally imposes a burden in excess of that contracted.[1027]

Burden of Proof and Presumptions.—It is clearly within the domain of the legislative branch of government to establish presumptions and rules respecting burden of proof in litigation.[1028] Nonetheless, the Due Process Clause does prevent the deprivation of lib-

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[1022] Mattson v. Department of Labor, 293 U.S. 151, 154 (1934).

[1023] Campbell v. Holt, 115 U.S. 620, 623, 628 (1885).

[1024] Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

[1025] Gange Lumber Co. v. Rowley, 326 U.S. 295 (1945).

[1026] Campbell v. Holt, 115 U.S. 620, 623 (1885). *See also* Stewart v. Keyes, 295 U.S. 403, 417 (1935).

[1027] Home Ins. Co. v. Dick, 281 U.S. 397, 398 (1930).

[1028] Hawkins v. Bleakly, 243 U.S. 210, 214 (1917); James-Dickinson Co. v. Harry, 273 U.S. 119, 124 (1927). Congress's power to provide rules of evidence and standards of proof in the federal courts stems from its power to create such courts. Vance v. Terrazas, 444 U.S. 252, 264–67 (1980); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 31 (1976). In the absence of congressional guidance, the Court has deter-

erty or property upon application of a standard of proof too lax to make reasonable assurance of accurate factfinding. Thus, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" [1029]

Applying the formula it has worked out for determining what process is due in a particular situation,[1030] the Court has held that a standard at least as stringent as clear and convincing evidence is required in a civil proceeding to commit an individual involuntarily to a state mental hospital for an indefinite period.[1031] Similarly, because the interest of parents in retaining custody of their children is fundamental, the state may not terminate parental rights through reliance on a standard of preponderance of the evidence—the proof necessary to award money damages in an ordinary civil action—but must prove that the parents are unfit by clear and convincing evidence.[1032] Further, unfitness of a parent may not simply be presumed because of some purported assumption about general characteristics, but must be established.[1033]

As long as a presumption is not unreasonable and is not conclusive, it does not violate the Due Process Clause. Legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property, however, and a statute creating a presumption which is entirely arbitrary and which operates to deny a fair opportunity to repel it or to present facts pertinent to one's defense is void.[1034] On the other hand, if there is a rational connection between what is proved and what is inferred, legislation declaring that

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mined the evidentiary standard in certain statutory actions. Nishikawa v. Dulles, 356 U.S. 129 (1958); Woodby v. INS, 385 U.S. 276 (1966).

[1029] Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Justice Harlan concurring)).

[1030] Mathews v. Eldridge, 424 U.S. 319 (1976).

[1031] Addington v. Texas, 441 U.S. 418 (1979).

[1032] Santosky v. Kramer, 455 U.S. 745 (1982). Four Justices dissented, arguing that considered as a whole the statutory scheme comported with due process. Id. at 770 (Justices Rehnquist, White, O'Connor, and Chief Justice Burger). Application of the traditional preponderance of the evidence standard is permissible in paternity actions. Rivera v. Minnich, 483 U.S. 574 (1987).

[1033] Stanley v. Illinois, 405 U.S. 645 (1972) (presumption that unwed fathers are unfit parents). *But see* Michael H. v. Gerald D., 491 U.S. 110 (1989) (statutory presumption of legitimacy accorded to a child born to a married woman living with her husband defeats the right of the child's biological father to establish paternity.

[1034] Presumptions were voided in Bailey v. Alabama, 219 U.S. 219 (1911) (anyone breaching personal services contract guilty of fraud); Manley v. Georgia, 279 U.S. 1 (1929) (every bank insolvency deemed fraudulent); Western & Atlantic R.R. v. Henderson, 279 U.S. 639 (1929) (collision between train and auto at grade crossing constitutes negligence by railway company); Carella v. California, 491 U.S. 263 (1989)

the proof of one fact or group of facts shall constitute *prima facie* evidence of a main or ultimate fact will be sustained.[1035]

For a brief period, the Court used what it called the "irrebuttable presumption doctrine" to curb the legislative tendency to confer a benefit or to impose a detriment based on presumed characteristics based on the existence of another characteristic.[1036] Thus, in *Stanley v. Illinois*,[1037] the Court found invalid a construction of the state statute that presumed illegitimate fathers to be unfit parents and that prevented them from objecting to state wardship. Mandatory maternity leave rules requiring pregnant teachers to take unpaid maternity leave at a set time prior to the date of the expected births of their babies were voided as creating a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of teaching.[1038]

Major controversy developed over the application of "irrebuttable presumption doctrine" in benefits cases. Thus, although a state may require that nonresidents must pay higher tuition charges at state colleges than residents, and while the Court assumed that a durational residency requirement would be permissible as a prerequisite to qualify for the lower tuition, it was held impermissible for the state to presume conclusively that because the legal address of a student was outside the state at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student. The Due Process Clause required that the student be afforded the opportunity to show that he is or has become a bona fide resident entitled to the lower tuition.[1039]

Moreover, a food stamp program provision making ineligible any household that contained a member age 18 or over who was claimed as a dependent for federal income tax purposes the prior tax year

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(conclusive presumption of theft and embezzlement upon proof of failure to return a rental vehicle).

[1035] Presumptions sustained include Hawker v. New York, 170 U.S. 189 (1898) (person convicted of felony unfit to practice medicine); Hawes v. Georgia, 258 U.S. 1 (1922) (person occupying property presumed to have knowledge of still found on property); Bandini Co. v. Superior Court, 284 U.S. 8 (1931) (release of natural gas into the air from well presumed wasteful); Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933) (rebuttable presumption of railroad negligence for accident at grade crossing). *See also* Morrison v. California, 291 U.S. 82 (1934).

[1036] The approach was not unprecedented, some older cases having voided tax legislation that presumed conclusively an ultimate fact. Schlesinger v. Wisconsin, 270 U.S. 230 (1926) (deeming any gift made by decedent within six years of death to be a part of estate denies estate's right to prove gift was not made in contemplation of death); Heiner v. Donnan, 285 U.S. 312 (1932); Hoeper v. Tax Comm'n, 284 U.S. 206 (1931).

[1037] 405 U.S. 645 (1972).

[1038] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

[1039] Vlandis v. Kline, 412 U.S. 441 (1973).

by a person not himself eligible for stamps was voided on the ground that it created a conclusive presumption that fairly often could be shown to be false if evidence could be presented.[1040] The rule which emerged for subjecting persons to detriment or qualifying them for benefits was that the legislature may not presume the existence of the decisive characteristic upon a given set of facts, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that it was the purpose of the legislature to reach. The doctrine in effect afforded the Court the opportunity to choose between resort to the Equal Protection Clause or to the Due Process Clause in judging the validity of certain classifications,[1041] and it precluded Congress and legislatures from making general classifications that avoided the administrative costs of individualization in many areas.

Use of the doctrine was curbed if not halted, however, in *Weinberger v. Salfi*,[1042] in which the Court upheld the validity of a Social Security provision requiring that the spouse of a covered wage earner must have been married to the wage earner for at least nine months prior to his death in order to receive benefits as a spouse. Purporting to approve but to distinguish the prior cases in the line,[1043] the Court imported traditional equal protection analysis into considerations of due process challenges to statutory classifications.[1044] Extensions of the prior cases to government entitlement classifications, such as the Social Security Act qualification standard before it, would, said the Court, "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." [1045] Whether the Court will now limit the doctrine to the detriment area only, exclusive of benefit programs, whether it will limit it to those areas which involve fundamental rights or suspect classifications (in the equal pro-

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[1040] Department of Agriculture v. Murry, 413 U.S. 508 (1973).

[1041] Thus, on the some day *Murry* was decided, a similar food stamp qualification was struck down on equal protection grounds. Department of Agriculture v. Moreno, 413 U.S. 528 (1973).

[1042] 422 U.S. 749 (1975).

[1043] *Stanley* and *LaFleur* were distinguished as involving fundamental rights of family and childbearing, 422 U.S. at 771, and *Murry* was distinguished as involving an irrational classification. Id. at 772. *Vlandis*, said Justice Rehnquist for the Court, meant no more than that when a state fixes residency as the qualification it may not deny to one meeting the test of residency the opportunity so to establish it. Id. at 771. *But see* id. at 802–03 (Justice Brennan dissenting).

[1044] 422 U.S. at 768–70, 775–77, 785 (using Dandridge v. Williams, 397 U.S. 471 (1970); Richardson v. Belcher, 404 U.S. 78 (1971); and similar cases).

[1045] Weinberger v. Salfi, 422 U.S. 749, 772 (1975).

tection sense of those expressions)[1046] or whether it will simply permit the doctrine to pass from the scene remains unsettled, but it is noteworthy that it now rarely appears on the Court's docket.[1047]

Trials and Appeals.—Trial by jury in civil trials, unlike the case in criminal trials, has not been deemed essential to due process, and the Fourteenth Amendment has not been held to restrain the states in retaining or abolishing civil juries.[1048] Thus, abolition of juries in proceedings to enforce liens,[1049] mandamus[1050] and quo warranto[1051] actions, and in eminent domain[1052] and equity[1053] proceedings has been approved. states are also free to adopt innovations respecting selection and number of jurors. Verdicts rendered by ten out of twelve jurors may be substituted for the requirement of unanimity,[1054] and petit juries containing eight rather than the conventional number of twelve members may be established.[1055]

If a full and fair trial on the merits is provided, due process does not require a state to provide appellate review.[1056] But if an appeal is afforded, the state must not so structure it as to arbitrarily deny to some persons the right or privilege available to others.[1057]

[1046] *Vlandis*, which was approved but distinguished, is only marginally in this doctrinal area, involving as it does a right to travel feature, but it is like *Salfi* and *Murry* in its benefit context and order of presumption. The Court has avoided deciding whether to overrule, retain, or further limit *Vlandis*. Elkins v. Moreno, 435 U.S. 647, 658–62 (1978).

[1047] In Turner v. Department of Employment Security, 423 U.S. 44 (1975), decided after *Salfi*, the Court voided under the doctrine a statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before the expected birth until six weeks after childbirth. *But see* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1977) (provision granting benefits to miners "irrebuttably presumed" to be disabled is merely a way of giving benefits to all those with the condition triggering the presumption); Califano v. Boles, 443 U.S. 282, 284–85 (1979) (Congress must fix general categorization; case-by-case determination would be prohibitively costly).

[1048] Walker v. Sauvinet, 92 U.S. 90 (1876); New York Central R.R. v. White, 243 U.S. 188, 208 (1917).

[1049] Marvin v. Trout, 199 U.S. 212, 226 (1905).

[1050] *In re* Delgado, 140 U.S. 586, 588 (1891).

[1051] Wilson v. North Carolina, 169 U.S. 586 (1898); Foster v. Kansas, 112 U.S. 201, 206 (1884).

[1052] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 694 (1897).

[1053] Montana Co. v. St. Louis M. & M. Co., 152 U.S. 160, 171 (1894).

[1054] *See* Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).

[1055] *See* Maxwell v. Dow, 176 U.S. 581, 602 (1900).

[1056] Lindsey v. Normet, 405 U.S. 56, 77 (1972) (citing cases).

[1057] 405 U.S. at 74–79 (conditioning appeal in eviction action upon tenant posting bond, with two sureties, in twice the amount of rent expected to accrue pending appeal, is invalid when no similar provision is applied to other cases). *Cf.* Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) (assessment of 15% penalty on party who unsuccessfully appeals from money judgment meets rational basis test

PROCEDURAL DUE PROCESS—CRIMINAL

Generally: The Principle of Fundamental Fairness

The Court has held that practically all the criminal procedural guarantees of the Bill of Rights—the Fourth, Fifth, Sixth, and Eighth Amendments—are fundamental to state criminal justice systems and that the absence of one or the other particular guarantees denies a suspect or a defendant due process of law under the Fourteenth Amendment.[1058] In addition, the Court has held that the Due Process Clause protects against practices and policies that violate precepts of fundamental fairness,[1059] even if they do not violate specific guarantees of the Bill of Rights.[1060] The standard query in such cases is whether the challenged practice or policy violates "a fundamental principle of liberty and justice which inheres in the very

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under equal protection challenge, since it applies to plaintiffs and defendants alike and does not single out one class of appellants).

[1058] *See* analysis under the Bill of Rights, "Fourteenth Amendment," *supra*.

[1059] For instance, *In re Winship*, 397 U.S. 358 (1970), held that, despite the absence of a specific constitutional provision requiring proof beyond a reasonable doubt in criminal cases, such proof is required by due process. For other recurrences to general due process reasoning, as distinct from reliance on more specific Bill of Rights provisions, see, e.g., United States v. Bryant, 579 U.S. ___, No. 15–420, slip op. at 15–16 (2016) (holding that principles of due process did not prevent a defendant's prior uncounseled convictions in tribal court from being used as the basis for a sentence enhancement, as those convictions complied with the Indian Civil Rights Act, which itself contained requirements that "ensure the reliability of tribal-court convictions"). *See also* Hicks v. Oklahoma, 447 U.S. 343 (1980) (where sentencing enhancement scheme for habitual offenders found unconstitutional, defendant's sentence cannot be sustained, even if sentence falls within range of unenhanced sentences); Sandstrom v. Montana, 442 U.S. 510 (1979) (conclusive presumptions in jury instruction may not be used to shift burden of proof of an element of crime to defendant); Kentucky v. Whorton, 441 U.S. 786 (1979) (fairness of failure to give jury instruction on presumption of innocence evaluated under totality of circumstances); Taylor v. Kentucky, 436 U.S. 478 (1978) (requiring, upon defense request, jury instruction on presumption of innocence); Patterson v. New York, 432 U.S. 197 (1977) (defendant may be required to bear burden of affirmative defense); Henderson v. Kibbe, 431 U.S. 145 (1977) (sufficiency of jury instructions); Estelle v. Williams, 425 U.S. 501 (1976) (a state cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothes); Mullaney v. Wilbur, 421 U.S. 684 (1975) (defendant may not be required to carry the burden of disproving an element of a crime for which he is charged); Wardius v. Oregon, 412 U.S. 470 (1973) (defendant may not be held to rule requiring disclosure to prosecution of an alibi defense unless defendant is given reciprocal discovery rights against the state); Chambers v. Mississippi, 410 U.S. 284 (1973) (defendant may not be denied opportunity to explore confession of third party to crime for which defendant is charged).

[1060] Justice Black thought the Fourteenth Amendment should be limited to the specific guarantees found in the Bill of Rights. *See*, *e.g.*, *In re* Winship, 397 U.S. 358, 377 (1970) (dissenting). For Justice Harlan's response, *see* id. at 372 n.5 (concurring).

idea of a free government and is the inalienable right of a citizen of such government." [1061]

This inquiry contains a historical component, as "recent cases . . . have proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. . . . [Therefore, the limitations imposed by the Court on the states are] not necessarily fundamental to fairness in every criminal system that might be imagined but [are] fundamental in the context of the criminal processes maintained by the American States." [1062]

The Elements of Due Process

Initiation of the Prosecution.—Indictment by a grand jury is not a requirement of due process; a state may proceed instead by information.[1063] Due process does require that, whatever the procedure, a defendant must be given adequate notice of the offense charged against him and for which he is to be tried,[1064] even aside from the notice requirements of the Sixth Amendment.[1065] Where,

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[1061] Twining v. New Jersey, 211 U.S. 78, 106 (1908). The question is phrased as whether a claimed right is "implicit in the concept of ordered liberty," whether it partakes "of the very essence of a scheme of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), or whether it "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses," Rochin v. California, 342 U.S. 165, 169 (1952).

[1062] Duncan v. Louisiana, 391 U.S. 145, 149–50 n.14 (1968).

[1063] Hurtado v. California, 110 U.S. 516 (1884). The Court has also rejected an argument that due process requires that criminal prosecutions go forward only on a showing of probable cause. Albright v. Oliver, 510 U.S. 266 (1994) (holding that there is no civil rights action based on the Fourteenth Amendment for arrest and imposition of bond without probable cause).

[1064] Smith v. O'Grady, 312 U.S. 329 (1941) (guilty plea of layman unrepresented by counsel to what prosecution represented as a charge of simple burglary but which was in fact a charge of "burglary with explosives" carrying a much lengthier sentence voided). *See also* Cole v. Arkansas, 333 U.S. 196 (1948) (affirmance by appellate court of conviction and sentence on ground that evidence showed defendant guilty under a section of the statute not charged violated due process); *In re* Ruffalo, 390 U.S. 544 (1968) (disbarment in proceeding on charge which was not made until after lawyer had testified denied due process); Rabe v. Washington, 405 U.S. 313 (1972) (affirmance of obscenity conviction because of the context in which a movie was shown—grounds neither covered in the statute nor listed in the charge—was invalid).

[1065] See Sixth Amendment, Notice of Accusation, *supra.*

of course, a grand jury is used, it must be fairly constituted and free from prejudicial influences.[1066]

Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine.—Criminal statutes that lack sufficient definiteness or specificity are commonly held "void for vagueness."[1067] Such legislation "may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."[1068] "Men of common intelligence cannot be required to guess at the meaning of [an] enactment."[1069]

For instance, the Court voided for vagueness a criminal statute providing that a person was a "gangster" and subject to fine or imprisonment if he was without lawful employment, had been either convicted at least three times for disorderly conduct or had been convicted of any other crime, and was "known to be a member of a gang of two or more persons." The Court observed that neither common law nor the statute gave the words "gang" or "gangster" definite meaning, that the enforcing agencies and courts were free to

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[1066] Norris v. Alabama, 294 U.S. 587 (1935); Cassell v. Texas, 339 U.S. 282 (1950); Eubanks v. Louisiana, 356 U.S. 584 (1958); Hernandez v. Texas, 347 U.S. 475 (1954); Pierre v. Louisiana, 306 U.S. 354 (1939). On prejudicial publicity, *see* Beck v. Washington, 369 U.S. 541 (1962).

[1067] Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[1068] Musser v. Utah, 333 U.S. 95, 97 (1948). "The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt." Id. at 97. "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972), *quoted in* Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 498 (1982).

[1069] Winters v. New York, 333 U.S. 507, 515–16 (1948). "The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable test to ascertain guilt." Id. *Cf.* Colten v. Kentucky, 407 U.S. 104, 110 (1972). Thus, a state statute imposing severe, cumulative punishments upon contractors with the state who pay their workers less than the "current rate of per diem wages in the locality where the work is performed" was held to be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Const. Co., 269 U.S. 385 (1926). Similarly, a statute which allowed jurors to require an acquitted defendant to pay the costs of the prosecution, elucidated only by the judge's instruction to the jury that the defendant should only have to pay the costs if it thought him guilty of "some misconduct" though innocent of the crime with which he was charged, was found to fall short of the requirements of due process. Giaccio v. Pennsylvania, 382 U.S. 399 (1966).

construe the terms broadly or narrowly, and that the phrase "known to be a member" was ambiguous. The statute was held void, and the Court refused to allow specification of details in the particular indictment to save it because it was the statute, not the indictment, that prescribed the rules to govern conduct.[1070]

A statute may be so vague or so threatening to constitutionally protected activity that it can be pronounced wholly unconstitutional; in other words, "unconstitutional on its face."[1071] Thus, for instance, a unanimous Court in *Papachristou v. City of Jacksonville*[1072] struck down as invalid on its face a vagrancy ordinance that punished "dissolute persons who go about begging, . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . persons neglecting all lawful business and habitually spending their time by frequenting house of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children . . . ."[1073] The ordinance was found to be facially invalid, according to Justice Douglas for the Court, because it did not give fair notice, it did not require specific intent to commit an unlawful act, it permitted and encouraged arbitrary and erratic arrests and convictions, it committed too much discretion to policemen, and it criminalized activities that by modern standards are normally innocent.[1074]

[1070] Lanzetta v. New Jersey, 306 U.S. 451 (1939); Edelman v. California, 344 U.S. 357 (1953).

[1071] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Smith v. Goguen, 415 U.S. 566 (1974). Generally, a vague statute that regulates in the area of First Amendment guarantees will be pronounced wholly void. Winters v. New York, 333 U.S. 507, 509–10 (1948); Thornhill v. Alabama, 310 U.S. 88 (1940).

[1072] 405 U.S. 156 (1972).

[1073] 405 U.S. at 156 n.1. Similar concerns regarding vagrancy laws had been expressed previously. *See*, *e.g.*, Winters v. New York, 333 U.S. 507, 540 (1948) (Justice Frankfurter dissenting); Edelman v. California, 344 U.S. 357, 362 (1953) (Justice Black dissenting); Hicks v. District of Columbia, 383 U.S. 252 (1966) (Justice Douglas dissenting).

[1074] Similarly, an ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by was found impermissibly vague and void on its face because it encroached on the freedom of assembly. Coates v. City of Cincinnati, 402 U.S. 611 (1971). *See* Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965) (conviction under statute imposing penalty for failure to "move on" voided); Bouie v. City of Columbia, 378 U.S. 347 (1964) (conviction on trespass charges arising out of a sit-in at a drugstore lunch counter voided since the trespass statute did not give fair notice that it was a crime to refuse to leave private premises after being requested to do so); Kolender v. Lawson, 461 U.S. 352 (1983) (requirement that person detained in valid *Terry* stop provide "credible and reliable" identification is facially void as encouraging arbitrary enforcement).

In *FCC v. Fox*, 567 U.S. ___, No. 10–1293, slip op. (2012) the Court held that the Federal Communiations Commission (FCC) had violated the Fifth Amendment due process rights of Fox Television and ABC, Inc., because the FCC had not given fair notice that broadcasting isolated instances of expletives or brief nudity could lead to punishment. 18 U.S.C. § 1464 bans the broadcast of "any obscene, indecent, or profane language", but the FCC had a long-standing policy that it would not consider "fleeting" instances of indecency to be actionable, and had confirmed such a policy by issuance of an industry guidance. The policy was not announced until after the instances at issues in this case (two concerned isolated utterances of expletives during two live broadcasts aired by Fox Television, and a brief exposure of the nude buttocks of an adult female character by ABC). The Commission policy in place at the time of the broadcasts, therefore, gave the broadcasters no notice that a fleeting instance of indecency could be actionable as indecent.

In other situations, a statute may be unconstitutionally vague because the statute is worded in a standardless way that invites arbitrary enforcement. For example, in *Johnson v. United States*, after years of litigation on the meaning and scope of the "residual clause" of the Armed Career Criminal Act of 1984 (ACCA),[1075] the Court concluded that the clause in question was void for vagueness.[1076] In relevant part, the ACCA imposes an increased prison term upon a felon who is in possession of a firearm, if that felon has previously been convicted for a "violent felony," a term defined by the statute to include "burglary, arson, or extortion, [a crime that] involves use of explosives, or" crimes that fall within the residual clause—that is, crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[1077] In *Johnson*, prosecutors sought an enhanced sentence for a felon found in possession of a firearm, arguing that one of the defendant's previous crimes—unlawful possession of a short-barreled shotgun—qualified as a violent felony because the crime amounted to one that "involve[d] conduct that presents a serious potential risk of physical injury to another."[1078] To determine whether a crime falls within the residual clause, the Court had previously endorsed a "categorical approach"—that is, instead of looking to whether the facts of a specific offense presented a serious risk of physical injury to another, the Supreme Court had interpreted the ACCA to require courts

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[1075] *See, e.g.*, Sykes v. United States, 564 U.S. 1 (2011); Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008); James v. United States, 550 U.S. 192 (2007).

[1076] *See* Johnson v. United States, 576 U.S. ___, No. 13–7120, slip op. (2015).

[1077] *See* 18 U.S.C. § 924(e)(2)(B) (2012).

[1078] *Johnson*, slip op. at 2–3.

to look to whether the underlying crime falls within a category such that the "ordinary case" of the crime would present a serious risk of physical injury.[1079] The Court in *Johnson* concluded that the residual clause was unconstitutionally vague because the clause's requirement that courts determine what an "ordinary case" of a crime entails led to "grave uncertainty" about (1) how to estimate the risk posed by the crime and (2) how much risk was sufficient to qualify as a violent felony.[1080] For example, in determining whether attempted burglary ordinarily posed serious risks of physical injury, the Court suggested that reasonable minds could differ as to whether an attempted burglary would typically end in a violent encounter, resulting in the conclusion that the residual clause provided "no reliable way" to determine what crimes fell within its scope.[1081] In so holding, the Court relied heavily on the difficulties that federal courts (including the Supreme Court) have had in establishing consistent standards to adjudge the scope of the residual clause, noting that the failure of "persistent efforts" to establish a standard can provide evidence of vagueness.[1082]

On the other hand, some less vague statutes may be held unconstitutional only in application to the defendant before the Court.[1083] For instance, where the terms of a statute could be applied both to innocent or protected conduct (such as free speech) and unprotected conduct, but the valuable effects of the law outweigh its potential general harm, such a statute will be held unconstitutional only as applied.[1084] Thus, in *Palmer v. City of Euclid*,[1085] an ordinance punishing "suspicious persons" defined as "[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself" was found void only as applied to a particular defendant. In *Palmer*, the Court found that the defendant, having dropped off a passenger and begun talking into a two-way radio, was engaging in conduct which

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[1079] *See James*, 550 U.S. at 208.

[1080] *Johnson*, slip op. at 5–6.

[1081] *Id*.

[1082] *See id*. at 6–10 ("Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.").

[1083] Where the terms of a vague statute do not threaten a constitutionally protected right, and where the conduct at issue in a particular case is clearly proscribed, then a due process challenge is unlikely to be successful. Where the conduct in question is at the margins of the meaning of an unclear statute, however, it will be struck down as applied. *E.g.*, United States v. National Dairy Corp., 372 U.S. 29 (1963).

[1084] Palmer v. City of Euclid, 402 U.S. 544 (1971); Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 494–95 (1982).

[1085] 402 U.S. 544 (1971).

could not reasonably be anticipated as fitting within the "without any visible or lawful business" portion of the ordinance's definition.

Loitering statutes that are triggered by failure to obey a police dispersal order are suspect, and may be struck down if they leave a police officer absolute discretion to give such orders.[1086] Thus, a Chicago ordinance that required police to disperse all persons in the company of "criminal street gang members" while in a public place with "no apparent purpose," failed to meet the "requirement that a legislature establish minimal guidelines to govern law enforcement."[1087] The Court noted that "no apparent purpose" is inherently subjective because its application depends on whether some purpose is "apparent" to the officer, who would presumably have the discretion to ignore such apparent purposes as engaging in idle conversation or enjoying the evening air.[1088] On the other hand, where such a statute additionally required a finding that the defendant was intent on causing inconvenience, annoyance, or alarm, it was upheld against facial challenge, at least as applied to a defendant who was interfering with the ticketing of a car by the police.[1089]

Statutes with vague standards may nonetheless be upheld if the text of statute is interpreted by a court with sufficient clarity.[1090] Thus, the civil commitment of persons of "such conditions of emotional instability . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons" was upheld by the Court, based on a state court's construction of the statute as only applying to persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The underlying conditions—habitual course of misconduct in sexual matters and lack of power to control impulses and likelihood of attack on others—were viewed as calling for evidence of past conduct pointing to probable consequences and as being as susceptible of proof as many of the criteria constantly applied in criminal proceedings.[1091]

Conceptually related to the problem of definiteness in criminal statutes is the problem of notice. Ordinarily, it can be said that ig-

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[1086] Kolender v. Lawson, 461 U.S. 352, 358 (1983).
[1087] City of Chicago v. Morales, 527 U.S. 41 (1999).
[1088] 527 U.S. at 62.
[1089] Colten v. Kentucky, 407 U.S. 104 (1972).
[1090] *See, e.g.*, McDonnell v. United States, 579 U.S. ___, No. 15–474, slip op. at 23 (2016) (narrowly interpreting the term "official act" to avoid a construction of the Hobbs Act and federal honest-services fraud statute that would allow public officials to be subject to prosecution without fair notice "for the most prosaic interactions" between officials and their constituents).
[1091] Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940).

norance of the law affords no excuse, or, in other instances, that the nature of the subject matter or conduct may be sufficient to alert one that there are laws which must be observed.[1092] On occasion the Court has even approved otherwise vague statutes because the statute forbade only "willful" violations, which the Court construed as requiring knowledge of the illegal nature of the proscribed conduct.[1093] Where conduct is not in and of itself blameworthy, however, a criminal statute may not impose a legal duty without notice.[1094]

The question of notice has also arisen in the context of "judge-made" law. Although the Ex Post Facto Clause forbids retroactive application of state and federal criminal laws, no such explicit restriction applies to the courts. Thus, when a state court abrogated the common law rule that a victim must die within a "year and a day" in order for homicide charges to be brought in *Rogers v. Tennessee*,[1095] the question arose whether such rule could be applied to acts occurring before the court's decision. The dissent argued vigorously that unlike the traditional common law practice of adapting legal principles to fit new fact situations, the court's decision was an outright reversal of existing law. Under this reasoning, the new "law" could not be applied retrospectively. The majority held, however, that only those holdings which were "unexpected and indefensible by reference to the law which had been express prior to the conduct in issue" [1096] could not be applied retroactively. The relatively archaic nature of "year and a day rule", its abandonment by most jurisdictions, and its inapplicability to modern times were all

[1092] *E.g.*, United States v. Freed, 401 U.S. 601 (1971). Persons may be bound by a novel application of a statute, not supported by Supreme Court or other "fundamentally similar" case precedent, so long as the court can find that, under the circumstance, "unlawfulness . . . is apparent" to the defendant. United States v. Lanier, 520 U.S. 259, 271–72 (1997).

[1093] *E.g.*, Boyce Motor Lines v. United States, 342 U.S. 337 (1952); Colautti v. Franklin, 439 U.S. 379, 395 (1979). *Cf.* Screws v. United States, 325 U.S. 91, 101–03 (1945) (plurality opinion). The Court have even done so when the statute did not explicitly include such a *mens rea* requirement. *E.g.*, Morissette v. United States, 342 U.S. 246 (1952).

[1094] *See*, *e.g.*, Lambert v. California, 355 U.S. 225 (1957) (invalidating a municipal code that made it a crime for anyone who had ever been convicted of a felony to remain in the city for more than five days without registering.). In *Lambert*, the Court emphasized that the act of being in the city was not itself blameworthy, holding that the failure to register was quite "unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed." "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community." Id. at 228, 229–30.

[1095] 532 U.S. 451 (2001).

[1096] Bouie v. City of Columbia, 378 U.S. 347, 354 (1964).

cited as reasons that the defendant had fair warning of the possible abrogation of the common law rule.

Entrapment.—Certain criminal offenses, because they are consensual actions taken between and among willing parties, present police with difficult investigative problems.[1097] Thus, in order to deter such criminal behavior, police agents may "encourage" persons to engage in criminal behavior, such as selling narcotics or contraband,[1098] or they may may seek to test the integrity of public employees, officers or public officials by offering them bribes.[1099] In such cases, an "entrapment" defense is often made, though it is unclear whether the basis for the defense is the Due Process Clause, the supervisory authority of the federal courts to deter wrongful police conduct, or merely statutory construction (interpreting criminal laws to find that the legislature would not have intended to punish conduct induced by police agents).[1100]

[1097] Some of that difficulty may be alleviated through electronic and other surveillance, which is covered by the search and seizure provisions of the Fourth Amendment, or informers may be used, which also has constitutional implications.

[1098] For instance, in Sorrells v. United States, 287 U.S. 435, 446–49 (1932) and Sherman v. United States, 356 U.S. 369, 380 (1958) government agents solicited defendants to engage in the illegal activity, in United States v. Russell, 411 U.S. 423, 490 (1973), the agents supplied a commonly available ingredient, and in Hampton v. United States, 425 U.S. 484, 488–89 (1976), the agents supplied an essential and difficult to obtain ingredient.

[1099] For instance, this strategy was seen in the "Abscam" congressional bribery controversy. The defense of entrapment was rejected as to all the "Abscam" defendants. *E.g.*, United States v. Kelly, 707 F.2d 1460 (D.C. Cir. 1983); United States v. Williams, 705 F.2d 603 (2d Cir. 1983); United States v. Jannotti, 673 F.2d 578 (3d Cir. 1982), *cert. denied*, 457 U.S. 1106 (1982).

[1100] For a thorough evaluation of the basis for and the nature of the entrapment defense, *see* Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111. The Court's first discussion of the issue was based on statutory grounds, *see* Sorrells v. United States, 287 U.S. 435, 446–49 (1932), and that basis remains the choice of some Justices. Hampton v. United States, 425 U.S. 484, 488–89 (1976) (plurality opinion of Justices Rehnquist and White and Chief Justice Burger). In Sherman v. United States, 356 U.S. 369, 380 (1958) (concurring), however, Justice Frankfurter based his opinion on the supervisory powers of the courts. In United States v. Russell, 411 U.S. 423, 490 (1973), however, the Court rejected the use of that power, as did a plurality in *Hampton*, 425 U.S. at 490. The *Hampton* plurality thought the Due Process Clause would never be applicable, no matter what conduct government agents engaged in, unless they violated some protected right of the defendant, and that inducement and encouragement could never do that. Justices Powell and Blackmun, on the other hand, 411 U.S. at 491, thought that police conduct, even in the case of a predisposed defendant, could be so outrageous as to violate due process. The *Russell* and *Hampton* dissenters did not clearly differentiate between the supervisory power and due process but seemed to believe that both were implicated. 411 U.S. at 495 (Justices Brennan, Stewart, and Marshall); *Russell*, 411 U.S. at 439 (Justices Stewart, Brennan, and Marshall). The Court again failed to clarify the basis for the defense in Mathews v. United States, 485 U.S. 58 (1988) (a defendant in a federal criminal case who denies commission of the crime is entitled to assert an "inconsistent" entrapment defense where the evidence warrants), and in Jacobson v. United States, 503 U.S. 540 (1992) (invalidating a

The Court has employed the so-called "subjective approach" in evaluating the defense of entrapment.[1101] This subjective approach follows a two-pronged analysis. First, the question is asked whether the offense was induced by a government agent. Second, if the government has induced the defendant to break the law, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents."[1102] If the defendant can be shown to have been ready and willing to commit the crime whenever the opportunity presented itself, the defense of entrapment is unavailing, no matter the degree of inducement.[1103] On the other hand, "[w]hen the Government's quest for conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never run afoul of the law, the courts should intervene."[1104]

Criminal Identification Process.—In criminal trials, the reliability and weight to be accorded an eyewitness identification ordinarily are for the jury to decide, guided by instructions by the trial judge and subject to judicial prerogatives under the rules of evidence to exclude otherwise relevant evidence whose probative value is substantially outweighed by its prejudicial impact or potential to mislead. At times, however, a defendant alleges an out-of-court identification in the presence of police is so flawed that it is inadmis-

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conviction under the Child Protection Act of 1984 because government solicitation induced the defendant to purchase child pornography).

[1101] An "objective approach," although rejected by the Supreme Court, has been advocated by some Justices and recommended for codification by Congress and the state legislatures. *See American Law Institute*, MODEL PENAL CODE § 2.13 (Official Draft, 1962); NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, A PROPOSED NEW FEDERAL CRIMINAL CODE § 702(2) (Final Draft, 1971). The objective approach disregards the defendant's predisposition and looks to the inducements used by government agents. If the government employed means of persuasion or inducement creating a substantial risk that the person tempted will engage in the conduct, the defense would be available. Sorrells v. United States, 287 U.S. 435, 458–59 (1932) (separate opinion of Justice Roberts); Sherman v. United States, 356 U.S. 369, 383 (1958) (Justice Frankfurter concurring); United States v. Russell, 411 U.S. 423, 441 (1973) (Justice Stewart dissenting); Hampton v. United States, 425 U.S. 484, 496–97 (1976) (Justice Brennan dissenting).

[1102] Jacobson v. United States, 503 U.S. 540, 548–49 (1992). Here the Court held that the government had failed to prove that the defendant was initially predisposed to purchase child pornography, even though he had become so predisposed following solicitation through an undercover "sting" operation. For several years government agents had sent the defendant mailings soliciting his views on pornography and child pornography, and urging him to obtain materials in order to fight censorship and stand up for individual rights.

[1103] Sorrells v. United States, 287 U.S. 435, 451–52 (1932); Sherman v. United States, 356 U.S. 369, 376–78 (1958); Masciale v. United States, 356 U.S. 386, 388 (1958); United States v. Russell, 411 U.S. 423, 432–36 (1973); Hampton v. United States, 425 U.S. 484, 488–489 (1976) (plurality opinion), and id. at 491 (Justices Powell and Blackmun concurring).

[1104] Jacobson v. United States, 503 U.S. 540, 553–54 (1992).

sible as a matter of fundamental justice under due process.[1105] These cases most commonly challenge such police-arranged procedures as lineups, showups, photographic displays, and the like.[1106] But not all cases have alleged careful police orchestration.[1107]

The Court generally disfavors judicial suppression of eyewitness identifications on due process grounds in lieu of having identification testimony tested in the normal course of the adversarial process.[1108] Two elements are required for due process suppression. First, law enforcement officers must have participated in an identification process that was *both* suggestive and unnecessary.[1109] Second, the identification procedures must have created a substantial prospect for misidentification. Determination of these elements is made by examining the "totality of the circumstances" of a case.[1110] The Court has not recognized any *per se* rule for excluding an eyewitness identification on due process grounds.[1111] Defendants have

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[1105] A hearing by the trial judge on whether an eyewitness identification should be barred from admission is not constitutionally required to be conducted out of the presence of the jury. Watkins v. Sowders, 449 U.S. 341 (1981).

[1106] *E.g.*, Manson v. Brathwaite, 432 U.S. 98, 114–17 (1977) (only one photograph provided to witness); Neil v. Biggers, 409 U.S. 188, 196–201 (1972) (showup in which police walked defendant past victim and ordered him to speak); Coleman v. Alabama, 399 U.S. 1 (1970) (lineup); Foster v. California, 394 U.S. 440 (1969) (two lineups, in one of which the suspect was sole participant above average height, and arranged one-on-one meeting between eyewitness and suspect); Simmons v. United States, 390 U.S. 377 (1968) (series of group photographs each of which contained suspect); Stovall v. Denno, 388 U.S. 293 (1967) (suspect brought to witness's hospital room).

[1107] Perry v. New Hampshire, 565 U.S. ___, No. 10–8974, slip op. (2012) (prior to being approached by police for questioning, witness by chance happened to see suspect standing in parking lot near police officer; no manipulation by police alleged).

[1108] *See* Perry v. New Hampshire, 565 U.S. ___, No. 10–8974, slip op. at 6–7, 15–17 (2012).

[1109] "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." Neil v. Biggers, 409 U.S. 188, 198 (1972). An identification process can be found to be suggestive regardless of police intent. Perry v. New Hampshire, 565 U.S. ___, No. 10–8974, slip op. at 2 & n.1 (2012) (circumstances of identification found to be suggestive but not contrived; no due process relief). The necessity of using a particular procedure depends on the circumstances. *E.g.*, Stovall v. Denno, 388 U.S. 293 (1967) (suspect brought handcuffed to sole witness's hospital room where it was uncertain whether witness would survive her wounds).

[1110] Neil v. Biggers, 409 U.S. 188, 196–201 (1972); Manson v. Brathwaite, 432 U.S. 98, 114–17 (1977). The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *See also* Stovall v. Denno, 388 U.S. 293 (1967).

[1111] The Court eschewed a *per se* exclusionary rule in due process cases at least as early as *Stovall*. 388 U.S. 293, 302 (1967). In Manson v. Brathwaite, the Court

had difficulty meeting the Court's standards: Only one challenge has been successful.[1112]

Fair Trial.—As noted, the provisions of the Bill of Rights now applicable to the states contain basic guarantees of a fair trial—right to counsel, right to speedy and public trial, right to be free from use of unlawfully seized evidence and unlawfully obtained confessions, and the like. But this does not exhaust the requirements of fairness. "Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."[1113] Conversely, "as applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it . . . [the Court] must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[1114]

For instance, bias or prejudice either inherent in the structure of the trial system or as imposed by external events will deny one's right to a fair trial. Thus, in *Tumey v. Ohio*[1115] it was held to violate due process for a judge to receive compensation out of the fines imposed on convicted defendants, and no compensation beyond his salary) "if he does not convict those who are brought before him." Or, in other cases, the Court has found that contemptuous behav-

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evaluated application of a *per se* rule versus the more flexible, *ad hoc* "totality of the circumstances" rule, and found the latter to be preferable in the interests of deterrence and the administration of justice. 432 U.S. 98, 111–14 (1977). The rule in due process cases differs from the *per se* exclusionary rule adopted in the *Wade-Gilbert* line of cases on denial of the right to counsel under the Sixth Amendment in post-indictment lineups. Cases refining the *Wade-Gilbert* holdings include Kirby v. Illinois, 406 U.S. 682 (1972) (right to counsel inapplicable to post-arrest police station identification made before formal initiation of criminal proceedings; due process protections remain available) and United States v. Ash, 413 U.S. 300 (1973) (right to counsel inapplicable at post-indictment display of photographs to prosecution witnesses out of defendant's presence; record insufficient to assess possible due process claim).

[1112] Foster v. California, 394 U.S. 440 (1969) (5–4) ("[T]he pretrial confrontations [between the witness and the defendant] clearly were so arranged as to make the resulting identifications virtually inevitable."). In a limited class of cases, pretrial identifications have been found to be constitutionally objectionable on a basis other than due process. *See* discussion of Assistance of Counsel under Amend. VI, "Lineups and Other Identification Situations."

[1113] Snyder v. Massachusetts, 291 U.S. 97, 116, 117 (1934). *See also* Buchalter v. New York, 319 U.S. 427, 429 (1943).

[1114] Lisenba v. California, 314 U.S. 219, 236 (1941).

[1115] 273 U.S. 510, 520 (1927). *See also* Ward v. Village of Monroeville, 409 U.S. 57 (1972). *But see* Dugan v. Ohio, 277 U.S. 61 (1928). Bias or prejudice of an appellate judge can also deprive a litigant of due process. Aetna Life Ins. Co. v. LaVoie, 475 U.S. 813 (1986) (failure of state supreme court judge with pecuniary interest—a pending suit on an indistinguishable claim—to recuse).

ior in court may affect the impartiality of the presiding judge, so as to disqualify such judge from citing and sentencing the contemnors.[1116] Due process is also violated by the participation of a biased or otherwise partial juror, although there is no presumption that all jurors with a potential bias are in fact prejudiced.[1117]

Public hostility toward a defendant that intimidates a jury is, or course, a classic due process violation.[1118] More recently, concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the Court to instruct trial courts that they should be vigilant to guard against such prejudice and to curb both the publicity and the jury's exposure to it.[1119] For instance, the impact of televising trials on a jury has been a source of some concern.[1120]

[1116] Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971) ("it is generally wise where the marks of unseemly conduct have left personal stings [for a judge] to ask a fellow judge to take his place"); Taylor v. Hayes, 418 U.S. 488, 503 (1974) (where "marked personal feelings were present on both sides," a different judge should preside over a contempt hearing). *But see* Ungar v. Sarafite, 376 U.S. 575 (1964) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to authority"). In the context of alleged contempt before a judge acting as a one-man grand jury, the Court reversed criminal contempt convictions, saying: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re* Murchison, 349 U.S. 133, 136 (1955).

[1117] Ordinarily the proper avenue of relief is a hearing at which the juror may be questioned and the defense afforded an opportunity to prove actual bias. Smith v. Phillips, 455 U.S. 209 (1982) (juror had job application pending with prosecutor's office during trial). *See also* Remmer v. United States, 347 U.S. 227 (1954) (bribe offer to sitting juror); Dennis v. United States, 339 U.S. 162, 167–72 (1950) (government employees on jury). But, a trial judge's refusal to question potential jurors about the contents of news reports to which they had been exposed did not violate the defendant's right to due process, it being sufficient that the judge on *voir dire* asked the jurors whether they could put aside what they had heard about the case, listen to the evidence with an open mind, and render an impartial verdict. Mu'Min v. Virginia, 500 U.S. 415 (1991). Nor is it a denial of due process for the prosecution, after a finding of guilt, to call the jury's attention to the defendant's prior criminal record, if the jury has been given a sentencing function to increase the sentence which would otherwise be given under a recidivist statute. Spencer v. Texas, 385 U.S. 554 (1967). For discussion of the requirements of jury impartiality about capital punishment, *see* discussion under Sixth Amendment, *supra*.

[1118] Frank v. Mangum, 237 U.S. 309 (1915); Moore v. Dempsey, 261 U.S. 86 (1923).

[1119] Sheppard v. Maxwell, 384 U.S. 333 (1966); Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); *But see* Stroble v. California, 343 U.S. 181 (1952); Murphy v. Florida, 421 U.S. 794 (1975).

[1120] Initially, the televising of certain trials was struck down on the grounds that the harmful potential effect on the jurors was substantial, that the testimony presented at trial may be distorted by the multifaceted influence of television upon the conduct of witnesses, that the judge's ability to preside over the trial and guarantee fairness is considerably encumbered to the possible detriment of fairness, and that the defendant is likely to be harassed by his television exposure. Estes v. Texas, 381 U.S. 532 (1965). Subsequently, however, in part because of improvements in technology which caused much less disruption of the trial process and in part because of the lack of empirical data showing that the mere presence of the broadcast media

The fairness of a particular rule of procedure may also be the basis for due process claims, but such decisions must be based on the totality of the circumstances surrounding such procedures.[1121] For instance, a court may not restrict the basic due process right to testify in one's own defense by automatically excluding all hypnotically refreshed testimony.[1122] Or, though a state may require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, due process requires reciprocal discovery in such circumstances, necessitating that the state give the defendant pretrial notice of its rebuttal evidence on the alibi issue.[1123] Due process is also violated when the accused is compelled to stand trial before a jury while dressed

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in the courtroom necessarily has an adverse effect on the process, the Court has held that due process does not altogether preclude the televising of state criminal trials. Chandler v. Florida, 449 U.S. 560 (1981). The decision was unanimous but Justices Stewart and White concurred on the basis that *Estes* had established a *per se* constitutional rule which had to be overruled, id. at 583, 586, contrary to the Court's position. Id. at 570–74.

[1121] For instance, the presumption of innocence has been central to a number of Supreme Court cases. Under some circumstances it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence, although the burden on the defendant is heavy to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction. Taylor v. Kentucky, 436 U.S. 478 (1978). However, an instruction on the presumption of innocence need not be given in every case. Kentucky v. Whorton, 441 U.S. 786 (1979) (reiterating that the totality of the circumstances must be looked to in order to determine if failure to so instruct denied due process). The circumstances emphasized in *Taylor* included skeletal instructions on burden of proof combined with the prosecutor's remarks in his opening and closing statements inviting the jury to consider the defendant's prior record and his indictment in the present case as indicating guilt. *See also* Sandstrom v. Montana, 442 U.S. 510 (1979) (instructing jury trying person charged with "purposely or knowingly" causing victim's death that "law presumes that a person intends the ordinary consequences of his voluntary acts" denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event state would not have carried its burden of proving guilt). *See also* Cupp v. Naughten, 414 U.S. 141 (1973); Henderson v. Kibbe, 431 U.S. 145, 154–55 (1973). For other cases applying *Sandstrom*, *see* Francis v. Franklin, 471 U.S. 307 (1985) (contradictory but ambiguous instruction not clearly explaining state's burden of persuasion on intent does not erase *Sandstrom* error in earlier part of charge); Rose v. Clark, 478 U.S. 570 (1986) (*Sandstrom* error can in some circumstances constitute harmless error under principles of Chapman v. California, 386 U.S. 18 (1967)); Middleton v. McNeil, 541 U.S. 433 (2004) (state courts could assume that an erroneous jury instruction was not reasonably likely to have misled a jury where other instructions made correct standard clear). Similarly, improper arguments by a prosecutor do not necessarily constitute "plain error," and a reviewing court may consider in the context of the entire record of the trial the trial court's failure to redress such error in the absence of contemporaneous objection. United States v. Young, 470 U.S. 1 (1985).

[1122] Rock v. Arkansas, 483 U.S. 44 (1987).

[1123] Wardius v. Oregon, 412 U.S. 470 (1973).

in identifiable prison clothes, because it may impair the presumption of innocence in the minds of the jurors.[1124]

The use of visible physical restraints, such as shackles, leg irons, or belly chains, in front of a jury, has been held to raise due process concerns. In *Deck v. Missouri*,[1125] the Court noted a rule dating back to English common law against bringing a defendant to trial in irons, and a modern day recognition that such measures should be used "only in the presence of a special need." [1126] The Court found that the use of visible restraints during the guilt phase of a trial undermines the presumption of innocence, limits the ability of a defendant to consult with counsel, and "affronts the dignity and decorum of judicial proceedings." [1127] Even where guilt has already been adjudicated, and a jury is considering the application of the death penalty, the latter two considerations would preclude the routine use of visible restraints. Only in special circumstances, such as where a judge has made particularized findings that security or flight risk requires it, can such restraints be used.

The combination of otherwise acceptable rules of criminal trials may in some instances deny a defendant due process. Thus, based on the particular circumstance of a case, two rules that (1) denied a defendant the right to cross-examine his own witness in order to elicit evidence exculpatory to the defendant [1128] and (2) denied a defendant the right to introduce the testimony of witnesses about matters told them out of court on the ground the testimony would be hearsay, denied the defendant his constitutional right to present his own defense in a meaningful way.[1129] Similarly, a questionable procedure may be saved by its combination with another. Thus, it does

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[1124] Estelle v. Williams, 425 U.S. 501 (1976). The convicted defendant was denied *habeas* relief, however, because of failure to object at trial. *But cf.* Holbrook v. Flynn, 475 U.S. 560 (1986) (presence in courtroom of uniformed state troopers serving as security guards was not the same sort of inherently prejudicial situation); Carey v. Musladin, 549 U.S. 70 (2006) (effect on defendant's fair-trial rights of private-actor courtroom conduct—in this case, members of victim's family wearing buttons with the victim's photograph—has never been addressed by the Supreme Court and therefore 18 U.S.C. § 2254(d)(1) precludes *habeas* relief; see Amendment 8, Limitations on Habeas Corpus Review of Capital Sentences).

[1125] 544 U.S. 622 (2005).

[1126] 544 U.S. at 626. In Illinois v. Allen, 397 U.S. 337, 344 (1970), the Court stated, in dictum, that "no person should be tried while shackled and gagged except as a last resort."

[1127] 544 U.S. at 630, 631 (internal quotation marks omitted).

[1128] The defendant called the witness because the prosecution would not.

[1129] Chambers v. Mississippi, 410 U.S. 284 (1973). *See also* Davis v. Alaska, 415 U.S. 786 (1974) (refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, in order to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid); Crane v. Kentucky, 476 U.S. 683 (1986) (exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntari-

not deny a defendant due process to subject him initially to trial before a non-lawyer police court judge when there is a later trial *de novo* available under the state's court system.[1130]

Prosecutorial Misconduct.—When a conviction is obtained by the presentation of testimony known to the prosecuting authorities to have been perjured, due process is violated. The clause "cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." [1131]

The above-quoted language was dictum,[1132] but the principle it enunciated has required state officials to controvert allegations that knowingly false testimony had been used to convict [1133] and has upset convictions found to have been so procured.[1134] Extending the

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ness of the confession); Holmes v. South Carolina, 547 U.S. 319 (2006) (overturning rule that evidence of third-party guilt can be excluded if there is strong forensic evidence establishing defendant's culpability). *But see* Montana v. Egelhoff, 518 U.S. 37 (1996) (state may bar defendant from introducing evidence of intoxication to prove lack of *mens rea*).

[1130] North v. Russell, 427 U.S. 328 (1976).

[1131] Mooney v. Holohan, 294 U.S. 103, 112 (1935).

[1132] The Court dismissed the petitioner's suit on the ground that adequate process existed in the state courts to correct any wrong and that petitioner had not availed himself of it. A state court subsequently appraised the evidence and ruled that the allegations had not been proved in *Ex parte* Mooney, 10 Cal. 2d 1, 73 P.2d 554 (1937), *cert. denied*, 305 U.S. 598 (1938).

[1133] Pyle v. Kansas, 317 U.S. 213 (1942); White v. Ragen, 324 U.S. 760 (1945). *See also* New York ex rel. Whitman v. Wilson, 318 U.S. 688 (1943); *Ex parte* Hawk, 321 U.S. 114 (1914). *But see* Hysler v. Florida, 315 U.S. 411 (1942); Lisenba v. California, 314 U.S. 219 (1941).

[1134] Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957). In the former case, the principal prosecution witness was defendant's accomplice, and he testified that he had received no promise of consideration in return for his testimony. In fact, the prosecutor had promised him consideration, but did nothing to correct the false testimony. *See also* Giglio v. United States, 405 U.S. 150 (1972) (same). In the latter case, involving a husband's killing of his wife because of her infidelity, a prosecution witness testified at the *habeas corpus* hearing that he told the prosecutor that he had been intimate with the woman but that the prosecutor had told him to volunteer nothing of it, so that at trial he had testified his relationship with the woman was wholly casual. In both cases, the Court deemed it irrelevant that the false testimony had gone only to the credibility of the witness rather than to the defendant's guilt. What if the prosecution should become aware of the perjury of a prosecution witness following the trial? *Cf.* Durley v. Mayo, 351 U.S. 277 (1956). *But see* Smith v. Phillips, 455 U.S. 209, 218–21 (1982) (prosecutor's failure to disclose that one of the jurors has a job application pending before him, thus rendering him possibly partial, does not go to fairness of the trial and due process is not violated).

principle, the Court in *Miller v. Pate* [1135] overturned a conviction obtained after the prosecution had represented to the jury that a pair of men's shorts found near the scene of a sex attack belonged to the defendant and that they were stained with blood; the defendant showed in a *habeas corpus* proceeding that no evidence connected him with the shorts and furthermore that the shorts were not in fact bloodstained, and that the prosecution had known these facts.

This line of reasoning has even resulted in the disclosure to the defense of information not relied upon by the prosecution during trial.[1136] In *Brady v. Maryland*,[1137] the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In that case, the prosecution had suppressed an extrajudicial confession of defendant's accomplice that he had actually committed the murder.[1138] "The heart of the holding in *Brady* is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence." [1139]

[1135] 386 U.S. 1 (1967).

[1136] The Constitution does not require the government, prior to entering into a binding plea agreement with a criminal defendant, to disclose impeachment information relating to any informants or other witnesses against the defendant. United States v. Ruiz, 536 U.S. 622 (2002). Nor has it been settled whether inconsistent prosecutorial theories in separate cases can be the basis for a due process challenge. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (Court remanded case to determine whether death sentence was based on defendant's role as shooter because subsequent prosecution against an accomplice proceeded on the theory that, based on new evidence, the accomplice had done the shooting).

[1137] 373 U.S. 83, 87 (1963). In Jencks v. United States, 353 U.S. 657 (1957), in the exercise of its supervisory power over the federal courts, the Court held that the defense was entitled to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses during the investigatory stage. *Cf.* Scales v. United States, 367 U.S. 203, 257–58 (1961). A subsequent statute modified but largely codified the decision and was upheld by the Court. Palermo v. United States, 360 U.S. 343 (1959), sustaining 18 U.S.C. § 3500.

[1138] Although the state court in *Brady* had allowed a partial retrial so that the accomplice's confession could be considered in the jury's determination of whether to impose capital punishment, it had declined to order a retrial of the guilt phase of the trial. The defendant's appeal of this latter decision was rejected, as the issue, as the Court saw it, was whether the state court could have excluded the defendant's confessed participation in the crime on evidentiary grounds, as the defendant had confessed to facts sufficient to establish grounds for the crime charged.

[1139] Moore v. Illinois, 408 U.S. 786, 794–95 (1972) (finding *Brady* inapplicable because the evidence withheld was not material and not exculpatory). *See also* Wood

In *United States v. Agurs*,[1140] the Court summarized and somewhat expanded the prosecutor's obligation to disclose to the defense exculpatory evidence in his possession, even in the absence of a request, or upon a general request, by defendant. First, as noted, if the prosecutor knew or should have known that testimony given to the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[1141] Second, as established in *Brady*, if the defense specifically requested certain evidence and the prosecutor withheld it,[1142] the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[1143] Third (the new law created in *Agurs*), if the defense did not make a request at all, or simply asked for "all *Brady* material" or for "anything exculpatory," a duty resides in the prosecution to reveal to the defense obviously exculpatory evidence. Under this third prong, if the prosecutor did not reveal the relevant information, reversal of a conviction may be required, but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt.[1144]

This tripartite formulation, however, suffered from two apparent defects. First, it added a new level of complexity to a *Brady* inquiry by requiring a reviewing court to establish the appropriate

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v. Bartholomew, 516 U.S. 1 (1995) (per curiam) (holding no due process violation where prosecutor's failure to disclose the result of a witness' polygraph test would not have affected the outcome of the case). The beginning in *Brady* toward a general requirement of criminal discovery was not carried forward. *See* the division of opinion in Giles v. Maryland, 386 U.S. 66 (1967).

In Cone v. Bell, 556 U.S. ___, No. 07–1114, slip op. at 23, 27 (2009), the Court emphasized the distinction between the materiality of the evidence with respect to guilt and the materiality of the evidence with respect to punishment, and concluded that, although the evidence that had been suppressed was not material to the defendant's conviction, the lower courts had erred in failing to assess its effect with respect to the defendant's capital sentence.

[1140] 427 U.S. 97 (1976).

[1141] 427 U.S. at 103–04. This situation is the Mooney v. Holohan-type of case.

[1142] A statement by the prosecution that it will "open its files" to the defendant appears to relieve the defendant of his obligation to request such materials. *See* Strickler v. Greene, 527 U.S. 263, 283–84 (1999); Banks v. Dretke, 540 U.S. 668, 693 (2004).

[1143] 427 U.S. at 104–06. This the *Brady* situation.

[1144] 427 U.S. at 106–14. This was the *Agurs* fact situation. Similarly, there is no obligation that law enforcement officials preserve breath samples that have been used in a breath-analysis test; to meet the *Agurs* materiality standard, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." California v. Trombetta, 467 U.S. 479, 489 (1984). *See also* Arizona v. Youngblood, 488 U.S. 51 (1988) (negligent failure to refrigerate and otherwise preserve potentially exculpatory physical evidence from sexual assault kit does not violate a defendant's due process rights absent bad faith on the part of the police); Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam) (the routine destruction of a bag of cocaine 11 years after an arrest, the defendant having fled prosecution during the intervening years, does not violate due process).

level of materiality by classifying the situation under which the exculpating information was withheld. Second, it was not clear, if the fairness of the trial was at issue, why the circumstances of the failure to disclose should affect the evaluation of the impact that such information would have had on the trial. Ultimately, the Court addressed these issues in *United States v. Bagley* [1145].

In *Bagley*, the Court established a uniform test for materiality, choosing the most stringent requirement that evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different.[1146] This materiality standard, found in contexts outside of *Brady* inquiries,[1147] is applied not only to exculpatory material, but also to material that would be relevant to the impeachment of witnesses.[1148] Thus, where inconsistent earlier statements by a witness to an abduction were not disclosed, the Court weighed the specific effect that impeachment of the witness would have had on establishing the required elements of the crime and of the punishment, finally concluding that there was no reasonable probability that the jury would have reached a different result.[1149]

The Supreme Court has also held that "*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.' . . . '[T]he individual prosecutor has a duty to learn of any favorable

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[1145] 473 U.S. 667 (1985).

[1146] 473 U.S. at 682. Or, to phrase it differently, a *Brady* violation is established by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Kyles v. Whitley, 514 U.S. 419, 435 (1995). *Accord* Smith v. Cain, 565 U.S. ___, No. 10–8145, slip op. (2012) (prior inconsistent statements of sole eyewitness withheld from defendant; state lacked other evidence sufficient to sustain confidence in the verdict independently).

[1147] *See* United States v. Malenzuela-Bernal, 458 U.S. 858 (1982) (testimony made unavailable by Government deportation of witnesses); Strickland v. Washington, 466 U.S. 668 (1984) (incompetence of counsel).

[1148] 473 U.S. at 676–77. *See also* Wearry v. Cain, 577 U.S. ___, No. 14–10008, slip op. at 9 (2016) (per curiam) (finding that a state post-conviction court had improperly (1) evaluated the materiality of each piece of evidence in isolation, rather than cumulatively; (2) emphasized reasons jurors might disregard the new evidence, while ignoring reasons why they might not; and (3) failed to consider the statements of two impeaching witnesses).

[1149] Strickler v. Greene, 527 U.S. 263 (1999). *But see* Banks v. Dretke, 540 U.S. 668, 692–94 (2004) (failure of prosecution to correct perjured statement that witness had not been coached and to disclose that separate witness was a paid government informant established prejudice for purposes of habeas corpus review); Smith v. Cain, 565 U.S. ___, No. 10–8145, slip op. (2012) (prior inconsistent statements of sole eyewitness withheld from defendant; state lacked other evidence sufficient to sustain confidence in the verdict independently).

evidence known to others acting on the government's behalf in the case, including the police.'" [1150]

Proof, Burden of Proof, and Presumptions.—It had long been presumed that "reasonable doubt" was the proper standard for criminal cases,[1151] but, because the standard was so widely accepted, it was only relatively recently that the Court had the opportunity to pronounce it guaranteed by due process. In 1970, the Court held in *In re Winship* that the Due Process Clauses of the Fifth and Fourteenth Amendments "[protect] the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." [1152]

The standard is closely related to the presumption of innocence, which helps to ensure a defendant a fair trial,[1153] and requires that a jury consider a case solely on the evidence.[1154] "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" [1155]

[1150] Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (per curiam), quoting Kyles v. Whitley, 514 U.S. 419, 438, 437 (1995).

[1151] Miles v. United States, 103 U.S. 304, 312 (1881); Davis v. United States, 160 U.S. 469, 488 (1895); Holt v. United States, 218 U.S. 245, 253 (1910); Speiser v. Randall, 357 U.S. 513, 525–26 (1958).

[1152] *In re* Winship, 397 U.S. 358, 364 (1970). *See* Estelle v. Williams, 425 U.S. 501, 503 (1976); Henderson v. Kibbe, 431 U.S. 145, 153 (1977); Ulster County Court v. Allen, 442 U.S. 140, 156 (1979); Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979). *See also* Sullivan v. Louisiana, 508 U.S. 275 (1993) (Sixth Amendment guarantee of trial by jury requires a jury verdict of guilty beyond a reasonable doubt). On the interrelationship of the reasonable doubt burden and defendant's entitlement to a presumption of innocence, *see* Taylor v. Kentucky, 436 U.S. 478, 483–86 (1978), and Kentucky v. Whorton, 441 U.S. 786 (1979).

[1153] *E.g.*, Deutch v. United States, 367 U.S. 456, 471 (1961). *See also* Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam) (jury instruction that explains "reasonable doubt" as doubt that would give rise to a "grave uncertainty," as equivalent to a "substantial doubt," and as requiring "a moral certainty," suggests a higher degree of certainty than is required for acquittal, and therefore violates the Due Process Clause). *But see* Victor v. Nebraska, 511 U.S. 1 (1994) (considered as a whole, jury instructions that define "reasonable doubt" as requiring a "moral certainty" or as equivalent to "substantial doubt" did not violate due process because other clarifying language was included.)

[1154] Holt v. United States, 218 U.S. 245 (1910); Agnew v. United States, 165 U.S. 36 (1897). These cases overturned Coffin v. United States, 156 U.S. 432, 460 (1895), in which the Court held that the presumption of innocence was evidence from which the jury could find a reasonable doubt.

[1155] 397 U.S. at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). Justice Harlan's *Winship* concurrence, id. at 368, proceeded on the basis that, because there is likelihood of error in any system of reconstructing past events, the

The Court had long held that, under the Due Process Clause, it would set aside convictions that are supported by no evidence at all.[1156] The holding of the *Winship* case, however, left open the question as to whether appellate courts should weigh the sufficiency of trial evidence. Thus, in *Jackson v. Virginia*,[1157] the Court held that federal courts, on direct appeal of federal convictions or collateral review of state convictions, must satisfy themselves that the evidence on the record could reasonably support a finding of guilt beyond a reasonable doubt. The question the reviewing court is to ask itself is not whether *it* believes the evidence at the trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[1158]

Because due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged,[1159] the Court held in *Mullaney v. Wilbur*[1160] that it was unconstitutional to require a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter. The Court indicated that a balancing-of-interests test should be used to determine when the Due Process Clause required the prosecution to carry the burden of proof and when some part of the burden might be shifted to the defendant. The decision, however, called into question the prac-

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error of convicting the innocent should be reduced to the greatest extent possible through the use of the reasonable doubt standard.

[1156] Thompson v. City of Louisville, 362 U.S. 199 (1960); Garner v. Louisiana, 368 U.S. 157 (1961); Taylor v. Louisiana, 370 U.S. 154 (1962); Barr v. City of Columbia, 378 U.S. 146 (1964); Johnson v. Florida, 391 U.S. 596 (1968). *See also* Chessman v. Teets, 354 U.S. 156 (1957).

[1157] 443 U.S. 307 (1979).

[1158] *Id.* at 316, 18–19. *See also* Musacchio v. United States, 577 U.S. ___, No. 14–1095, slip op. (2016) ("When a jury finds guilt after being instructed on all elements of the charged crime plus one more element," the fact that the government did not introduce evidence of the additional element—which was not required to prove the offense, but was included in the erroneous jury instruction—"does not implicate the principles that sufficiency review protects."); Griffin v. United States, 502 U.S. 46 (1991) (general guilty verdict on a multiple-object conspiracy need not be set aside if the evidence is inadequate to support conviction as to one of the objects of the conviction, but is adequate to support conviction as to another object).

[1159] Bunkley v. Florida, 538 U.S. 835 (2003); Fiore v. White, 528 U.S. 23 (1999). These cases both involved defendants convicted under state statutes that were subsequently interpreted in a way that would have precluded their conviction. The Court remanded the cases to determine if the new interpretation was in effect at the time of the previous convictions, in which case those convictions would violate due process.

[1160] 421 U.S. 684 (1975). *See also* Sandstrom v. Montana, 442 U.S. 510, 520–24 (1979).

tice in many states under which some burdens of persuasion [1161] were borne by the defense, and raised the prospect that the prosecution must bear all burdens of persuasion—a significant and weighty task given the large numbers of affirmative defenses.

The Court, however, summarily rejected the argument that *Mullaney* means that the prosecution must negate an insanity defense,[1162] and, later, in *Patterson v. New York*,[1163] upheld a state statute that required a defendant asserting "extreme emotional disturbance" as an affirmative defense to murder [1164] to prove such by a preponderance of the evidence. According to the Court, the constitutional deficiency in *Mullaney* was that the statute made malice an element of the offense, permitted malice to be presumed upon proof of the other elements, and then required the defendant to prove the absence of malice. In *Patterson*, by contrast, the statute obligated the state to prove each element of the offense (the death, the intent to kill, and the causation) beyond a reasonable doubt, while allowing the defendant to prove an affirmative defense by preponderance of the evidence that would reduce the degree of the offense.[1165] This distinction has been criticized as formalistic, as the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses.[1166]

[1161] The general notion of "burden of proof" can be divided into the "burden of production" (providing probative evidence on a particular issue) and a "burden of persuasion" (persuading the factfinder with respect to an issue by a standard such as proof beyond a reasonable doubt). *Mullaney*, 421 U.S. at 695 n.20.

[1162] Rivera v. Delaware, 429 U.S. 877 (1976), dismissing as not presenting a substantial federal question an appeal from a holding that *Mullaney* did not prevent a state from placing on the defendant the burden of proving insanity by a preponderance of the evidence. *See* Patterson v. New York, 432 U.S. 197, 202–05 (1977) (explaining the import of *Rivera*). Justice Rehnquist and Chief Justice Burger concurring in *Mullaney*, 421 U.S. at 704, 705, had argued that the case did not require any reconsideration of the holding in Leland v. Oregon, 343 U.S. 790 (1952), that the defense may be required to prove insanity beyond a reasonable doubt.

[1163] 432 U.S. 197 (1977).

[1164] Proving the defense would reduce a murder offense to manslaughter.

[1165] The decisive issue, then, was whether the statute required the state to prove beyond a reasonable doubt each element of the offense. *See also* Dixon v. United States, 548 U.S. 1 (2006) (requiring defendant in a federal firearms case to prove her duress defense by a preponderance of evidence did not violate due process). In *Dixon*, the prosecution had the burden of proving all elements of two federal firearms violations, one requiring a "willful" violation (having knowledge of the facts that constitute the offense) and the other requiring a "knowing" violation (acting with knowledge that the conduct was unlawful). Although establishing other forms of *mens rea* (such as "malicious intent") might require that a prosecutor prove that a defendant's intent was without justification or excuse, the Court held that neither of the forms of *mens rea* at issue in *Dixon* contained such a requirement. Consequently, the burden of establishing the defense of duress could be placed on the defendant without violating due process.

[1166] Dissenting in *Patterson*, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold

Despite the requirement that states prove each element of a criminal offense, criminal trials generally proceed with a presumption that the defendant is sane, and a defendant may be limited in the evidence that he may present to challenge this presumption. In *Clark v. Arizona*,[1167] the Court considered a rule adopted by the Supreme Court of Arizona that prohibited the use of expert testimony regarding mental disease or mental capacity to show lack of *mens rea*, ruling that the use of such evidence could be limited to an insanity defense. In *Clark*, the Court weighed competing interests to hold that such evidence could be "channeled" to the issue of insanity due to the controversial character of some categories of mental disease, the potential of mental-disease evidence to mislead, and the danger of according greater certainty to such evidence than experts claim for it.[1168]

Another important distinction that can substantially affect a prosecutor's burden is whether a fact to be established is an element of a crime or instead is a sentencing factor. Although a criminal conviction is generally established by a jury using the "beyond a reasonable doubt" standard, sentencing factors are generally evaluated by a judge using few evidentiary rules and under the more lenient "preponderance of the evidence" standard. The Court has taken a formalistic approach to this issue, allowing states to designate essentially which facts fall under which of these two categories. For instance, the Court has held that whether a defendant "visibly possessed a gun" during a crime may be designated by a state as a sentencing factor, and determined by a judge based on the preponderance of evidence.[1169]

Although the Court has generally deferred to the legislature's characterizations in this area, it limited this principle in *Apprendi v. New Jersey*. In *Apprendi* the Court held that a sentencing factor cannot be used to increase the maximum penalty imposed for the

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that as to those facts that historically have made a substantial difference in the punishment and stigma flowing from a criminal act the state always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. 432 U.S. at 216. *Patterson* was followed in Martin v. Ohio, 480 U.S. 228 (1987) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is "prior calculation and design"). Justice Powell, again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. Id. at 236, 240.

[1167] 548 U.S. 735 (2006).

[1168] 548 U.S. at 770, 774.

[1169] McMillan v. Pennsylvania, 477 U.S. 79 (1986). It should be noted that these type of cases may also implicate the Sixth Amendment, as the right to a jury extends to all facts establishing the elements of a crime, while sentencing factors may be evaluated by a judge. *See* discussion in "Criminal Proceedings to Which the Guarantee Applies," *supra*.

underlying crime.[1170] This led, in turn, to the Court's overruling conflicting prior case law that had held constitutional the use of aggravating sentencing factors by judges when imposing capital punishment.[1171] These holdings are subject to at least one exception, however,[1172] and the decisions might be evaded by legislatures revising criminal provisions to increase maximum penalties, and then providing for mitigating factors within the newly established sentencing range.

Another closely related issue is statutory presumptions, where proof of a "presumed fact" that is a required element of a crime, is established by another fact, the "basic fact."[1173] In *Tot v. United States*,[1174] the Court held that a statutory presumption was valid under the Due Process Clause only if it met a "rational connection" test. In that case, the Court struck down a presumption that a person possessing an illegal firearm had shipped, transported, or received such in interstate commerce. "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience."

[1170] 530 U.S. 466, 490 (2000) (interpreting New Jersey's "hate crime" law). It should be noted that, prior to its decision in *Apprendi*, the Court had held that sentencing factors determinative of *minimum* sentences could be decided by a judge. McMillan v. Pennsylvania, 477 U.S. 79 (1986). Although the vitality of *McMillan* was put in doubt by *Apprendi*, *McMillan* was subsequently reaffirmed in Harris v. United States, 536 U.S. 545 (2002).

[1171] Walton v. Arizona, 497 U.S. 639 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

[1172] This limiting principle does not apply to sentencing enhancements based on recidivism. *Apprendi*, 530 U.S. at 490. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[1173] *See*, *e.g.*, Yee Hem v. United States, 268 U.S. 178 (1925) (upholding statute that proscribed possession of smoking opium that had been illegally imported and authorized jury to presume illegal importation from fact of possession); Manley v. Georgia, 279 U.S. 1 (1929) (invalidating statutory presumption that every insolvency of a bank shall be deemed fraudulent).

[1174] 319 U.S. 463, 467–68 (1943). *Compare* United States v. Gainey, 380 U.S. 63 (1965) (upholding presumption from presence at site of illegal still that defendant was "carrying on" or aiding in "carrying on" its operation), *with* United States v. Romano, 382 U.S. 136 (1965) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still).

In *Leary v. United States*,[1175] this due process test was stiffened to require that, for such a "rational connection" to exist, it must "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Thus, the Court voided a provision that permitted a jury to infer from a defendant's possession of marijuana his knowledge of its illegal importation. A lengthy canvass of factual materials established to the Court's satisfaction that, although the greater part of marijuana consumed in the United States is of foreign origin, there was still a good amount produced domestically and there was no way to assure that the majority of those possessing marijuana have any reason to know whether their marijuana is imported.[1176] The Court left open the question whether a presumption that survived the "rational connection" test "must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." [1177]

In a later case, a closely divided Court drew a distinction between mandatory presumptions, which a jury must accept, and permissive presumptions, which may be presented to the jury as part of all the evidence to be considered. With respect to mandatory presumptions, "since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption, unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." [1178] But, with respect to permissive presumptions, "the prosecution may rely on all of the evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*." [1179] Thus, due process was not violated by the application of the stat-

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[1175] 395 U.S. 6, 36 (1969).

[1176] 395 U.S. at 37–54. Although some of the reasoning in *Yee Hem*, *supra*, was disapproved, it was factually distinguished as involving users of "hard" narcotics.

[1177] 395 U.S. at 36 n.64. The matter was also left open in Turner v. United States, 396 U.S. 398 (1970) (judged by either "rational connection" or "reasonable doubt," a presumption that the possessor of heroin knew it was illegally imported was valid, but the same presumption with regard to cocaine was invalid under the "rational connection" test because a great deal of the substance was produced domestically), and in Barnes v. United States, 412 U.S. 837 (1973) (under either test a presumption that possession of recently stolen property, if not satisfactorily explained, is grounds for inferring possessor knew it was stolen satisfies due process).

[1178] Ulster County Court v. Allen, 442 U.S. 140, 167 (1979).

[1179] 442 U.S. at 167.

ute that provides that "the presence of a firearm in an automobile is presumptive evidence of its illegal possession by all persons then occupying the vehicle." [1180] The division of the Court in these cases and in the *Mullaney v. Wilbur* line of cases clearly shows the unsettled nature of the issues they concern.

The Problem of the Incompetent or Insane Defendant.—It is a denial of due process to try or sentence a defendant who is insane or incompetent to stand trial.[1181] When it becomes evident during the trial that a defendant is or has become insane or incompetent to stand trial, the court on its own initiative must conduct a hearing on the issue.[1182] Although there is no constitutional requirement that the state assume the burden of proving a defendant competent, the state must provide the defendant with a chance to prove that he is incompetent to stand trial. Thus, a statutory presumption that a criminal defendant is competent to stand trial or a requirement that the defendant bear the burden of proving incompetence by a preponderance of the evidence does not violate due process.[1183]

When a state determines that a person charged with a criminal offense is incompetent to stand trial, he cannot be committed indefinitely for that reason. The court's power is to commit him to a period no longer than is necessary to determine whether there is a substantial probability that he will attain his capacity in the foreseeable future. If it is determined that he will not, then the state

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[1180] 442 U.S. at 142. The majority thought that possession was more likely than not the case from the circumstances, while the four dissenters disagreed. 442 U.S. at 168. *See also* Estelle v. McGuire, 502 U.S. 62 (1991) (upholding a jury instruction that, to dissenting Justices O'Connor and Stevens, id. at 75, seemed to direct the jury to draw the inference that evidence that a child had been "battered" in the past meant that the defendant, the child's father, had necessarily done the battering).

[1181] Pate v. Robinson, 383 U.S. 375, 378 (1966) (citing Bishop v. United States, 350 U.S. 961 (1956)). The standard for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960) (per curiam), cited with approval in Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008). The fact that a defendant is mentally competent to stand trial does not preclude a court from finding him not mentally competent to represent himself at trial. Indiana v. Edwards, *supra*.

[1182] Pate v. Robinson, 383 U.S. 375, 378 (1966). For treatment of the circumstances when a trial court should inquire into the mental competency of the defendant, *see* Drope v. Missouri, 420 U.S. 162 (1975). Also, an indigent who makes a preliminary showing that his sanity at the time of his offense will be a substantial factor in his trial is entitled to a court-appointed psychiatrist to assist in presenting the defense. Ake v. Oklahoma, 470 U.S. 68 (1985).

[1183] Medina v. California, 505 U.S. 437 (1992). It is a violation of due process, however, for a state to require that a defendant must prove competence to stand trial by clear and convincing evidence. Cooper v. Oklahoma, 517 U.S. 348 (1996).

must either release the defendant or institute the customary civil commitment proceeding that would be required to commit any other citizen.[1184]

Where a defendant is found competent to stand trial, a state appears to have significant discretion in how it takes account of mental illness or defect at the time of the offense in determining criminal responsibility.[1185] The Court has identified several tests that are used by states in varying combinations to address the issue: the M'Naghten test (cognitive incapacity or moral incapacity),[1186] volitional incapacity,[1187] and the irresistible-impulse test.[1188] "[I]t is clear that no particular formulation has evolved into a baseline for due process, and that the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice." [1189]

Commitment to a mental hospital of a criminal defendant acquitted by reason of insanity does not offend due process, and the period of confinement may extend beyond the period for which the person could have been sentenced if convicted.[1190] The purpose of the confinement is not punishment, but treatment, and the Court explained that the length of a possible criminal sentence "therefore is irrelevant to the purposes of . . . commitment." [1191] Thus, the insanity-defense acquittee may be confined for treatment "until such time as he has regained his sanity or is no longer a danger to him-

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[1184] Jackson v. Indiana, 406 U.S. 715 (1972).

[1185] Clark v. Arizona, 548 U.S. 735 (2006).

[1186] *M'Naghten's Case*, 8 Eng. Rep. 718 (1843), states that "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." 8 Eng. Rep., at 722.

[1187] *See* Queen v. Oxford, 173 Eng. Rep. 941, 950 (1840) ("If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible").

[1188] *See* State v. Jones, 50 N.H. 369 (1871) ("If the defendant had a mental disease which irresistibly impelled him to kill his wife—if the killing was the product of mental disease in him—he is not guilty; he is innocent—as innocent as if the act had been produced by involuntary intoxication, or by another person using his hand against his utmost resistance").

[1189] *Clark*, 548 U.S. at 752. In *Clark*, the Court considered an Arizona statute, based on the *M'Naghten* case, that was amended to eliminate the defense of cognitive incapacity. The Court noted that, despite the amendment, proof of cognitive incapacity could still be introduced as it would be relevant (and sufficient) to prove the remaining moral incapacity test. Id. at 753.

[1190] Jones v. United States, 463 U.S. 354 (1983). The fact that the affirmative defense of insanity need only be established by a preponderance of the evidence, while civil commitment requires the higher standard of clear and convincing evidence, does not render the former invalid; proof beyond a reasonable doubt of commission of a criminal act establishes dangerousness justifying confinement and eliminates the risk of confinement for mere idiosyncratic behavior.

[1191] 463 U.S. at 368.

self or society." [1192] It follows, however, that a state may not indefinitely confine an insanity-defense acquittee who is no longer mentally ill but who has an untreatable personality disorder that may lead to criminal conduct.[1193]

The Court held in *Ford v. Wainwright* that the Eighth Amendment prohibits the state from executing a person who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding that satisfies the requirements of due process.[1194] Due process is not met when the decision on sanity is left to the unfettered discretion of the governor; rather, due process requires the opportunity to be heard before an impartial officer or board.[1195] The Court, however, left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences." [1196]

In *Atkins v. Virginia*, the Court held that the Eighth Amendment also prohibits the state from executing a person who is mentally retarded, and added, "As was our approach in *Ford v. Wainwright* with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" [1197]

Issues of substantive due process may arise if the government seeks to compel the medication of a person found to be incompetent to stand trial. In *Washington v. Harper*,[1198] the Court had found that an individual has a significant "liberty interest" in avoiding

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[1192] 463 U.S. at 370.

[1193] Foucha v. Louisiana, 504 U.S. 71 (1992).

[1194] 477 U.S. 399 (1986).

[1195] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." Id. at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court's holding.

[1196] 477 U.S. at 416–17.

[1197] 536 U.S. at 317 (citation omitted), quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986). The Court quoted this language again in Schriro v. Smith, holding that "[t]he Ninth Circuit erred in commanding the Arizona courts to conduct a jury trial to resolve Smith's mental retardation claim." 546 U.S. 6, 7 (2005) (per curiam). States, the Court added, are entitled to "adopt[ ] their own measures for adjudicating claims of mental retardation," though "those measures might, in their application, be subject to constitutional challenge." Id.

[1198] 494 U.S. 210 (1990) (prison inmate could be drugged against his will if he presented a risk of serious harm to himself or others).

the unwanted administration of antipsychotic drugs. In *Sell v. United States*,[1199] the Court found that this liberty interest could in "rare" instances be outweighed by the government's interest in bringing an incompetent individual to trial. First, however, the government must engage in a fact-specific inquiry as to whether this interest is important in a particular case.[1200] Second, the court must find that the treatment is likely to render the defendant competent to stand trial without resulting in side effects that will interfere with the defendant's ability to assist counsel. Third, the court must find that less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must conclude that administration of the drugs is in the patient's best medical interests.

Guilty Pleas.—A defendant may plead guilty instead of insisting that the prosecution prove him guilty. Often the defendant does so as part of a "plea bargain" with the prosecution, where the defendant is guaranteed a light sentence or is allowed to plead to a lesser offense.[1201] Although the government may not structure its system so as to coerce a guilty plea,[1202] a guilty plea that is entered voluntarily, knowingly, and understandingly, even to obtain an advantage, is sufficient to overcome constitutional objections.[1203] The guilty plea and the often concomitant plea bargain are important and necessary components of the criminal justice system,[1204] and it is permissible for a prosecutor during such plea bargains to require a defendant to forgo his right to a trial in return for escaping additional charges that are likely upon conviction to

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[1199] 539 U.S. 166 (2003).

[1200] For instance, if the defendant is likely to remain civilly committed absent medication, this would diminish the government's interest in prosecution. 539 U.S. at 180.

[1201] There are a number of other reasons why a defendant may be willing to plead guilty. There may be overwhelming evidence against him or his sentence after trial will be more severe than if he pleads guilty.

[1202] United States v. Jackson, 390 U.S. 570 (1968).

[1203] North Carolina v. Alford, 400 U.S. 25 (1971); Parker v. North Carolina, 397 U.S. 790 (1970). *See also* Brady v. United States, 397 U.S. 742 (1970). A guilty plea will ordinarily waive challenges to alleged unconstitutional police practices occurring prior to the plea, unless the defendant can show that the plea resulted from incompetent counsel. Tollett v. Henderson, 411 U.S. 258 (1973); Davis v. United States, 411 U.S. 233 (1973). *But see* Blackledge v. Perry, 417 U.S. 21 (1974). The state can permit pleas of guilty in which the defendant reserves the right to raise constitutional questions on appeal, and federal *habeas* courts will honor that arrangement. Lefkowitz v. Newsome, 420 U.S. 283 (1975). Release-dismissal agreements, pursuant to which the prosecution agrees to dismiss criminal charges in exchange for the defendant's agreement to release his right to file a civil action for alleged police or prosecutorial misconduct, are not *per se* invalid. Town of Newton v. Rumery, 480 U.S. 386 (1987).

[1204] Blackledge v. Allison, 431 U.S. 63, 71 (1977).

result in a more severe penalty.[1205] But the prosecutor does deny due process if he penalizes the assertion of a right or privilege by the defendant by charging more severely or recommending a longer sentence.[1206]

In accepting a guilty plea, the court must inquire whether the defendant is pleading voluntarily, knowingly, and understandingly,[1207] and "the adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that, when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." [1208]

[1205] Bordenkircher v. Hayes, 434 U.S. 357 (1978). Charged with forgery, Hayes was informed during plea negotiations that if he would plead guilty the prosecutor would recommend a five-year sentence; if he did not plead guilty, the prosecutor would also seek an indictment under the habitual criminal statute under which Hayes, because of two prior felony convictions, would receive a mandatory life sentence if convicted. Hayes refused to plead, was reindicted, and upon conviction was sentenced to life. Four Justices dissented, id. at 365, 368, contending that the Court had watered down North Carolina v. Pearce, 395 U.S. 711 (1969). *See also* United States v. Goodwin, 457 U.S. 368 (1982) (after defendant was charged with a misdemeanor, refused to plead guilty and sought a jury trial in district court, the government obtained a four-count felony indictment and conviction).

[1206] Blackledge v. Perry, 417 U.S. 21 (1974). Defendant was convicted in an inferior court of a misdemeanor. He had a right to a *de novo* trial in superior court, but when he exercised the right the prosecutor obtained a felony indictment based upon the same conduct. The distinction the Court draws between this case and *Bordenkircher* and *Goodwin* is that of pretrial conduct, in which vindictiveness is not likely, and post-trial conduct, in which vindictiveness is more likely and is not permitted. *Accord*, Thigpen v. Roberts, 468 U.S. 27 (1984). The distinction appears to represent very fine line-drawing, but it appears to be one the Court is committed to.

[1207] Boykin v. Alabama, 395 U.S. 238 (1969). In Henderson v. Morgan, 426 U.S. 637 (1976), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily, in the constitutional sense, entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt in the second degree; consequently no showing was made that he knowingly was admitting such intent. "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Id. at 645 n.13. However, this does not mean that a court accepting a guilty plea must explain all the elements of a crime, as it may rely on counsel's representations to the defendant. Bradshaw v. Stumpf, 545 U.S. 175 (2005) (where defendant maintained that shooting was done by someone else, guilty plea to aggravated manslaughter was still valid, as such charge did not require defendant to be the shooter). *See also* Blackledge v. Allison, 431 U.S. 63 (1977) (defendant may collaterally challenge guilty plea where defendant had been told not to allude to existence of a plea bargain in court, and such plea bargain was not honored).

[1208] Santobello v. New York, 404 U.S. 257, 262 (1971). Defendant and a prosecutor reached agreement on a guilty plea in return for no sentence recommendation

Sentencing.—In the absence of errors by the sentencing judge,[1209] or of sentencing jurors considering invalid factors,[1210] the significance of procedural due process at sentencing is limited.[1211] In *Williams v. New York*,[1212] the Court upheld the imposition of the death penalty, despite a jury's recommendation of mercy, where the judge acted based on information in a presentence report not shown to the defendant or his counsel. The Court viewed as highly undesirable the restriction of judicial discretion in sentencing by requiring adherence to rules of evidence which would exclude highly relevant and informative material. Further, disclosure of such information to the defense could well dry up sources who feared retribution or embarrassment. Thus, hearsay and rumors can be considered in sentencing. In *Gardner v. Florida*,[1213] however, the Court limited the application of *Williams* to capital cases.[1214]

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by the prosecution. At the sentencing hearing months later, a different prosecutor recommended the maximum sentence, and that sentence was imposed. The Court vacated the judgment, holding that the prosecutor's entire staff was bound by the promise. Prior to the plea, however, the prosecutor may withdraw his first offer, and a defendant who later pled guilty after accepting a second, less attractive offer has no right to enforcement of the first agreement. Mabry v. Johnson, 467 U.S. 504 (1984).

[1209] In Townsend v. Burke, 334 U.S. 736, 740–41 (1948) the Court overturned a sentence imposed on an uncounseled defendant by a judge who in reciting defendant's record from the bench made several errors and facetious comments. "[W]hile disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand."

[1210] In Hicks v. Oklahoma, 447 U.S. 343 (1980), the jury had been charged in accordance with a habitual offender statute that if it found defendant guilty of the offense charged, which would be a third felony conviction, it should assess punishment at 40 years imprisonment. The jury convicted and gave defendant 40 years. Subsequently, in another case, the habitual offender statute under which Hicks had been sentenced was declared unconstitutional, but Hicks' conviction was affirmed on the basis that his sentence was still within the permissible range open to the jury. The Supreme Court reversed. Hicks was denied due process because he was statutorily entitled to the exercise of the jury's discretion and could have been given a sentence as low as ten years. That the jury might still have given the stiffer sentence was only conjectural. On other due process restrictions on the determination of the applicability of recidivist statutes to convicted defendants, *see* Chewning v. Cunningham, 368 U.S. 443 (1962); Oyler v. Boles, 368 U.S. 448 (1962); Spencer v. Texas, 385 U.S. 554 (1967); Parke v. Raley, 506 U.S. 20 (1992).

[1211] Due process does not impose any limitation upon the sentence that a legislature may affix to any offense; that function is in the Eighth Amendment. Williams v. Oklahoma, 358 U.S. 576, 586–87 (1959). *See also* Collins v. Johnston, 237 U.S. 502 (1915). On recidivist statutes, *see* Graham v. West Virginia, 224 U.S. 616, 623 (1912); Ughbanks v. Armstrong, 208 U.S. 481, 488 (1908), and, under the Eighth Amendment, Rummel v. Estelle, 445 U.S. 263 (1980).

[1212] 337 U.S. 241 (1949). *See also* Williams v. Oklahoma, 358 U.S. 576 (1959).

[1213] 430 U.S. 349 (1977).

[1214] In *Gardner*, the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge sentenced the defendant to death, relying in part on a confidential presentence report which he did not characterize or make available to defense or prosecution. Justices Stevens, Stewart, and Powell found that be-

In *United States v. Grayson*,[1215] a noncapital case, the Court relied heavily on *Williams* in holding that a sentencing judge may properly consider his *belief* that the defendant was untruthful in his trial testimony in deciding to impose a more severe sentence than he would otherwise have imposed. the Court declared that, under the current scheme of individualized indeterminate sentencing, the judge must be free to consider the broadest range of information in assessing the defendant's prospects for rehabilitation; defendant's truthfulness, as assessed by the trial judge from his own observations, is relevant information.[1216]

There are various sentencing proceedings, however, that so implicate substantial rights that additional procedural protections are required.[1217] Thus, in *Specht v. Patterson*,[1218] the Court considered a defendant who had been convicted of taking indecent liberties, which carried a maximum sentence of ten years, but was sentenced under a sex offenders statute to an indefinite term of one day to life. The sex offenders law, the Court observed, did not make the commission of the particular offense the basis for sentencing. Instead, by triggering a new hearing to determine whether the convicted person was a public threat, a habitual offender, or mentally ill, the law in effect constituted a new charge that must be accompanied by procedural safeguards. And in *Mempa v. Rhay*,[1219] the Court held that, when sentencing is deferred subject to probation and the terms of probation are allegedly violated so that the con-

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cause death was significantly different from other punishments and because sentencing procedures were subject to higher due process standards than when *Williams* was decided, the report must be made part of the record for review so that the factors motivating imposition of the death penalty may be known, and ordinarily must be made available to the defense. 430 U.S. at 357–61. All but one of the other Justices joined the result on various other bases. Justice Brennan without elaboration thought the result was compelled by due process, id. at 364, while Justices White and Blackmun thought the result was necessitated by the Eighth Amendment, id. at 362, 364, as did Justice Marshall in a different manner. Id. at 365. Chief Justice Burger concurred only in the result, id. at 362, and Justice Rehnquist dissented. Id. at 371. *See also* Lankford v. Idaho, 500 U.S. 110 (1991) (due process denied where judge sentenced defendant to death after judge's and prosecutor's actions misled defendant and counsel into believing that death penalty would not be at issue in sentencing hearing).

[1215] 438 U.S. 41 (1978).

[1216] 438 U.S. at 49–52. *See also* United States v. Tucker, 404 U.S. 443, 446 (1972); Chaffin v. Stynchcombe, 412 U.S. 17, 32 (1973). *Cf.* 18 U.S.C. § 3577.

[1217] *See, e.g,* Kent v. United States, 383 U.S. 541, 554, 561, 563 (1966), where the Court required that before a juvenile court decided to waive jurisdiction and transfer a juvenile to an adult court it must hold a hearing and permit defense counsel to examine the probation officer's report which formed the basis for the court's decision. *Kent* was ambiguous whether it was based on statutory interpretation or constitutional analysis. *In re* Gault, 387 U.S. 1 (1967), however, appears to have constitutionalized the language.

[1218] 386 U.S. 605 (1967).

[1219] 389 U.S. 128 (1967).

victed defendant is returned for sentencing, he must then be represented by counsel, inasmuch as it is a point in the process where substantial rights of the defendant may be affected.

Due process considerations can also come into play in sentencing if the state attempts to withhold relevant information from the jury. For instance, in *Simmons v. South Carolina*, the Court held that due process requires that if prosecutor makes an argument for the death penalty based on the future dangerousness of the defendant to society, the jury must then be informed if the only alternative to a death sentence is a life sentence without possibility of parole.[1220] But, in *Ramdass v. Angelone*,[1221] the Court refused to apply the reasoning of *Simmons* because the defendant was not technically parole ineligible at time of sentencing.

A defendant should not be penalized for exercising a right to appeal. Thus, it is a denial of due process for a judge to sentence a convicted defendant on retrial to a longer sentence than he received after the first trial if the object of the sentence is to punish the defendant for having successfully appealed his first conviction or to discourage similar appeals by others.[1222] If the judge does impose a longer sentence the second time, he must justify it on the record by showing, for example, the existence of new information meriting a longer sentence.[1223]

Because the possibility of vindictiveness in resentencing is *de minimis* when it is the jury that sentences, however, the requirement of justifying a more severe sentence upon resentencing is inapplicable to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence.[1224] The presump-

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[1220] 512 U.S. 154 (1994). *See also* Lynch v. Arizona, 578 U.S. ___, No. 15–8366, slip op. at 3–4 (2016) (holding that the possibility of clemency and the potential for future "legislative reform" does not justify a departure from the rule of *Simmons*); Kelly v. South Carolina, 534 U.S. 246, 252 (2002) (concluding that a prosecutor need not express intent to rely on future dangerousness; logical inferences may be drawn); Shafer v. South Carolina, 532 U.S. 36 (2001) (amended South Carolina law still runs afoul of *Simmons*).

[1221] 530 U.S. 156 (2000).

[1222] North Carolina v. Pearce, 395 U.S. 711 (1969). *Pearce* was held to be nonretroactive in Michigan v. Payne, 412 U.S. 47 (1973). When a state provides a two-tier court system in which one may have an expeditious and somewhat informal trial in an inferior court with an absolute right to trial *de novo* in a court of general criminal jurisdiction if convicted, the second court is not bound by the rule in *Pearce*, because the potential for vindictiveness and inclination to deter is not present. Colten v. Kentucky, 407 U.S. 104 (1972). *But see* Blackledge v. Perry, 417 U.S. 21 (1974), discussed *supra*.

[1223] An intervening conviction on other charges for acts committed prior to the first sentencing may justify imposition of an increased sentence following a second trial. Wasman v. United States, 468 U.S. 559 (1984).

[1224] Chaffin v. Stynchcombe, 412 U.S. 17 (1973). The Court concluded that the possibility of vindictiveness was so low because normally the jury would not know

tion of vindictiveness is also inapplicable if the first sentence was imposed following a guilty plea. Here the Court reasoned that a trial may well afford the court insights into the nature of the crime and the character of the defendant that were not available following the initial guilty plea.[1225]

Corrective Process: Appeals and Other Remedies.—"An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review."[1226] This holding has been reaffirmed,[1227] although the Court has also held that, when a state does provide appellate review, it may not so condition the privilege as to deny it irrationally to some persons, such as indigents.[1228]

A state is not free, however, to have no corrective process in which defendants may pursue remedies for federal constitutional violations. In *Frank v. Mangum*,[1229] the Court asserted that a conviction obtained in a mob-dominated trial was contrary to due process: "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." Consequently, the Court has stated numerous times that the absence of some form of corrective process when the convicted defendant alleges a federal

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of the result of the prior trial nor the sentence imposed, nor would it feel either the personal or institutional interests of judges leading to efforts to discourage the seeking of new trials. Justices Stewart, Brennan, and Marshall thought the principle was applicable to jury sentencing and that prophylactic limitations appropriate to the problem should be developed. Id. at 35, 38. Justice Douglas dissented on other grounds. Id. at 35. The *Pearce* presumption that an increased, judge-imposed second sentence represents vindictiveness also is inapplicable if the second trial came about because the trial judge herself concluded that a retrial was necessary due to prosecutorial misconduct before the jury in the first trial. Texas v. McCullough, 475 U.S. 134 (1986).

[1225] Alabama v. Smith, 490 U.S. 794 (1989).

[1226] McKane v. Durston, 153 U.S. 684, 687 (1894). *See also* Andrews v. Swartz, 156 U.S. 272, 275 (1895); Murphy v. Massachusetts, 177 U.S. 155, 158 (1900); Reetz v. Michigan, 188 U.S. 505, 508 (1903).

[1227] Griffin v. Illinois, 351 U.S. 12, 18 (1956); id. at 21 (Justice Frankfurter concurring), 27 (dissenting opinion); Ross v. Moffitt, 417 U.S. 600 (1974).

[1228] The line of cases begins with Griffin v. Illinois, 351 U.S. 12 (1956), in which it was deemed to violate both the Due Process and the Equal Protection Clauses for a state to deny to indigent defendants free transcripts of the trial proceedings, which would enable them adequately to prosecute appeals from convictions. *See* analysis under "Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection—Generally," *infra.*

[1229] 237 U.S. 309, 335 (1915).

constitutional violation contravenes the Fourteenth Amendment,[1230] and the Court has held that to burden this process, such as by limiting the right to petition for *habeas corpus*, is to deny the convicted defendant his constitutional rights.[1231]

The mode by which federal constitutional rights are to be vindicated after conviction is for the government concerned to determine. "Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . In respecting the duty laid upon them . . . States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis*. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated." [1232] If a state provides a mode of redress, then a defendant must first exhaust that mode. If he is unsuccessful, or if a state does not provide an adequate mode of redress, then the defendant may petition a federal court for relief through a writ of *habeas corpus*.[1233]

When appellate or other corrective process is made available, because it is no less a part of the process of law under which a defendant is held in custody, it becomes subject to scrutiny for any alleged unconstitutional deprivation of life or liberty. At first, the Court seemed content to assume that, when a state appellate process formally appeared to be sufficient to correct constitutional errors committed by the trial court, the conclusion by the appellate court that the trial court's sentence of execution should be affirmed was ample assurance that life would not be forfeited without due process of law.[1234] But, in *Moore v. Dempsey*,[1235] while insisting that

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[1230] Moore v. Dempsey, 261 U.S. 86, 90, 91 (1923); Mooney v. Holohan, 294 U.S. 103, 113 (1935); New York ex rel. Whitman v. Wilson, 318 U.S. 688, 690 (1943); Young v. Ragan, 337 U.S. 235, 238–39 (1949).

[1231] *Ex parte* Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945).

[1232] Carter v. Illinois, 329 U.S. 173, 175–76 (1946).

[1233] In Case v. Nebraska, 381 U.S. 336 (1965) (per curiam), the Court had taken for review a case that raised the issue of whether a state could simply omit any corrective process for hearing and determining claims of federal constitutional violations, but it dismissed the case when the state in the interim enacted provisions for such process. Justices Clark and Brennan each wrote a concurring opinion.

[1234] Frank v. Mangum, 237 U.S. 309 (1915).

[1235] 261 U.S. 86 (1923).

it was not departing from precedent, the Court directed a federal district court in which petitioners had sought a writ of *habeas corpus* to make an independent investigation of the facts alleged by the petitioners—mob domination of their trial—notwithstanding that the state appellate court had ruled against the legal sufficiency of these same allegations. Indubitably, *Moore* marked the abandonment of the Supreme Court's deference, founded upon considerations of comity, to decisions of state appellate tribunals on issues of constitutionality, and the proclamation of its intention no longer to treat as virtually conclusive pronouncements by the latter that proceedings in a trial court were fair, an abandonment soon made even clearer in *Brown v. Mississippi* [1236] and now taken for granted.

The Court has held, however, that the Due Process Clause does not provide convicted persons a right to postconviction access to the state's evidence for DNA testing.[1237] Chief Justice Roberts, in a five-to-four decision, noted that 46 states had enacted statutes dealing specifically with access to DNA evidence, and that the Federal Government had enacted a statute that allows federal prisoners to move for court-ordered DNA testing under specified conditions. Even the states that had not enacted statutes dealing specifically with access to DNA evidence must, under the Due Process Clause, provide adequate postconviction relief procedures. The Court, therefore, saw "no reason to constitutionalize the issue." [1238] It also expressed concern that "[e]stablishing a freestanding right to access DNA evidence for testing would force us to act as policymakers . . . . We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when?" [1239]

Rights of Prisoners.—Until relatively recently the view prevailed that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state." [1240] This view is not now the law, and may

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[1236] 297 U.S. 278 (1936).

[1237] District Attorney's Office for the Third Judicial District v. Osborne, 557 U.S. ___, No. 08–6 (2009).

[1238] 557 U.S. ___, No. 08–6, slip op. at 2.

[1239] 557 U.S. ___, No. 08–6, slip op. at 20 (citation omitted). Justice Stevens, in a dissenting opinion joined by Justices Ginsburg and Breyer and in part by Justice Souter, concluded, "[T]here is no reason to deny access to the evidence and there are many reasons to provide it, not least of which is a fundamental concern in ensuring that justice has been done in this case." Id. at 17.

[1240] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

never have been wholly correct.[1241] In 1948 the Court declared that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights";[1242] "many," indicated less than "all," and it was clear that the Due Process and Equal Protection Clauses to some extent do apply to prisoners.[1243] More direct acknowledgment of constitutional protection came in 1972: "[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' which include prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations. But persons in prison, like other individuals, have the right to petition the government for redress of grievances . . . ."[1244] However, while the Court affirmed that federal courts have the responsibility to scrutinize prison practices alleged to violate the Constitution, at the same time concerns of federalism and of judicial restraint caused the Court to emphasize the necessity of deference to the judgments of prison officials and others with responsibility for administering such systems.[1245]

Save for challenges to conditions of confinement of pretrial detainees,[1246] the Court has generally treated challenges to prison con-

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[1241] *Cf. In re* Bonner, 151 U.S. 242 (1894).

[1242] Price v. Johnston, 334 U.S. 266, 285 (1948).

[1243] "There is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

[1244] Cruz v. Beto, 405 U.S. 319, 321 (1972). *See also* Procunier v. Martinez, 416 U.S. 396, 404–05 (1974) (invalidating state prison mail censorship regulations).

[1245] Bell v. Wolfish, 441 U.S. 520, 545–548, 551, 555, 562 (1979) (federal prison); Rhodes v. Chapman, 452 U.S. 337, 347, 351–352 (1981).

[1246] *See* Bell v. Wolfish, 441 U.S. 520, 535–40 (1979). Persons not yet convicted of a crime may be detained by the government upon the appropriate determination of probable cause, and the government is entitled to "employ devices that are calculated to effectuate [a] detention." *Id*. at 537. Nonetheless, the Court has held that the Due Process Clause protects a pretrial detainee from being subject to conditions that amount to punishment, which can be demonstrated through (1) actions taken with the "express intent to punish" or (2) the use of restrictions or conditions on confinement that are not reasonably related to a legitimate goal. *See Wolfish*, 441 U.S. at 538, 561. More recently, the Court clarified the standard by which the due process rights of pretrial detainees are adjudged with respect to excessive force claims. Specifically, in *Kingsley v. Hendrickson*, the Court held that, in order for a pretrial detainee to prove an excessive force claim in violation of his due process rights, a plaintiff must show that an officer's use of force was objectively unreasonable, depending on the facts and circumstances from the perspective of a reasonable officer on the scene, *see* 576 U.S. ___, No. 14–6368, slip op. at 6–7 (2015), aligning the due process excessive force analysis with the standard for excessive force claims brought under the Fourth Amendment. *Cf.* Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that a "free citizen's claim that law enforcement officials used excessive force . . . [is] properly analyzed under the Fourth Amendment's 'objective reasonableness' standard"). Liability for actions taken by the government in the context of a pretrial detainee due process lawsuit does not, therefore, turn on whether a particular officer subjectively knew that the conduct being taken was unreasonable. *See Kingsley*, slip op. at 1.

ditions as a whole under the Cruel and Unusual Punishments Clause of the Eighth Amendment,[1247] while challenges to particular incidents and practices are pursued under the Due Process Clause [1248] or more specific provisions, such as the First Amendment's speech and religion clauses.[1249] Prior to formulating its current approach, the Court recognized several rights of prisoners. Prisoners have the right to petition for redress of grievances, which includes access to the courts for purposes of presenting their complaints,[1250] and to bring actions in federal courts to recover for damages wrongfully done them by prison administrators.[1251] And they have a right, circumscribed by legitimate prison administration considerations, to fair and regular treatment during their incarceration. Prisoners have a right to be free of racial segregation in prisons, except for the necessities of prison security and discipline.[1252]

In *Turner v. Safley*,[1253] the Court announced a general standard for measuring prisoners' claims of deprivation of constitutional rights: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." [1254] Several considerations, the

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[1247] *See* "Prisons and Punishment," *supra*.

[1248] *E.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Baxter v. Palmigiano, 425 U.S. 308 (1976); Vitek v. Jones, 445 U.S. 480 (1980); Washington v. Harper, 494 U.S. 210 (1990) (prison inmate has liberty interest in avoiding the unwanted administration of antipsychotic drugs).

[1249] *E.g.*, Procunier v. Martinez, 416 U.S. 396 (1974); Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977). On religious practices and ceremonies, *see* Cooper v. Pate, 378 U.S. 546 (1964); Cruz v. Beto, 405 U.S. 319 (1972).

[1250] *Ex parte* Hull, 312 U.S. 546 (1941); White v. Ragen, 324 U.S. 760 (1945). Prisoners must have reasonable access to a law library or to persons trained in the law. Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1978). Establishing a right of access to law materials, however, requires an individualized demonstration of an inmate having been hindered in efforts to pursue a legal claim. *See* Lewis v. Casey, 518 U.S. 343 (1996) (no requirement that the state "enable [a] prisoner to discover grievances, and to litigate effectively").

[1251] Haines v. Kerner, 404 U.S. 519 (1972); Preiser v. Rodriguez, 411 U.S. 475 (1973).

[1252] Lee v. Washington, 390 U.S. 333 (1968). There was some question as to the standard to be applied to racial discrimination in prisons after Turner v. Safley, 482 U.S. 78 (1987) (prison regulations upheld if "reasonably related to legitimate penological interests"). In Johnson v. California, 543 U.S. 499 (2005), however, the Court held that discriminatory prison regulations would continue to be evaluated under a "strict scrutiny" standard, which requires that regulations be narrowly tailored to further compelling governmental interests. Id. at 509–13 (striking down a requirement that new or transferred prisoners at the reception area of a correctional facility be assigned a cellmate of the same race for up to 60 days before they are given a regular housing assignment).

[1253] 482 U.S. 78 (1987)

[1254] 482 U.S. at 89 (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child). *See* Overton v. Bazzetta, 539 U.S. 126 (2003) (upholding restrictions on prison visitation by unrelated children or children

Court indicated, are appropriate in determining reasonableness of a prison regulation. First, there must be a rational relation to a legitimate, content-neutral objective, such as prison security, broadly defined. Availability of other avenues for exercise of the inmate right suggests reasonableness.[1255] A further indicium of reasonableness is present if accommodation would have a negative effect on the liberty or safety of guards, other inmates,[1256] or visitors.[1257] On the other hand, "if an inmate claimant can point to an alternative that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests," it would suggest unreasonableness.[1258]

Fourth Amendment protection is incompatible with "the concept of incarceration and the needs and objectives of penal institutions"; hence, a prisoner has no reasonable expectation of privacy in his prison cell protecting him from "shakedown" searches designed to root out weapons, drugs, and other contraband.[1259] Avenues of redress "for calculated harassment unrelated to prison needs" are not totally blocked, the Court indicated; inmates may still seek protection in the Eighth Amendment or in state tort law.[1260] Existence of "a meaningful postdeprivation remedy" for unauthorized, intentional deprivation of an inmate's property by prison personnel protects the inmate's due process rights.[1261] Due process is not implicated at all by negligent deprivation of life, liberty, or property by prison officials.[1262]

A change of the conditions under which a prisoner is housed, including one imposed as a matter of discipline, may implicate a protected liberty interest if such a change imposes an "atypical and significant hardship" on the inmate.[1263] In *Wolff v. McDonnell*,[1264]

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over which a prisoner's parental rights have been terminated and visitation where a prisoner has violated rules against substance abuse).

[1255] For instance, limiting who may visit prisoners is ameliorated by the ability of prisoners to communicate through other visitors, by letter, or by phone. 539 U.S. at 135.

[1256] 482 U.S. at 90, 92.

[1257] Hudson v. Palmer, 468 U.S. 517, 526 (1984).

[1258] 482 U.S. at 91.

[1259] Hudson v. Palmer, 468 U.S. 517, 526 (1984); Block v. Rutherford, 468 U.S. 576 (1984) (holding also that needs of prison security support a rule denying pretrial detainees contact visits with spouses, children, relatives, and friends).

[1260] Hudson v. Palmer, 468 U.S. 517, 530 (1984).

[1261] Hudson v. Palmer, 468 U.S. 517, 533 (1984) (holding that state tort law provided adequate postdeprivation remedies). *But see* Zinermon v. Burch, 494 U.S. 113 (1990) (availability of postdeprivation remedy is inadequate when deprivation is foreseeable, predeprivation process was possible, and official conduct was not "unauthorized").

[1262] Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986).

[1263] Sandin v. Conner, 515 U.S. 472, 484 (1995) (30-day solitary confinement not atypical "in relation to the ordinary incidents of prison life").

the Court promulgated due process standards to govern the imposition of discipline upon prisoners. Due process applies, but, because prison disciplinary proceedings are not part of a criminal prosecution, the full panoply of a defendant's rights is not available. Rather, the analysis must proceed by identifying the interest in "liberty" that the clause protects. Thus, where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for serious misconduct, the interest of the prisoner in this degree of "liberty" entitles him to the minimum procedures appropriate under the circumstances.[1265] What the minimum procedures consist of is to be determined by balancing the prisoner's interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions.

The Court in *Wolff* held that the prison must afford the subject of a disciplinary proceeding "advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the action taken."[1266] In addition, an "inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[1267] Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt threaten valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Finally, only a partial right to an impartial tribunal was recognized, the Court ruling that limitations imposed on the discretion of a committee of prison officials sufficed for this purpose.[1268] Revocation of good time credits, the Court later ruled, must be supported by "some evidence in the record," but an amount that "might be characterized as meager" is constitutionally sufficient.[1269]

[1264] 418 U.S. 539 (1974).

[1265] 418 U.S. at 557. This analysis, of course, tracks the interest analysis discussed under "The Interests Protected: Entitlements and Positivist Recognition," *supra*.

[1266] 418 U.S. at 563.

[1267] 418 U.S. at 566. However, the Court later ruled that the reasons for denying an inmate's request to call witnesses need not be disclosed until the issue is raised in court. Ponte v. Real, 471 U.S. 491 (1985).

[1268] 418 U.S. at 561–72. The Court continues to adhere to its refusal to require appointment of counsel. Vitek v. Jones, 445 U.S. 480, 496–97 (1980), and id. at 497–500 (Justice Powell concurring); Baxter v. Palmigiano, 425 U.S. 308 (1976).

[1269] Superintendent v. Hill, 472 U.S. 445, 454, 457 (1985).

Determination whether due process requires a hearing before a prisoner is transferred from one institution to another requires a close analysis of the applicable statutes and regulations as well as a consideration of the particular harm suffered by the transferee. On the one hand, the Court found that no hearing need be held prior to the transfer from one prison to another prison in which the conditions were substantially less favorable. Because the state had not conferred any right to remain in the facility to which the prisoner was first assigned, defeasible upon the commission of acts for which transfer is a punishment, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all; consequently, there was nothing to hold a hearing about.[1270] The same principles govern interstate prison transfers.[1271]

Transfer of a prisoner to a high security facility, with an attendant loss of the right to parole, gave rise to a liberty interest, although the due process requirements to protect this interest are limited.[1272] On the other hand, transfer of a prisoner to a mental hospital pursuant to a statute authorizing transfer if the inmate suffers from a "mental disease or defect" must, for two reasons, be preceded by a hearing. First, the statute gave the inmate a liberty interest, because it presumed that he would not be moved absent a finding that he was suffering from a mental disease or defect. Second, unlike transfers from one prison to another, transfer to a mental institution was not within the range of confinement covered by the prisoner's sentence, and, moreover, imposed a stigma constituting a deprivation of a liberty interest.[1273]

The *kind* of hearing that is required before a state may force a mentally ill prisoner to take antipsychotic drugs against his will was at issue in *Washington v. Harper*.[1274] There the Court held that a judicial hearing was not required. Instead, the inmate's substantive liberty interest (derived from the Due Process Clause as well as from state law) was adequately protected by an administrative hearing before independent medical professionals, at which hearing the inmate has the right to a lay advisor but not an attorney.

[1270] Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976).

[1271] Olim v. Wakinekona, 461 U.S. 238 (1983).

[1272] Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (assignment to Ohio SuperMax prison, with attendant loss of parole eligibility and with only annual status review, constitutes an "atypical and significant hardship"). In *Wilkinson*, the Court upheld Ohio's multi-level review process, despite the fact that a prisoner was provided only summary notice as to the allegations against him, a limited record was created, the prisoner could not call witnesses, and reevaluation of the assignment only occurred at one 30-day review and then annually. Id. at 219–20.

[1273] Vitek v. Jones, 445 U.S. 480 (1980).

[1274] 494 U.S. 210 (1990).

Probation and Parole.—Sometimes convicted defendants are not sentenced to jail, but instead are placed on probation subject to incarceration upon violation of the conditions that are imposed; others who are jailed may subsequently qualify for release on parole before completing their sentence, and are subject to reincarceration upon violation of imposed conditions. Because both of these dispositions are statutory privileges granted by the governmental authority,[1275] it was long assumed that the administrators of the systems did not have to accord procedural due process either in the granting stage or in the revocation stage. Now, both granting and revocation are subject to due process analysis, although the results tend to be disparate. Thus, in *Mempa v. Rhay*,[1276] the trial judge had deferred sentencing and placed the convicted defendant on probation; when facts subsequently developed that indicated a violation of the conditions of probation, he was summoned and summarily sentenced to prison. The Court held that he was entitled to counsel at the deferred sentencing hearing.

In *Morrissey v. Brewer* [1277] a unanimous Court held that parole revocations must be accompanied by the usual due process hearing and notice requirements. "[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocation . . . [But] the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." [1278] What process is due, then, turned upon the state's interests. Its principal interest was that, having once convicted a defendant, imprisoned him, and, at some risk, released him for rehabilitation purposes, it should be "able to return the individual to imprisonment without the burden of a

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[1275] Ughbanks v. Armstrong, 208 U.S. 481 (1908), held that parole is not a constitutional right but instead is a "present" from government to the prisoner. In Escoe v. Zerbst, 295 U.S. 490 (1935), the Court's premise was that as a matter of grace the parolee was being granted a privilege and that he should neither expect nor seek due process. Then-Judge Burger in Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963), reasoned that due process was inapplicable because the parole board's function was to assist the prisoner's rehabilitation and restoration to society and that there was no adversary relationship between the board and the parolee.

[1276] 389 U.S. 128 (1967).

[1277] 408 U.S. 471 (1972).

[1278] 408 U.S. at 480, 482.

new adversary criminal trial if in fact he has failed to abide by the conditions of his parole. Yet, the state has no interest in revoking parole without some informal procedural guarantees," inasmuch as such guarantees will not interfere with its reasonable interests.[1279]

Minimal due process, the Court held, requires that at both stages of the revocation process—the arrest of the parolee and the formal revocation—the parolee is entitled to certain rights. Promptly following arrest of the parolee, there should be an informal hearing to determine whether reasonable grounds exist for revocation of parole; this preliminary hearing should be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available, and should be conducted by someone not directly involved in the case, though he need not be a judicial officer. The parolee should be given adequate notice that the hearing will take place and what violations are alleged, he should be able to appear and speak in his own behalf and produce other evidence, and he should be allowed to examine those who have given adverse evidence against him unless it is determined that the identity of such informant should not be revealed. Also, the hearing officer should prepare a digest of the hearing and base his decision upon the evidence adduced at the hearing.[1280]

Prior to the final decision on revocation, there should be a more formal revocation hearing at which there would be a final evaluation of any contested relevant facts and consideration whether the facts as determined warrant revocation. The hearing must take place within a reasonable time after the parolee is taken into custody and he must be enabled to controvert the allegations or offer evidence in mitigation. The procedural details of such hearings are for the states to develop, but the Court specified minimum requirements of due process. "They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole."[1281] Ordinarily, the written statement need not indicate that the sentencing court or review board

[1279] 408 U.S. at 483.
[1280] 408 U.S. at 484–87.
[1281] 408 U.S. at 489.

considered alternatives to incarceration,[1282] but a sentencing court must consider such alternatives if the probation violation consists of the failure of an indigent probationer, through no fault of his own, to pay a fine or restitution.[1283]

The Court has applied a flexible due process standard to the provision of counsel. Counsel is not invariably required in parole or probation revocation proceedings. The state should, however, provide the assistance of counsel where an indigent person may have difficulty in presenting his version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be provided where the person requests counsel, based on a timely and colorable claim that he has not committed the alleged violation, or if that issue be uncontested, there are reasons in justification or mitigation that might make revocation inappropriate.[1284]

With respect to the granting of parole, the Court's analysis of the Due Process Clause's meaning in *Greenholtz v. Nebraska Penal Inmates* [1285] is much more problematical. The theory was rejected that the mere establishment of the possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to a due process protected expectation of being dealt with in any particular way. On the other hand, the Court did recognize that a parole statute could create an expectancy of release entitled to some measure of constitutional protection, although a determination would need to be made on a case-by-case basis,[1286] and the full panoply of due process guarantees is not required.[1287] Where, however, government by its statutes and regu-

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[1282] Black v. Romano, 471 U.S. 606 (1985).

[1283] Bearden v. Georgia, 461 U.S. 660, 672 (1983).

[1284] Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[1285] 442 U.S. 1 (1979). Justice Powell thought that creation of a parole system did create a legitimate expectancy of fair procedure protected by due process, but, save in one respect, he agreed with the Court that the procedure followed was adequate. Id. at 18. Justices Marshall, Brennan, and Stevens argued in dissent that the Court's analysis of the liberty interest was faulty and that due process required more than the board provided. Id. at 22.

[1286] Following *Greenholtz*, the Court held in Board of Pardons v. Allen, 482 U.S. 369 (1987), that a liberty interest was created by a Montana statute providing that a prisoner "shall" be released upon certain findings by a parole board. *Accord* Swarthout v. Cooke, 562 U.S. ___, 10–333, slip op. (2011) (*per curiam*).

[1287] The Court in *Greenholtz* held that procedures designed to elicit specific facts were inappropriate under the circumstances, and minimizing the risk of error should be the prime consideration. This goal may be achieved by the board's largely informal methods; eschewing formal hearings, notice, and specification of particular evidence in the record. The inmate in this case was afforded an opportunity to be heard and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due. *Accord* Swarthout v. Cooke, 562 U.S. ___, 10–333, slip op. (2011) (*per curiam*).

lations creates no obligation of the pardoning authority and thus creates no legitimate expectancy of release, the prisoner may not by showing the favorable exercise of the authority in the great number of cases demonstrate such a legitimate expectancy. The power of the executive to pardon, or grant clemency, being a matter of grace, is rarely subject to judicial review.[1288]

The Problem of the Juvenile Offender.—All fifty states and the District of Columbia provide for dealing with juvenile offenders outside the criminal system for adult offenders.[1289] Their juvenile justice systems apply both to offenses that would be criminal if committed by an adult and to delinquent behavior not recognizable under laws dealing with adults, such as habitual truancy, deportment endangering the morals or health of the juvenile or others, or disobedience making the juvenile uncontrollable by his parents. The reforms of the early part of the 20th century provided not only for segregating juveniles from adult offenders in the adjudication, detention, and correctional facilities, but they also dispensed with the substantive and procedural rules surrounding criminal trials which were mandated by due process. Justification for this abandonment of constitutional guarantees was offered by describing juvenile courts as civil not criminal and as not dispensing criminal punishment, and offering the theory that the state was acting as *parens patriae* for the juvenile offender and was in no sense his adversary.[1290]

Disillusionment with the results of juvenile reforms coupled with judicial emphasis on constitutional protection of the accused led in the 1960s to a substantial restriction of these elements of juvenile jurisprudence. After tracing in much detail this history of juvenile courts, the Court held in *In re Gault* [1291] that the application of due process to juvenile proceedings would not endanger the good inten-

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[1288] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272 (1998). The mere existence of purely discretionary authority and the frequent exercise of it creates no entitlement. Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981); Jago v. Van Curen, 454 U.S. 14 (1981). The former case involved not parole but commutation of a life sentence, commutation being necessary to become eligible for parole. The statute gave the Board total discretion to commute, but in at least 75% of the cases prisoner received a favorable action and virtually all of the prisoners who had their sentences commuted were promptly paroled. In *Van Curen*, the Court made express what had been implicit in *Dumschat*; the "mutually explicit understandings" concept under which some property interests are found protected does not apply to liberty interests. *Van Curen* is also interesting because there the parole board had granted the petition for parole but within days revoked it before the prisoner was released, upon being told that he had lied at the hearing before the board.

[1289] For analysis of the state laws as well as application of constitutional principles to juveniles, *see* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM (2d ed. 2006).

[1290] *In re* Gault, 387 U.S. 1, 12–29 (1967).

[1291] 387 U.S. 1 (1967).

tions vested in the system nor diminish the features of the system which were deemed desirable—emphasis upon rehabilitation rather than punishment, a measure of informality, avoidance of the stigma of criminal conviction, the low visibility of the process—but that the consequences of the absence of due process standards made their application necessary.[1292]

Thus, the Court in *Gault* required that notice of charges be given in time for the juvenile to prepare a defense, required a hearing in which the juvenile could be represented by retained or appointed counsel, required observance of the rights of confrontation and cross-examination, and required that the juvenile be protected against self-incrimination.[1293] It did not pass upon the right of appeal or the failure to make transcripts of hearings. Earlier, the Court had held that before a juvenile could be "waived" to an adult court for trial, there had to be a hearing and findings of reasons, a result based on statutory interpretation but apparently constitutionalized in *Gault*.[1294] Subsequently, the Court held that the "essentials of due process and fair treatment" required that a juvenile could be adjudged delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if committed by an adult,[1295] but still later the Court held that jury trials were not constitutionally required in juvenile trials.[1296]

[1292] "Ultimately, however, we confront the reality of that portion of the juvenile court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes 'a building with white-washed walls, regimented routine and institutional hours . . . .' Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." 387 U.S. at 27–28.

[1293] 387 U.S. at 31–35. Justice Harlan concurred in part and dissented in part, id. at 65, agreeing on the applicability of due process but disagreeing with the standards of the Court. Justice Stewart dissented wholly, arguing that the application of procedures developed for adversary criminal proceedings to juvenile proceedings would endanger their objectives and contending that the decision was a backward step toward undoing the reforms instituted in the past. Id. at 78.

[1294] Kent v. United States, 383 U.S. 541 (1966), noted on this point in *In re* Gault, 387 U.S. 1, 30–31 (1967).

[1295] *In re* Winship, 397 U.S. 358 (1970). Chief Justice Burger and Justice Stewart dissented, following essentially the Stewart reasoning in *Gault*. "The Court's opinion today rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitation. . . . What the juvenile court systems need is not more but less of the trappings of legal procedure and judi-

On a few occasions the Court has considered whether rights accorded to adults during investigation of crime are to be accorded juveniles. In one such case the Court ruled that a juvenile undergoing custodial interrogation by police had not invoked a *Miranda* right to remain silent by requesting permission to consult with his probation officer, since a probation officer could not be equated with an attorney, but indicated as well that a juvenile's waiver of *Miranda* rights was to be evaluated under the same totality-of-the-circumstances approach applicable to adults. That approach "permits—indeed it mandates—inquiry into all the circumstances surrounding the interrogation . . . includ[ing] evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him . . . ." [1297] In another case the Court ruled that, although the Fourth Amendment applies to searches of students by public school authorities, neither the warrant requirement nor the probable cause standard is appropriate.[1298] Instead, a simple reasonableness standard governs all searches of students' persons and effects by school authorities.[1299]

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cial formalism; the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court." Id. at 375, 376. Justice Black dissented because he did not think the reasonable doubt standard a constitutional requirement at all. Id. at 377.

[1296] McKeiver v. Pennsylvania, 403 U.S. 528 (1971). No opinion was concurred in by a majority of the Justices. Justice Blackmun's opinion of the Court, which was joined by Chief Justice Burger and Justices Stewart and White, reasoned that a juvenile proceeding was not "a criminal prosecution" within the terms of the Sixth Amendment, so that jury trials were not automatically required; instead, the prior cases had proceeded on a "fundamental fairness" approach and in that regard a jury was not a necessary component of fair factfinding and its use would have serious repercussions on the rehabilitative and protection functions of the juvenile court. Justice White also submitted a brief concurrence emphasizing the differences between adult criminal trials and juvenile adjudications. Id. at 551. Justice Brennan concurred in one case and dissented in another because in his view open proceedings would operate to protect juveniles from oppression in much the same way as a jury would. Id. at 553. Justice Harlan concurred because he did not believe jury trials were constitutionally mandated in state courts. Id. at 557. Justices Douglas, Black, and Marshall dissented. Id. at 557.

[1297] Fare v. Michael C., 442 U.S. 707, 725 (1979).

[1298] New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding the search of a student's purse to determine whether the student possessed cigarettes in violation of school rule; evidence of drug activity held admissible in a prosecution under the juvenile laws). In Safford Unified School District #1 v. Redding, 557 U.S. ___, No. 08–479 (2009), the Court found unreasonable a strip search of a 13-year-old girl suspected of possessing ibuprofen. *See* Fourth Amendment, "Public Schools," *supra*.

[1299] This single rule, the Court explained, will permit school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." 469 U.S. at 342 n.9.

The Court ruled in *Schall v. Martin* [1300] that preventive detention of juveniles does not offend due process when it serves the legitimate state purpose of protecting society and the juvenile from potential consequences of pretrial crime, when the terms of confinement serve those legitimate purposes and are nonpunitive, and when procedures provide sufficient protection against erroneous and unnecessary detentions. A statute authorizing pretrial detention of accused juvenile delinquents on a finding of "serious risk" that the juvenile would commit crimes prior to trial, providing for expedited hearings (the maximum possible detention was 17 days), and guaranteeing a formal, adversarial probable cause hearing within that period, was found to satisfy these requirements.

Each state has a procedure by which juveniles may be tried as adults.[1301] With the Court having clarified the constitutional requirements for imposition of capital punishment, it was only a matter of time before the Court would have to determine whether states may subject juveniles to capital punishment. In *Stanford v. Kentucky*,[1302] the Court held that the Eighth Amendment does not categorically prohibit imposition of the death penalty for individuals who commit crimes at age 16 or 17; earlier the Court had invalidated a statutory scheme permitting capital punishment for crimes committed before age 16.[1303] In weighing validity under the Eighth Amendment, the Court has looked to state practice to determine whether a consensus against execution exists.[1304] Still to be considered by the Court are such questions as the substantive and procedural guarantees to be applied in proceedings when the matter at issue is non-criminal delinquent behavior.

The Problem of Civil Commitment.—As with juvenile offenders, several other classes of persons are subject to confinement by court processes deemed civil rather than criminal. Within this category of "protective commitment" are involuntary commitments for treatment of insanity and other degrees of mental disability, alcoholism, narcotics addiction, sexual psychopathy, and the like. In *O'Connor v. Donaldson*,[1305] the Court held that "a State cannot constitutionally confine without more a nondangerous individual who

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[1300] 467 U.S. 253 (1984).

[1301] *See* SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM, ch. 4, Waiver of Jurisdiction (2d ed. 1989).

[1302] 492 U.S. 361 (1989).

[1303] Thompson v. Oklahoma, 487 U.S. 815 (1988).

[1304] *See* analysis of Eighth Amendment principles, under "Capital Punishment," *supra*.

[1305] 422 U.S. 563 (1975). The Court bypassed "the difficult issues of constitutional law" raised by the lower courts' resolution of the case, that is, the right to treatment of the involuntarily committed, discussed under "Liberty Interests of People with Mental Disabilities: Commitment and Treatment," *supra*.

is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." [1306] The jury had found that Donaldson was not dangerous to himself or to others, and the Court ruled that he had been unconstitutionally confined.[1307] Left to another day were such questions as "when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness" [1308] and the right, if any, to receive treatment for the confined person's illness. To conform to due process requirements, procedures for voluntary admission should recognize the possibility that persons in need of treatment may not be competent to give informed consent; this is not a situation where availability of a meaningful post-deprivation remedy can cure the due process violation.[1309]

Procedurally, it is clear that an individual's liberty interest in being free from unjustifiable confinement and from the adverse social consequences of being labeled mentally ill requires the government to assume a greater share of the risk of error in proving the existence of such illness as a precondition to confinement. Thus, the evidentiary standard of a preponderance, normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings. On the other hand, the criminal standard of beyond a reasonable doubt is not necessary because the state's aim is not punitive and because some or even much of the consequence of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment.

[1306] 422 U.S. at 576. Prior to O'Connor v. Donaldson, only in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940), had the Court considered the issue. Other cases reflected the Court's concern with the rights of convicted criminal defendants and generally required due process procedures or that the commitment of convicted criminal defendants follow the procedures required for civil commitments. Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966); Lynch v. Overholser, 369 U.S. 705 (1962); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); McNeil v. Director, 407 U.S. 245 (1972). *Cf.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

[1307] 422 U.S. at 576–77. The Court remanded to allow the trial court to determine whether Donaldson should recover personally from his doctors and others for his confinement, under standards formulated under 42 U.S.C. § 1983. *See* Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974).

[1308] O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).

[1309] Zinermon v. Burch, 494 U.S. 113 (1990).

The Court therefore imposed a standard of "clear and convincing" evidence.[1310]

In *Parham v. J.R.*, the Court confronted difficult questions as to what due process requires in the context of commitment of allegedly mentally ill and mentally retarded children by their parents or by the state, when such children are wards of the state.[1311] Under the challenged laws there were no formal preadmission hearings, but psychiatric and social workers did interview parents and children and reached some form of independent determination that commitment was called for. The Court acknowledged the potential for abuse but balanced this against such factors as the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually act in behalf of their children's welfare, the independent role of medical professionals in deciding to accept the children for admission, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing such care and interfere with the ability of parents to assist with the care of institutionalized children.[1312] Similarly, the same concerns, reflected in the statutory obligation of the state to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the government.[1313] Left to future resolution was the question of the due process requirements for postadmission review of the necessity for continued confinement.[1314]

EQUAL PROTECTION OF THE LAWS

Scope and Application

State Action.—The Fourteenth Amendment, by its terms, limits discrimination only by governmental entities, not by private parties.[1315] As the Court has noted, "the action inhibited by the first

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[1310] Addington v. Texas, 441 U.S. 418 (1979). *See also* Vitek v. Jones, 445 U.S. 480 (1980) (transfer of prison inmate to mental hospital).

[1311] 442 U.S. 584 (1979). *See also* Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).

[1312] 442 U.S. at 598–617. The dissenters agreed on this point. Id. at 626–37.

[1313] 442 U.S. at 617–20. The dissenters would have required a preconfinement hearing. Id. at 637–38.

[1314] 442 U.S. at 617. The dissent would have mandated a formal postadmission hearing. Id. at 625–26.

[1315] The Amendment provides that "[n]o State" and "nor shall any State" engage in the proscribed conduct. There are, of course, numerous federal statutes that prohibit discrimination by private parties. *See*, *e.g.*, Civil Rights Act of 1964, Title II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a *et seq.* These statutes, however, are generally based on Congress's power to regulate commerce. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." [1316] Although state action requirements also apply to other provisions of the Constitution [1317] and to federal governmental actions,[1318] the doctrine is most often associated with the application of the Equal Protection Clause to the states.[1319]

Certainly, an act passed by a state legislature that directs a discriminatory result is state action and would violate the first section of the Fourteenth Amendment.[1320] In addition, acts by other branches of government "by whatever instruments or in whatever modes that action may be taken" can result in a finding of "state action." [1321] But the difficulty for the Court has been when the con-

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[1316] Shelley v. Kraemer, 334 U.S. 1, 13 (1948). "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws." *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

[1317] The doctrine applies to other rights protected of the Fourteenth Amendment, such as privileges and immunities and failure to provide due process. It also applies to Congress's enforcement powers under section 5 of the Amendment. For discussion of the latter, *see* Section 5, Enforcement, "State Action," *infra*. Several other constitutional rights are similarly limited—the Fifteenth Amendment (racial discrimination in voting), the Nineteenth Amendment (sex discrimination in voting) and the Twenty-sixth Amendment (voting rights for 18-year olds)—although the Thirteenth Amendment, banning slavery and involuntary servitude, is not.

[1318] The scope and reach of the "state action" doctrine is the same whether a state or the National Government is concerned. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[1319] Recently, however, because of broadening due process conceptions and the resulting litigation, issues of state action have been raised with respect to the Due Process Clause. *See*, *e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

[1320] United States v. Raines, 362 U.S. 17, 25 (1960). A prime example is the statutory requirement of racially segregated schools condemned in Brown v. Board of Education, 347 U.S. 483 (1954). *See also* Peterson v. City of Greenville, 373 U.S. 244 (1963), holding that trespass convictions of African-Americans "sitting-in" at a lunch counter over the objection of the manager cannot stand because of a local ordinance commanding such separation, irrespective of the manager's probable attitude if no such ordinance existed.

[1321] *Ex parte* Virginia, 100 U.S. 339, 346 (1880). "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." Id. at 346–47

duct complained of is not so clearly the action of a state. For instance, is it state action when a minor state official's act was not authorized or perhaps was even forbidden by state law? What if a private party engages in discrimination while in a special relationship with governmental authority? "The vital requirement is State responsibility," Justice Frankfurter once wrote, "that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to deny protected rights.[1322]

The state action doctrine is not just a textual interpretation of the Fourteenth Amendment, but may also serve the purposes of federalism. Thus, following the Civil War, when the Court sought to reassert states' rights, it imposed a rather rigid state action standard, limiting the circumstances under which discrimination suits could be pursued. During the civil rights movement of the 1950s and 1960s, however when almost all state action contentions were raised in a racial context, the Court generally found the presence of state action. As it grew more sympathetic to federalism concerns in the late 1970s and 1980s, the Court began to reassert a strengthened state action doctrine, primarily but hardly exclusively in nonracial cases.[1323] "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." [1324]

[1322] Terry v. Adams, 345 U.S. 461, 473 (1953) (concurring) (concerning the Fifteenth Amendment).

[1323] The history of the state action doctrine makes clear that the Court has considerable discretion and that the weighing of the opposing values and interests will lead to substantially different applications of the tests. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[1324] Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982). "Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instru-

Operation of the state action doctrine was critical in determining whether school systems were segregated unconstitutionally by race. The original *Brown* cases as well as many subsequent cases arose in the context of statutorily mandated separation of the races, and therefore the finding of state action occasioned no controversy.[1325] In the South, the aftermath of the case more often involved disputes over which remedies were needed to achieve a unitary system than it did the requirements of state action.[1326] But if racial segregation is not the result of state action in some aspect, then its existence is not subject to constitutional remedy.[1327] Distinguishing between the two situations has occasioned much controversy.

For instance, in a case arising from a Denver, Colorado school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that *de jure* racial segregation caused by "intentionally segregative school board actions" is to be treated as if it had been mandated by statute, and is to be distinguished from *de facto* segregation arising from actions not associated with the state.[1328] In addition, when it is proved that a meaningful portion of a school system is segregated as a result of official action, the responsible agency must then bear the burden of proving that other school segregation within the system is adventitious and not the result of official action.[1329] Moreover, the Court has also apparently adopted a rule that if it can be proved that at some time in the past a school board has purposefully maintained a racially separated system, a continuing obligation to dismantle that system can devolve upon the agency so that so that subsequent facially neutral or ambiguous school board policies can form the basis for a judicial finding of intentional discrimination.[1330]

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ments of local authority." Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Justice Harlan concurring).

[1325] Brown v. Board of Education, 347 U.S. 483 (1954).

[1326] *See* "Brown's Aftermath," *supra*.

[1327] *Compare* Washington v. Seattle School Dist., 458 U.S. 457 (1982), *with* Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982).

[1328] "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate." Keyes v. Denver School District, 413 U.S. 189, 208 (1973) (emphasis by Court). *See also* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979).

[1329] It is not the responsibility of complainants to show that each school in a system is *de jure* segregated to be entitled to a system-wide desegregation plan. 413 U.S. at 208–13. The continuing validity of the *Keyes* shifting-of-the-burden principle, after Washington v. Davis, 426 U.S. 229 (1976), and Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977), was asserted in Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 455–458 & n.7, 467–68 (1979), and Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 540–42 (1979).

[1330] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458–61 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534–40 (1979).

Different results follow, however, when inter-district segregation is an issue. Disregard of district lines is permissible by a federal court in formulating a desegregation plan only when it finds an inter-district violation. "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantive cause of inter-district segregation." [1331] The *de jure/de facto* distinction is thus well established in school cases and is firmly grounded upon the "state action" language of the Fourteenth Amendment.

It has long been established that the actions of state officers and agents are attributable to the state. Thus, application of a federal statute imposing a criminal penalty on a state judge who excluded African-Americans from jury duty was upheld as within congressional power under the Fourteenth Amendment; the judge's action constituted state action even though state law did not authorize him to select the jury in a racially discriminatory manner.[1332] The fact that the "state action" category is not limited to situations in which state law affirmatively authorizes discriminatory action was made clearer in *Yick Wo v. Hopkins*,[1333] in which the Court found unconstitutional state action in the discriminatory administration of an ordinance that was fair and non-discriminatory on its face. Not even the fact that the actions of the state agents are illegal under state law makes the action unattributable to the state for purposes of the Fourteenth Amendment. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." [1334] When the denial of equal protection is not commanded by law or by administrative regulation but is nonetheless accom-

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[1331] Milliken v. Bradley, 418 U.S. 717, 744–45 (1974).

[1332] *Ex parte* Virginia, 100 U.S. 339 (1880). Similarly, the acts of a state governor are state actions, Cooper v. Aaron, 358 U.S. 1, 16–17 (1958); Sterling v. Constantin, 287 U.S. 378, 393 (1932), as are the acts of prosecuting attorneys, Mooney v. Holohan, 294 U.S. 103, 112, 113 (1935), state and local election officials, United States v. Classic, 313 U.S. 299 (1941), and law enforcement officials. Griffin v. Maryland, 378 U.S. 130 (1964); Monroe v. Pape, 365 U.S. 167 (1961); Screws v. United States, 325 U.S. 91 (1945). One need not be an employee of the state to act "under color of" state law; mere participation in an act with state officers suffices. United States v. Price, 383 U.S. 787 (1966).

[1333] 118 U.S. 356 (1886).

[1334] United States v. Classic, 313 U.S. 299, 326 (1941). *See also* Screws v. United States, 325 U.S. 91, 109 (1945) (citation omitted); Williams v. United States, 341 U.S. 97 (1951); United States v. Price, 383 U.S. 787 (1966). *See also* United States v.

plished through police enforcement of "custom" [1335] or through hortatory admonitions by public officials to private parties to act in a discriminatory manner,[1336] the action is state action. In addition, when a state clothes a private party with official authority, that private party may not engage in conduct forbidden the state.[1337]

Beyond this are cases where a private individual discriminates, and the question is whether a state has encouraged the effort or has impermissibly aided it.[1338] Of notable importance and a subject of controversy since it was decided is *Shelley v. Kraemer*.[1339] There, property owners brought suit to enforce a racially restrictive covenant, seeking to enjoin the sale of a home by white sellers to black buyers. The covenants standing alone, Chief Justice Vinson said, violated no rights protected by the Fourteenth Amendment. "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." However, this situation is to be distinguished from where "the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements." [1340] Establishing that the precedents were to the effect that judicial action of state courts was state action, the Court continued to find that judicial enforcement of these covenants was forbidden. "The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desire to establish homes.

Raines, 362 U.S. 17, 25 (1960). As Justice Brandeis noted in Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 246 (1931), "acts done 'by virtue of public position under a State government . . . and . . . in the name and for the State' . . . are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law." Note that, for purposes of being amenable to suit in federal court, however, the immunity of the states does not shield state officers who are alleged to be engaging in illegal or unconstitutional action. *Ex parte* Young, 209 U.S. 123 (1908). *Cf.* Screws v. United States, 325 U.S. at 147–48. .

[1335] *Cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[1336] Lombard v. Louisiana, 373 U.S. 267 (1963). No statute or ordinance mandated segregation at lunch counters but both the mayor and the chief of police had recently issued statements announcing their intention to maintain the existing policy of separation. Thus, the conviction of African-Americans for trespass because they refused to leave a segregated lunch counter was voided.

[1337] Griffin v. Maryland, 378 U.S. 130 (1964). Guard at private entertainment ground was also deputy sheriff; he could not execute the racially discriminatory policies of his private employer. *See also* Williams v. United States, 341 U.S. 97 (1951).

[1338] Examples already alluded to include Lombard v. Louisiana, 373 U.S. 267 (1963), in which certain officials had advocated continued segregation, Peterson v. City of Greenville, 373 U.S. 244 (1963), in which there were segregation-requiring ordinances and customs of separation, and Robinson v. Florida, 378 U.S. 153 (1964), in which health regulations required separate restroom facilities in any establishment serving both races.

[1339] 334 U.S. 1 (1948).

[1340] 334 U.S. at 13–14.

The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. . . .” [1341]

Arguments about the scope of *Shelley* began immediately. Did the rationale mean that no private decision to discriminate could be effectuated in any manner by action of the state, as by enforcement of trespass laws or judicial enforcement of discrimination in wills? Or did it rather forbid the action of the state in interfering with the willingness of two private parties to deal with each other? Disposition of several early cases possibly governed by *Shelley* left this issue unanswered.[1342] But the Court has experienced no difficulty in finding that state court enforcement of common-law rules in a way that has an impact upon speech and press rights is state action and triggers the application of constitutional rules.[1343]

It may be that the substantive rule that is being enforced is the dispositive issue, rather than the mere existence of state action. Thus, in *Evans v. Abney*,[1344] a state court, asked to enforce a discriminatory stipulation in a will that property devised to a city for use as a public park should never be used by African-Americans, ruled that the city could not operate the park in a segregated fashion. Instead of striking the segregation requirement from the will, however, the court instead ordered return of the property

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[1341] “These are not cases . . . in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell.” 334 U.S. at 19. In Hurd v. Hodge, 334 U.S. 24 (1948), the Court outlawed judicial enforcement of restrictive covenants in the District of Columbia as violating civil rights legislation and public policy. Barrows v. Jackson, 346 U.S. 249 (1953), held that damage actions for violations of racially restrictive covenants would not be judicially entertained.

[1342] Rice v. Sioux City Memorial Park Cemetery, 245 Iowa 147, 60 N.W. 2d 110 (1953), *aff'd by an equally divided Court*, 348 U.S. 880 (1954), *rehearing granted, judgment vacated and certiorari dismissed*, 349 U.S. 70 (1955); Black v. Cutter Laboratories, 351 U.S. 292 (1956). The central issue in the “sit-in” cases, whether state enforcement of trespass laws at the behest of private parties acting on the basis of their own discriminatory motivations, was evaded by the Court, in finding some other form of state action and reversing all convictions. Individual Justices did elaborate, however. *Compare* Bell v. Maryland, 378 U.S. 226, 255–60 (1964) (opinion of Justice Douglas), *with* id. at 326 (Justices Black, Harlan, and White dissenting).

[1343] In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and progeny, defamation actions based on common-law rules were found to implicate First Amendment rights and Court imposed varying limitations on such rules. *See* id. at 265 (finding state action). Similarly, in NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), a civil lawsuit between private parties, the application of state common-law rules to assess damages for actions in a boycott and picketing was found to constitute state action. Id. at 916 n.51.

[1344] 396 U.S. 435 (1970). The matter had previously been before the Court in Evans v. Newton, 382 U.S. 296 (1966).

to the decedent's heirs, inasmuch as the trust had failed. The Supreme Court held the decision permissible, inasmuch as the state court had merely carried out the testator's intent with no racial motivation itself, and distinguished *Shelley* on the basis that African-Americans were not discriminated against by the reversion, because everyone was deprived of use of the park.[1345]

The case of *Reitman v. Mulkey* [1346] was similar to *Shelley* in both its controversy and the uncertainty of its rationale. In *Reitman*, the Court struck down an amendment to the California Constitution that prohibited the state and its subdivisions and agencies from forbidding racial discrimination in private housing. The Court, finding the provision to deny equal protection of the laws, appeared to ground its decision on either of two lines of reasoning. First was that the provision constituted state action to impermissibly encourage private racial discrimination. Second was that the provision made discriminatory racial practices immune from the ordinary legislative process, and thus impermissibly burdened minorities in the achievement of legitimate aims.[1347] In a subsequent case, *Hunter v. Erickson*,[1348] the latter rationale was used in a unanimous decision voiding an Akron ordinance, which suspended an "open housing" ordinance and provided that any future ordinance regulating transactions in real property "on the basis of race, color, religion, national origin or ancestry" must be submitted to a vote of the people before it could become effective.[1349]

[1345] 396 U.S. at 445. Note the use of the same rationale in another context in Palmer v. Thompson, 403 U.S. 217, 226 (1971). On a different result in the "Girard College" will case, *see* Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957), discussed *infra*.

[1346] 387 U.S. 369 (1967). The decision was 5-to-4, Justices Harlan, Black, Clark, and Stewart dissenting. Id. at 387.

[1347] *See*, *e.g.*, 387 U.S. at 377 (language suggesting both lines of reasoning). *But see* City of Cuyahoga Falls v. Buckeye Community Hope Foundation, 538 U.S. 188 (2003) (ministerial acts associated with a referendum repealing a low-income housing ordinance did not constitute state action, as the referendum process was facially neutral, and the potentially discriminatory repeal was never enforced).

[1348] 393 U.S. 385 (1969).

[1349] In contrast, other ordinances would become effective when passed, except that petitions could be submitted to revoke those ordinances by referendum. 393 U.S. at 389–90 (1969). In Lee v. Nyquist, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971), New York enacted a statute prohibiting the assignment of students or the establishment of school districts for the purpose of achieving racial balance in attendance, unless with the express approval of a locally elected school board or with the consent of the parents, a measure designed to restrict the state education commissioner's program to ameliorate *de facto* segregation. The federal court held the law void, relying on *Mulkey* to conclude that the statute encouraged racial discrimination *and* that by treating educational matters involving racial criteria differently than it treated other educational matters it made more difficult a resolution of the *de facto* segregation problem.

Two later decisions involving state referenda on busing for integration confirm that the condemning factor of *Mulkey* and *Hunter* was the imposition of barriers to racial amelioration legislation.[1350] Both cases agree that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification."[1351] It is thus not impermissible merely to overturn a previous governmental decision, or to defeat the effort initially to arrive at such a decision, simply because the state action may conceivably encourage private discrimination.

In other instances in which the discrimination is being practiced by private parties, the question essentially is whether there has been sufficient state involvement to bring the Fourteenth Amendment into play.[1352] There is no clear formula. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[1353] State action has been found in a number of circumstances. The "White Primary" was outlawed by the Court not because the party's discrimination was commanded by statute but because the party operated under the authority of the state and the state prescribed a general election ballot made up of party nominees chosen in the primaries.[1354] Although the City of Philadelphia was acting as trustee in administering and carrying out the will of someone who had left money for a college, admission to which was stipulated to be for white boys only, the city was held to be engaged in forbidden state action in discriminating against African-Americans in admission.[1355] When state courts on petition of interested parties removed the City of Macon as trustees of a segregated park that had been left in trust for such use in a will, and appointed new trust-

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[1350] Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). A five-to-four majority in *Seattle* found the fault to be a racially based structuring of the political process making it more difficult to undertake actions designed to improve racial conditions than to undertake any other educational action. An 8-to-1 majority in *Crawford* found that repeal of a measure to bus to undo *de facto* segregation, without imposing any barrier to other remedial devices, was permissible.

[1351] *Crawford*, 458 U.S. at 539, quoted in *Seattle*, 458 U.S. at 483. *See also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 414 (1977).

[1352] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (private discrimination is not constitutionally forbidden "unless to some significant extent the State in any of its manifestations has been found to have become involved in it").

[1353] 365 U.S. at 722.

[1354] Smith v. Allwright, 321 U.S. 649, 664 (1944).

[1355] Pennsylvania v. Board of Trustees, 353 U.S. 230 (1957). On remand, the state courts substituted private persons as trustees to carry out the will. *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, *cert. denied*, 357 U.S. 570 (1958). This expedient was, however, ultimately held unconstitutional. Brown v. Pennsylvania, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968).

ees in order to keep the park segregated, the Court reversed, finding that the City was still inextricably involved in the maintenance and operation of the park.[1356]

In a significant case in which the Court explored a lengthy list of contacts between the state and a private corporation, it held that the lessee of property within an off-street parking building owned and operated by a municipality could not exclude African-Americans from its restaurant. The Court emphasized that the building was publicly built and owned, that the restaurant was an integral part of the complex, that the restaurant and the parking facilities complemented each other, that the parking authority had regulatory power over the lessee, and that the financial success of the restaurant benefitted the governmental agency. The "degree of state participation and involvement in discriminatory action," therefore, was sufficient to condemn it.[1357]

The question arose, then, what degree of state participation was "significant"? Would licensing of a business clothe the actions of that business with sufficient state involvement? Would regulation? Or provision of police and fire protection? Would enforcement of state trespass laws be invalid if it effectuated discrimination? The "sit-in" cases of the early 1960s presented all these questions and more but did not resolve them.[1358] The basics of an answer came in *Moose Lodge No. 107 v. Irvis*,[1359] in which the Court held that the fact that a private club was required to have a liquor license to serve alcoholic drinks and did have such a license did not bar it from discriminating against African-Americans. It denied that private discrimination became constitutionally impermissible "if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever," since any such rule would eviscerate the state action doctrine. Rather, "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discrimination.'" [1360] Moreover, although the state had extensive powers to regulate in detail the liquor dealings of its licensees, "it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer

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[1356] Evans v. Newton, 382 U.S. 296 (1966). Justices Black, Harlan, and Stewart dissented. Id. at 312, 315. For the subsequent ruling in this case, *see* Evans v. Abney, 396 U.S. 435 (1970).

[1357] Burton v. Wilmington Parking Authority, 365 U.S. 715, 724 (1961).

[1358] *See*, *e.g.*, the various opinions in Bell v. Maryland, 378 U.S. 226 (1964).

[1359] 407 U.S. 163 (1972). One provision of the state law was, however, held unconstitutional. That provision required a licensee to observe all its by-laws and therefore mandated the Moose Lodge to follow the discrimination provision of its by-laws. Id. at 177–79.

[1360] 407 U.S. at 173.

in the club's enterprise."[1361] And there was nothing in the licensing relationship here that approached "the symbiotic relationship between lessor and lessee" that the Court had found in *Burton*.[1362]

The Court subsequently made clear that governmental involvement with private persons or private corporations is not the critical factor in determining the existence of "state action." Rather, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[1363] Or, to quote Judge Friendly, who first enunciated the test this way, the "essential point" is "that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of the complaint."[1364] Therefore, the Court found no such nexus between the state and a public utility's action in terminating service to a customer. Neither the fact that the business was subject to state regulation, nor that the state had conferred in effect a monopoly status upon the utility, nor that in reviewing the company's tariff schedules the regulatory commission had in effect approved the termination provision (but had not required the practice, had "not put its own weight on the side of the proposed practice by ordering it")[1365] operated to make the utility's action the state's action.[1366] Significantly tightening the standard further against a finding of "state action," the Court asserted that plaintiffs must establish not only that a private party "acted

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[1361] 407 U.S. at 176–77.

[1362] 407 U.S. at 174–75.

[1363] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (under the Due Process Clause).

[1364] Powe v. Miles, 407 F.2d. 73, 81 (2d Cir. 1968). *See also* NCAA v. Tarkanian, 488 U.S. 179 (1988) (where individual state has minimal influence over national college athletic association's activities, the application of association rules leading to a state university's suspending its basketball coach could not be ascribed to the state.). *But see* Brentwood Academy v. Tennessee Secondary School Athletic Assoc., 531 U.S. 288 (2001) (where statewide public school scholastic association is "overwhelmingly" composed of public school officials for that state, this "entwinement" is sufficient to ascribe actions of association to state).

[1365] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974). In dissent, Justice Marshall protested that the quoted language marked "a sharp departure" from precedent, "that state authorization and approval of 'private' conduct has been held to support a finding of state action." Id. at 369. In Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), the plurality opinion used much the same analysis to deny antitrust immunity to a utility practice merely approved but not required by the regulating commission, but most of the Justices were on different sides of the same question in the two cases.

[1366] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351–58 (1974). On the due process limitations on the conduct of public utilities, *see* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978).

under color of the challenged statute, but also that its actions are properly attributable to the State. . . .” [1367] And the actions are to be attributable to the state apparently only if the state compelled the actions and not if the state merely established the process through statute or regulation under which the private party acted.

Thus, when a private party, having someone’s goods in his possession and seeking to recover the charges owned on storage of the goods, acts under a permissive state statue to sell the goods and retain his charges out of the proceeds, his actions are not governmental action and need not follow the dictates of the Due Process Clause.[1368] Or, where a state workers’ compensation statute was amended to allow, but not require, an insurer to suspend payment for medical treatment while the necessity of the treatment was being evaluated by an independent evaluator, this action was not fairly attributable to the state, and thus pre-deprivation notice of the suspension was not required.[1369] In the context of regulated nursing home situations, in which the homes were closely regulated and state officials reduced or withdrew Medicaid benefits paid to patients when they were discharged or transferred to institutions providing a lower level of care, the Court found that the actions of the homes in discharging or transferring were not thereby rendered the actions of the government.[1370]

In a few cases, the Court has indicated that discriminatory action by private parties may be precluded by the Fourteenth Amendment if the particular party involved is exercising a “public function.” [1371] For instance, in *Marsh v. Alabama*,[1372] a Jehovah’s Witness had been convicted of trespass after passing out literature on the streets of a company-owned town, but the Court reversed. It is not entirely clear from the Court’s opinion what it was that made the privately owned town one to which the Constitution applied. In essence, it appears to have been that the town “had all the characteristics of any other American town” and that it was “like” a state. “The more an owner, for his advantage, opens up his property for

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[1367] Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978) (due process).

[1368] 436 U.S. at 164–66. If, however, a state officer acts with the private party in securing the property in dispute, that is sufficient to create the requisite state action and the private party may be subjected to suit if the seizure does not comport with due process. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

[1369] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

[1370] Blum v. Yaretsky, 457 U.S. 991 (1982).

[1371] This rationale is one of those that emerges from various opinions in Terry v. Adams, 345 U.S. 461 (1953) (holding that a political association limited to white voters that held internal elections to designate which of its member would run in the Texas Democratic primaries was acting as part of the state-established electoral system).

[1372] 326 U.S. 501 (1946).

use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." [1373] A subsequent attempt to extend *Marsh* to privately owned shopping centers was at first successful, but was soon turned back, resulting in a sharp curtailment of the "public function" doctrine.[1374]

Attempts to apply this theory to other kinds of private conduct, such as operation of private utilities,[1375] use of permissive state laws to secure property claimed to belong to creditors,[1376] maintaining schools for "problem" children referred by public institutions,[1377] provision of workers' compensation coverage by private insurance companies,[1378] and operation of nursing homes in which patient care is almost all funded by public resources,[1379] proved unavailing. The question is not "whether a private group is serving a 'public function.' . . . That a private entity performs a function which serves the public does not make its acts state action." [1380] The "public function" doctrine is to be limited to a delegation of "a power 'traditionally exclusively reserved to the State.'" [1381]

Public function did play an important part, however, in the Court's finding state action in the exercise of peremptory challenges in jury selection by non-governmental parties. Using tests developed in an earlier case involving garnishment and attachment,[1382] the Court found state action in the racially discriminatory use of such challenges during *voir dire* in a civil case.[1383] The Court first asked "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority," and then "whether the private party charged with the deprivation could be described in all fairness as a state actor." In answering the second question, the Court considered three factors: "the extent to which the actor relies on governmental assistance and benefits, whether the actor is performing a traditional governmental function, and whether the injury caused is aggravated in a unique way

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[1373] 326 U.S. at 506.

[1374] *See* Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968), *limited in* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), and *overruled in* Hudgens v. NLRB, 424 U.S. 507 (1976). The *Marsh* principle is good only when private property has taken on *all* the attributes of a municipality. Id. at 516–17.

[1375] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

[1376] Flagg Bros. v. Brooks, 436 U.S. 149, 157–159 (1978).

[1377] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[1378] American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

[1379] Blum v. Yaretsky, 457 U.S. 991, 1011–1012 (1982).

[1380] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[1381] Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)).

[1382] Lugar v. Edmondson Oil Corp., 457 U.S. 922 (1982).

[1383] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

by the incidents of governmental authority." [1384] There was no question that the exercise of peremptory challenges derives from governmental authority (either state or federal, as the case may be); exercise of peremptory challenges is authorized by law, and the number is limited. Similarly, the Court easily concluded that private parties exercise peremptory challenges with the "overt" and "significant" assistance of the court.

In addition, jury selection was found to be a traditional governmental function: the jury "is a quintessential governmental body, having no attributes of a private actor," and it followed, so the Court majority believed, that selection of individuals to serve on that body is also a governmental function whether or not it is delegated to or shared with private individuals.[1385] Finally, the Court concluded that "the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself." [1386] Dissenting Justice O'Connor complained that the Court was wiping away centuries of adversary practice in which "unrestrained private choice" has been recognized in exercise of peremptory challenges; "[i]t is antithetical to the nature of our adversarial process," the Justice contended, "to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes." [1387]

The Court soon applied these same principles to hold that the exercise of peremptory challenges by the defense in a criminal case also constitutes state action,[1388] even though in a criminal case it is the government and the defendant who are adversaries. The same generalities apply with at least equal force: there is overt and significant governmental assistance in creating and structuring the process, a criminal jury serves an important governmental function and its selection is also important, and the courtroom setting intensifies harmful effects of discriminatory actions. An earlier case [1389] holding that a public defender was not a state actor when engaged in general representation of a criminal defendant was distinguished, with the Court emphasizing that "exercise of a peremptory challenge differs significantly from other actions taken in support of a

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[1384] Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620–22 (1991) (citations omitted).

[1385] 500 U.S. at 624, 625.

[1386] 500 U.S. at 628.

[1387] 500 U.S. at 639, 643.

[1388] Georgia v. McCollum, 505 U.S. 42 (1992). It was, of course, beyond dispute that a prosecutor's exercise of peremptory challenges constitutes state action. *See* Swain v. Alabama, 380 U.S. 202 (1965); Batson v. Kentucky, 476 U.S. 79 (1986).

[1389] Polk County v. Dodson, 454 U.S. 512 (1981).

defendant's defense," because it involves selection of persons to wield governmental power.[1390]

Previously, the Court's decisions with respect to state "involvement" in the private activities of individuals and entities raised the question whether financial assistance and tax benefits provided to private parties would so clothe them with state action that discrimination by them and other conduct would be subject to constitutional constraints. Many lower courts had held state action to exist in such circumstances.[1391] However the question might have been answered under prior Court holdings, it is evident that the more recent cases would not generally support a finding of state action in these cases. In *Rendell-Baker v. Kohn*,[1392] a private school received "problem" students referred to it by public institutions, it was heavily regulated, and it received between 90 and 99% of its operating budget from public funds. In *Blum v. Yaretsky*,[1393] a nursing home had practically all of its operating and capital costs subsidized by public funds and more than 90% of its residents had their medical expenses paid from public funds; in setting reimbursement rates, the state included a formula to assure the home a profit. Nevertheless, in both cases the Court found that the entities remained private, and required plaintiffs to show that as to the complained of actions the state was involved, either through coercion or encouragement.[1394] "That programs undertaken by the State result in substantial funding of the activities of a private entity is no more per-

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[1390] 505 U.S. at 54. Justice O'Connor, again dissenting, pointed out that the Court's distinction was inconsistent with *Dodson's* declaration that public defenders are not vested with state authority "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." Id. at 65–66. Justice Scalia, also dissenting again, decried reduction of *Edmonson* "to the terminally absurd: A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state." Id. at 69–70. Chief Justice Rehnquist, who had dissented in *Edmonson*, concurred in *McCollum* in the belief that it was controlled by *Edmonson*, and Justice Thomas, who had not participated in *Edmonson*, expressed similar views in a concurrence.

[1391] On funding, *see* Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); Kerr v. Enoch Pratt Free Library, 149 F.2d 212 (4th Cir.), *cert. denied*, 326 U.S. 721 (1945); Christhilf v. Annapolis Emergency Hosp. Ass'n, 496 F.2d 174 (4th Cir. 1974). *But cf.* Greco v. Orange Mem. Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975). On tax benefits, *see* Green v. Connally, 330 F. Supp. 1150 (D.D.C.) (three-judge court), *aff'd. sub nom.* Coit v. Green, 404 U.S. 997 (1971);McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972); Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974). *But cf.* New York City Jaycees v. United States Jaycees, 512 F.2d 856 (2d Cir. 1976); Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975).

[1392] 457 U.S. 830 (1982).

[1393] 457 U.S. 991 (1982).

[1394] The rules developed by the Court for general business regulation are that (1) the "mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amend-

suasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business." [1395]

In the social welfare area, the Court has drawn a sharp distinction between governmental action subject to substantive due process requirements, and governmental inaction, not so constrained. There being "no affirmative right to governmental aid," the Court announced in *DeShaney v. Winnebago County Social Services Department* [1396] that "as a general matter, . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." Before there can be state involvement creating an affirmative duty to protect an individual, the Court explained, the state must have taken a person into its custody and held him there against his will so as to restrict his freedom to act on his own behalf. Thus, although the Court had recognized due process violations for failure to provide adequate medical care to incarcerated prisoners,[1397] and for failure to ensure reasonable safety for involuntarily committed mental patients,[1398] no such affirmative duty arose from the failure of social services agents to protect an abused child from further abuse from his parent. Even though possible abuse had been reported to the agency and confirmed and monitored by the agency, and the agency had done nothing to protect the child, the Court emphasized that the actual injury was inflicted by the parent and "did not occur while [the child] was in the State's custody." [1399] Although the state may have incurred liability in tort through the negligence of its social workers, "[not] every tort committed by a state actor [is] a constitutional violation." [1400] "[I]t is well to remember . . . that the harm was inflicted not by the State of Wisconsin, but by [the child's] father." [1401]

Judicial inquiry into the existence of "state action" may lead to different results depending on what remedy is sought to be en-

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ment," Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) *quoting* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), and (2) "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed to be that of the State." Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). To the latter point, see Flagg Bros. v. Brooks, 436 U.S. 149, 166 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974).

[1395] 457 U.S. at 1011.
[1396] 489 U.S. 189, 197 (1989).
[1397] Estelle v. Gamble, 429 U.S. 97 (1976).
[1398] Youngberg v. Romeo, 457 U.S. 307 (1982).
[1399] 489 U.S. at 201.
[1400] 489 U.S. at 202.
[1401] 489 U.S. at 203.

forced. While cases may be brought against a private actor to compel him to halt his discriminatory action (for example, to enjoin him to admit blacks to a lunch counter), one could just as readily bring suit against the government to compel it to cease aiding the private actor in his discriminatory conduct. Enforcing the latter remedy might well avoid constitutional issues that an order directed to the private party would raise.[1402] In either case, however, it must be determined whether the governmental involvement is sufficient to give rise to a constitutional remedy. In a suit against the private party it must be determined whether he is so involved with the government as to be subject to constitutional restraints, while in a suit against the government agency it must be determined whether the government's action "impermissibly fostered" the private conduct.

Thus, in *Norwood v. Harrison*,[1403] the Court struck down the provision of free textbooks by a state to racially segregated private schools (which were set up to avoid desegregated public schools), even though the textbook program predated the establishment of these schools. "[A]ny tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.' . . . The constitutional obligation of the State requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discriminations."[1404] And in a subsequent case, the Court approved a lower court order that barred the city from permitting exclusive temporary use of public recreational facilities by segregated private schools because that interfered with an outstanding order mandating public school desegregation. But it remanded for further factfinding with respect to permitting nonexclusive use of public recreational facilities and general government services by segregated private schools so that the district court could determine whether such uses "involve government so directly in the actions of

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[1402] For example, if a Court finds a relationship between the state and a discriminating private group (which may have rights of association protected by the First Amendment), a remedy directed against the relationship might succeed, where a direction to such group to eliminate such discrimination might not. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179–80 (1972) (Justice Douglas dissenting); Gilmore v. City of Montgomery, 417 U.S. 556, 575 (1974); Norwood v. Harrison, 413 U.S. 455, 470 (1973). The right can be implicated as well by affirmative legislative action barring discrimination in private organizations. *See* Runyon v. McCrary, 427 U.S. 160, 175–79 (1976).

[1403] 413 U.S. 455 (1973).

[1404] Gilmore v. City of Montgomery, 417 U.S. 556, 568–69 (1974) (quoting Norwood v. Harrison, 413 U.S. 455, 466, 467 (1973)).

those users as to warrant court intervention on constitutional grounds."[1405] The lower court was directed to sift facts and weigh circumstances on a case-by-case basis in making determinations.[1406]

It should be noted, however, that, without mentioning these cases, the Court has interposed a potentially significant barrier to use of the principle set out in them. In a 1976 decision, which it has since expanded, it held that plaintiffs, seeking disallowal of governmental tax benefits accorded to institutions that allegedly discriminated against complainants and thus involved the government in their actions, must show that revocation of the benefit would cause the institutions to cease the complained-of conduct.[1407]

"Person".—In the case in which it was first called upon to interpret this clause, the Court doubted whether "any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[1408] Nonetheless, in deciding the *Granger Cases* shortly thereafter, the Justices, as with the due process clause, seemingly entertained no doubt that the railroad corporations were entitled to invoke the protection of the clause.[1409] Nine years later, Chief Justice Waite announced from the bench that the Court would not hear argument on the question whether the Equal Protection Clause applied to corporations. "We are all of the opinion that it does."[1410] The word has been given the broadest possible meaning.

[1405] Gilmore v. City of Montgomery, 417 U.S. 556, 570 (1974).

[1406] Unlike the situation in which private club discrimination is attacked directly, "the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities. . . ." Receipt of just any sort of benefit or service at all does not by the mere provision—electricity, water, and police and fire protection, access generally to municipal recreational facilities—constitute a showing of state involvement in discrimination and the lower court's order was too broad because not predicated upon a proper finding of state action. "If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation." 417 U.S. at 573–74. *See also* Blum v. Yaretsky, 457 U.S. 991 (1982) (plaintiffs unsuccessfully sued public officials, objecting not to regulatory decision made by the officials as to Medicaid payments, but to decisions made by the nursing home in discharging and transferring patients).

[1407] Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). *See* id. at 46, 63–64 (Justice Brennan concurring and dissenting).

[1408] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873). *Cf.* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Justice Rehnquist dissenting).

[1409] Chicago, B. & Q. R.R. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & N.W. Ry., 94 U.S. 164 (1877); Chicago, M. & St. P. R.R. v. Ackley, 94 U.S. 179 (1877); Winona & St. Peter R.R. v. Blake, 94 U.S. 180 (1877).

[1410] Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886). The background and developments from this utterance are treated in H. Graham, Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the Conspiracy Theory,

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ." [1411] The only qualification is that a municipal corporation cannot invoke the clause against its state.[1412]

"Within Its Jurisdiction".—Persons "within its jurisdiction" are entitled to equal protection from a state. Largely because Article IV, § 2, has from the beginning guaranteed the privileges and immunities of citizens in the several states, the Court has rarely construed the phrase in relation to natural persons.[1413] As to business entities, it was first held that a foreign corporation that was not doing business in a state in a manner that subjected it to the process of a state's courts was not "within the jurisdiction" of the state and could not complain that resident creditors were given preferences in the distribution of assets of an insolvent corporation.[1414] This holding was subsequently qualified, however, with the Court holding that a foreign corporation seeking to recover possession of property wrongfully taken in one state, but suing in another state in which it was not licensed to do business, was "within the jurisdiction" of the latter state, so that unequal burdens could not be imposed on the maintenance of the suit.[1415] The test of amenability to service of process within the state was ignored in a later case dealing with discriminatory assessment of property belonging to a nonresident individual.[1416] On the other hand, if a state has admitted a foreign corporation to do business within its borders, that corporation is entitled to equal protection of the laws, but not necessarily to identical treatment with domestic corporations.[1417]

AND AMERICAN CONSTITUTIONALISM chs. 9, 10, and pp. 566–84 (1968). Justice Black, in Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 85 (1938), and Justice Douglas, in Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576 (1949), have disagreed that corporations are persons for equal protection purposes.

[1411] Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). For modern examples, *see* Levy v. Louisiana, 391 U.S. 68, 70 (1968); Graham v. Richardson, 403 U.S. 365, 371 (1971).

[1412] City of Newark v. New Jersey, 262 U.S. 192 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933).

[1413] *But see* Plyler v. Doe, 457 U.S. 202, 210–16 (1982) (explicating meaning of the phrase in the context of holding that aliens illegally present in a state are "within its jurisdiction" and may thus raise equal protection claims).

[1414] Blake v. McClung, 172 U.S. 239, 261 (1898); Sully v. American Nat'l Bank, 178 U.S. 289 (1900).

[1415] Kentucky Finance Corp. v. Paramount Auto Exchange Corp., 262 U.S. 544 (1923).

[1416] Hillsborough v. Cromwell, 326 U.S. 620 (1946).

[1417] Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949); Hanover Fire Ins. Co. v. Harding, 272 U.S. 494 (1926). *See also* Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886).

Equal Protection: Judging Classifications by Law

A guarantee of equal protection of the laws was contained in every draft leading up to the final version of section 1 of the Fourteenth Amendment.[1418] The desire to provide a firm constitutional basis for already-enacted civil rights legislation [1419] and to place repeal beyond the accomplishment of a simple majority in a future Congress was important to its sponsors.[1420] No doubt there were conflicting interpretations of the phrase "equal protection" among sponsors and supporters and the legislative history does little to clarify whether any sort of consensus was accomplished and if so what it was.[1421] Although the Court early recognized that African-Americans were the primary intended beneficiaries of the protections thus adopted,[1422] the spare language was majestically unconfined to so limited a class or to so limited a purpose. Though efforts to argue for an expansive interpretation met with little initial success,[1423] the equal protection standard ultimately came to be applicable to all classifications by legislative and other official bodies. Now, the Equal Protection Clause looms large in the fields of civil rights and fundamental liberties as a constitutional text affording the federal and state courts extensive powers of review with regard to differential treatment of persons and classes.

The Traditional Standard: Restrained Review.—The traditional standard of review of equal protection challenges of classifications developed largely though not entirely in the context of economic regulation.[1424] It is still most often applied there, although it

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[1418] The story is recounted in J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956). *See also* JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (B. Kendrick, ed. 1914). The floor debates are collected in 1 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 181 (B. Schwartz, ed. 1970).

[1419] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, now in part 42 U.S.C. §§ 1981, 1982. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 422–37 (1968).

[1420] As in fact much of the legislation which survived challenge in the courts was repealed in 1894 and 1909. 28 Stat. 36; 35 Stat. 1088. *See* R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 45–46 (1947).

[1421] TENBROEK, EQUAL UNDER LAW (rev. ed. 1965); Frank & Munro, *The Original Understanding of 'Equal Protection of the Laws'*, 50 COLUM. L. REV. 131 (1950); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); *see also* the essays collected in H. GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM (1968). In calling for reargument in Brown v. Board of Education, 345 U.S. 972 (1952), the Court asked for and received extensive analysis of the legislative history of the Amendment with no conclusive results. Brown v. Board of Education, 347 U.S. 483, 489–90 (1954).

[1422] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873).

[1423] In Buck v. Bell, 274 U.S. 200, 208 (1927), Justice Holmes characterized the Equal Protection Clause as "the usual last resort of constitutional arguments."

[1424] *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (discrimination against Chinese on the West Coast).

appears in many other contexts as well,[1425] including so-called "class-of-one" challenges.[1426] A more active review has been developed for classifications based on a "suspect" indicium or affecting a "fundamental" interest. "The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions." Justice Frankfurter once wrote, "They do not relate to abstract units, A, B, and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." [1427] Thus, the mere fact of classification will not void legislation,[1428] because in the exercise of its powers a legislature has considerable discretion in recognizing the differences between and among persons and situations.[1429] "Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." [1430] Or, more succinctly, "statutes create many classifications which do not deny equal

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[1425] Vacco v. Quill, 521 U.S. 793 (1997) (assisted suicide prohibition does not violate Equal Protection Clause by distinguishing between terminally ill patients on life-support systems who are allowed to direct the removal of such systems and patients who are not on life support systems and are not allowed to hasten death by self-administering prescribed drugs).

[1426] The Supreme Court has recognized successful equal protection claims brought by a class-of-one, where a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for that difference. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam) (village's demand for an easement as a condition of connecting the plaintiff's property to the municipal water supply was irrational and wholly arbitrary). However, the class-of-one theory, which applies with respect to legislative and regulatory action, does not apply in the public employment context. Engquist v. Oregon Department of Agriculture, 128 S. Ct. 2146, 2149 (2008) (allegation that plaintiff was fired not because she was a member of an identified class but simply for "arbitrary, vindictive, and malicious reasons" does not state an equal protection claim). In *Engquist*, the Court noted that "the government as employer indeed has far broader powers than does the government as sovereign," id. at 2151 (quoting Waters v. Churchill, 511 U.S. 661, 671 (1994), and that it is a "common-sense realization" that government offices could not function if every employment decision became a constitutional matter. Id. at 2151, 2156.

[1427] Tigner v. Texas, 310 U.S. 141, 147 (1980).

[1428] Atchison, T. & S.F.R.R. v. Matthews, 174 U.S. 96, 106 (1899). From the same period, *see also* Orient Ins. Co. v. Daggs, 172 U.S. 557 (1869); Bachtel v. Wilson, 204 U.S. 36 (1907); Watson v. Maryland, 218 U.S. 173 (1910). For later cases, *see* Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947); Goesaert v. Cleary, 335 U.S. 464 (1948); McGowan v. Maryland, 366 U.S. 420 (1961); Schilb v. Kuebel, 404 U.S. 357 (1971); Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Schweiker v. Wilson, 450 U.S. 221 (1981).

[1429] Barrett v. Indiana, 229 U.S. 26 (1913).

[1430] Barbier v. Connolly, 113 U.S. 27, 32 (1885).

protection; it is only 'invidious discrimination' which offends the Constitution." [1431]

How then is the line between permissible and invidious classification to be determined? In *Lindsley v. Natural Carbonic Gas Co.*,[1432] the Court summarized one version of the rules still prevailing. "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Especially because of the emphasis upon the necessity for total arbitrariness, utter irrationality, and the fact that the Court will strain to conceive of a set of facts that will justify the classification, the test is extremely lenient and, assuming the existence of a constitutionally permissible goal, no classification will ever be upset. But, contemporaneously with this test, the Court also pronounced another lenient standard which did leave to the courts a judgmental role. In *F.S. Royster Guano Co. v. Virginia*,[1433] the court put forward the following test: "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." [1434] Use of the latter standard did in fact result in some invalidations.[1435]

[1431] Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

[1432] 220 U.S. 61, 78–79 (1911), *quoted in full* in Morey v. Doud, 354 U.S. 457, 463–64 (1957). Classifications which are purposefully discriminatory fall before the Equal Protection Clause without more. *E.g.*, Barbier v. Connolly, 113 U.S. 27, 30 (1885); Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886). *Cf.* New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 n.40 (1979). Explicit in all the formulations is that a legislature must have had a permissible purpose, a requirement which is seldom failed, given the leniency of judicial review. *But see* Zobel v. Williams, 457 U.S. 55, 63–64 (1982), and id. at 65 (Justice Brennan concurring).

[1433] 253 U.S. 412 (1920).

[1434] 253 U.S. at 415. *See also* Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910).

[1435] *E.g.*, F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) (striking down a tax on the out-of-state income of domestic corporations that did business in the

But then, coincident with the demise of substantive due process in the area of economic regulation,[1436] the Court reverted to the former standard, deferring to the legislative judgment on questions of economics and related matters; even when an impermissible purpose could have been attributed to the classifiers it was usually possible to conceive of a reason that would justify the classification.[1437] Strengthening the deference was the recognition of discretion in the legislature not to try to deal with an evil or a class of evils all within the scope of one enactment but to approach the problem piecemeal, to learn from experience, and to ameliorate the harmful results of two evils differently, resulting in permissible over- and under-inclusive classifications.[1438]

In recent years, the Court has been remarkably inconsistent in setting forth the standard which it is using, and the results have reflected this. It has upheld economic classifications that suggested impermissible intention to discriminate, reciting at length the *Lindsley* standard, complete with the conceiving-of-a-basis and the one-step-at-a-time rationale,[1439] and it has applied this relaxed standard to

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state, when domestic corporations that engaged only in out-of-state business were exempted); Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935) (striking down a graduated tax on gross receipts as arbitrary because it was insufficiently related to net profits); Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936) (striking down a milk-price-control regulation that distinguished between certain milk producers based on their dates of entry into the market).

[1436] In Nebbia v. New York, 291 U.S. 502, 537 (1934), speaking of the limits of the Due Process Clause, the Court observed that "in the absence of other constitutional restrictions, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare."

[1437] *E.g.*, Tigner v. Texas, 310 U.S. 141 (1940) (exclusion of agriculture and livestock from price-fixing statute justified by heightened concerns surrounding concentrations of power in other industries); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947) (where apprenticeship was a requirement to obtain a river pilot license, allowing river pilots to apprentice mostly friends and relatives justified upon desire to create a cohesive piloting community); Goesaert v. Cleary, 335 U.S. 464 (1948) (court will not question legislature's determination that allowing women to bartend gives rise to moral and social problems, but that such problems are relieved when a barmaid's husband or father is the owner of the bar); Railway Express Agency v. New York, 336 U.S. 106 (1949) (upholding ban on advertising on the side of delivery trucks except by the business employing the truck, as legislature could determine that the nature and extent of the distraction presented by the latter advertising did not present the same threat to traffic); McGowan v. Maryland, 366 U.S. 420 (1961) (allowing the sale of certain products on Sunday, while prohibiting the sale of others, does not exceed a state's wide discretion to affect some groups of citizens differently than others).

[1438] Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969); Schilb v. Kuebel, 404 U.S. 357, 364–65 (1971); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981).

[1439] City of New Orleans v. Dukes, 427 U.S. 297, 303–04 (1976); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

social welfare regulations.[1440] In other cases, it has used the *Royster Guano* standard and has looked to the actual goal articulated by the legislature in determining whether the classification had a reasonable relationship to that goal,[1441] although it has usually ended up upholding the classification. Finally, purportedly applying the rational basis test, the Court has invalidated some classifications in the areas traditionally most subject to total deference.[1442]

Attempts to develop a consistent principle have so far been unsuccessful. In *Railroad Retirement Board v. Fritz*,[1443] the Court acknowledged that "[t]he most arrogant legal scholar would not claim that all of these cases cited applied a uniform or consistent test un-

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[1440] Dandridge v. Williams, 397 U.S. 471, 485–86 (1970); Jefferson v. Hackney, 406 U.S. 535, 549 (1972). *See also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587–94 (1979).

[1441] *E.g.*, McGinnis v. Royster, 410 U.S. 263, 270–77 (1973); Johnson v. Robison, 415 U.S. 361, 374–83 (1974); City of Charlotte v. International Ass'n of Firefighters, 426 U.S. 283, 286–89 (1976). It is significant that these opinions were written by Justices who subsequently dissented from more relaxed standard of review cases and urged adherence to at least a standard requiring articulation of the goals sought to be achieved and an evaluation of the "fit" of the relationship between goal and classification. Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 182 (1980) (Justices Brennan and Marshall dissenting); Schweiker v. Wilson, 450 U.S. 221, 239 (1981) (Justices Powell, Brennan, Marshall, and Stevens dissenting). *See also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 594 (1979) (Justice Powell concurring in part and dissenting in part), and id. at 597, 602 (Justices White and Marshall dissenting).

[1442] *E.g.*, Lindsey v. Normet, 405 U.S. 56, 74–79 (1972) (requirement for tenant to post forfeitable bond for twice the amount of rent expected to accrue pending appellate decision on landlord-tenant dispute violates Equal Protection); Eisenstadt v. Baird, 405 U.S. 438 (1972) (state cannot provide dissimilar access to contraceptives for married and unmarried persons); James v. Strange, 407 U.S. 128 (1972) (statute allowing state to seek recoupment of attorney fees from indigent defendants who were provided legal counsel may not treat defendants differently from other civil debtors); Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (state may not exclude households containing a person unrelated to other members of the household from food stamp program); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (rejecting various justifications offered for exclusion of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses were permitted). The Court in Reed v. Reed, 404 U.S. 71, 76 (1971), used the *Royster Guano* formulation and purported to strike down a sex classification on the rational basis standard, but, whether the standard was actually used or not, the case was the beginning of the decisions applying a higher standard to sex classifications.

[1443] 449 U.S. 166, 174–79 (1980). The quotation is at 176–77 n.10. The extent of deference is notable, inasmuch as the legislative history seemed clearly to establish that the purpose the Court purported to discern as the basis for the classification was not the congressional purpose at all. Id. at 186–97 (Justice Brennan dissenting). The Court observed, however, that it was "constitutionally irrelevant" whether the plausible basis was in fact within Congress's reasoning, inasmuch as the Court has never required a legislature to articulate its reasons for enactng a statute. Id. at 179. For a continuation of the debate over actual purpose and conceivable justification, *see* Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 680–85 (1981) (Justice Brennan concurring), and id. at 702–06 (Justice Rehnquist dissenting). *Cf.* Schweiker v. Wilson, 450 U.S. 221, 243–45 (1981) (Justice Powell dissenting).

der equal protection principles," but then went on to note the differences between *Lindsley* and *Royster Guano* and chose the former. But, shortly, in *Schweiker v. Wilson*,[1444] in an opinion written by a different Justice,[1445] the Court sustained another classification, using the *Royster Guano* standard to evaluate whether the classification bore a substantial relationship to the goal actually chosen and articulated by Congress. In between these decisions, the Court approved a state classification after satisfying itself that the legislature had pursued a permissible goal, but setting aside the decision of the state court that the classification would not promote that goal; the Court announced that it was irrelevant whether in fact the goal would be promoted, the question instead being whether the legislature "could rationally have decided" that it would.[1446]

In short, it is uncertain which formulation of the rational basis standard the Court will adhere to.[1447] In the main, the issues in recent years have not involved the validity of classifications, but rather the care with which the Court has reviewed the facts and the legislation with its legislative history to uphold the challenged classifications. The recent decisions voiding classifications have not clearly set out which standard they have been using.[1448] Clarity in this area, then, must await presentation to the Court of a classification that it would sustain under the *Lindsley* standard and invalidate under *Royster Guano*.

The New Standards: Active Review.—When government legislates or acts either on the basis of a "suspect" classification or with regard to a "fundamental" interest, the traditional standard of equal protection review is abandoned, and the Court exercises a "strict scrutiny." Under this standard government must demonstrate a high degree of need, and usually little or no presumption favoring the classification is to be expected. After much initial controversy within

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[1444] 450 U.S. 221, 230–39 (1981). Nonetheless, the four dissenters thought that the purpose discerned by the Court was not the actual purpose, that it had in fact no purpose in mind, and that the classification was not rational. Id. at 239.

[1445] Justice Blackmun wrote the Court's opinion in *Wilson*, Justice Rehnquist in *Fritz*.

[1446] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466.

[1447] In City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982), the Court observed that it was not clear whether it would apply *Royster Guano* to the classification at issue, citing *Fritz* as well as Craig v. Boren, 429 U.S. 190 (1976), an intermediate standard case involving gender. Justice Powell denied that *Royster Guano* or Reed v. Reed had ever been rejected. Id. at 301 n.6 (dissenting). *See also* id. at 296–97 (Justice White).

[1448] The exception is Reed v. Reed, 404 U.S. 71 (1971), which, though it purported to apply *Royster Guano*, may have applied heightened scrutiny. *See* Zobel v. Williams, 457 U.S. 55, 61–63 (1982), in which the Court found the classifications not rationally related to the goals, without discussing which standard it was using.

the Court, it has now created a third category, finding several classifications to be worthy of a degree of "intermediate" scrutiny requiring a showing of important governmental purposes and a close fit between the classification and the purposes.

Paradigmatic of "suspect" categories is classification by race. First in the line of cases dealing with this issue is *Korematsu v. United States*,[1449] concerning the wartime evacuation of Japanese-Americans from the West Coast, in which the Court said that because only a single ethnic-racial group was involved the measure was "immediately suspect" and subject to "rigid scrutiny." The school segregation cases[1450] purported to enunciate no *per se* rule, however, although subsequent summary treatment of a host of segregation measures may have implicitly done so, until in striking down state laws prohibiting interracial marriage or cohabitation the Court declared that racial classifications "bear a far heavier burden of justification" than other classifications and were invalid because no "overriding statutory purpose"[1451] was shown and they were not necessary to some "legitimate overriding purpose."[1452] "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[1453] Remedial racial classifications, that is, the development of "affirmative action" or similar programs that classify on the basis of race for the purpose of ameliorating conditions resulting from past discrimination, are subject to more than traditional review scrutiny, but whether the highest or some intermediate standard is the applicable test is uncertain.[1454] A measure that does not draw a distinction explicitly on race but that does draw a line between those who seek to use the law to do away with or modify racial discrimination and those

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[1449] 323 U.S. 214, 216 (1944). In applying "rigid scrutiny," however, the Court was deferential to the judgment of military authorities, and to congressional judgment in exercising its war powers.

[1450] Brown v. Board of Education, 347 U.S. 483 (1954).

[1451] McLaughlin v. Florida, 379 U.S. 184, 192, 194 (1964).

[1452] Loving v. Virginia, 388 U.S. 1, 11 (1967). In Lee v. Washington, 390 U.S. 333 (1968), it was indicated that preservation of discipline and order in a jail might justify racial segregation there if shown to be necessary.

[1453] Personnel Administrator v. Feeney, 442 U.S. 256, 272 (1979), *quoted in* Washington v. Seattle School Dist., 458 U.S. 457, 485 (1982).

[1454] Regents of the Univ. of California v. Bakke, 438 U.S. 265, 287–20 (1978) (Justice Powell announcing judgment of Court) (suspect), and id. at 355–79 (Justices Brennan, White, Marshall, and Blackmun concurring in part and dissenting in part) (intermediate scrutiny); Fullilove v. Klutznick, 448 U.S. 448, 491–92 (1980) (Chief Justice Burger announcing judgment of Court) ("a most searching examination" but not choosing a particular analysis), and id. at 495 (Justice Powell concurring), 523 (Justice Stewart dissenting) (suspect), 548 (Justice Stevens dissenting) (searching scrutiny).

who oppose such efforts does in fact create an explicit racial classification and is constitutionally suspect.[1455]

Toward the end of the Warren Court, there emerged a trend to treat classifications on the basis of nationality or alienage as suspect,[1456] to accord sex classifications a somewhat heightened traditional review while hinting that a higher standard might be appropriate if such classifications passed lenient review,[1457] and to pass on statutory and administrative treatments of illegitimates inconsistently.[1458] Language in a number of opinions appeared to suggest that poverty was a suspect condition, so that treating the poor adversely might call for heightened equal protection review.[1459]

However, in a major evaluation of equal protection analysis early in this period, the Court reaffirmed a two-tier approach, determining that where the interests involved that did not occasion strict scrutiny, the Court would decide the case on minimum rationality standards. Justice Powell, writing for the Court in *San Antonio School Dist. v. Rodriguez*,[1460] decisively rejected the contention that a *de facto* wealth classification, with an adverse impact on the poor, was either a suspect classification or merited some scrutiny other than the traditional basis,[1461] a holding that has several times been strongly reaffirmed by the Court.[1462] But the Court's rejection of some form of intermediate scrutiny did not long survive.

Without extended consideration of the issue of standards, the Court more recently adopted an intermediate level of scrutiny, perhaps one encompassing several degrees of intermediate scrutiny. Thus, gender classifications must, in order to withstand constitutional challenge, "serve important governmental objectives and must be sub-

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[1455] Hunter v. Erickson, 393 U.S. 385 (1969); Washington v. Seattle School Dist., 458 U.S. 457 (1982).

[1456] Graham v. Richardson, 403 U.S. 365, 371–72 (1971).

[1457] Reed v. Reed, 404 U.S. 71 (1971); for the hint, *see* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

[1458] *See* Levy v. Louisiana, 391 U.S. 68 (1968) (strict review); Labine v. Vincent, 401 U.S. 532 (1971) (lenient review); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (modified strict review).

[1459] *Cf.* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969); Bullock v. Carter, 405 U.S. 134 (1972). *See* Shapiro v. Thompson, 394 U.S. 618, 658–59 (1969) (Justice Harlan dissenting). *But cf.* Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

[1460] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[1461] 411 U.S. at 44–45. The Court asserted that only when there is an absolute deprivation of some right or interest because of inability to pay will there be strict scrutiny. Id. at 20.

[1462] *E.g.*, United States v. Kras, 409 U.S. 434 (1973); Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

stantially related to achievement of those objectives."[1463] And classifications that disadvantage illegitimates are subject to a similar though less exacting scrutiny of purpose and fit.[1464] This period also saw a withdrawal of the Court from the principle that alienage is always a suspect classification, so that some discriminations against aliens based on the nature of the political order, rather than economics or social interests, need pass only the lenient review standard.[1465]

The Court has so far resisted further expansion of classifications that must be justified by a standard more stringent than rational basis. For example, the Court has held that age classifica-

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[1463] Craig v. Boren, 429 U.S. 190, 197 (1976). Justice Powell noted that he agreed the precedents made clear that gender classifications are subjected to more critical examination than when "fundamental" rights and "suspect classes" are absent, id. at 210 (concurring), and added: "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited 'upper tier'—now has substantial precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases." Id. at 210, n.*. Justice Stevens wrote that in his view the two-tiered analysis does not describe a method of deciding cases "but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." Id. at 211, 212. Chief Justice Burger and Justice Rehnquist would employ the rational basis test for gender classification. Id. at 215, 217 (dissenting). Occasionally, because of the particular subject matter, the Court has appeared to apply a rational basis standard in fact if not in doctrine, *E.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (military); Michael M. v. Superior Court, 450 U.S. 464 (1981) (application of statutory rape prohibition to boys but not to girls). Four Justices in Frontiero v. Richardson, 411 U.S. 677, 684–87 (1973), were prepared to find sex a suspect classification, and in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982), the Court appeared to leave open the possibility that at least some sex classifications may be deemed suspect.

[1464] Mills v. Habluetzel, 456 U.S. 91, 99 (1982); Parham v. Hughes, 441 U.S. 347 (1979); Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977). In Mathews v. Lucas, 427 U.S. 495, 506 (1976), it was said that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes." *Lucas* sustained a statutory scheme virtually identical to the one struck down in Califano v. Goldfarb, 430 U.S. 199 (1977), except that the latter involved sex while the former involved illegitimacy.

[1465] Applying strict scrutiny, *see*, *e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Nyquist v. Mauclet, 432 U.S. 1 (1977). Applying lenient scrutiny in cases involving restrictions on alien entry into the political community, *see* Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979); Cabell v. Chavez-Salido, 454 U.S. 432 (1982). *See also* Plyler v. Doe, 457 U.S. 202 (1982).

tions are neither suspect nor entitled to intermediate scrutiny.[1466] Although the Court resists the creation of new suspect or "quasi-suspect" classifications, it may still, on occasion, apply the *Royster Guano* rather than the *Lindsley* standard of rationality.[1467]

The other phase of active review of classifications holds that when certain fundamental liberties and interests are involved, government classifications which adversely affect them must be justified by a showing of a compelling interest necessitating the classification and by a showing that the distinctions are required to further the governmental purpose. The effect of applying the test, as in the other branch of active review, is to deny to legislative judgments the deference usually accorded them and to dispense with the general presumption of constitutionality usually given state classifications.[1468]

It is thought [1469] that the "fundamental right" theory had its origins in *Skinner v. Oklahoma ex rel. Williamson*,[1470] in which the Court subjected to "strict scrutiny" a state statute providing for compulsory sterilization of habitual criminals, such scrutiny being thought necessary because the law affected "one of the basic civil rights." In the apportionment decisions, Chief Justice Warren observed that, "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." [1471] A stiffening of the traditional test could be noted in the opinion of the Court striking down certain restrictions on voting eligibility [1472] and the phrase "compelling state interest" was used several times in Justice Brennan's opinion in *Shapiro v. Thompson*.[1473] Thereafter, the phrase was used in

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[1466] Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding mandatory retirement at age 50 for state police); Vance v. Bradley, 440 U.S. 93 (1979) (mandatory retirement at age 60 for foreign service officers); Gregory v. Ashcroft, 501 U.S. 452 (1991) (mandatory retirement at age 70 for state judges). *See also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985) (holding that a lower court "erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation").

[1467] City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); *see* discussion, *supra*.

[1468] Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

[1469] Shapiro v. Thompson, 394 U.S. at 660 (Justice Harlan dissenting).

[1470] 316 U.S. 535, 541 (1942).

[1471] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[1472] Carrington v. Rash, 380 U.S. 89 (1965); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968).

[1473] 394 U.S. 618, 627, 634, 638 (1969).

several voting cases in which restrictions were voided, and the doctrine was asserted in other cases.[1474]

Although no opinion of the Court attempted to delineate the process by which certain "fundamental" rights were differentiated from others,[1475] it was evident from the cases that the right to vote,[1476] the right of interstate travel,[1477] the right to be free of wealth distinctions in the criminal process,[1478] and the right of procreation [1479] were at least some of those interests that triggered active review when *de jure* or *de facto* official distinctions were made with respect to them. In *Rodriguez*,[1480] the Court also sought to rationalize and restrict this branch of active review, as that case involved both a claim that *de facto* wealth classifications should be suspect and a claim that education was a fundamental interest, so that providing less of it to people because they were poor triggered a compelling state interest standard. The Court readily agreed that education was an important value in our society. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." [1481] A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undoubted importance.

But just as *Rodriguez* did not ultimately prevent the Court's adoption of a "three-tier" or "sliding-tier" standard of review, Justice Powell's admonition that only interests expressly or impliedly protected by the Constitution should be considered "fundamental" did not prevent the expansion of the list of such interests. The difficulty was that Court decisions on the right to vote, the right to travel, the right to procreate, as well as other rights, premise the constitutional violation to be of the Equal Protection Clause, which does not itself guarantee the right but prevents the differential govern-

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[1474] Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Dunn v. Blumstein, 405 U.S. 330 (1972).

[1475] This indefiniteness has been a recurring theme in dissents. *E.g.*, Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Justice Harlan); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 177 (1972) (Justice Rehnquist).

[1476] *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

[1477] *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[1478] *E.g.*, Tate v. Short, 401 U.S. 395 (1971).

[1479] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

[1480] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[1481] 411 U.S. at 30, 33–34. *But see* id. at 62 (Justice Brennan dissenting), 70, 110–17 (Justices Marshall and Douglas dissenting).

mental treatment of those attempting to exercise the right.[1482] Thus, state limitation on the entry into marriage was soon denominated an incursion on a fundamental right that required a compelling justification.[1483] Although denials of public funding of abortions were held to implicate no fundamental interest—abortion's being a fundamental interest—and no suspect classification—because only poor women needed public funding[1484]—other denials of public assistance because of illegitimacy, alienage, or sex have been deemed to be governed by the same standard of review as affirmative harms imposed on those grounds.[1485] And, in *Plyler v. Doe*,[1486] the complete denial of education to the children of illegal aliens was found subject to intermediate scrutiny and invalidated.

An open question after *Obergefell v. Hodges*, the 2015 case finding the right to same-sex marriage is protected by the Constitution, is the extent to which the Court is reconceptualizing equal protection analysis.[1487] In *Obergefell*, the Court concluded that state laws that distinguished between marriages between same- and opposite-sex married couples violated the Equal Protection Clause.[1488] However, in lieu of more traditional equal protection analysis, the *Obergefell* Court did not identify whether the base classification made by the challenged state marriage laws was "suspect." Nor did the *Obergefell* Court engage in a balancing test to determine whether the purpose of the state classification was tailored to or fit the contours of the classification. Instead, the Court merely declared that state laws prohibiting same-sex marriage "abridge[d] central precepts of equality."[1489] It remains to be seen whether *Obergefell* signals a new direction for the Court's equal protection jurisprudence or is merely an anomaly that indicates the fluctuating nature of active review, as the doctrine has been subject to shifting majorities and varying degrees of concern about judicial activism and judicial restraint. Nonetheless, as will be more fully reviewed below, the sliding scale of review underlies many of the Court's most recent equal protection cases, even if the jurisprudence and its doctrinal basis have not been fully elucidated or consistently endorsed by the Court.

[1482] Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and id. at 66–68 (Justice Brennan concurring), 78–80 (Justice O'Connor concurring) (travel).

[1483] Zablocki v. Redhail, 434 U.S. 374 (1978).

[1484] Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

[1485] *E.g.*, Jiminez v. Weinberger, 417 U.S. 628 (1974) (illegitimacy); Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Califano v. Goldfarb, 430 U.S. 199 (1977) (sex).

[1486] 457 U.S. 202 (1982).

[1487] *See* 576 U.S. ___, No. 14–556, slip op. at 2, 28 (2015).

[1488] *Id*. at 22.

[1489] *Id*.

Testing Facially Neutral Classifications Which Impact on Minorities

A classification made expressly upon the basis of race triggers strict scrutiny and ordinarily results in its invalidation; similarly, a classification that facially makes a distinction on the basis of sex, or alienage, or illegitimacy triggers the level of scrutiny appropriate to it. A classification that is ostensibly neutral but is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis is subject to heightened scrutiny and ordinarily invalidation.[1490] But when it is contended that a law, which is in effect neutral, has a disproportionately adverse effect upon a racial minority or upon another group particularly entitled to the protection of the Equal Protection Clause, a much more difficult case is presented.

In *Washington v. Davis*, the Court held that is necessary that one claiming harm based on the disparate or disproportionate impact of a facially neutral law prove intent or motive to discriminate.[1491] For a time, in reliance upon a prior Supreme Court decision that had seemed to eschew motive or intent and to pinpoint effect as the key to a constitutional violation, lower courts had questioned this proposition.[1492] Further, the Court had considered various civil rights statutes which provided that when employment practices are challenged for disqualifying a disproportionate numbers

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[1490] *See*, *e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Guinn v. United States, 238 U.S. 347 (1915); Lane v. Wilson, 307 U.S. 268 (1939); Gomillion v. Lightfoot, 364 U.S. 339 (1960). Government may make a racial classification that, for example, does not separate whites from blacks but that by focusing on an issue of racial import creates a classification that is suspect. Washington v. Seattle School Dist., 458 U.S. 457, 467–74 (1982).

[1491] 426 U.S. 229, 242 (1976) ("[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.") A classification having a differential impact, absent a showing of discriminatory purpose, is subject to review under the lenient, rationality standard. Id. at 247–48; Rogers v. Lodge, 458 U.S. 613, 617 n.5 (1982). The Court has applied the same standard to a claim of selective prosecution allegedly penalizing exercise of First Amendment rights. Wayte v. United States, 470 U.S. 598 (1985) (no discriminatory purpose shown). *See also* Bazemore v. Friday, 478 U.S. 385 (1986) (existence of single-race, state-sponsored 4–H Clubs is permissible, given wholly voluntary nature of membership).

[1492] The principal case was Palmer v. Thompson, 403 U.S. 217 (1971), in which a 5-to-4 majority refused to order a city to reopen its swimming pools closed allegedly to avoid complying with a court order to desegregate them. The majority opinion strongly warned against voiding governmental action upon an assessment of official motive, id. at 224–26, but it also drew the conclusion (and the *Davis* Court read it as actually deciding) that, because the pools were closed for both whites and blacks, there was no discrimination. The city's avowed reason for closing the pools—to avoid violence and economic loss—could not be impeached by allegations of a racial motive. *See also* Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

of blacks, discriminatory purpose need not be proved and that demonstrating a rational basis for the challenged practices was not a sufficient defense.[1493] Thus, the lower federal courts developed a constitutional "disproportionate impact" analysis under which, absent some justification going substantially beyond what would be necessary to validate most other classifications, a violation could be established without regard to discriminatory purpose by showing that a statute or practice adversely affected a class.[1494] These cases were disapproved in *Davis*, but the Court noted that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it be true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds." [1495]

The application of *Davis* in the following Terms led to both elucidation and not a little confusion. Looking to a challenged zoning decision of a local board that had a harsher impact upon blacks

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[1493] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The *Davis* Court adhered to this reading of Title VII, merely refusing to import the statutory standard into the constitutional standard. Washington v. Davis, 426 U.S. 229, 238–39, 246–48 (1976). Subsequent cases involving gender discrimination raised the question of the vitality of *Griggs*, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), but the disagreement among the Justices appears to be whether *Griggs* applies to each section of the antidiscrimination provision of Title VII. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977); Furnco Const. Co. v. Waters, 438 U.S. 567 (1978). *But see* General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) (unlike Title VII, under 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, proof of discriminatory intent is required).

[1494] *See* Washington v. Davis, 426 U.S. 229, 244 n.12 (1976) (listing and disapproving cases). Cases that the Court did not cite include those in which the Fifth Circuit wrestled with the distinction between *de facto* and *de jure* segregation. In Cisneros v. Corpus Christi Indep. School Dist. 467 F.2d 142, 148–50 (5th Cir. 1972) (en banc), *cert. denied*, 413 U.S. 920 (1973), the court held that motive and purpose were irrelevant and the "*de facto* and *de jure* nomenclature" to be "meaningless." After the distinction was reiterated in Keyes v. Denver School District, 413 U.S. 189 (1973), the Fifth Circuit adopted the position that a decisionmaker must be presumed to have intended the probable, natural, or foreseeable consequences of his decision and therefore that a school board decision that results in segregation is intentional in the constitutional sense, regardless of its motivation. United States v. Texas Educ. Agency, 532 F.2d 380 (5th Cir.), vacated and remanded for reconsideration in light of Washington v. Davis, 426 U.S. 229 (1976), *modified and adhered to*, 564 F.2d 162, *reh. denied*, 579 F.2d 910 (5th Cir. 1977–78), *cert denied*, 443 U.S. 915 (1979). *See also* United States v. Texas Educ. Agency, 600 F.2d 518 (5th Cir. 1979). This form of analysis was, however, substantially cabined in Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 278–80 (1979), although foreseeability as one kind of proof was acknowledged by Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464–65 (1979).

[1495] Washington v. Davis, 426 U.S. at 242 (1976).

and low-income persons than upon others, the Court in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*[1496] explained in some detail how inquiry into motivation would work. First, a plaintiff is not required to prove that an action rested solely on discriminatory purpose; establishing "a discriminatory purpose" among permissible purposes shifts the burden to the defendant to show that the same decision would have resulted absent the impermissible motive.[1497] Second, determining whether a discriminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Impact provides a starting point and "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," but this is a rare case.[1498] In the absence of such a stark pattern, a court will look to such factors as the "historical background of the decision," especially if there is a series of official discriminatory actions. The specific sequence of events may shed light on purpose, as would departures from normal procedural sequences or from substantive considerations usually relied on in the past to guide official actions. Contemporary statements of decisionmakers may be examined, and "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege."[1499] In most circumstances, a court is to look to the totality of the circumstances to ascertain intent.

Strengthening of the intent standard was evidenced in a decision sustaining against a sex discrimination challenge a state law giving an absolute preference in civil service hiring to veterans. Veterans who obtain at least a passing grade on the relevant examination may exercise the preference at any time and as many times as they wish and are ranked ahead of all non-veterans, no matter what their score. The lower court observed that the statutory and administrative exclusion of women from the armed forces until the recent

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[1496] 429 U.S. 252 (1977).

[1497] 429 U.S. at 265–66, 270 n.21. *See also* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977) (once plaintiff shows defendant acted from impermissible motive in not rehiring him, burden shifts to defendant to show result would have been same in the absence of that motive; constitutional violation not established merely by showing of wrongful motive); Hunter v. Underwood, 471 U.S. 222 (1985) (circumstances of enactment made it clear that state constitutional amendment requiring disenfranchisement for crimes involving moral turpitude had been adopted for purpose of racial discrimination, even though it was realized that some poor whites would also be disenfranchised thereby).

[1498] *Arlington Heights*, 429 U.S. at 266.

[1499] 429 U.S. 267–68.

past meant that virtually all women were excluded from state civil service positions and held that results so clearly foreseen could not be said to be unintended. Reversing, the Supreme Court found that the veterans preference law was not overtly or covertly gender-based; too many men are non-veterans to permit such a conclusion, and some women are veterans. That the preference implicitly incorporated past official discrimination against women was held not to detract from the fact that rewarding veterans for their service to their country was a legitimate public purpose. Acknowledging that the consequences of the preference were foreseeable, the Court pronounced this fact insufficient to make the requisite showing of intent. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." [1500]

Moreover, in *City of Mobile v. Bolden* [1501] a plurality of the Court apparently attempted to do away with the totality of circumstances test and to separately evaluate each of the factors offered to show a discriminatory intent. At issue was the constitutionality of the use of multi-member electoral districts to select the city commission. A prior decision had invalidated a multi-member districting system as discriminatory against blacks and Hispanics by listing and weighing a series of factors which in totality showed invidious discrimination, but the Court did not consider whether its ruling was premised on discriminatory purpose or adverse impact.[1502] But in the plurality opinion in *Mobile*, each of the factors, viewed "alone," was deemed insufficient to show purposeful discrimination.[1503] Moreover, the plurality suggested that some of the factors thought to be

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[1500] Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). This case clearly established the application of *Davis* and *Arlington Heights* to all nonracial classifications attacked under the Equal Protection Clause. *But compare* Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979), *and* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979), in the context of the quotation in the text. These cases found the *Davis* standard satisfied on a showing of past discrimination coupled with foreseeable impact in the school segregation area.

[1501] 446 U.S. 55 (1980). Also decided by the plurality was that discriminatory purpose is a requisite showing to establish a violation of the Fifteenth Amendment and of the Equal Protection Clause in the "fundamental interest" context, vote dilution, rather than just in the suspect classification context.

[1502] White v. Regester, 412 U.S. 755 (1972), was the prior case. *See also* Whitcomb v. Chavis, 403 U.S. 124 (1971). Justice White, the author of *Register*, dissented in *Mobile*, 446 U.S. at 94, on the basis that "the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White v. Register*." Justice Blackmun, id. at 80, and Justices Brennan and Marshall, agreed with him as alternate holdings, id. at 94, 103.

[1503] 446 U.S. at 65–74.

derived from its precedents and forming part of the totality test in opinions of the lower federal courts—such as minority access to the candidate selection process, governmental responsiveness to minority interests, and the history of past discrimination—were of quite limited significance in determining discriminatory intent.[1504] But, contemporaneously with Congress's statutory rejection of the *Mobile* plurality standards,[1505] the Court, in *Rogers v. Lodge*,[1506] appeared to disavow much of *Mobile* and to permit the federal courts to find discriminatory purpose on the basis of "circumstantial evidence" [1507] that is more reminiscent of pre-*Washington v. Davis* cases than of the more recent decisions.

Rogers v. Lodge was also a multimember electoral district case brought under the Equal Protection Clause [1508] and the Fifteenth Amendment. The fact that the system operated to cancel out or dilute black voting strength, standing alone, was insufficient to condemn it; discriminatory intent in creating or maintaining the system was necessary. But direct proof of such intent is not required. "[A]n invidious purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." [1509] Turning to the lower court's enunciation of standards, the Court approved the *Zimmer* formulation. The fact that no black had ever been elected in the county, in which blacks were a majority of the population but a minority of registered voters, was "important evidence of purposeful

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[1504] 446 U.S. at 73–74. The principal formulation of the test was in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976), and its components are thus frequently referred to as the *Zimmer* factors.

[1505] By the Voting Rights Act Amendments of 1982, P.L. 97–205, 96 Stat. 131, 42 U.S.C. § 1973 (as amended), *see* S. REP. NO. 417, 97th Congress, 2d Sess. 27–28 (1982), Congress proscribed a variety of electoral practices "which results" in a denial or abridgment of the right to vote, and spelled out in essence the *Zimmer* factors as elements of a "totality of the circumstances" test.

[1506] 458 U.S. 613 (1982). The decision, handed down within days of final congressional passage of the Voting Rights Act Amendments, was written by Justice White and joined by Chief Justice Burger and Justices Brennan, Marshall, Blackmun, and O'Connor. Justices Powell and Rehnquist dissented, id. at 628, as did Justice Stevens. Id. at 631.

[1507] 458 U.S. at 618–22 (describing and disagreeing with the *Mobile* plurality, which had used the phrase at 446 U.S. 74). The *Lodge* Court approved the prior reference that motive analysis required an analysis of "such circumstantial and direct evidence" as was available. Id. at 618 (quoting *Arlington Heights*, 429 U.S. at 266).

[1508] The Court confirmed the Mobile analysis that the "fundamental interest" side of heightened equal protection analysis requires a showing of intent when the criteria of classification are neutral and did not reach the Fifteenth Amendment issue in this case. 458 U.S. at 619 n.6.

[1509] 458 U.S. at 618 (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)).

exclusion."[1510] Standing alone this fact was not sufficient, but a historical showing of past discrimination, of systemic exclusion of blacks from the political process as well as educational segregation and discrimination, combined with continued unresponsiveness of elected officials to the needs of the black community, indicated the presence of discriminatory motivation. The Court also looked to the "depressed socio-economic status" of the black population as being both a result of past discrimination and a barrier to black access to voting power.[1511] As for the district court's application of the test, the Court reviewed it under the deferential "clearly erroneous" standard and affirmed it.

The Court in a jury discrimination case also seemed to allow what it had said in *Davis* and *Arlington Heights* it would not permit.[1512] Noting that disproportion alone is insufficient to establish a violation, the Court nonetheless held that the plaintiff's showing that 79 percent of the county's population was Spanish-surnamed, whereas jurors selected in recent years ranged from 39 to 50 percent Spanish-surnamed, was sufficient to establish a *prima facie* case of discrimination. Several factors probably account for the difference. First, the Court has long recognized that discrimination in jury selection can be inferred from less of a disproportion than is needed to show other discriminations, in major part because if jury selection is truly random any substantial disproportion reveals the presence of an impermissible factor, whereas most official decisions are not random.[1513] Second, the jury selection process was "highly subjective" and thus easily manipulated for discriminatory purposes, unlike the process in *Davis* and *Arlington Heights*, which was regularized and open to inspection.[1514] Thus, jury cases are likely to continue to be special cases and, in the usual fact situation, at least where the process is open, plaintiffs will bear a heavy and substantial burden in showing discriminatory racial and other animus.

[1510] 458 U.S. at 623–24.

[1511] 458 U.S. at 624–27. The Court also noted the existence of other factors showing the tendency of the system to minimize the voting strength of blacks, including the large size of the jurisdiction and the maintenance of majority vote and single-seat requirements and the absence of residency requirements.

[1512] Castaneda v. Partida, 430 U.S. 482 (1977). The decision was 5-to-4, Justice Blackmun writing the opinion of the Court and Chief Justice Burger and Justices Stewart, Powell, and Rehnquist dissenting. Id. at 504–07.

[1513] 430 U.S. at 493–94. This had been recognized in Washington v. Davis, 426 U.S. 229, 241 (1976), and Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 n.13 (1977).

[1514] Castaneda v. Partida, 430 U.S. 482, 494, 497–99 (1977).

TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWER

Taxation

At the outset, the Court did not regard the Equal Protection Clause as having any bearing on taxation.[1515] It soon, however, entertained cases assailing specific tax laws under this provision,[1516] and in 1890 it cautiously conceded that "clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition." [1517] The Court observed, however, that the Equal Protection Clause "was not intended to compel the State to adopt an iron rule of equal taxation" and propounded some conclusions that remain valid today.[1518] In succeeding years the clause has been invoked but sparingly to invalidate state levies. In the field of property taxation, inequality has been condemned only in two classes of cases: (1) discrimination in assessments, and (2) discrimination against foreign corporations. In addition, there are a handful of cases invalidating, because of inequality, state laws imposing income, gross receipts, sales and license taxes.

Classification for Purpose of Taxation.—The power of the state to classify for purposes of taxation is "of wide range and flexibility." [1519] A state may adjust its taxing system in such a way as

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[1515] Davidson v. City of New Orleans, 96 U.S. 97, 106 (1878).

[1516] Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886); Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886).

[1517] Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890).

[1518] The state "may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution." 134 U.S. at 237. *See* Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); and City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[1519] Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). Classifications for purpose of taxation have been held valid in the following situations:

Banks: a heavier tax on banks which make loans mainly from money of depositors than on other financial institutions which make loans mainly from money supplied otherwise than by deposits. First Nat'l Bank v. Tax Comm'n, 289 U.S. 60 (1933).

Bank deposits: a tax of 50 cents per $100 on deposits in banks outside a state in contrast with a rate of 10 cents per $100 on deposits in the state. Madden v. Kentucky, 309 U.S. 83 (1940).

Coal: a tax of 2 ½ percent on anthracite but not on bituminous coal. Heisler v. Thomas Colliery Co., 260 U.S. 245 (1922).

Gasoline: a graduated severance tax on oils sold primarily for their gasoline content, measured by resort to Baume gravity. Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (prohibition on pass-through to consumers of oil and gas severance tax).

Chain stores: a privilege tax graduated according to the number of stores maintained, Tax Comm'rs v. Jackson, 283 U.S. 527 (1931); Fox v. Standard Oil Co., 294 U.S. 87 (1935); a license tax based on the number of stores both within and without the state, Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937) (distinguishing Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933)).

Electricity: municipal systems may be exempted, Puget Sound Co. v. Seattle, 291 U.S. 619 (1934); that portion of electricity produced which is used for pumping water for irrigating lands may be exempted, Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932).

Gambling: slot machines on excursion riverboats are taxed at a maximum rate of 20 percent, while slot machines at a racetrack are taxed at a maximum rate of 36 percent. Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

Insurance companies: license tax measured by gross receipts upon domestic life insurance companies from which fraternal societies having lodge organizations and insuring lives of members only are exempt, and similar foreign corporations are subject to a fixed and comparatively slight fee for the privilege of doing local business of the same kind. Northwestern Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918).

Oleomargarine: classified separately from butter. Magnano Co. v. Hamilton, 292 U.S. 40 (1934).

Peddlers: classified separately from other vendors. Caskey Baking Co. v. Virginia, 313 U.S. 117 (1941).

Public utilities: a gross receipts tax at a higher rate for railroads than for other public utilities, *Ohio Tax Cases*, 232 U.S. 576 (1914); a gasoline storage tax which places a heavier burden upon railroads than upon common carriers by bus, Nashville C. & St. L. Ry. v. Wallace, 288 U.S. 249 (1933); a tax on railroads measured by gross earnings from local operations, as applied to a railroad which received a larger net income than others from the local activity of renting, and borrowing cars, Illinois Cent. R.R. v. Minnesota, 309 U.S. 157 (1940); a gross receipts tax applicable only to public utilities, including carriers, the proceeds of which are used for relieving the unemployed, New York Rapid Transit Corp. v. New York, 303 U.S. 573 (1938).

Wine: exemption of wine from grapes grown in the State while in the hands of the producer, Cox v. Texas, 202 U.S. 446 (1906).

Laws imposing miscellaneous license fees have been upheld as follows:

Cigarette dealers: taxing retailers and not wholesalers. Cook v. Marshall County, 196 U.S. 261 (1905).

Commission merchants: requirements that dealers in farm products on commission procure a license, Payne v. Kansas, 248 U.S. 112 (1918).

Elevators and warehouses: license limited to certain elevators and warehouses on right-of-way of railroad, Cargill Co. v. Minnesota, 180 U.S. 452 (1901); a license tax applicable only to commercial warehouses where no other commercial warehousing facilities in township subject to tax, Independent Warehouses v. Scheele, 331 U.S. 70 (1947).

Laundries: exemption from license tax of steam laundries and women engaged in the laundry business where not more than two women are employed. Quong Wing v. Kirkendall, 223 U.S. 59 (1912).

Merchants: exemption from license tax measured by amount of purchases, of manufacturers within the state selling their own product. Armour & Co. v. Virginia, 246 U.S. 1 (1918).

to favor certain industries or forms of industry [1520] and may tax different types of taxpayers differently, despite the fact that they compete.[1521] It does not follow, however, that because "some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed." [1522] Classification may not be arbitrary. It must be based on a real and substantial difference [1523] and the difference need not be great or conspicuous,[1524] but there must be no discrimination in favor of one as against another of the same class.[1525] Also, discriminations of an unusual character are scrutinized with special care.[1526] A gross sales tax graduated at increasing rates with the volume of sales,[1527] a heavier license tax on each unit in a chain of stores where the owner has stores located in more than one country,[1528] and a gross receipts tax levied on corporations operating taxicabs, but not on individuals,[1529] have been held to be a repugnant to the Equal Protection Clause. But it is not the function of the Court to consider the propriety or justness of the tax, to seek for the motives and criticize the public policy which prompted the adoption of the statute.[1530] If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied.[1531]

One not within the class claimed to be discriminated against cannot challenge the constitutionality of a statute on the ground

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Sugar refineries: exemption from license applicable to refiners of sugar and molasses of planters and farmers grinding and refining their own sugar and molasses. American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900).

Theaters: license graded according to price of admission. Metropolis Theatre Co. v. Chicago, 228 U.S. 61 (1913).

Wholesalers of oil: occupation tax on wholesalers in oil not applicable to wholesalers in other products. Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910).

[1520] Quong Wing v. Kirkendall, 223 U.S. 59, 62 (1912). *See also* Hammond Packing Co. v. Montana, 233 U.S. 331 (1914); Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959); Fitzgerald v. Racing Ass'n of Central Iowa, 539 U.S. 103 (2003).

[1521] Puget Sound Co. v. Seattle, 291 U.S. 619, 625 (1934). *See* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).

[1522] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

[1523] Southern Ry. v. Greene, 216 U.S. 400, 417 (1910); Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389, 400 (1928).

[1524] Keeney v. New York, 222 U.S. 525, 536 (1912); Tax Comm'rs v. Jackson, 283 U.S. 527, 538 (1931).

[1525] Giozza v. Tiernan, 148 U.S. 657, 662 (1893).

[1526] Louisville Gas Co. v. Coleman, 227 U.S. 32, 37 (1928). *See also* Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890).

[1527] Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935). *See also* Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32 (1936).

[1528] Louis K. Liggett Co. v. Lee, 288 U.S. 517 (1933).

[1529] Quaker City Cab Co. v. Pennsylvania, 277 U.S. 389 (1928). This case was formally overruled in Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

[1530] Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931).

[1531] Colgate v. Harvey, 296 U.S. 404, 422 (1935).

that it denies equal protection of the law.[1532] If a tax applies to a class that may be separately taxed, those within the class may not complain because the class might have been more aptly defined or because others, not of the class, are taxed improperly.[1533]

Foreign Corporations and Nonresidents.—The Equal Protection Clause does not require identical taxes upon all foreign and domestic corporations in every case.[1534] In 1886, a Pennsylvania corporation previously licensed to do business in New York challenged an increased annual license tax imposed by that state in retaliation for a like tax levied by Pennsylvania against New York corporations. This tax was held valid on the ground that the state, having power to exclude entirely, could change the conditions of admission for the future and could demand the payment of a new or further tax as a license fee.[1535] Later cases whittled down this rule considerably. The Court decided that "after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind,"[1536] and that where it has acquired property of a fixed and permanent nature in a state, it cannot be subjected to a more onerous tax for the privilege of doing business than is imposed on domestic corporations.[1537] A state statute taxing foreign corporations writing fire, marine, inland navigation and casualty insurance on net receipts, including receipts from casualty business, was held invalid under the Equal Protection Clause where foreign companies writing only casualty insurance were not subject to a similar tax.[1538] Later, the doctrine of *Philadelphia Fire Association v. New York* was revived to sustain an increased tax on gross premiums which was exacted as an annual license fee from foreign but not from domestic corporations.[1539] Even though the right of a foreign corporation to do business in a state rests on a license, the Equal Protection Clause is held to insure it equality of treatment, at least so far as ad valorem taxation is concerned.[1540] The Court,

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[1532] Darnell v. Indiana, 226 U.S. 390, 398 (1912); Farmers Bank v. Minnesota, 232 U.S. 516, 531 (1914).

[1533] Morf v. Bingaman, 298 U.S. 407, 413 (1936).

[1534] Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 88 (1913). *See also* Cheney Brothers Co. v. Massachusetts, 246 U.S. 147, 157 (1918).

[1535] Philadelphia Fire Ass'n v. New York, 119 U.S. 110, 119 (1886).

[1536] Hanover Fire Ins. Co. v. Harding, 272 U.S. 494, 511 (1926).

[1537] Southern Ry. v. Green, 216 U.S. 400, 418 (1910).

[1538] Concordia Ins. Co. v. Illinois, 292 U.S. 535 (1934).

[1539] Lincoln Nat'l Life Ins. Co. v. Read, 325 U.S. 673 (1945). This decision was described as "an anachronism" in Western & Southern Life Ins. Co. v. State Bd. Of Equalization, 451 U.S. 648, 667 (1981), the Court reaffirming the rule that taxes discriminating against foreign corporations must bear a rational relation to a legitimate state purpose.

[1540] Wheeling Steel Corp. v. Glander, 337 U.S. 562, 571, 572 (1949).

in *WHYY Inc. v. Glassboro*,[1541] held that a foreign nonprofit corporation licensed to do business in the taxing state is denied equal protection of the law where an exemption from state property taxes granted to domestic corporations is denied to a foreign corporation solely because it was organized under the laws of a sister state and where there is no greater administrative burden in evaluating a foreign corporation than a domestic corporation in the taxing state.

State taxation of insurance companies, insulated from Commerce Clause attack by the McCarran-Ferguson Act, must pass similar hurdles under the Equal Protection Clause. In *Metropolitan Life Ins. Co. v. Ward*,[1542] the Court concluded that taxation favoring domestic over foreign corporations "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Rejecting the assertion that it was merely imposing "Commerce Clause rhetoric in equal protection clothing," the Court explained that the emphasis is different even though the result in some cases will be the same: the Commerce Clause measures the effects which otherwise valid state enactments have on interstate commerce, while the Equal Protection Clause merely requires a rational relation to a valid state purpose.[1543] However, the Court's holding that the discriminatory purpose was invalid under equal protection analysis would also be a basis for invalidation under a different strand of Commerce Clause analysis.[1544]

Income Taxes.—A state law that taxes the entire income of domestic corporations that do business in the state, including that derived within the state, while exempting entirely the income received outside the state by domestic corporations that do no local business, is arbitrary and invalid.[1545] In taxing the income of a nonresident, there is no denial of equal protection in limiting the deduction of losses to those sustained within the state, although resi-

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[1541] 393 U.S. 117 (1968).

[1542] 470 U.S. 869, 878 (1985). The vote was 5–4, with Justice Powell's opinion for the Court joined by Chief Justice Burger and by Justices White, Blackmun, and Stevens. Justice O'Connor's dissent was joined by Justices Brennan, Marshall, and Rehnquist.

[1543] 470 U.S. at 880.

[1544] The first level of the Court's "two-tiered" analysis of state statutes affecting commerce tests for virtual *per se* invalidity. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

[1545] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *See also* Walters v. City of St. Louis, 347 U.S. 231 (1954), sustaining a municipal income tax imposed on gross wages of employed persons but only on net profits of the self-employed, of corporations, and of business enterprises.

dents are permitted to deduct all losses, wherever incurred.[1546] A retroactive statute imposing a graduated tax at rates different from those in the general income tax law, on dividends received in a prior year that were deductible from gross income under the law in effect when they were received, does not violate the Equal Protection Clause.[1547]

Inheritance Taxes.—There is no denial of equal protection in prescribing different treatment for lineal relations, collateral kindred and unrelated persons, or in increasing the proportionate burden of the tax progressively as the amount of the benefit increases.[1548] A tax on life estates where the remainder passes to lineal heirs is valid despite the exemption of life estates where the remainder passes to collateral heirs.[1549] There is no arbitrary classification in taxing the transmission of property to a brother or sister, while exempting that to a son-in-law or daughter-in-law.[1550] Vested and contingent remainders may be treated differently.[1551] The exemption of property bequeathed to charitable or educational institutions may be limited to those within the state.[1552] In computing the tax collectible from a nonresident decedent's property within the state, a state may apply the pertinent rates to the whole estate wherever located and take that proportion thereof which the property within the state bears to the total; the fact that a greater tax may result than would be assessed on an equal amount of property if owned by a resident, does not invalidate the result.[1553]

Motor Vehicle Taxes.—In demanding compensation for the use of highways, a state may exempt certain types of vehicles, according to the purpose for which they are used, from a mileage tax on carriers.[1554] A state maintenance tax act, which taxes vehicle property carriers for hire at greater rates than it taxes similar vehicles carrying property not for hire, is reasonable, because the use of roads by one hauling not for hire generally is limited to transportation of his own property as an incident to his occupation and is substantially less extensive than that of one engaged in business as a common carrier.[1555] A property tax on motor vehicles used in operating a stage line that makes constant and unusual use of the highways

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[1546] Shaffer v. Carter, 252 U.S. 37, 56, 57 (1920); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 75, 76 (1920).
[1547] Welch v. Henry, 305 U.S. 134 (1938).
[1548] Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 288, 300 (1898).
[1549] Billings v. Illinois, 188 U.S. 97 (1903).
[1550] Campbell v. California, 200 U.S. 87 (1906).
[1551] Salomon v. State Tax Comm'n, 278 U.S. 484 (1929).
[1552] Board of Educ. v. Illinois, 203 U.S. 553 (1906).
[1553] Maxwell v. Bugbee, 250 U.S. 525 (1919).
[1554] Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).
[1555] Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 78 (1939).

may be measured by gross receipts and be assessed at a higher rate than are taxes on property not so employed.[1556] Common motor carriers of freight operating over regular routes between fixed termini may be taxed at higher rates than other carriers, common and private.[1557] A fee for the privilege of transporting motor vehicles on their own wheels over the highways of the state for purpose of sale does not violate the Equal Protection Clause as applied to cars moving in caravans.[1558] The exemption from a tax for a permit to bring cars into the state in caravans of cars moved for sale between zones in the state is not an unconstitutional discrimination where it appears that the traffic subject to the tax places a much more serious burden on the highways than that which is exempt from the tax.[1559] Also sustained as valid have been exemptions of vehicles weighing less than 3,000 pounds from graduated registration fees imposed on carriers for hire, notwithstanding that the exempt vehicles, when loaded, may outweigh those taxed;[1560] and exemptions from vehicle registration and license fees levied on private carriers operating a motor vehicle in the business of transporting persons or property for hire, the exemptions including one for vehicles hauling people and farm products exclusively between points not having railroad facilities and not passing through or beyond municipalities having railroad facilities.[1561]

Property Taxes.—The state's latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemption on the grounds of policy,[1562] whether the exemption results from the terms of the statute itself or the conduct of a state official implementing state policy.[1563] A provision for the forfeiture of land for nonpayment of taxes is not invalid because the conditions to which it applies exist only in a part of the state.[1564] Also, differences in the basis of assessment are not invalid where the person or property affected might properly be placed in a separate class for purposes of taxation.[1565]

Early cases drew the distinction between intentional and systematic discriminatory action by state officials in undervaluing some property while taxing at full value other property in the same

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[1556] Alward v. Johnson, 282 U.S. 509 (1931).
[1557] Bekins Van Lines v. Riley, 280 U.S. 80 (1929).
[1558] Morf v. Bingaman, 298 U.S. 407 (1936).
[1559] Clark v. Paul Gray, Inc., 306 U.S. 583 (1939).
[1560] Carley & Hamilton v. Snook, 281 U.S. 66 (1930).
[1561] Aero Mayflower Transit Co. v. Georgia Pub. Serv. Comm'n, 295 U.S. 285 (1935).
[1562] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
[1563] Missouri v. Dockery, 191 U.S. 165 (1903).
[1564] Kentucky Union Co. v. Kentucky, 219 U.S. 140, 161 (1911).
[1565] Charleston Fed. S. & L. Ass'n v. Alderson, 324 U.S. 182 (1945); Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362 (1940).

class—an action that could be invalidated under the Equal Protection Clause—and mere errors in judgment resulting in unequal valuation or undervaluation—actions that did not support a claim of discrimination.[1566] Subsequently, however, the Court in *Allegheny Pittsburgh Coal Co. v. Webster County Comm'n*,[1567] found a denial of equal protection to property owners whose assessments, based on recent purchase prices, ranged from 8 to 35 times higher than comparable neighboring property for which the assessor failed over a 10-year period to readjust appraisals.

Then, only a few years later, the Court upheld a California ballot initiative that imposed a quite similar result: property that is sold is appraised at purchase price, whereas assessments on property that has stayed in the same hands since 1976 may rise no more that 2% per year.[1568] *Allegheny Pittsburgh* was distinguished, the disparity in assessments being said to result from administrative failure to implement state policy rather than from implementation of a coherent state policy.[1569] California's acquisition-value system favoring those who hold on to property over those who purchase and sell property was viewed as furthering rational state interests in promoting "local neighborhood preservation, continuity, and stability," and in protecting reasonable reliance interests of existing homeowners.[1570]

Allegheny Pittsburgh was similarly distinguished in *Armour v. City of Indianapolis*,[1571] where the Court held that Indianapolis, which had abandoned one method of assessing payments against affected lots for sewer projects for another, could forgive outstanding assessments payments without refunding assessments already paid. In *Armour*, owners of affected lots had been given the option of paying in one lump sum, or of paying in 10, 20 or 30-year installment plan. Despite arguments that the forgiveness of the assessment resulted in a significant disparity in the assessment paid by similarly-situated homeowners, the Court found that avoiding the administrative burden of continuing to collect the outstanding fees was a rational basis for the City's decision.[1572]

[1566] Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350 (1918); Raymond v. Chicago Traction Co., 207 U.S. 20, 35, 37 (1907); Coutler v. Louisville & Nashville R.R., 196 U.S. 599 (1905). *See also* Chicago, B. & Q. Ry. v. Babcock, 204 U.S. 585 (1907).

[1567] 488 U.S. 336 (1989).

[1568] Nordlinger v. Hahn, 505 U.S. 1 (1992).

[1569] 505 U.S. at 14–15.

[1570] 505 U.S. at 12–13.

[1571] 566 U.S. ___, No. 11–161, slip op. (2012).

[1572] 566 U.S. ___, No. 11–161, slip op. at 7–10.

An owner aggrieved by discrimination is entitled to have his assessment reduced to the common level.[1573] Equal protection is denied if a state does not itself remove the discrimination; it cannot impose upon the person against whom the discrimination is directed the burden of seeking an upward revision of the assessment of other members of the class.[1574] A corporation whose valuations were accepted by the assessing commission cannot complain that it was taxed disproportionately, as compared with others, if the commission did not act fraudulently.[1575]

Special Assessment.—A special assessment is not discriminatory because apportioned on an *ad valorem* basis, nor does its validity depend upon the receipt of some special benefit as distinguished from the general benefit to the community.[1576] Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality.[1577] A special highway assessment against railroads based on real property, rolling stock, and other personal property is unjustly discriminatory when other assessments for the same improvement are based on real property alone.[1578] A law requiring the franchise of a railroad to be considered in valuing its property for apportionment of a special assessment is not invalid where the franchises were not added as a separate personal property value to the assessment of the real property.[1579] In taxing railroads within a levee district on a mileage basis, it is not necessarily arbitrary to fix a lower rate per mile for those having fewer than 25 miles of main line within the district than for those having more.[1580]

Police Power Regulation

Classification.—Justice Holmes' characterization of the Equal Protection Clause as the "usual last refuge of constitutional arguments"[1581] was no doubt made with the practice in mind of contestants tacking on an equal protection argument to a due process challenge of state economic regulation. Few police regulations have been held unconstitutional on this ground.

[1573] Sioux City Bridge v. Dakota County, 260 U.S. 441, 446 (1923).

[1574] Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946); Allegheny Pittsburgh Coal Co. v. Webster County Comm'n, 488 U.S. 336 (1989).

[1575] St. Louis-San Francisco Ry v. Middlekamp, 256 U.S. 226, 230 (1921).

[1576] Memphis & Charleston Ry. v. Pace, 282 U.S. 241 (1931).

[1577] Kansas City So. Ry. v. Road Improv. Dist. No. 6, 256 U.S. 658 (1921); Thomas v. Kansas City So. Ry., 261 U.S. 481 (1923).

[1578] Road Improv. Dist. v. Missouri Pacific R.R., 274 U.S. 188 (1927).

[1579] Branson v. Bush, 251 U.S. 182 (1919).

[1580] Columbus & Greenville Ry. v. Miller, 283 U.S. 96 (1931).

[1581] Buck v. Bell, 274 U.S. 200, 208 (1927).

"[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." [1582] The Court has made it clear that only the totally irrational classification in the economic field will be struck down,[1583] and it has held that legislative classifications that impact severely upon some businesses and quite favorably upon others may be saved through stringent deference to legislative judgment.[1584] So deferential is the classification that it denies the challenging party any right to offer evidence to seek to prove that the legislature is wrong in its conclusion that its classification will serve the purpose it has in mind, so long as the question is at least debatable and the legislature "*could rationally have decided*" that its classification would foster its goal.[1585] The Court has con-

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[1582] McGowan v. Maryland, 366 U.S. 420, 425–26 (1961).

[1583] City of New Orleans v. Dukes, 427 U.S. 297 (1976). Upholding an ordinance that banned all pushcart vendors from the French Quarter, except those in continuous operation for more than eight years, the Court summarized its method of decision here. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a superlegislature to judge the wisdom or undesirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . . ; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." Id. at 303–04.

[1584] The "grandfather" clause upheld in *Dukes* preserved the operations of two concerns that had operated in the Quarter for 20 years. The classification was sustained on the basis of (1) the City Council proceeding step-by-step and eliminating vendors of more recent vintage, (2) the Council deciding that newer businesses were less likely to have built up substantial reliance interests in continued operation in the Quarter, and (3) the Council believing that both "grandfathered" vending interests had themselves become part of the distinctive character and charm of the Quarter. 427 U.S. at 305–06. *See also* Friedman v. Rogers, 440 U.S. 1, 17–18 (1979); United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 6 (1970).

[1585] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461–70 (1981). The quoted phrase is at 466 (emphasis by Court). Purporting to promote the purposes of

resource conservation, easing solid waste disposal problems, and conserving energy, the legislature had banned plastic nonreturnable milk cartons but permitted all other nonplastic nonreturnable containers, such as paperboard cartons. The state court had thought the distinction irrational, but the Supreme Court thought the legislature could have believed a basis for the distinction existed. Courts will receive evidence that a distinction is wholly irrational. United States v. Carolene Products Co., 304 U.S. 144, 153–54 (1938).

Classifications under police regulations have been held valid as follows:

Advertising: discrimination between billboard and newspaper advertising of cigarettes, Packer Corp. v. Utah, 285 U.S. 105 (1932); prohibition of advertising signs on motor vehicles, except when used in the usual business of the owner and not used mainly for advertising, Fifth Ave. Coach Co. v. New York, 221 U.S. 467 (1911); prohibition of advertising on motor vehicles except notices or advertising of products of the owner, Railway Express Agency v. New York, 336 U.S. 106 (1949); prohibition against sale of articles on which there is a representation of the flag for advertising purposes, except newspapers, periodicals and books, Halter v. Nebraska, 205 U.S. 34 (1907).

Amusement: prohibition against keeping billiard halls for hire, except in case of hotels having twenty-five or more rooms for use of regular guests. Murphy v. California, 225 U.S. 623 (1912).

Attorneys: Kansas law and court regulations requiring resident of Kansas, licensed to practice in Kansas and Missouri and maintaining law offices in both States, but who practices regularly in Missouri, to obtain local associate counsel as a condition of appearing in a Kansas court. Martin v. Walton, 368 U.S. 25 (1961). Two dissenters, Justices Douglas and Black, would sustain the requirement, if limited in application to an attorney who practiced only in Missouri.

Cable Television: exemption from regulation under the Cable Communications Policy Act of facilities that serve only dwelling units under common ownership. FCC v. Beach Communications, 508 U.S. 307 (1993). Regulatory efficiency is served by exempting those systems for which the costs of regulation exceed the benefits to consumers, and potential for monopoly power is lessened when a cable system operator is negotiating with a single-owner.

Cattle: a classification of sheep, as distinguished from cattle, in a regulation restricting the use of public lands for grazing. Bacon v. Walker, 204 U.S. 311 (1907). *See also* Omaechevarria v. Idaho, 246 U.S. 343 (1918).

Cotton gins: in a State where cotton gins are held to be public utilities and their rates regulated, the granting of a license to a cooperative association distributing profits ratably to members and nonmembers does not deny other persons operating gins equal protection when there is nothing in the laws to forbid them to distribute their net earnings among their patrons. Corporation Comm'n v. Lowe, 281 U.S. 431 (1930).

Debt adjustment business: operation only as incident to legitimate practice of law. Ferguson v. Skrupa, 372 U.S. 726 (1963).

Eye glasses: law exempting sellers of ready-to-wear glasses from regulations forbidding opticians to fit or replace lenses without prescriptions from ophthalmologist or optometrist and from restrictions on solicitation of sale of eye glasses by use of advertising matter. Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

Fish processing: stricter regulation of reduction of fish to flour or meal than of canning. Bayside Fish Co. v. Gentry, 297 U.S. 422 (1936).

Food: bread sold in loaves must be of prescribed standard sizes, Schmidinger v. Chicago, 226 U.S. 578 (1913); food preservatives containing boric acid may not be sold, Price v. Illinois, 238 U.S. 446 (1915); lard not sold in bulk must be put up in containers holding one, three or five pounds or some whole multiple thereof, Armour & Co. v. North Dakota, 240 U.S. 510 (1916); milk industry may be placed in a special class for regulation, Lieberman v. Van De Carr, 199 U.S. 552 (1906); vendors producing milk outside city may be classified separately, Adams v. Milwaukee, 228

U.S. 572 (1913); producing and nonproducing vendors may be distinguished in milk regulations, St. John v. New York, 201 U.S. 633 (1906); different minimum and maximum milk prices may be fixed for distributors and storekeepers, Nebbia v. New York, 291 U.S. 502 (1934); price differential may be granted for sellers of milk not having a well advertised trade name, Borden's Farm Products Co. v. Ten Eyck, 297 U.S. 251 (1936); oleomargarine colored to resemble butter may be prohibited, Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902); table syrups may be required to be so labeled and disclose identity and proportion of ingredients, Corn Products Ref. Co. v. Eddy, 249 U.S. 427 (1919)

Geographical discriminations: legislation limited in application to a particular geographical or political subdivision of a state, Ft. Smith Co. v. Paving Dist., 274 U.S. 387, 391 (1927); ordinance prohibiting a particular business in certain sections of a municipality, Hadacheck v. Sebastian, 239 U.S. 394 (1915); statute authorizing a municipal commission to limit the height of buildings in commercial districts to 125 feet and in other districts to 80 to 100 feet, Welch v. Swasey, 214 U.S. 91 (1909); ordinance prescribing limits in city outside of which no woman of lewd character shall dwell, L'Hote v. New Orleans, 177 U.S. 587, 595 (1900). *See also* North v. Russell, 427 U.S. 328, 338 (1976).Geographic distinctions in regulatory laws

Hotels: requirement that keepers of hotels having over fifty guests employ night watchmen. Miller v. Strahl, 239 U.S. 426 (1915).

Insurance companies: regulation of fire insurance rates with exemption for farmers mutuals, German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); different requirements imposed upon reciprocal insurance associations than upon mutual companies, Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943); prohibition against life insurance companies or agents engaging in undertaking business, Daniel v. Family Ins. Co., 336 U.S. 220 (1949).

Intoxicating liquors: exception of druggist or manufacturers from regulation. Lloyd v. Dollison, 194 U.S. 445 (1904); Eberle v. Michigan, 232 U.S. 700 (1914).

Landlord-tenant: requiring trial no later than six days after service of complaint and limiting triable issues to the tenant's default, provisions applicable in no other legal action, under procedure allowing landlord to sue to evict tenants for nonpayment of rent, inasmuch as prompt and peaceful resolution of the dispute is proper objective and tenants have other means to pursue other relief. Lindsey v. Normet, 405 U.S. 56 (1972).

Lodging houses: requirement that sprinkler systems be installed in buildings of nonfireproof construction is valid as applied to such a building which is safeguarded by a fire alarm system, constant watchman service and other safety arrangements. Queenside Hills Co. v. Saxl, 328 U.S. 80 (1946).

Markets: prohibition against operation of private market within six squares of public market. Natal v. Louisiana, 139 U.S. 621 (1891).

Medicine: a uniform standard of professional attainment and conduct for all physicians, Hurwitz v. North, 271 U.S. 40 (1926); reasonable exemptions from medical registration law. Watson v. Maryland, 218 U.S. 173 (1910); exemption of persons who heal by prayer from regulations applicable to drugless physicians, Crane v. Johnson, 242 U.S. 339 (1917); exclusion of osteopathic physicians from public hospitals, Hayman v. Galveston, 273 U.S. 414 (1927); requirement that persons who treat eyes without use of drugs be licensed as optometrists with exception for persons treating eyes by use of drugs, who are regulated under a different statute, McNaughton v. Johnson, 242 U.S. 344 (1917); a prohibition against advertising by dentists, not applicable to other professions, Semler v. Dental Examiners, 294 U.S. 608 (1935).

Motor vehicles: guest passenger regulation applicable to automobiles but not to other classes of vehicles, Silver v. Silver, 280 U.S. 117 (1929); exemption of vehicles from other states from registration requirement, Storaasli v. Minnesota, 283 U.S. 57 (1931); classification of driverless automobiles for hire as public vehicles, which are required to procure a license and to carry liability insurance, Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); exemption from limitations on hours of labor for driv-

demned a variety of statutory classifications as failing the rational

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ers of motor vehicles of carriers of property for hire, of those not principally engaged in transport of property for hire, and carriers operating wholly in metropolitan areas, Welch Co. v. New Hampshire, 306 U.S. 79 (1939); exemption of busses and temporary movements of farm implements and machinery and trucks making short hauls from common carriers from limitations in net load and length of trucks, Sproles v. Binford, 286 U.S. 374 (1932); prohibition against operation of uncertified carriers, Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933); exemption from regulations affecting carriers for hire, of persons whose chief business is farming and dairying, but who occasionally haul farm and dairy products for compensation, Hicklin v. Coney, 290 U.S. 169 (1933); exemption of private vehicles, street cars and omnibuses from insurance requirements applicable to taxicabs, Packard v. Banton, 264 U.S. 140 (1924).

Peddlers and solicitors: a state may classify and regulate itinerant vendors and peddlers, Emert v. Missouri, 156 U.S. 296 (1895); may forbid the sale by them of drugs and medicines, Baccus v. Louisiana, 232 U.S. 334 (1914); prohibit drumming or soliciting on trains for business for hotels, medical practitioners, and the like, Williams v. Arkansas, 217 U.S. 79 (1910); or solicitation of employment to prosecute or collect claims, McCloskey v. Tobin, 252 U.S. 107 (1920). And a municipality may prohibit canvassers or peddlers from calling at private residences unless requested or invited by the occupant to do so. Breard v. City of Alexandria, 341 U.S. 622 (1951).

Property destruction: destruction of cedar trees to protect apple orchards from cedar rust, Miller v. Schoene, 276 U.S. 272 (1928).

Railroads: prohibition on operation on a certain street, Railroad Co. v. Richmond, 96 U.S. 521 (1878); requirement that fences and cattle guards and allow recovery of multiple damages for failure to comply, Missouri Pacific Ry. v. Humes, 115 U.S. 512 (1885); Minneapolis & St. L. Ry. v. Beckwith, 129 U.S. 26 (1889); Minneapolis & St. L. Ry. v. Emmons, 149 U.S. 364 (1893); assessing railroads with entire expense of altering a grade crossing, New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894); liability for fire communicated by locomotive engines, St. Louis & S.F. Ry. v. Mathews, 165 U.S. 1 (1897); required weed cutting; Missouri, Kan., & Tex. Ry. v. May, 194 U.S. 267 (1904); presumption against a railroad failing to give prescribed warning signals, Atlantic Coast Line R.R. v. Ford, 287 U.S. 502 (1933); required use of locomotive headlights of a specified form and power, Atlantic Coast Line Ry. v. Georgia, 234 U.S. 280 (1914); presumption that railroads are liable for damage caused by operation of their locomotives, Seaboard Air Line Ry. v. Watson, 287 U.S. 86 (1932); required sprinkling of streets between tracks to lay the dust, Pacific Gas Co. v. Police Court, 251 U.S. 22 (1919). State "full-crew" laws do not violate the Equal Protection Clause by singling out the railroads for regulation and by making no provision for minimum crews on any other segment of the transportation industry, Firemen v. Chicago, R.I. & P. Ry. 393 U.S. 129 (1968).

Sales in bulk: requirement of notice of bulk sales applicable only to retail dealers. Lemieux v. Young, 211 U.S. 489 (1909).

Secret societies: regulations applied only to one class of oath-bound associations, having a membership of 20 or more persons, where the class regulated has a tendency to make the secrecy of its purpose and membership a cloak for conduct inimical to the personal rights of others and to the public welfare. New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928).

Securities: a prohibition on the sale of capital stock on margin or for future delivery which is not applicable to other objects of speculation, *e.g.*, cotton, grain. Otis v. Parker, 187 U.S. 606 (1903).

Sunday closing law: notwithstanding that they prohibit the sale of certain commodities and services while permitting the vending of others not markedly different, and, even as to the latter, frequently restrict their distribution to small retailers as distinguished from large establishments handling salable as well as nonsalable items, such laws have been upheld. Despite the desirability of having a required day of rest, a certain measure of mercantile activity must necessarily continue on

basis test, although some of the cases are of doubtful vitality today and some have been questioned. Thus, the Court invalidated a statute that forbade stock insurance companies to act through agents who were their salaried employees but permitted mutual companies to operate in this manner.[1586] A law that required private motor vehicle carriers to obtain certificates of convenience and necessity and to furnish security for the protection of the public was held invalid because of the exemption of carriers of fish, farm, and dairy products.[1587] The same result befell a statute that permitted mill dealers without well-advertised trade names the benefit of a price differential but that restricted this benefit to such dealers entering the business before a certain date.[1588] In a decision since overruled, the Court struck down a law that exempted by name the American Express Company from the terms pertaining to the licensing, bonding, regulation, and inspection of "currency exchanges" engaged in the sale of money orders.[1589]

Other Business and Employment Relations

Labor Relations.—Objections to labor legislation on the ground that the limitation of particular regulations to specified industries was obnoxious to the Equal Protection Clause have been consistently overruled.[1590] Statutes limiting hours of labor for employees in mines, smelters,[1591] mills, factories,[1592] or on public works [1593] have

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that day and in terms of requiring the smallest number of employees to forego their day of rest and minimizing traffic congestion, it is preferable to limit this activity to retailers employing the smallest number of workers; also, it curbs evasion to refuse to permit stores dealing in both salable and nonsalable items to be open at all. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961). *See also* Soon Hing v. Crowley, 113 U.S. 703 (1885); Petit v. Minnesota, 177 U.S. 164 (1900).

Telegraph companies: a statute prohibiting stipulation against liability for negligence in the delivery of interstate messages, which did not forbid express companies and other common carriers to limit their liability by contract. Western Union Telegraph Co. v. Milling Co., 218 U.S. 406 (1910).

[1586] Hartford Ins. Co. v. Harrison, 301 U.S. 459 (1937).

[1587] Smith v. Cahoon, 283 U.S. 553 (1931).

[1588] Mayflower Farms v. Ten Eyck, 297 U.S. 266 (1936). *See* United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4, 7 n.2 (1970) (reserving question of case's validity, but interpreting it as standing for the proposition that no showing of a valid legislative purpose had been made).

[1589] Morey v. Doud, 354 U.S. 457 (1957), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297 (1976), where the exemption of one concern had been by precise description rather than by name.

[1590] Central State Univ. v. American Ass'n of Univ. Professors, 526 U.S. 124 (1999) (upholding limitation on the authority of public university professors to bargain over instructional workloads).

[1591] Holden v. Hardy, 169 U.S. 366 (1988).

[1592] Bunting v. Oregon, 243 U.S. 426 (1917).

[1593] Atkin v. Kansas, 191 U.S. 207 (1903).

been sustained. And a statute forbidding persons engaged in mining and manufacturing to issue orders for payment of labor unless redeemable at face value in cash was similarly held unobjectionable.[1594] The exemption of mines employing fewer than ten persons from a law pertaining to measurement of coal to determine a miner's wages is not unreasonable.[1595] All corporations [1596] or public service corporations [1597] may be required to issue to employees who leave their service letters stating the nature of the service and the cause of leaving even though other employers are not so required.

Industries may be classified in a workers' compensation act according to the respective hazards of each,[1598] and the exemption of farm laborers and domestic servants does not render such an act invalid.[1599] A statute providing that no person shall be denied opportunity for employment because he is not a member of a labor union does not offend the Equal Protection Clause.[1600] At a time when protective labor legislation generally was falling under "liberty of contract" applications of the Due Process Clause, the Court generally approved protective legislation directed solely to women workers,[1601] and this solicitude continued into present times in the approval of laws that were more questionable,[1602] but passage of the sex discrimination provision of the Civil Rights Act of 1964 has generally called into question all such protective legislation addressed solely to women.[1603]

Monopolies and Unfair Trade Practices.—On the principle that the law may hit the evil where it is most felt, state antitrust laws applicable to corporations but not to individuals,[1604] or to ven-

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[1594] Keokee Coke Co. v. Taylor, 234 U.S. 224 (1914). *See also* Knoxville Iron Co. v. Harbison, 183 U.S. 13 (1901).

[1595] McLean v. Arkansas, 211 U.S. 539 (1909).

[1596] Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922).

[1597] Chicago, R.I. & P. Ry. v. Perry, 259 U.S. 548 (1922).

[1598] Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

[1599] New York Central R.R. v. White, 243 U.S. 188 (1917); Middletown v. Texas Power & Light Co., 249 U.S. 152 (1919); Ward & Gow v. Krinsky, 259 U.S. 503 (1922).

[1600] Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949). Nor is it a denial of equal protection for a city to refuse to withhold from its employees' paychecks dues owing their union, although it withholds for taxes, retirement-insurance programs, saving programs, and certain charities, because its offered justification that its practice of allowing withholding only when it benefits all city or department employees is a legitimate method to avoid the burden of withholding money for all persons or organizations that request a checkoff. City of Charlotte v. Firefighters, 426 U.S. 283 (1976).

[1601] *E.g.*, Muller v. Oregon, 208 U.S. 412 (1908).

[1602] Goesaert v. Cleary, 335 U.S. 464 (1948).

[1603] Title VII, 78 Stat. 253, 42 U.S.C. § 2000e. On sex discrimination generally, *see* "Classifications Meriting Close Scrutiny—Sex," *supra*.

[1604] Mallinckrodt Works v. St. Louis, 238 U.S. 41 (1915).

dors of commodities but not to vendors of labor,[1605] have been upheld. Contrary to its earlier view, the Court now holds that an antitrust act that exempts agricultural products in the hands of the producer is valid.[1606] Diversity with respect to penalties also has been sustained. Corporations violating the law may be proceeded against by bill in equity, while individuals are indicted and tried.[1607] A provision, superimposed upon the general antitrust law, for revocation of the licenses of fire insurance companies that enter into illegal combinations, does not violate the Equal Protection Clause.[1608] A grant of monopoly privileges, if otherwise an appropriate exercise of the police power, is immune to attack under that clause.[1609] Likewise, enforcement of an unfair sales act, under which merchants are privileged to give trading stamps, worth two and one-half percent of the price, with goods sold at or near statutory cost, while a competing merchant, not issuing stamps, is precluded from making an equivalent price reduction, effects no discrimination. There is a reasonable basis for concluding that destructive, deceptive competition results from selective loss-leader selling whereas such abuses do not attend issuance of trading stamps "across the board," as a discount for payment in cash.[1610]

Administrative Discretion.—A municipal ordinance that vests in supervisory authorities a naked and arbitrary power to grant or withhold consent to the operation of laundries in wooden buildings, without consideration of the circumstances of individual cases, constitutes a denial of equal protection of the law when consent is withheld from certain persons solely on the basis of nationality.[1611] But a city council may reserve to itself the power to make exceptions from a ban on the operation of a dairy within the city,[1612] or from building line restrictions.[1613] Written permission of the mayor or president of the city council may be required before any person shall move a building on a street.[1614] The mayor may be empowered to determine whether an applicant has a good character and reputation and is a suitable person to receive a license for the sale of ciga-

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[1605] International Harvester Co. v. Missouri, 234 U.S. 199 (1914).

[1606] Tigner v. Texas, 310 U.S. 141 (1940) (overruling Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902)).

[1607] Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910).

[1608] Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905).

[1609] Pacific States Co. v. White, 296 U.S. 176 (1935); *see also Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873): Nebbia v. New York, 291 U.S. 502, 529 (1934).

[1610] Safeway Stores v. Oklahoma Grocers, 360 U.S. 334, 339–41 (1959).

[1611] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[1612] Fischer v. St. Louis, 194 U.S. 361 (1904).

[1613] Gorieb v. Fox, 274 U.S. 603 (1927).

[1614] Wilson v. Eureka City, 173 U.S. 32 (1899).

rettes.[1615] In a later case,[1616] the Court held that the unfettered discretion of river pilots to select their apprentices, which was almost invariably exercised in favor of their relatives and friends, was not a denial of equal protection to persons not selected despite the fact that such apprenticeship was requisite for appointment as a pilot.

Social Welfare.—The traditional "reasonable basis" standard of equal protection adjudication developed in the main in cases involving state regulation of business and industry. "The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard." [1617] Thus, a formula for dispensing aid to dependent children that imposed an upper limit on the amount one family could receive, regardless of the number of children in the family, so that the more children in a family the less money per child was received, was found to be rationally related to the legitimate state interest in encouraging employment and in maintaining an equitable balance between welfare families and the families of the working poor.[1618] Similarly, a state welfare assistance formula that, after calculation of individual need, provided less of the determined amount to families with dependent children than to those persons in the aged and infirm categories did not violate equal protection because a state could reasonably believe that the aged and infirm are the least able to bear the hardships of an inadequate standard of living, and that the apportionment of limited funds was therefore rational.[1619] Although reiterating that this standard of review is "not a toothless one," the Court has nonetheless sustained a variety of distinctions on the basis that Congress could rationally have believed them justified,[1620] acting to invalidate a provision only once,

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[1615] Gundling v. Chicago, 177 U.S. 183 (1900).

[1616] Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

[1617] Dandridge v. Williams, 397 U.S. 471, 485 (1970). Decisions respecting the rights of the indigent in the criminal process and dicta in Shapiro v. Thompson, 394 U.S. 618, 627 (1969), had raised the prospect that because of the importance of "food, shelter, and other necessities of life," classifications with an adverse or perhaps severe impact on the poor and needy would be subjected to a higher scrutiny. *Dandridge* was a rejection of this approach, which was more fully elaborated in another context in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 18–29 (1973).

[1618] Dandridge v. Williams, 397 U.S. 471, 483–87 (1970).

[1619] Jefferson v. Hackney, 406 U.S. 535 (1972). *See also* Richardson v. Belcher, 404 U.S. 78 (1971) (sustaining Social Security provision reducing disability benefits by amount received from worker's compensation but not that received from private insurance).

[1620] *E.g.*, Mathews v. De Castro, 429 U.S. 181 (1976) (provision giving benefits to married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying benefits to divorced woman under 62 with

and then on the premise that Congress was actuated by an improper purpose.[1621]

Similarly, the Court has rejected the contention that access to housing, despite its great importance, is of any fundamental interest that would place a bar upon the legislature's giving landlords a much more favorable and summary process of judicially controlled eviction actions than was available in other kinds of litigation.[1622]

However, a statute that prohibited the dispensing of contraceptive devices to single persons for birth control but not for disease prevention purposes and that contained no limitation on dispensation to married persons was held to violate the Equal Protection Clause on several grounds. On the basis of the right infringed by the limitation, the Court saw no rational basis for the state to distinguish between married and unmarried persons. Similarly, the exemption from the prohibition for purposes of disease prevention nullified the argument that the rational basis for the law was the deterrence of fornication, the rationality of which the Court doubted in any case.[1623] Also denying equal protection was a law affording married parents, divorced parents, and unmarried mothers an opportunity to be heard with regard to the issue of their fitness to continue or to take custody of their children, an opportunity the Court decided was mandated by due process, but presuming the unfitness of the unmarried father and giving him no hearing.[1624]

Punishment of Crime.—Equality of protection under the law implies that in the administration of criminal justice no person shall be subject to any greater or different punishment than another in similar circumstances.[1625] Comparative gravity of criminal offenses

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dependents represents rational judgment with respect to likely dependency of married but not divorced women); Califano v. Boles, 443 U.S. 282 (1979) (limitation of benefits to widows and divorced wives of wage earners does not deny equal protection to mother of illegitimate child of wage earner who was never married to wage earner).

[1621] Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (also questioning rationality).

[1622] Lindsey v. Normet, 405 U.S. 56 (1972). The Court did invalidate one provision of the law requiring tenants against whom an eviction judgment had been entered after a trial to post a bond in double the amount of rent to become due by the determination of the appeal, because it bore no reasonable relationship to any valid state objective and arbitrarily distinguished between defendants in eviction actions and defendants in other actions. Id. at 74–79.

[1623] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[1624] Stanley v. Illinois, 405 U.S. 645, 658 (1972).

[1625] Pace v. Alabama, 106 U.S. 583 (1883). *See* Salzburg v. Maryland, 346 U.S. 545 (1954), sustaining law rendering illegally seized evidence inadmissible in prosecutions in state courts for misdemeanors but permitting use of such evidence in one county in prosecutions for certain gambling misdemeanors. Distinctions based on county areas were deemed reasonable. In North v. Russell, 427 U.S. 328 (1976), the Court sustained the provision of law-trained judges for some police courts and

is, however, largely a matter of state discretion, and the fact that some offenses are punished with less severity than others does not deny equal protection.[1626] Heavier penalties may be imposed upon habitual criminals for like offenses,[1627] even after a pardon for an earlier offense,[1628] and such persons may be made ineligible for parole.[1629] A state law doubling the sentence on prisoners attempting to escape does not deny equal protection by subjecting prisoners who attempt to escape together to different sentences depending on their original sentences.[1630]

A statute denying state prisoners good-time credit for presentence incarceration, but permitting those prisoners who obtain bail or other release immediately to receive good-time credit for the entire period that they ultimately spend in custody, good time counting toward the date of eligibility for parole, does not deny the prisoners incarcerated in local jails equal protection. The distinction is rationally justified by the fact that good-time credit is designed to encourage prisoners to engage in rehabilitation courses and activities that exist only in state prisons and not in local jails.[1631]

The Equal Protection Clause does, however, render invalid a statute requiring the sterilization of persons convicted of various offenses when the statute draws a line between like offenses, such as between larceny by fraud and embezzlement.[1632] A statute that provided that convicted defendants sentenced to imprisonment must reimburse the state for the furnishing of free transcripts of their trial by having amounts deducted from prison pay denied such persons equal protection when it did not require reimbursement of those fined, given suspended sentences, or placed on probation.[1633] Similarly, a statute enabling the state to recover the costs of such transcripts and other legal defense fees by a civil action violated equal protection because indigent defendants against whom judgment was

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lay judges for others, depending upon the state constitutional classification of cities according to population, since as long as all people within each classified area are treated equally, the different classifications within the court system are justifiable.

[1626] Collins v. Johnston, 237 U.S. 502, 510 (1915); Pennsylvania v. Ashe, 302 U.S. 51 (1937).

[1627] McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895); Graham v. West Virginia, 224 U.S. 616 (1912).

[1628] Carlesi v. New York, 233 U.S. 51 (1914).

[1629] Ughbanks v. Armstrong, 208 U.S. 481 (1908).

[1630] Pennsylvania v. Ashe, 302 U.S. 51 (1937).

[1631] McGinnis v. Royster, 410 U.S. 263 (1973). *Cf.* Hurtado v. United States, 410 U.S. 578 (1973).

[1632] Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

[1633] Rinaldi v. Yeager, 384 U.S. 305 (1966). *But see* Fuller v. Oregon, 417 U.S. 40 (1974) (imposition of reimbursement obligation for state-provided defense assistance upon convicted defendants but not upon those acquitted or whose convictions are reversed is objectively rational).

entered under the statute did not have the benefit of exemptions and benefits afforded other civil judgment debtors.[1634] But a bail reform statute that provided for liberalized forms of release and that imposed the costs of operating the system upon one category of released defendants, generally those most indigent, was not invalid because the classification was rational and because the measure was in any event a substantial improvement upon the old bail system.[1635] The Court has applied the clause strictly to prohibit numerous *de jure* and *de facto* distinctions based on wealth or indigency.[1636]

EQUAL PROTECTION AND RACE

Overview

The Fourteenth Amendment "is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments . . . cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. . . . [The Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation." [1637] Thus, a state law that on its face discriminated against African-Americans was void.[1638] In addition,

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[1634] James v. Strange, 407 U.S. 128 (1972).

[1635] Schilb v. Kuebel, 404 U.S. 357 (1971).

[1636] *See* "Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection—Generally," *supra*.

[1637] Strauder v. West Virginia, 100 U.S. 303, 306–07 (1880).

[1638] Strauder v. West Virginia, 100 U.S. 303 (1880) (law limiting jury service to white males). Moreover it will not do to argue that a law that segregates the races or prohibits contacts between them discriminates equally against both races. Buchanan v. Warley, 245 U.S. 60 (1917) (ordinance prohibiting blacks from occupying houses in blocks where whites were predominant and whites from occupying houses in blocks

"[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." [1639]

Education

Development and Application of "Separate But Equal".—Cases decided soon after ratification of the Fourteenth Amendment may be read as precluding any state-imposed distinction based on race,[1640] but the Court in *Plessy v. Ferguson* [1641] adopted a principle first propounded in litigation attacking racial segregation in the schools of Boston, Massachusetts.[1642] *Plessy* concerned not schools but a state law requiring "equal but separate" facilities for rail transportation and requiring the separation of "white and colored" passengers. "The object of the [Fourteenth] [A]mendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in exercise of their police power." [1643] The Court observed that a common instance of this type of law was the separation by race of children in school, which had been upheld, it was noted, "even by courts of states where

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where blacks were predominant). *Compare* Pace v. Alabama, 106 U.S. 583 (1883) (sustaining conviction under statute that imposed a greater penalty for adultery or fornication between a white person and a Negro than was imposed for similar conduct by members of the same race, using "equal application" theory), *with* McLaughlin v. Florida, 379 U.S. 184, 188 (1964), *and* Loving v. Virginia, 388 U.S. 1, 10 (1967) (rejecting theory).

[1639] Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (discrimination against Chinese).

[1640] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 67–72 (1873); Strauder v. West Virginia, 100 U.S. 303, 307–08 (1880); Virginia v. Rives, 100 U.S. 313, 318 (1880); *Ex parte* Virginia, 100 U.S. 339, 344–45 (1880).

[1641] 163 U.S. 537 (1896).

[1642] Roberts v. City of Boston, 59 Mass. 198, 206 (1849).

[1643] Plessy v. Ferguson, 163 U.S. 537, 543–44 (1896). "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Id. at 552, 559.

the political rights of the colored race have been longest and most earnestly enforced." [1644]

Subsequent cases following *Plessy* that actually concerned school segregation did not expressly question the doctrine and the Court's decisions assumed its validity. It held, for example, that a Chinese student was not denied equal protection by being classified with African-Americans and sent to school with them rather than with whites,[1645] and it upheld the refusal of an injunction to require a school board to close a white high school until it opened a high school for African-Americans.[1646] And no violation of the Equal Protection Clause was found when a state law prohibited a private college from teaching whites and African-Americans together.[1647]

In 1938, the Court began to move away from "separate but equal." It held that a state that operated a law school open to whites only and did not operate any law school open to African-Americans violated an applicant's right to equal protection, even though the state offered to pay his tuition at an out-of-state law school. The requirement of the clause was for equal facilities within the state.[1648] When Texas established a law school for African-Americans after the plaintiff had applied and been denied admission to the school maintained for whites, the Court held the action to be inadequate, finding that the nature of law schools and the associations possible in the white school necessarily meant that the separate school was unequal.[1649] Equally objectionable was the fact that when Oklahoma admitted an African-American law student to its only law school it required him to remain physically separate from the other students.[1650]

Brown v. Board of Education.—"Separate but equal" was formally abandoned in *Brown v. Board of Education*,[1651] which involved challenges to segregation *per se* in the schools of four states

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[1644] 163 U.S. at 544–45. The act of Congress in providing for separate schools in the District of Columbia was specifically noted. Justice Harlan's well-known dissent contended that the purpose and effect of the law in question was discriminatory and stamped African-Americans with a badge of inferiority. "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Id. at 552, 559.

[1645] Gong Lum v. Rice, 275 U.S. 78 (1927).

[1646] Cumming v. Richmond County Bd. of Educ., 175 U.S. 528 (1899).

[1647] Berea College v. Kentucky, 211 U.S. 45 (1908).

[1648] Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). *See also* Sipuel v. Board of Regents, 332 U.S. 631 (1948).

[1649] Sweatt v. Painter, 339 U.S. 629 (1950).

[1650] McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

[1651] 347 U.S. 483 (1954). Segregation in the schools of the District of Columbia was held to violate the due process clause of the Fifth Amendment in Bolling v. Sharpe, 347 U.S. 497 (1954).

in which the lower courts had found that the schools provided were equalized or were in the process of being equalized. Though the Court had asked for argument on the intent of the framers, extensive research had proved inconclusive, and the Court asserted that it could not "turn the clock back to 1867 . . . or even to 1896," but must rather consider the issue in the context of the vital importance of education in 1954. The Court reasoned that denial of opportunity for an adequate education would often be a denial of the opportunity to succeed in life, that separation of the races in the schools solely on the basis of race must necessarily generate feelings of inferiority in the disfavored race adversely affecting education as well as other matters, and therefore that the Equal Protection Clause was violated by such separation. "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." [1652]

After hearing argument on what remedial order should issue, the Court remanded the cases to the lower courts to adjust the effectuation of its mandate to the particularities of each school district. "At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." The lower courts were directed to "require that the defendants make a prompt and reasonable start toward full compliance," although "[o]nce such a start has been made," some additional time would be needed because of problems arising in the course of compliance and the lower courts were to allow it if on inquiry delay were found to be "in the public interest and [to be] consistent with good faith compliance . . . to effectuate a transition to a racially nondiscriminatory school system." In any event, however, the lower courts were to require compliance "with all deliberate speed." [1653]

Brown's Aftermath.—For the next several years, the Court declined to interfere with the administration of its mandate, ruling only in those years on the efforts of Arkansas to block desegregation of schools in Little Rock.[1654] In the main, these years were taken up with enactment and administration of "pupil placement laws" by which officials assigned each student individually to a school on the basis of formally nondiscriminatory criteria, and which required the exhaustion of state administrative remedies before each pupil seeking reassignment could bring individual litigation.[1655] The lower courts eventually began voiding these laws for discrimina-

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[1652] Brown v. Board of Education, 347 U.S. 483, 489–90, 492–95 (1954).

[1653] Brown v. Board of Education, 349 U.S. 294, 300–01 (1955).

[1654] Cooper v. Aaron, 358 U.S. 1 (1958).

[1655] *E.g.*, Covington v. Edwards, 264 F.2d 780 (4th Cir.), *cert. denied*, 361 U.S. 840 (1959); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95 (4th Cir.), *cert. denied*, 361 U.S. 818 (1959); Dove v. Parham, 271 F.2d 132 (8th Cir. 1959).

tory application, permitting class actions,[1656] and the Supreme Court voided the exhaustion of state remedies requirement.[1657] In the early 1960s, various state practices—school closings,[1658] minority transfer plans,[1659] zoning,[1660] and the like—were ruled impermissible, and the Court indicated that the time was running out for full implementation of the *Brown* mandate.[1661]

About this time, "freedom of choice" plans were promulgated under which each child in the school district could choose each year which school he wished to attend, and, subject to space limitations, he could attend that school. These were first approved by the lower courts as acceptable means to implement desegregation, subject to the reservation that they be fairly administered.[1662] Enactment of Title VI of the Civil Rights Act of 1964 and HEW enforcement in a manner as to require effective implementation of affirmative actions to desegregate [1663] led to a change of attitude in the lower courts and the Supreme Court. In *Green v. School Board of New Kent*

[1656] *E.g.*, McCoy v. Greensboro City Bd. of Educ., 283 F.2d 667 (4th Cir. 1960); Green v. School Board of Roanoke, 304 F.2d 118 (4th Cir. 1962); Gibson v. Board of Pub. Instruction of Dade County, 272 F.2d 763 (5th Cir. 1959); Northcross v. Board of Educ. of Memphis, 302 F.2d 818 (6th Cir. 1962), *cert. denied*, 370 U.S. 944 (1962).

[1657] McNeese v. Cahokia Bd. of Educ., 373 U.S. 668 (1963).

[1658] Griffin v. Prince Edward County School Bd., 377 U.S. 218 (1964) (holding that "under the circumstances" the closing by a county of its schools while all the other schools in the State were open denied equal protection, the circumstances apparently being the state permission and authority for the closing and the existence of state and county tuition grant/tax credit programs making an official connection with the "private" schools operating in the county and holding that a federal court is empowered to direct the appropriate officials to raise and expend money to operate schools). On school closing legislation in another State, *see* Bush v. Orleans Parish School Bd., 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), aff'd, 365 U.S. 569 (1961); Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), aff'd, 368 U.S. 515 (1962).

[1659] Goss v. Knoxville Bd. of Educ., 373 U.S. 683 (1963). Such plans permitted as of right a student assigned to a school in which students of his race were a minority to transfer to a school where the student majority was of his race.

[1660] Northcross v. Board of Educ. of Memphis, 333 F.2d 661 (6th Cir. 1964).

[1661] The first comment appeared in dictum in a nonschool case, Watson v. City of Memphis, 373 U.S. 526, 530 (1963), and was implied in Goss v. Board of Educ. of City of Knoxville, 373 U.S. 683, 689 (1963). In Bradley v. School Bd. of City of Richmond, 382 U.S. 103, 105 (1965), the Court announced that "[d]elays in desegregating school systems are no longer tolerable." A grade-a-year plan was implicitly disapproved in Calhoun v. Latimer, 377 U.S. 263 (1964), vacating and remanding 321 F.2d 302 (5th Cir. 1963). *See* Singleton v. Jackson Municipal Separate School Dist., 355 F.2d 865 (5th Cir. 1966).

[1662] *E.g.*, Bradley v. School Bd. of City of Richmond, 345 F.2d 310 (4th Cir.), rev'd on other grounds, 382 U.S. 103 (1965); Bowman v. School Bd. of Charles City County, 382 F.2d 326 (4th Cir. 1967).

[1663] Pub. L. 88–352, 78 Stat. 252, 42 U.S.C. §§ 2000d *et seq*. (prohibiting discrimination in federally assisted programs). HEW guidelines were designed to afford guidance to state and local officials in interpretations of the law and were accepted as authoritative by the courts and used. Davis v. Board of School Comm'rs of Mobile County, 364 F.2d 896 (5th Cir. 1966); Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965).

County,[1664] the Court posited the principle that the only desegregation plan permissible is one which actually results in the abolition of the dual school, and charged school officials with an affirmative obligation to achieve it. School boards must present to the district courts "a plan that promises realistically to work and promises realistically to work *now*," in such a manner as "to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." [1665] Furthermore, as the Court and lower courts had by then made clear, school desegregation encompassed not only the abolition of dual attendance systems for students, but also the merging into one system of faculty,[1666] staff, and services, so that no school could be marked as either a "black" or a "white" school.[1667]

Implementation of School Desegregation.—In the aftermath of *Green*, the various Courts of Appeals held inadequate an increasing number of school board plans based on "freedom of choice," on zoning which followed traditional residential patterns, or on some combination of the two.[1668] The Supreme Court's next opportunity to speak on the subject came when HEW sought to withdraw desegregation plans it had submitted at court request and asked for a postponement of a court-imposed deadline, which was reluctantly granted by the Fifth Circuit. The Court unanimously reversed and announced that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no

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[1664] 391 U.S. 430 (1968); Raney v. Gould Bd. of Educ., 391 U.S. 443 (1968). These cases had been preceded by a circuit-wide promulgation of similar standards in United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *modified and aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

[1665] *Green*, 391 U.S. at 439, 442 (1968). "*Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Id. at 437–38. The case laid to rest the dictum of Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955), that the Constitution "does not require integration" but "merely forbids discrimination." *Green* and Raney v. Board of Educ. of Gould School Dist., 391 U.S. 443 (1968), found "freedom of choice" plans inadequate, and Monroe v. Board of Comm'rs of City of Jackson, 391 U.S. 450 (1968), found a "free transfer" plan inadequate.

[1666] Bradley v. School Bd. of City of Richmond, 382 U.S. 103 (1965) (faculty desegregation is integral part of any pupil desegregation plan); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (upholding district court order requiring assignment of faculty and staff on a ratio based on racial population of district).

[1667] United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *mod. and aff'd*, 380 F.2d 385 (5th Cir.) (en banc), *cert. denied*, 389 U.S. 840 (1967).

[1668] Hall v. St. Helena Parish School Bd., 417 F.2d 801 (5th Cir.), *cert. denied*, 396 U.S. 904 (1969); Henry v. Clarksdale Mun. Separate School Dist., 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); Brewer v. School Bd. of City of Norfolk, 397 F.2d 37 (4th Cir. 1968); Clark v. Board of Educ. of City of Little Rock, 426 F.2d 1035 (8th Cir. 1970).

longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." [1669]

In the October 1970 Term the Court in *Swann v. Charlotte-Mecklenburg Board of Education* [1670] undertook to elaborate the requirements for achieving a unitary school system and delineating the methods which could or must be used to achieve it, and at the same time struck down state inhibitions on the process.[1671] The opinion in *Swann* emphasized that the goal since *Brown* was the dismantling of an officially imposed dual school system. "Independent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." [1672] Although "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law," any such situation must be closely scrutinized by the lower courts, and school officials have a heavy burden to prove that the situation is not the result of state-fostered segregation. Any desegregation plan that contemplates such a situation must before a court accepts it be shown not to be affected by present or past discriminatory action on the part of state and local officials.[1673] When a federal court has to develop a remedial desegregation plan, it must start with an appreciation of the mathematics of the racial composition of the school district population; its plan may rely to some extent on mathematical ratios but it should exercise care that this use is only a starting point.[1674]

Because current attendance patterns may be attributable to past discriminatory actions in site selection and location of school buildings, the Court in *Swann* determined that it is permissible, and may be required, to resort to altering of attendance boundaries and grouping or pairing schools in noncontiguous fashion in order to promote

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[1669] Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969). The Court summarily reiterated its point several times in the Term. Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970); Northcross v. Board of Educ. of Memphis, 397 U.S. 232 (1970); Dowell v. Board of Educ. of Oklahoma City, 396 U.S. 269 (1969).

[1670] 402 U.S. 1 (1971); *see also* Davis v. Board of School Comm'rs of Mobile County, 402 U.S. 33 (1971).

[1671] McDaniel v. Barresi, 402 U.S. 39 (1971); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

[1672] 402 U.S. at 18.

[1673] 402 U.S. at 25–27.

[1674] 402 U.S. at 22–25.

desegregation and undo past official action; in this remedial process, conscious assignment of students and drawing of boundaries on the basis of race is permissible.[1675] Transportation of students—busing—is a permissible tool of educational and desegregation policy, inasmuch as a neighborhood attendance policy may be inadequate due to past discrimination. The soundness of any busing plan must be weighed on the basis of many factors, including the age of the students; when the time or distance of travel is so great as to risk the health of children or significantly impinge on the educational process, the weight shifts.[1676] Finally, the Court indicated, once a unitary system has been established, no affirmative obligation rests on school boards to adjust attendance year by year to reflect changes in composition of neighborhoods so long as the change is solely attributable to private action.[1677]

Northern Schools: Inter- and Intradistrict Desegregation.—The appearance in the Court of school cases from large metropolitan areas in which the separation of the races was not mandated by law but allegedly by official connivance through zoning of school boundaries, pupil and teacher assignment policies, and site selections, required the development of standards for determining when segregation was *de jure* and what remedies should be imposed when such official separation was found.[1678]

Accepting the findings of lower courts that the actions of local school officials and the state school board were responsible in part for the racial segregation existing within the school system of the City of Detroit, the Court in *Milliken v. Bradley* [1679] set aside a de-

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[1675] 402 U.S. at 27–29.

[1676] 402 U.S. at 29–31.

[1677] 402 U.S. at 31–32. In Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), the Court held that after a school board has complied with a judicially-imposed desegregation plan in student assignments and thus undone the existing segregation, it is beyond the district court's power to order it subsequently to implement a new plan to undo the segregative effects of shifting residential patterns. The Court agreed with the dissenters, Justices Marshall and Brennan, id. at 436, 441, that the school board had not complied in other respects, such as in staff hiring and promotion, but it thought that was irrelevant to the issue of neutral student assignments.

[1678] The presence or absence of a statute mandating separation provides no talisman indicating the distinction between *de jure* and *de facto* segregation. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 457 n.5 (1979). As early as *Ex parte* Virginia, 100 U.S. 339, 347 (1880), it was said that "no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws . . . violates the constitutional inhibition: and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." The significance of a statute is that it simplifies in the extreme a complainant's proof.

[1679] 418 U.S. 717 (1974).

segregation order which required the formulation of a plan for a metropolitan area including the City and 53 adjacent suburban school districts. The basic holding of the Court was that such a remedy could be implemented only to cure an inter-district constitutional violation, a finding that the actions of state officials and of the suburban school districts were responsible, at least in part, for the interdistrict segregation, through either discriminatory actions within those jurisdictions or constitutional violations within one district that had produced a significant segregative effect in another district.[1680] The permissible scope of an inter-district order, however, would have to be considered in light of the Court's language regarding the value placed upon local educational units. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[1681] Too, the complexity of formulating and overseeing the implementation of a plan that would effect a *de facto* consolidation of multiple school districts, the Court indicated, would impose a task that few, if any, judges are qualified to perform and one that would deprive the people of control of their schools through elected representatives.[1682] "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district."[1683]

"The controlling principle consistently expounded in our holdings," the Court wrote in the *Detroit* case, "is that the scope of the remedy is determined by the nature and extent of the constitutional violation."[1684] Although this axiom caused little problem when

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[1680] 418 U.S. at 745.

[1681] 418 U.S. at 741–42.

[1682] 418 U.S. at 742–43. This theme has been sounded in a number of cases in suits seeking remedial actions in particularly intractable areas. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974); O'Shea v. Littleton, 414 U.S. 488, 500–02 (1974). In Hills v. Gautreaux, 425 U.S. 284, 293 (1976), the Court wrote that it had rejected the metropolitan order because of "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities . . . ." In other places, the Court stressed the absence of interdistrict violations, id. at 294, and in still others paired the two reasons. Id. at 296.

[1683] Milliken v. Bradley, 418 U.S. 717, 746 (1974). The four dissenters argued both that state involvement was so pervasive that an inter-district order was permissible and that such an order was mandated because it was the State's obligation to establish a unitary system, an obligation which could not be met without an interdistrict order. Id . at 757, 762, 781.

[1684] 418 U.S. at 744. *See* Hills v. Gautreaux, 425 U.S. 284, 294 n.11 (1976) ("[T]he Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power."); Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (Justice Powell concurring) ("a core principle of desegregation cases" is that set out in *Milliken*).

the violation consisted of statutorily mandated separation,[1685] it required a considerable expenditure of judicial effort and parsing of opinions to work out in the context of systems in which the official practice was nondiscriminatory, but official action operated to the contrary. At first, the difficulty was obscured through the creation of presumptions that eased the burden of proof on plaintiffs, but later the Court appeared to stiffen the requirements on plaintiffs.

Determination of the existence of a constitutional violation and the formulation of remedies, within one district, first was presented to the Court in a northern setting in *Keyes v. Denver School District*.[1686] The lower courts had found the school segregation existing within one part of the city to be attributable to official action, but as to the central city they found the separation not to be the result of official action and refused to impose a remedy for those schools. The Supreme Court found this latter holding to be error, holding that, when it is proved that a significant portion of a system is officially segregated, the presumption arises that segregation in the remainder or other portions of the system is also similarly contrived. The burden then shifts to the school board or other officials to rebut the presumption by proving, for example, that geographical structure or natural boundaries have caused the dividing of a district into separate identifiable and unrelated units. Thus, a finding that one significant portion of a school system is officially segregated may well be the predicate for finding that the entire system is a dual one, necessitating the imposition upon the school authorities of the affirmative obligation to create a unitary system throughout.[1687]

Keyes then was consistent with earlier cases requiring a showing of official complicity in segregation and limiting the remedy to the violation found; by creating presumptions *Keyes* simply af-

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[1685] When an entire school system has been separated into white and black schools by law, disestablishment of the system and integration of the entire system is required. "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness." Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971). *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971).

[1686] 413 U.S. 189 (1973).

[1687] 413 U.S. at 207–11. Justice Rehnquist argued that imposition of a district-wide segregation order should not proceed from a finding of segregative intent and effect in only one portion, that in effect the Court was imposing an affirmative obligation to integrate without first finding a constitutional violation. Id. at 254 (dissenting). Justice Powell cautioned district courts against imposing disruptive desegregation plans, especially substantial busing in large metropolitan areas, and stressed the responsibility to proceed with reason, flexibility, and balance. Id. at 217, 236 (concurring and dissenting). *See* his opinion in Austin Indep. School Dist. v. United States, 429 U.S. 990, 991 (1976) (concurring).

forded plaintiffs a way to surmount the barriers imposed by strict application of the requirements. Following the enunciation in the *Detroit* inter-district case, however, of the "controlling principle" of school desegregation cases, the Court appeared to move away from the *Keyes* approach.[1688] First, the Court held that federal equity power was lacking to impose orders to correct demographic shifts "not attributed to any segregative actions on the part of the defendants."[1689] A district court that had ordered implementation of a student assignment plan that resulted in a racially neutral system exceeded its authority, the Court held, by ordering annual readjustments to offset the demographic changes.[1690]

Second, in the first *Dayton* case the lower courts had found three constitutional violations that had resulted in some pupil segregation, and, based on these three, viewed as "cumulative violations," a district-wide transportation plan had been imposed. Reversing, the Supreme Court reiterated that the remedial powers of the federal courts are called forth by violations and are limited by the scope of those violations. "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'"[1691] The goal is to restore the plaintiffs to the position they would have occupied had they not been subject to unconstitutional action. Lower courts "must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy."[1692] The Court then sent the case back to the district court for the taking of evidence, the finding of the nature of the violations, and the development of an appropriate remedy.

[1688] Of significance was the disallowance of the disproportionate impact analysis in constitutional interpretation and the adoption of an apparently strengthened intent requirement. Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256 (1979). This principle applies in the school area. Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 419 (1977).

[1689] Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

[1690] 427 U.S. at 436.

[1691] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (quoting Hills v. Gautreaux, 425 U.S. 284, 294 (1976)).

[1692] Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977). The Court did not discuss the presumptions that had been permitted by *Keyes*. Justice Brennan, the author of *Keyes*, concurred on the basis that the violations found did not justify the remedy imposed, asserting that the methods of proof used in *Keyes* were still valid. Id. at 421.

Surprisingly, however, *Keyes* was reaffirmed and broadly applied in subsequent appeals of the *Dayton* case after remand and in an appeal from Columbus, Ohio.[1693] Following the Supreme Court standards, the *Dayton* district court held that the plaintiffs had failed to prove official segregative intent, but was reversed by the appeals court. The *Columbus* district court had found and had been affirmed in finding racially discriminatory conduct and had ordered extensive busing. The Supreme Court held that the evidence adduced in both district courts showed that the school boards had carried out segregating actions affecting a substantial portion of each school system prior to and contemporaneously with the 1954 decision in *Brown v. Board of Education*. The *Keyes* presumption therefore required the school boards to show that systemwide discrimination had not existed, and they failed to do so. Because each system was a dual one in 1954, it was subject to an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[1694] Following 1954, segregated schools continued to exist and the school boards had in fact taken actions which had the effect of increasing segregation. In the context of the on-going affirmative duty to desegregate, the foreseeable impact of the actions of the boards could be used to infer segregative intent, thus satisfying the *Davis-Arlington Heights* standards.[1695] The Court further affirmed the district-wide remedies, holding that its earlier *Dayton* ruling had been premised upon the evidence of only a few isolated discriminatory practices; here, because systemwide impact had been found, systemwide remedies were appropriate.[1696]

Reaffirmation of the breadth of federal judicial remedial powers came when, in a second appeal of the *Detroit* case, the Court unanimously upheld the order of a district court mandating compensatory or remedial educational programs for school children who had been subjected to past acts of *de jure* segregation. So long as the

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[1693] Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

[1694] Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 459 (1979) (quoting Green v. School Bd. of New Kent County, 391 U.S. 430, 437–38 (1968)). *Contrast* the Court's more recent decision in Bazemore v. Friday, 478 U.S. 385 (1986) (per curiam), holding that adoption of "a wholly neutral admissions policy" for voluntary membership in state-sponsored 4–H Clubs was sufficient even though single race clubs continued to exist under that policy. There is no constitutional requirement that states in all circumstances pursue affirmative remedies to overcome past discrimination, the Court concluded; the voluntary nature of the clubs, unrestricted by state definition of attendance zones or other decisions affecting membership, presented a "wholly different milieu" from public schools. Id. at 408 (concurring opinion of Justice White, endorsed by the Court's per curiam opinion).

[1695] 443 U.S. at 461–65.

[1696] 443 U.S. at 465–67.

remedy is related to the condition found to violate the Constitution, so long as it is remedial, and so long as it takes into account the interests of state and local authorities in managing their own affairs, federal courts have broad and flexible powers to remedy past wrongs.[1697]

The broad scope of federal courts' remedial powers was more recently reaffirmed in *Missouri v. Jenkins*.[1698] There the Court ruled that a federal district court has the power to order local authorities to impose a tax increase in order to pay to remedy a constitutional violation, and if necessary may enjoin operation of state laws prohibiting such tax increases. However, the Court also held, the district court had abused its discretion by itself imposing an increase in property taxes without first affording local officials "the opportunity to devise their own solutions." [1699]

Efforts to Curb Busing and Other Desegregation Remedies.— Especially during the 1970s, courts and Congress grappled with the appropriateness of various remedies for *de jure* racial separation in the public schools, both North and South. Busing of school children created the greatest amount of controversy. *Swann*, of course, sanctioned an order requiring fairly extensive busing, as did the more recent *Dayton* and *Columbus* cases, but the earlier case cautioned as well that courts must observe limits occasioned by the nature of the educational process and the well-being of children,[1700] and subsequent cases declared the principle that the remedy must be no more extensive than the violation found.[1701] Congress enacted several provisions of law, either permanent statutes or annual appropriations limits, that purport to restrict the power of federal courts and administrative agencies to order or to require busing, but these, either because of drafting infelicities or because of modifications required to obtain passage, have been largely ineffectual.[1702] Stron-

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[1697] Milliken v. Bradley, 433 U.S. 267 (1977). The Court also affirmed that part of the order directing the State of Michigan to pay one-half the costs of the mandated programs. Id. at 288–91.

[1698] 495 U.S. 33 (1990).

[1699] 495 U.S. at 52. Similarly, the Court held in Spallone v. United States, 493 U.S. 265 (1990), that a district court had abused its discretion in imposing contempt sanctions directly on members of a city council for refusing to vote to implement a consent decree designed to remedy housing discrimination. Instead, the court should have proceeded first against the city alone, and should have proceeded against individual council members only if the sanctions against the city failed to produce compliance.

[1700] Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 30–31 (1971).

[1701] Milliken v. Bradley, 418 U.S. 717, 744 (1974).

[1702] *E.g.*, § 407(a) of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. § 2000c–6, construed to cover only *de facto* segregation in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 17–18 (1971); § 803 of the Education Amendments of 1972, 86 Stat. 372, 20 U.S.C. § 1653 (expired), interpreted in Drummond v. Acree, 409 U.S.

ger proposals, for statutes or for constitutional amendments, were introduced in Congress, but none passed both Houses.[1703]

Of considerable importance to the possible validity of any substantial congressional restriction on judicial provision of remedies for *de jure* segregation violations are two decisions contrastingly dealing with referenda-approved restrictions on busing and other remedies in Washington State and California.[1704] Voters in Washington, following a decision by the school board in Seattle to undertake a mandatory busing program, approved an initiative that prohibited school boards from assigning students to any but the nearest or next nearest school that offered the students' course of study; there were so many exceptions, however, that the prohibition in effect applied only to busing for racial purposes. In California the state courts had interpreted the state constitution to require school systems to eliminate both *de jure* and *de facto* segregation. The voters approved an initiative that prohibited state courts from ordering busing unless the segregation was in violation of the Fourteenth Amendment, and a federal judge would be empowered to order it under United States Supreme Court precedents.

By a narrow division, the Court held unconstitutional the Washington measure, and, with near unanimity of result if not of reasoning, it sustained the California measure. The constitutional flaw in the Washington measure, the Court held, was that it had chosen a racial classification—busing for desegregation—and imposed more severe burdens upon those seeking to obtain such a policy than it imposed with respect to any other policy. Local school boards could make education policy on anything but busing. By singling out busing and making it more difficult than anything else, the voters had expressly and knowingly enacted a law that had an intentional im-

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1228 (1972) (Justice Powell in Chambers), and the Equal Educational Opportunities and Transportation of Students Act of 1974, 88 Stat. 514 (1974), 20 U.S.C. §§ 1701–1757, *see especially* § 1714, interpreted in Morgan v. Kerrigan, 530 F.2d 401, 411–15 (1st Cir.), *cert. denied*, 426 U.S. 995 (1976), and United States v. Texas Education Agency, 532 F.2d 380, 394 n.18 (5th Cir.), *vacated on other grounds sub nom.* Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976); and a series of annual appropriations riders, first passed as riders to the 1976 and 1977 Labor-HEW bills, § 108, 90 Stat. 1434 (1976), and § 101, 91 Stat. 1460, 42 U.S.C. § 2000d, upheld against facial attack in Brown v. Califano, 627 F.2d 1221 (D.C. Cir. 1980).

[1703] *See, e.g.*, *The 14th Amendment and School Busing: Hearings Before the Senate Judiciary Subcommittee on the Constitution*, 97th Congress, 1st Sess. (1981); and *School Desegregation: Hearings Before the House Judiciary Subcommittee on Civil and Constitutional Rights*, 97th Congress, 1st Sess. (1981).

[1704] Washington v. Seattle School Dist., 458 U.S. 457 (1982); Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982). The decisions were in essence an application of Hunter v. Erickson, 393 U.S. 385 (1969).

pact on a minority.[1705] The Court discerned no such impediment in the California measure, a simple repeal of a remedy that had been within the government's discretion to provide. Moreover, the state continued under an obligation to alleviate *de facto* segregation by every other feasible means. The initiative had merely foreclosed one particular remedy—court-ordered mandatory busing—as inappropriate.[1706]

The Court subsequently declined to extend the reasoning of these cases to remedies for exclusively de facto racial segregation. In *Schuette v. Coalition to Defend Affirmative Action*,[1707] the Court considered the constitutionality of an amendment to the Michigan Constitution, approved by that state's voters, to prohibit the use of race-based preferences as part of the admissions process for state universities. A plurality of the *Schuette* Court restricted its prior holdings as applying only to those situations where state action had the serious risk, if not purpose, of causing specific injuries on account of race.[1708] Finding no similar risks of injury with regard to the Michigan Amendment and no similar allegations of past discrimination in the Michigan university system, the Court declined to "restrict the right of Michigan voters to determine that race-based preferences granted by state entities should be ended."[1709] The plurality opinion and a majority of the Court, however, explicitly rejected a broader "political process theory" with respect to the constitutionality of race-based remedies. Specifically, the Court held that state action that places effective decision making over a policy that "in-

[1705] Washington v. Seattle School Dist., 458 U.S. 457, 470–82 (1982). Justice Blackmun wrote the opinion of the Court and was joined by Justices Brennan, White, Marshall, and Stevens. Dissenting were Justices Powell, Rehnquist, O'Connor, and Chief Justice Burger. Id. at 488. The dissent essentially argued that because the state was ultimately entirely responsible for all educational decisions, its choice to take back part of the power it had delegated did not raise the issues the majority thought it did.

[1706] Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 535–40 (1982).

[1707] 572 U.S. ___, No. 12–682, slip op. (2014).

[1708] The plurality opinion was written by Justice Kennedy, joined by Chief Justice Roberts and Justice Alito. Justice Scalia authored an opinion concurring in judgment, joined by Justice Thomas, arguing that *Seattle School District* and the case on which it was based should be overturned in their entirety. *Schuette*, slip op. at 7–8 (Scalia, J., concurring in judgment). Justice Breyer also wrote an opinion concurring in judgment that the Michigan amendment did not violate the Equal Protection Clause. Specifically, Justice Breyer relied on the facts that (1) the amendment forbid racial preferences aimed at achieving diversity in education (as opposed to remedying past discrimination); (2) the amendment was aimed at ensuring that the democratic process (as opposed to the university administration) controlled with respect to affirmative action policy; and (3) the underlying racial preference policy had been adopted by individual school administrations, not by elected officials. *Id.* at 5 (Breyer, J., concurring in judgment). Justice Sotomayor, joined by Justice Ginsburg, dissented. *Id.* at 5, 22 (Sotomayor, J., dissenting). Justice Kagan recused herself.

[1709] *Id.* at 3–4 (plurality opinion).

ures primarily to the benefit of the minority" at a different level of government is not subject to heightened constitutional scrutiny.[1710]

Termination of Court Supervision.—With most school desegregation decrees having been entered decades ago, the issue arose as to what showing of compliance is necessary for a school district to free itself of continuing court supervision. The Court grappled with the issue, first in a case involving Oklahoma City public schools, then in a case involving the University of Mississippi college system. A desegregation decree may be lifted, the Court said in *Oklahoma City Board of Education v. Dowell*,[1711] upon a showing that the purposes of the litigation have been "fully achieved"—*i.e.*, that the school district is being operated "in compliance with the commands of the Equal Protection Clause," that it has been so operated "for a reasonable period of time," and that it is "unlikely" that the school board would return to its former violations. On remand, the trial court was directed to determine "whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past [*de jure*] discrimination had been eliminated to the extent practicable." [1712] In *United States v. Fordice*,[1713] the Court determined that Mississippi had not, by adopting and implementing race-neutral policies, eliminated all vestiges of its prior *de jure*, racially segregated, "dual" system of higher education. The state also, to the extent practicable and consistent with sound educational practices, had to eradicate policies and practices that were traceable to the dual system and that continued to have segregative effects. The Court identified several surviving aspects of Mississippi's prior dual system that were constitutionally suspect and that had to be justified or eliminated. The state's admissions policy, requiring higher test scores for admission to the five historically white institutions than for admission to the three historically black institutions, was suspect because it originated as a means of preserving segregation. Also suspect were the widespread duplication of programs, a possible remnant of the dual "separate-but-equal" system; institutional mission classifications that made three historically white schools the flagship "comprehensive" universities; and the retention and operation of all eight schools rather than the possible merger of some.

[1710] *Id.* at 11 (plurality opinion).
[1711] 498 U.S. 237 (1991).
[1712] 498 U.S. at 249–50.
[1713] 505 U.S. 717.

Juries

It has been established since *Strauder v. West Virginia* [1714] that exclusion of an identifiable racial or ethnic group from a grand jury [1715] that indicts a defendant or a from petit jury [1716] that tries him, or from both,[1717] denies a defendant of the excluded race equal protection and necessitates reversal of his conviction or dismissal of his indictment.[1718] Even if the defendant's race differs from that of the excluded jurors, the Court held, the defendant has third-party standing to assert the rights of jurors excluded on the basis of race.[1719] "Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection. People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." [1720] Thus, persons may bring actions seeking affirmative

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[1714] 100 U.S. 303 (1880). *Cf.* Virginia v. Rives, 100 U.S. 313 (1880). Discrimination on the basis of race, color, or previous condition of servitude in jury selection has also been statutorily illegal since enactment of § 4 of the Civil Rights Act of 1875, 18 Stat. 335, 18 U.S.C. § 243. *See Ex parte* Virginia, 100 U.S. 339 (1880). In Hernandez v. Texas, 347 U.S. 475 (1954), the Court found jury discrimination against Mexican-Americans to be a denial of equal protection, a ruling it reiterated in Castaneda v. Partida, 430 U.S. 482 (1977), finding proof of discrimination by statistical disparities, even though Mexican-surnamed individuals constituted a governing majority of the county and a majority of the selecting officials were Mexican-American.

[1715] Bush v. Kentucky, 107 U.S. 110 (1883); Carter v. Texas, 177 U.S. 442 (1900); Rogers v. Alabama, 192 U.S. 226 (1904); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Cassell v. Texas, 339 U.S. 282 (1950); Reece v. Georgia, 350 U.S. 85 (1955); Eubanks v. Louisiana, 356 U.S. 584 (1958); Arnold v. North Carolina, 376 U.S. 773 (1964); Alexander v. Louisiana, 405 U.S. 625 (1972).

[1716] Hollins v. Oklahoma, 295 U.S. 394 (1935); Avery v. Georgia, 345 U.S. 559 (1953).

[1717] Neal v. Delaware, 103 U.S. 370 (1881); Martin v. Texas, 200 U.S. 316 (1906); Norris v. Alabama, 294 U.S. 587 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Patton v. Mississippi, 332 U.S. 463 (1947); Coleman v. Alabama, 377 U.S. 129 (1964); Whitus v. Georgia, 385 U.S. 545 (1967); Jones v. Georgia, 389 U.S. 24 (1967); Sims v. Georgia, 385 U.S. 538 (1967).

[1718] Even if there is no discrimination in the selection of the petit jury which convicted him, a defendant who shows discrimination in the selection of the grand jury which indicted him is entitled to a reversal of his conviction. Cassell v. Texas, 339 U.S. 282 (1950); Alexander v. Louisiana, 405 U.S. 625 (1972); Vasquez v. Hillery, 474 U.S. 254 (1986) (habeas corpus remedy).

[1719] Powers v. Ohio, 499 U.S. 400, 415 (1991). Campbell v. Louisiana, 523 U.S. 392 (1998) (grand jury). *See also* Peters v. Kiff, 407 U.S. 493 (1972) (defendant entitled to have his conviction or indictment set aside if he proves such exclusion). The Court in 1972 was substantially divided with respect to the reason for rejecting the "same class" rule—that the defendant be of the excluded class—but in Taylor v. Louisiana, 419 U.S. 522 (1975), involving a male defendant and exclusion of women, the Court ascribed the result to the fair-cross-section requirement of the Sixth Amendment, which would have application across-the-board.

[1720] Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 329 (1970).

relief to outlaw discrimination in jury selection, instead of depending on defendants to raise the issue.[1721]

A *prima facie* case of deliberate and systematic exclusion is made when it is shown that no African-Americans have served on juries for a period of years[1722] or when it is shown that the number of African-Americans who served was grossly disproportionate to the percentage of African-Americans in the population and eligible for jury service.[1723] Once this *prima facie* showing has been made, the burden is upon the jurisdiction to prove that it had not practiced discrimination; it is not adequate that jury selection officials testify under oath that they did not discriminate.[1724] Although the Court in connection with a showing of great disparities in the racial makeup of jurors called has voided certain practices that made discrimination easy to accomplish,[1725] it has not outlawed discretionary selection pursuant to general standards of educational attainment and character that can be administered fairly.[1726] Similarly, it declined to rule that African-Americans must be included on all-white jury commissions that administer the jury selection laws in some states.[1727]

In *Swain v. Alabama*,[1728] African-Americans regularly appeared on jury venires but no African-American had actually served on a jury. It appeared that the absence was attributable to the action of the prosecutor in peremptorily challenging all potential African-American jurors, but the Court refused to set aside the conviction. The use of peremptory challenges to exclude the African-Americans in the particular case was permissible, the Court held, regardless of the prosecutor's motive, although it indicated that the consistent use of such challenges to remove African-Americans would be unconstitutional. Because the record did not disclose that the prosecution was responsible solely for the fact that no African-American

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[1721] Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970).

[1722] Norris v. Alabama, 294 U.S. 587 (1935); Patton v. Mississippi, 332 U.S. 463 (1947); Hill v. Texas, 316 U.S. 400 (1942).

[1723] Pierre v. Louisiana, 306 U.S. 354 (1939); Cassell v. Texas, 339 U.S. 282 (1950); Eubanks v. Louisiana, 356 U.S. 584 (1958); Whitus v. Georgia, 385 U.S. 545 (1967); Alexander v. Louisiana, 405 U.S. 625 (1972). For an elaborate discussion of statistical proof, *see* Castaneda v. Partida, 430 U.S. 482 (1977).

[1724] Norris v. Alabama, 294 U.S. 587 (1935); Eubanks v. Georgia, 385 U.S. 545 (1967); Sims v. Georgia, 389 U.S. 404 (1967); Turner v. Fouche, 396 U.S. 346, 360–361 (1970).

[1725] Avery v. Georgia, 345 U.S. 559 (1953) (names of whites and African-Americans listed on differently colored paper for drawing for jury duty); Whitus v. Georgia, 385 U.S. 545 (1967) (jurors selected from county tax books, in which names of African-Americans were marked with a "c").

[1726] Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 331–37 (1970), and cases cited.

[1727] 396 U.S. at 340–41.

[1728] 380 U.S. 202 (1965).

had ever served on a jury and that some exclusions were not the result of defense peremptory challenges, the defendant's claims were rejected.

The *Swain* holding as to the evidentiary standard was overruled in *Batson v. Kentucky*, the Court ruling that "a defendant may establish a *prima facie* case of purposeful [racial] discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's [own] trial."[1729] To rebut this showing, the prosecutor "must articulate a neutral explanation related to the particular case," but the explanation "need not rise to the level justifying exercise of a challenge for cause."[1730] In fact, "[a]lthough the prosecutor must present a comprehensible reason, '[t]he [rebuttal] does not demand an explanation that is persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices."[1731] Such a rebuttal having been offered, "the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating 'the persuasiveness of the justification' proffered by the prosecutor, but the 'ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.'"[1732] "On appeal, a trial court's ruling

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[1729] 476 U.S. 79, 96 (1986). Establishing a *prima facie* case can be done through a "wide variety of evidence, so long as the sum of proffered facts gives rise to an inference of discriminatory purpose." Id. at 93–94. A state, however, cannot require that a defendant prove a *prima facie* case under a "more likely than not" standard, as the function of the *Batson* test is to create an inference and shift the burden to the state to offer race-neutral reasons for the peremptory challenges. Only then does a court weigh the likelihood that racial discrimination occurred. Johnson v. California, 543 U.S. 499 (2005).

[1730] 476 U.S. at 98 (1986). The principles were applied in Trevino v. Texas, 503 U.S. 562 (1991), holding that a criminal defendant's allegation of a state's pattern of historical and habitual use of peremptory challenges to exclude members of racial minorities was sufficient to raise an equal protection claim under *Swain* as well as *Batson*. In Hernandez v. New York, 500 U.S. 352 (1991), a prosecutor was held to have sustained his burden of providing a race-neutral explanation for using peremptory challenges to strike bilingual Latino jurors; the prosecutor had explained that, based on the answers and demeanor of the prospective jurors, he had doubted whether they would accept the interpreter's official translation of trial testimony by Spanish-speaking witnesses. The *Batson* ruling applies to cases pending on direct review or not yet final when *Batson* was decided, Griffith v. Kentucky, 479 U.S. 314 (1987), but does not apply to a case on federal *habeas corpus* review, Allen v. Hardy, 478 U.S. 255 (1986).

[1731] Rice v. Collins, 546 U.S. 333, 338 (2006) (citation omitted). The holding of the case was that, in a habeas corpus action, the Ninth Circuit "panel majority improperly substituted its evaluation of the record for that of the state trial court." Id. at 337–38. Justice Breyer, joined by Justice Souter, concurred but suggested "that legal life without peremptories is no longer unthinkable" and "that we should reconsider *Batson's* test and the peremptory challenge system as a whole." Id. at 344.

[1732] Rice v. Collins, 546 U.S. at 338 (citations omitted). "[O]nce it is shown that a discriminatory intent was a substantial or motivating factor in an action taken by

on the issue of discriminatory intent must be sustained unless it is clearly erroneous,"[1733] but, on more than one occasion, the Supreme Court has reversed trial courts' findings of no discriminatory intent.[1734] The Court has also extended *Batson* to apply to racially discriminatory use of peremptory challenges by private litigants in civil litigation,[1735] and by a defendant in a criminal case,[1736] the principal issue in these cases being the presence of state action, not the invalidity of purposeful racial discrimination.

Discrimination in the selection of grand jury foremen presents a closer question, the answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus, the Court "assumed without deciding" that discrimination in selection of foremen for state grand juries would violate equal protection in a system in which the judge selected a foreman to serve as a thirteenth voting juror, and that foreman exercised significant powers.[1737] That situation was distinguished, however, in a due process challenge to the federal system, where the foreman's responsibili-

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a state actor, the burden shifts to the party defending the action to show that this factor was not determinative. We have not previously applied this rule in a *Batson* case, and we need not decide here whether that standard governs in this context. . . . [Nevertheless,] a peremptory strike shown to have been motivated in substantial part by a discriminatory intent could not be sustained based on any lesser showing by the prosecution." Snyder v. Louisiana, 128 S. Ct. 1203, 1212 (2008) (citation omitted).

To rule on a *Batson* objection based on a prospective juror's demeanor during *voir dire*, it is not necessary that the ruling judge have observed the juror personally. That a judge who observed a prospective juror should take those observations into account, among other things, does not mean that a demeanor-based explanation for a strike must be rejected if the judge did not observe or cannot recall the juror's demeanor. Thaler v. Haynes, 559 U.S. ___, No. 09–273, slip op. (2010).

[1733] Federal courts are especially deferential to state court decisions on discriminatory intent when conducting federal *habeas* review. Felkner v. Jackson, 562 U.S. ___, No. 10–797, slip op. at 4 (2011) (per curiam) (citation omitted)..

[1734] *See, e.g.*, Foster v. Chatman, 578 U.S. ___, No. 14–8349, slip op. at 10–23 (2016) (applying the three-step process set forth in *Batson* to allow a death row inmate to pursue an appeal on the grounds that the state court's conclusion that the defendant had not shown purposeful discrimination during voir dire was clearly erroneous given that the prosecution's justifications for striking African-American jurors, while seeming "reasonable enough," had "no grounding in fact," were contradicted by the record, and had shifted over time); Snyder v. Louisiana, 552 U.S. 472, 483 (2008) (finding the prosecution's race-neutral explanation for its peremptory challenge of an African-American juror to be implausible, and that this "implausibility" was "reinforced by the prosecutor's acceptance of white jurors" whom the prosecution could have challenged for the same reasons that it claimed to have challenged the African-American juror); Miller-El v. Dretke, 545 U.S. 231, 240–41 (2005) (finding discrimination in the use of peremptory strikes based on various factors, including the high ratio of African-Americans struck from the venire panel, some of whom were struck on grounds that "appeared equally on point as to some white jurors who served").

[1735] Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[1736] Georgia v. McCollum, 505 U.S. 42 (1992).

[1737] Rose v. Mitchell, 443 U.S. 545, 551 n.4 (1979).

ties were "essentially clerical" and where the selection was from among the members of an already chosen jury.[1738]

Capital Punishment

In *McCleskey v. Kemp*[1739] the Court rejected an equal protection claim of a black defendant who received a death sentence following conviction for murder of a white victim, even though a statistical study showed that blacks charged with murdering whites were more than four times as likely to receive a death sentence in the state than were defendants charged with killing blacks. The Court distinguished *Batson v. Kentucky* by characterizing capital sentencing as "fundamentally different" from jury venire selection; consequently, reliance on statistical proof of discrimination is less rather than more appropriate.[1740] "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[1741] Also, the Court noted, there is not the same opportunity to rebut a statistical inference of discrimination; jurors may not be required to testify as to their motives, and for the most part prosecutors are similarly immune from inquiry.[1742]

Housing

Buchanan v. Warley[1743] invalidated an ordinance that prohibited blacks from occupying houses in blocks where the greater number of houses were occupied by whites and that prohibited whites

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[1738] Hobby v. United States, 468 U.S. 339 (1984). Note also that in this limited context where injury to the defendant was largely conjectural, the Court seemingly revived the same class rule, holding that a white defendant challenging on due process grounds exclusion of blacks as grand jury foremen could not rely on equal protection principles protecting black defendants from "the injuries of stigmatization and prejudice" associated with discrimination. Id. at 347.

[1739] 481 U.S. 279 (1987). The decision was 5–4, with Justice Powell's opinion of the Court being joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Scalia, and with Justices Brennan, Blackmun, Stevens, and Marshall dissenting.

[1740] 481 U.S. at 294. Dissenting Justices Brennan, Blackmun and Stevens challenged this position as inconsistent with the Court's usual approach to capital punishment, in which greater scrutiny is required. Id. at 340, 347–48, 366.

[1741] 481 U.S. at 297. Discretion is especially important to the role of a capital sentencing jury, which must be allowed to consider any mitigating factor relating to the defendant's background or character, or to the nature of the offense; the Court also cited the "traditionally 'wide discretion'" accorded decisions of prosecutors. Id. at 296.

[1742] The Court distinguished *Batson* by suggesting that the death penalty challenge would require a prosecutor "to rebut a study that analyzes the past conduct of scores of prosecutors" whereas the peremptory challenge inquiry would focus only on the prosecutor's own acts. 481 U.S. at 296 n.17.

[1743] 245 U.S. 60 (1917). *See also* Harmon v. Tyler, 273 U.S. 668 (1927); Richmond v. Deans, 281 U.S. 704 (1930).

from doing so where the greater number of houses were occupied by blacks. Although racially restrictive covenants do not themselves violate the Equal Protection Clause, the judicial enforcement of them, either by injunctive relief or through entertaining damage actions, does.[1744] Referendum passage of a constitutional amendment repealing a "fair housing" law and prohibiting further state or local action in that direction was held unconstitutional in *Reitman v. Mulkey*,[1745] though on somewhat ambiguous grounds, whereas a state constitutional requirement that decisions of local authorities to build low-rent housing projects in an area must first be submitted to referendum, although other similar decisions were not so limited, was found not to violate the Equal Protection Clause.[1746] Private racial discrimination in the sale or rental of housing is subject to two federal laws prohibiting most such discrimination.[1747] Provision of publicly assisted housing, of course, must be on a nondiscriminatory basis.[1748]

Other Areas of Discrimination

Transportation.—The "separate but equal" doctrine won Supreme Court endorsement in the transportation context,[1749] and its passing in the education field did not long predate its demise in transportation as well.[1750] During the interval, the Court held invalid a state statute that permitted carriers to provide sleeping and dining cars for white persons only,[1751] held that a carrier's provision of unequal, or nonexistent, first class accommodations to African-Americans violated the Interstate Commerce Act,[1752] and voided both state-required and privately imposed segregation of the races on interstate carriers as burdens on commerce.[1753] *Boynton v. Vir-*

[1744] Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); Barrows v. Jackson, 346 U.S. 249 (1953). *Cf.* Corrigan v. Buckley, 271 U.S. 323 (1926).

[1745] 387 U.S. 369 (1967).

[1746] James v. Valtierra, 402 U.S. 137 (1971). The Court did not perceive that either on its face or as applied the provision was other than racially neutral. Justices Marshall, Brennan, and Blackmun dissented. Id. at 143.

[1747] Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1982, *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), and Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act), 82 Stat. 73, 42 U.S.C. §§ 3601 *et seq*.

[1748] *See* Hills v. Gautreaux, 425 U.S. 284 (1976).

[1749] Plessy v. Ferguson, 163 U.S. 537 (1896).

[1750] Gayle v. Browder, 352 U.S. 903 (1956), *aff'g* 142 F. Supp. 707 (M.D. Ala.) (statute requiring segregation on buses is unconstitutional). "We have settled beyond question that no State may require racial segregation of interstate transportation facilities. . . . This question is no longer open; it is foreclosed as a litigable issue." Bailey v. Patterson, 369 U.S. 31, 33 (1962).

[1751] McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914).

[1752] Mitchell v. United States, 313 U.S. 80 (1941).

[1753] Morgan v. Virginia, 328 U.S. 373 (1946); Henderson v. United States, 339 U.S. 816 (1950).

ginia [1754] voided a trespass conviction of an interstate African-American bus passenger who had refused to leave a restaurant that the Court viewed as an integral part of the facilities devoted to interstate commerce and therefore subject to the Interstate Commerce Act.

Public Facilities.—In the aftermath of *Brown v. Board of Education*, the Court, in a lengthy series of *per curiam* opinions, established the invalidity of segregation in publicly provided or supported facilities and of required segregation in any facility or function.[1755] A municipality could not operate a racially segregated park pursuant to a will that left the property for that purpose and that specified that only whites could use the park,[1756] but it was permissible for the state courts to hold that the trust had failed and to imply a reverter to the decedent's heirs.[1757] A municipality under court order to desegregate its publicly owned swimming pools was held to be entitled to close the pools instead, so long as it entirely ceased operation of them.[1758]

Marriage.—Statutes that forbid the contracting of marriage between persons of different races are unconstitutional,[1759] as are statutes that penalize interracial cohabitation.[1760] Nor may a court deny custody of a child based on a parent's remarriage to a person of

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[1754] 364 U.S. 454 (1960).

[1755] *E.g.*, Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954) (city lease of park facilities); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (public parks and golf courses); State Athletic Comm'n v. Dorsey, 359 U.S. 533 (1959) (statute requiring segregated athletic contests); Turner v. City of Memphis, 369 U.S. 350 (1962) (administrative regulation requiring segregation in airport restaurant); Schiro v. Bynum, 375 U.S. 395 (1964) (ordinance requiring segregation in municipal auditorium).

[1756] Evans v. Newton, 382 U.S. 296 (1966). State courts had removed the city as trustee but the Court thought the city was still inextricably bound up in the operation and maintenance of the park. Justices Black, Harlan, and Stewart dissented because they thought the removal of the city as trustee removed the element of state action. Id. at 312, 315.

[1757] Evans v. Abney, 396 U.S. 435 (1970). The Court thought that in effectuating the testator's intent in the fashion best permitted by the Fourteenth Amendment, the state courts engaged in no action violating the Equal Protection Clause. Justices Douglas and Brennan dissented. Id. at 448, 450.

[1758] Palmer v. Thompson, 403 U.S. 217 (1971). The Court found that there was no official encouragement of discrimination through the act of closing the pools and that inasmuch as both white and black citizens were deprived of the use of the pools there was no unlawful discrimination. Justices White, Brennan, and Marshall dissented, arguing that state action taken solely in opposition to desegregation was impermissible, both in defiance of the lower court order and because it penalized African-Americans for asserting their rights. Id. at 240. Justice Douglas also dissented. Id. at 231.

[1759] Loving v. Virginia, 388 U.S. 1 (1967).

[1760] McLaughlin v. Florida, 379 U.S. 184 (1964).

another race and the presumed "best interests of the child" to be free from the prejudice and stigmatization that might result.[1761]

Judicial System.—Segregation in courtrooms is unlawful and may not be enforced through contempt citations for disobedience[1762] or through other means. Treatment of parties to or witnesses in judicial actions based on their race is impermissible.[1763] Jail inmates have a right not to be segregated by race unless there is some overriding necessity arising out of the process of keeping order.[1764]

Public Designation.—It is unconstitutional to designate candidates on the ballot by race[1765] and apparently any sort of designation by race on public records is suspect, although not necessarily unlawful.[1766]

Public Accommodations.—Whether discrimination practiced by operators of retail selling and service establishments gave rise to a denial of constitutional rights occupied the Court's attention considerably in the early 1960s, but it avoided finally deciding one way or the other, generally finding forbidden state action in some aspect of the situation.[1767] Passage of the Civil Rights Act of 1964 obviated any necessity to resolve the issue.[1768]

Elections .—Although, of course, the denial of the franchise on the basis of race or color violates the Fifteenth Amendment and a series of implementing statutes enacted by Congress,[1769] the administration of election statutes so as to treat white and black voters or candidates differently can constitute a denial of equal protection

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[1761] Palmore v. Sidoti, 466 U.S. 429 (1984).

[1762] Johnson v. Virginia, 373 U.S. 61 (1963).

[1763] Hamilton v. Alabama, 376 U.S. 650 (1964) (reversing contempt conviction of witness who refused to answer questions so long as prosecutor addressed her by her first name).

[1764] Lee v. Washington, 390 U.S. 333 (1968); Wilson v. Kelley, 294 F. Supp. 1005 (N.D.Ga.), *aff'd*, 393 U.S. 266 (1968).

[1765] Anderson v. Martin, 375 U.S. 399 (1964).

[1766] Tancil v. Woolls, 379 U.S. 19 (1964) (summarily affirming lower court rulings sustaining law requiring that every divorce decree indicate race of husband and wife, but voiding laws requiring separate lists of whites and African-Americans in voting, tax and property records).

[1767] *E.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Turner v. City of Memphis, 369 U.S. 350 (1962); Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267 (1963); Robinson v. Florida, 378 U.S. 153 (1964).

[1768] Title II, 78 Stat. 243, 42 U.S.C. §§ 2000a to 2000a–6. *See* Hamm v. City of Rock Hill, 379 U.S. 306 (1964). On the various positions of the Justices on the constitutional issue, *see* the opinions in Bell v. Maryland, 378 U.S. 226 (1964).

[1769] *See* "Federal Remedial Legislation," *infra*.

as well.[1770] Additionally, cases of gerrymandering of electoral districts and the creation or maintenance of electoral practices that dilute and weaken black and other minority voting strength is subject to Fourteenth and Fifteenth Amendment and statutory attack.[1771]

"Affirmative Action": Remedial Use of Racial Classifications

Of critical importance in equal protection litigation is the degree to which government is permitted to take race or another suspect classification into account when formulating and implementing a remedy to overcome the effects of past discrimination. Often the issue is framed in terms of "reverse discrimination," in that the governmental action deliberately favors members of one class and consequently may adversely affect nonmembers of that class.[1772] Although the Court had previously accepted the use of suspect criteria such as race to formulate remedies for specific instances of past discrimination [1773] and had allowed preferences for members of certain non-suspect classes that had been the object of societal discrimination,[1774] it was not until the late 1970s that the Court gave plenary review to programs that expressly used race as the primary consideration for awarding a public benefit.[1775]

[1770] *E.g.*, Hadnott v. Amos, 394 U.S. 358 (1971); Hunter v. Underwood, 471 U.S. 222 (1985) (disenfranchisement for crimes involving moral turpitude adopted for purpose of racial discrimination).

[1771] *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977); Rogers v. Lodge, 458 U.S. 613 (1982).

[1772] While the emphasis is upon governmental action, private affirmative actions may implicate statutory bars to uses of race. *E.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), held, not in the context of an affirmative action program, that whites were as entitled as any group to protection of federal laws banning racial discrimination in employment. The Court emphasized that it was not passing at all on the permissibility of affirmative action programs. Id. at 280 n.8. In United Steelworkers v. Weber, 443 U.S. 193 (1979), the Court held that title VII did not prevent employers from instituting voluntary, race-conscious affirmative action plans. *Accord*, Johnson v. Transportation Agency, 480 U.S. 616 (1987). Nor does title VII prohibit a court from approving a consent decree providing broader relief than the court would be permitted to award. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). And, court-ordered relief pursuant to title VII may benefit persons not themselves the victims of discrimination. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986).

[1773] *E.g.*, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 22–25 (1971).

[1774] Programs to overcome past societal discriminations against women have been approved, Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); Califano v. Webster, 430 U.S. 313 (1977), but gender classifications are not as suspect as racial ones. Preferential treatment for American Indians was approved, Morton v. Mancari, 417 U.S. 535 (1974), but on the basis that the classification was political rather than racial.

[1775] The constitutionality of a law school admissions program in which minority applicants were preferred for a number of positions was before the Court in DeFunis v. Odegaard, 416 U.S. 312 (1974), but the Court did not reach the merits.

In *United Jewish Organizations v. Carey*,[1776] New York State had drawn a plan that consciously used racial criteria to create districts with nonwhite populations in order to comply with the Voting Rights Act and to obtain the United States Attorney General's approval for a redistricting law. These districts were drawn large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhites. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts, and members of that community sued, alleging that the value of their votes had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the districting, although the fragmented majority of seven concurred in no majority opinion.

Justice White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took place pursuant to the administration of the Voting Rights Act, Justice White argued that compliance with the Act necessarily required states to be race conscious in the drawing of lines so as not to dilute minority voting strength. Justice White noted that this requirement was not dependent upon a showing of past discrimination and that the states retained discretion to determine just what strength minority voters needed in electoral districts in order to assure their proportional representation. Moreover, the creation of the certain number of districts in which minorities were in the majority was reasonable under the circumstances.[1777]

Second, Justice White wrote that, irrespective of what the Voting Rights Act may have required, what the state had done did not violate either the Fourteenth or the Fifteenth Amendment. This was so because the plan, even though it used race in a purposeful manner, represented no racial slur or stigma with respect to whites or any other race; the plan did not operate to minimize or unfairly cancel out white voting strength, because as a class whites would be represented in the legislature in accordance with their proportion of the population in the jurisdiction.[1778]

[1776] 430 U.S. 144 (1977). Chief Justice Burger dissented, id. at 180, and Justice Marshall did not participate.

[1777] 430 U.S. at 155–65. Joining this part of the opinion were Justices Brennan, Blackmun, and Stevens.

[1778] 430 U.S. at 165–68. Joining this part of the opinion were Justices Stevens and Rehnquist. In a separate opinion, Justice Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimulate society's latent race consciousness; (3) they may stigmatize recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many

It was anticipated that *Regents of the University of California v. Bakke* [1779] would shed further light on the constitutionality of affirmative action. Instead, the Court again fragmented. In *Bakke*, the Davis campus medical school admitted 100 students each year. Of these slots, the school set aside 16 of those seats for disadvantaged minority students, who were qualified but not necessarily as qualified as those winning admission to the other 84 places. Twice denied admission, Bakke sued, arguing that had the 16 positions not been set aside he could have been admitted. The state court ordered him admitted and ordered the school not to consider race in admissions. By two 5-to-4 votes, the Supreme Court affirmed the order admitting Bakke but set aside the order forbidding the consideration of race in admissions.[1780]

Four Justices, in an opinion by Justice Brennan, argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution under appropriate circumstances. Even ostensibly benign racial classifications, however, could be misused and produce stigmatizing effects; therefore, they must be searchingly scrutinized by courts to ferret out these instances. But benign racial preferences, unlike invidious discriminations, need not be subjected to strict scrutiny; instead, an intermediate scrutiny would do. As applied, then, this review would enable the Court to strike down a remedial racial classification that stigmatized a group, that singled out those least well represented in the political process to bear the brunt of the program, or that was not justified by an important and articulated purpose.[1781]

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as unjust. The presence of the Voting Rights Act and the Attorney General's supervision made the difference to him in this case. Id. at 168. Justices Stewart and Powell concurred, agreeing with Justice White that there was no showing of a purpose on the legislature's part to discriminate against white voters and that the effect of the plan was insufficient to invalidate it. Id. at 179.

[1779] 438 U.S. 265 (1978).

[1780] Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964, which bars discrimination on the ground of race, color, or national origin by any recipient of federal financial assistance, outlawed the college's program and made unnecessary any consideration of the Constitution. *See* 78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d–7. These Justices would have admitted Bakke and barred the use of race in admissions. 438 U.S. at 408–21 (Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger). The remaining five Justices agreed among themselves that Title VI, on its face and in light of its legislative history, proscribed only what the Equal Protection Clause proscribed. 438 U.S. at 284–87 (Justice Powell), 328–55 (Justices Brennan, White, Marshall, and Blackmun). They thus reached the constitutional issue.

[1781] 438 U.S. at 355–79 (Justices Brennan, White, Marshall, and Blackmun). The intermediate standard of review adopted by the four Justices is that formulated for gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" Id. at 359.

Justice Powell, however, argued that all racial classifications are suspect and require strict scrutiny. Because none of the justifications asserted by the college met this high standard of review, he would have invalidated the program. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past societal discrimination.[1782] Justice Powell thus agreed that Bakke should be admitted, but he joined the four justices who sought to allow the college to consider race to some degree in its admissions.[1783]

The Court then began a circuitous route toward disfavoring affirmative action, at least when it occurs outside the education context. At first, the Court seemed inclined to extend the result in *Bakke*. In *Fullilove v. Klutznick*,[1784] the Court, still lacking a majority opinion, upheld a federal statute requiring that at least ten percent of public works funds be set aside for minority business enterprises. A series of opinions by six Justices all recognized that alleviation and remediation of past societal discrimination was a legitimate goal and that race was a permissible classification to use in remedying the present effects of past discrimination. Chief Judge Burger issued the judgment, which emphasized Congress's preeminent role under the Commerce Clause and the Fourteenth Amendment to determine the existence of past discrimination and its continuing effects and to implement remedies that were race conscious in order to cure those effects. The principal concurring opinion by Justice Marshall applied the Brennan analysis in *Bakke*, using middle-tier scrutiny to hold that the race conscious set-aside was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination." [1785]

Taken together, the opinions established that, although Congress had the power to make the findings that will establish the necessity to use racial classifications in an affirmative way, these

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[1782] 438 U.S. at 287–320.

[1783] *See* 438 U.S. at 319–20 (Justice Powell).

[1784] 448 U.S. 448 (1980). Justice Stewart, joined by Justice Rehnquist, dissented in one opinion, id. at 522, while Justice Stevens dissented in another. Id. at 532.

[1785] 448 U.S. at 517.

findings need not be extensive nor express and may be collected in many ways.[1786] Moreover, although the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to attach no constitutional significance to these limitations, thus leaving open the way for programs of a scope sufficient to remedy all the identified effects of past discrimination.[1787] But the most important part of these opinions rested in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. The Court rejected arguments that minority beneficiaries of such programs are stigmatized, that burdens are placed on innocent third parties, and that the program is overinclusive, so as to benefit some minority members who had suffered no discrimination.[1788]

Despite these developments, the Court remained divided in its response to constitutional challenges to affirmative action plans.[1789] As a general matter, authority to apply racial classifications was found to be at its greatest when Congress was acting pursuant to section 5 of the Fourteenth Amendment or other of its remedial powers, or when a court is acting to remedy proven discrimination. But a countervailing consideration was the impact of such discrimination on disadvantaged non-minorities. Two cases illustrate the latter point. In *Wygant v. Jackson Board of Education*,[1790] the Court invalidated a provision of a collective bargaining agreement giving minority teachers a preferential protection from layoffs. In *United*

[1786] Whether federal agencies or state legislatures and state agencies have the same breadth and leeway to make findings and formulate remedies was left unsettled, but that they have some such power seems evident. 448 U.S. at 473–80. The program was an exercise of Congress's spending power, but the constitutional objections raised had not been previously resolved in that context. The plurality therefore turned to Congress's regulatory powers, which in this case undergirded the spending power, and found the power to lie in the Commerce Clause with respect to private contractors and in section 5 of the Fourteenth Amendment with respect to state agencies. The Marshall plurality appeared to attach no significance in this regard to the fact that Congress was the acting party.

[1787] 448 U.S. at 484–85, 489 (Chief Justice Burger), 513–15 (Justice Powell).

[1788] 448 U.S. at 484–89 (Chief Justice Burger), 514–515 (Justice Powell), 520–521 (Justice Marshall).

[1789] Guidance on constitutional issues is not necessarily afforded by cases arising under Title VII of the Civil Rights Act, the Court having asserted that "the *statutory* prohibition with which the employer must contend was not intended to extend as far as that of the Constitution," and that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace." Johnson v. Transportation Agency, 480 U.S. 616, 628 n.6, 630 (1987) (upholding a local governmental agency's voluntary affirmative action plan predicated upon underrepresentation of women rather than upon past discriminatory practices by that agency) (emphasis in original). The constitutionality of the agency's plan was not challenged. *See* id. at 620 n.2.

[1790] 476 U.S. 267 (1986).

States v. Paradise,[1791] the Court upheld as a remedy for past discrimination a court-ordered racial quota in promotions. Justice White, concurring in *Wygant*, emphasized the harsh, direct effect of layoffs on affected non-minority employees.[1792] By contrast, a plurality of Justices in *Paradise* viewed the remedy in that case as affecting non-minorities less harshly than did the layoffs in *Wygant*, because the promotion quota would merely delay promotions of those affected, rather than cause the loss of their jobs.[1793]

A clear distinction was then drawn between federal and state power to apply racial classifications. In *City of Richmond v. J.A. Croson Co.*,[1794] the Court invalidated a minority set-aside requirement that holders of construction contracts with the city subcontract at least 30% of the dollar amount to minority business enterprises. Applying strict scrutiny, the Court found Richmond's program to be deficient because it was not tied to evidence of past discrimination in the city's construction industry. By contrast, the Court in *Metro Broadcasting, Inc. v. FCC* [1795] applied a more lenient standard of review in upholding two racial preference policies used by the FCC in the award of radio and television broadcast licenses. The FCC policies, the Court explained, are "benign, race-conscious measures" that are "substantially related" to the achievement of an "important" governmental objective of broadcast diversity.[1796]

In *Croson*, the Court ruled that the city had failed to establish a "compelling" interest in the racial quota system because it failed to identify past discrimination in its construction industry. Mere recitation of a "benign" or remedial purpose will not suffice, the Court concluded, nor will reliance on the disparity between the number

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[1791] 480 U.S. 149 (1987).

[1792] 476 U.S. at 294. A plurality of Justices in *Wygant* thought that past societal discrimination alone is insufficient to justify racial classifications; they would require some convincing evidence of past discrimination by the governmental unit involved. 476 U.S. at 274–76 (opinion of Justice Powell, joined by Chief Justice Burger and by Justices Rehnquist and O'Connor).

[1793] 480 U.S. at 182–83 (opinion of Justice Brennan, joined by Justices Marshall, Blackmun, and Powell). A majority of Justices emphasized that the egregious nature of the past discrimination by the governmental unit justified the ordered relief. 480 U.S. at 153 (opinion of Justice Brennan), id. at 189 (Justice Stevens).

[1794] 488 U.S. 469 (1989). *Croson* was decided by a 6–3 vote. The portions of Justice O'Connor's opinion adopted as the opinion of the Court were joined by Chief Justice Rehnquist and by Justices White, Stevens, and Kennedy. The latter two Justices joined only part of Justice O'Connor's opinion; each added a separate concurring opinion. Justice Scalia concurred separately; Justices Marshall, Brennan, and Blackmun dissented.

[1795] 497 U.S. 547 (1990). This was a 5–4 decision, Justice Brennan's opinion of the Court being joined by Justices White, Marshall, Blackmun, and Stevens. Justice O'Connor wrote a dissenting opinion joined by the Chief Justice and by Justices Scalia and Kennedy, and Justice Kennedy added a separate dissenting opinion joined by Justice Scalia.

[1796] 497 U.S. at 564–65.

of contracts awarded to minority firms and the minority population of the city. "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the number of minorities qualified to undertake the particular task." [1797] The overinclusive definition of minorities, including U.S. citizens who are "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts," also "impugn[ed] the city's claim of remedial motivation," there having been "no evidence" of any past discrimination against non-blacks in the Richmond construction industry.[1798] It followed that Richmond's set-aside program also was not "narrowly tailored" to remedy the effects of past discrimination in the city: an individualized waiver procedure made the quota approach unnecessary, and a minority entrepreneur "from anywhere in the country" could obtain an absolute racial preference.[1799]

At issue in *Metro Broadcasting* were two minority preference policies of the FCC, one recognizing an "enhancement" for minority ownership and participation in management when the FCC considers competing license applications, and the other authorizing a "distress sale" transfer of a broadcast license to a minority enterprise. These racial preferences—unlike the set-asides at issue in *Fullilove*—originated as administrative policies rather than statutory mandates. Because Congress later endorsed these policies, however, the Court was able to conclude that they bore "the imprimatur of longstanding congressional support and direction." [1800]

Metro Broadcasting was noteworthy for several other reasons as well. The Court rejected the dissent's argument—seemingly accepted by a *Croson* majority—that Congress's more extensive authority to adopt racial classifications must trace to section 5 of the Fourteenth Amendment, and instead ruled that Congress also may rely on race-conscious measures in exercise of its commerce and spending powers.[1801] This meant that the governmental interest furthered by a race-conscious policy need not be remedial, but could be a less focused interest such as broadcast diversity. Secondly, as noted above, the Court eschewed strict scrutiny analysis: the governmental interest need only be "important" rather than "compelling," and the means adopted need only be "substantially related" rather than "narrowly tailored" to furthering the interest.

[1797] 488 U.S. at 501–02.

[1798] 488 U.S. at 506.

[1799] 488 U.S. at 508.

[1800] 497 U.S. at 600. Justice O'Connor's dissenting opinion contended that the case "does not present 'a considered decision of the Congress and the President.'" Id. at 607 (quoting *Fullilove*, 448 U.S. at 473).

[1801] 497 U.S. at 563 & n.11. For the dissenting views of Justice O'Connor *see* id. at 606–07. *See also Croson*, 488 U.S. at 504 (opinion of Court).

The distinction between federal and state power to apply racial classifications, however, proved ephemeral. The Court ruled in *Adarand Constructors, Inc. v. Pena* [1802] that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled *Metro Broadcasting* and, to the extent that it applied a review standard less stringent than strict scrutiny, *Fullilove v. Klutznick*. Strict scrutiny is to be applied regardless of the race of those burdened or benefitted by the particular classification; there is no intermediate standard applicable to "benign" racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore, that classifications based on the group characteristic of race "should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection . . . has not been infringed." [1803]

By applying strict scrutiny, the Court was in essence affirming Justice Powell's individual opinion in *Bakke*, which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether Justice Powell's suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the Court essentially reaffirmed Justice Powell's line of reasoning in the cases of *Grutter v. Bollinger*,[1804] and *Gratz v. Bollinger*.[1805]

In *Grutter*, the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in their file (*e.g.*, grade point average, Law School Admissions Test score, personal statement, recommendations) and on "soft" variables (*e.g.*, strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans . . . ." Although, the policy did not limit the seeking of diversity to "ethnic and racial" classifications, it did seek a "critical

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[1802] 515 U.S. 200 (1995). This was a 5–4 decision. Justice O'Connor's opinion for Court was joined by Chief Justice Rehnquist, and by Justices Kennedy, Thomas, and—to the extent not inconsistent with his own concurring opinion—Scalia. Justices Stevens, Souter, Ginsburg and Breyer dissented.

[1803] 515 U.S. at 227 (emphasis original).

[1804] 539 U.S. 306 (2003).

[1805] 539 U.S. 244 (2003).

mass" of minorities so that those students would not feel isolated.[1806]

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who might have otherwise not been admitted, but also to the student body as a whole. These benefits include "cross-racial understanding," the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to "cultivate a set of leaders with legitimacy in the eyes of the citizenry."[1807] As the university did not rely on quotas, but rather relied on "flexible assessments" of a student's record, the Court found that the university's policy was narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.[1808]

The law school's admission policy in *Grutter*, however, can be contrasted with the university's undergraduate admission policy. In *Gratz*, the Court evaluated the undergraduate program's "selection index," which assigned applicants up to 150 points based on a variety of factors similar to those considered by the law school. Applicants with scores over 100 were generally admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was that an applicant would be entitled to 20 points based solely upon his or her membership in an underrepresented racial or ethnic minority group. The policy also included the "flagging" of certain applications for special review, and underrepresented minorities were among those whose applications were flagged.[1809]

The Court in *Gratz* struck down this admissions policy, relying again on Justice Powell's decision in *Bakke*. Although Justice Pow-

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[1806] 539 U.S. at 316.

[1807] 539 U.S. at 335.

[1808] *Grutter*, 539 U.S. at 315. While an educational institution will receive deference in its judgment as to whether diversity is essential to its educational mission, the courts must closely scrutinize the means by which this goal is achieved. Thus, the institution will receive no deference regarding the question of the necessity of the means chosen and will bear the burden of demonstrating that "each applicant is evaluated as an individual and not in a way that an applicant's race or ethnicity is the defining feature of his or her application." Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. ___, No. 11–345, slip op. at 10 (2013) (citation omitted). In its 2013 decision in *Fisher*, the Court did not rule on the substance of the challenged affirmative action program and instead remanded the case so that the reviewing appellate court could apply the correct standard of review. However, the Court issued a subsequent decision in *Fisher* addressing the Texas program directly. *See* Fisher v. Univ. of Tex. at Austin (*Fisher II*), 579 U.S. ___, No. 14–981, slip op. (2016).

[1809] 539 U.S. at 272–73.

ell had thought it permissible that "race or ethnic background . . . be deemed a 'plus' in a particular applicant's file,"[1810] the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz*, the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing 20 points to every applicant from an "underrepresented minority" group, the policy effectively admitted every qualified minority applicant. Although it acknowledged that the volume of applications could make individualized assessments an "administrative challenge," the Court found that the policy was not narrowly tailored to achieve respondents' asserted compelling interest in diversity.[1811]

The Court subsequently revisited the question of affirmative action in undergraduate education in its 2016 decision in *Fisher v. University of Texas at Austin*, upholding the University of Texas at Austin's (UT's) use of "scores" based, in part, on race in filling approximately 25% of the slots in its incoming class that were not required by statute to be awarded to Texas high school students who finished in the top 10% of their graduating class (Top Ten Percent Plan or TTPP).[1812] The Court itself suggested that the "sui generis" nature of the UT program,[1813] coupled with the "fact that this case has been litigated on a somewhat artificial basis" because the record lacked information about the impact of Texas's TTPP,[1814] may limit the decision's value for "prospective guidance."[1815] Nonetheless, certain language in the Court's decision, along with its application of the three "controlling factors" set forth in the Court's 2013 decision in *Fisher*,[1816] seem likely to have some influence, as they represent the Court's most recent jurisprudence on whether and when institutions of higher education may take race into consideration

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[1810] 438 U.S. at 317.
[1811] 438 U.S. at 284–85.
[1812] *Fisher II*, slip. op. at 3–4.
[1813] *Id.* at 8.
[1814] *Id.* at 10.
[1815] *Id.*
[1816] Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. ___, No. 11–345, slip op. at 10 (2013). The first of these principles is that strict scrutiny requires the university to demonstrate with clarity that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose." *Id.* at 7. The second principle is that the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an "academic judgment" to which "some, but not complete, judicial deference is proper." *Id.* at 9. The third is that no deference is owed in determining whether the use of race is narrowly tailored; rather, the university bears burden of proving a non-racial approach would not promote its interests "about as well" and "at tolerable administrative expense." *Id.* at 11.

in their admission decisions. Specifically, the 2016 *Fisher* decision began and ended with broad language recognizing constraints on the implementation of affirmative action programs in undergraduate education, including language that highlights the university's "continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances" [1817] and emphasized that "[t]he Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement." [1818] Nonetheless, while citing these constraints, the 2016 *Fisher* decision held that the challenged UT program did not run afoul of the Fourteenth Amendment. In particular, the Court concluded that the state's compelling interest in the case was not in enrolling a certain number of minority students, but in obtaining the educational benefits that flow from student body diversity, noting that the state cannot be faulted for not specifying a particular level of minority enrollment.[1819] The Court further concurred with UT's view that the alleged "critical mass" of minority students achieved under the 10% plan was not dispositive, as the university had found that it was insufficient,[1820] and that UT had found other means of promoting student-body diversity were unworkable.[1821] In so concluding, the Court held that the university had met its burden in surviving strict scrutiny by providing sworn affidavits from UT officials and internal assessments based on months of studies, retreats, interviews, and reviews of data that amounted, in the view of the Court, to a "reasoned, principled explanation" of the university's interests and its efforts to achieve those interests in a manner that was no broader than necessary.[1822] The Court refused to question the motives of university administrators and did not further scrutinize the underlying evidence relied on by the respondents, which may indicate that there are some limits to the degree in which the Court will evaluate a race-conscious admissions policy

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[1817] *Fisher II*, slip op. at 10.

[1818] *Id.*

[1819] *Id.* at 11–13. On the other hand, the Court emphasized that the university cannot claim educational benefits in "diversity writ large." *Id.* at 12. "A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them." *Id.* The Court also noted that the asserted goals of UT's affirmative action program "mirror" those approved in earlier cases (e.g., ending stereotypes and promoting cross-racial understanding). *Id.* at 13.

[1820] *Id.* at 13–15. The Court further emphasized that the fact that race allegedly plays a minor role in UT admissions, given that approximately 75% of the incoming class is admitted under the 10% plan, shows that the challenged use of race in determining the composition of the rest of the incoming class is narrowly tailored, not that it is unconstitutional. *Id.* at 15.

[1821] *Id.* at 15–19.

[1822] *Id.* at 13 ("Petitioner's contention that the University's goal was insufficiently concrete is rebutted by the record").

once the university has provided sufficient support for its approach.[1823]

While institutions of higher education were striving to increase racial diversity in their student populations, state and local governments were engaged in a similar effort with respect to elementary and secondary schools. Whether this goal could be constitutionally achieved after *Grutter* and *Gratz*, however, remained unclear, especially as the type of individualized admission considerations found in higher education are less likely to have useful analogies in the context of public school assignments. Thus, for instance, in *Parents Involved in Community Schools v. Seattle School District No. 1*,[1824] the Court rejected plans in both Seattle, Washington and Jefferson County, Kentucky, that, in order reduce what the Court found to be "de facto" racial imbalance in the schools, used "racial tiebreakers" to determine school assignments.[1825] As in *Bakke*, numerous opinions by a fractured Court led to an uncertain resolution of the issue.

In an opinion by Chief Justice Roberts, a majority of the Court in *Parents Involved in Community Schools* agreed that the plans before the Court did not include the kind of individualized considerations that had been at issue in the university admissions process in *Grutter*, but rather focused primarily on racial considerations.[1826] Although a majority of the Court found the plans unconstitutional, only four Justices (including the Chief Justice) concluded that alleviating "de facto" racial imbalance in elementary and secondary schools could never be a compelling governmental interest. Justice Kennedy, while finding that the school plans at issue were unconstitutional because they were not narrowly tailored,[1827]

[1823] *Id.* at 13–14.

[1824] 551 U.S. 701 (2007). Another case involving racial diversity in public schools, *Meredith v. Jefferson County Board of Education*, was argued separately before the Court on the same day, but the two cases were subsequently consolidated and both were addressed in the cited opinion.

[1825] In Seattle, students could choose among 10 high schools in the school district, but, if an oversubscribed school was not within 10 percentage points of the district's overall white/nonwhite racial balance, the district would assign students whose race would serve to bring the school closer to the desired racial balance. 127 S. Ct. at 2747. In Jefferson County, assignments and transfers were limited when such action would cause a school's black enrollment to fall below 15 percent or exceed 50 percent. Id. at 2749.

[1826] 127 S. Ct. at 2753–54. The Court also noted that, in *Grutter*, the Court had relied upon "considerations unique to institutions of higher education." Id. at 2574 (finding that, as stated in *Grutter*, 539 U.S. at 329, because of the "expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition").

[1827] In his analysis of whether the plans were narrowly tailored to the governmental interest in question, Justice Kennedy focused on a lack of clarity in the administration and application of Kentucky's plan and the use of the "crude racial cat-

suggested in separate concurrence that relieving "racial isolation" could be a compelling governmental interest. The Justice even envisioned the use of plans based on individual racial classifications "as a last resort" if other means failed.[1828] As Justice Kennedy's concurrence appears to represent a narrower basis for the judgment of the Court than does Justice Roberts' opinion, it appears to represent, for the moment, the controlling opinion for the lower courts.[1829]

THE NEW EQUAL PROTECTION

Classifications Meriting Close Scrutiny

Alienage and Nationality.—"It has long been settled . . . that the term 'person' [in the Equal Protection Clause] encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside." [1830] Thus, one of the earliest equal protection decisions struck down the administration of a facially lawful licensing ordinance that was being applied to discriminate against Chinese.[1831] In many subsequent cases, however, the Court recognized a permissible state interest in distinguishing between its citizens and aliens by restricting enjoyment of re-

egories" of "white" and "non-white" (which failed to distinguish among racial minorities) in the Seattle plan. 127 S. Ct. at 2790–91.

[1828] 127 S. Ct. at 2760–61. Some other means suggested by Justice Kennedy (which by implication could be constitutionally used to address racial imbalance in schools) included strategic site selection for new schools, the redrawing of attendance zones, the allocation of resources for special programs, the targeted recruiting of students and faculty, and the tracking of enrollments, performance, and other statistics by race.

[1829] Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . .'").

[1830] Graham v. Richardson, 403 U.S. 365, 371 (1971). *See also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Truax v. Raich, 239 U.S. 33, 39 (1915); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948). Aliens, even unlawful aliens, are "persons" to whom the Fifth and Fourteenth Amendments apply. Plyler v. Doe, 457 U.S. 202, 210–16 (1982). The Federal Government may not discriminate invidiously against aliens, Mathews v. Diaz, 426 U.S. 67, 77 (1976). However, because of the plenary power delegated by the Constitution to the national government to deal with aliens and naturalization, federal classifications are judged by less demanding standards than are those of the states, and many classifications that would fail if attempted by the states have been sustained because Congress has made them. Id. at 78–84; Fiallo v. Bell, 430 U.S. 787 (1977). Additionally, state discrimination against aliens may fail because it imposes burdens not permitted or contemplated by Congress in its regulations of admission and conditions of admission. Hines v. Davidowitz, 312 U.S. 52 (1941); Toll v. Moreno, 458 U.S. 1 (1982). Such state discrimination may also violate treaty obligations and be void under the Supremacy Clause, Askura v. City of Seattle, 265 U.S. 332 (1924), and some federal civil rights statutes, such as 42 U.S.C. § 1981, protect resident aliens as well as citizens. Graham v. Richardson, 403 U.S. at 376–80.

[1831] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

sources and public employment to its own citizens.[1832] But, in *Hirabayashi v. United States*,[1833] the Court announced that "[d]istinctions between citizens solely because of their ancestry" were "odious to a free people whose institutions are founded upon the doctrine of equality." And, in *Korematsu v. United States*,[1834] classifications based upon race and nationality were said to be suspect and subject to the "most rigid scrutiny." These dicta resulted in a 1948 decision that appeared to call into question the rationale of the "particular interest" doctrine under which earlier discrimination had been justified. In the 1948 decision, the Court held void a statute barring issuance of commercial fishing licenses to persons "ineligible to citizenship," which in effect meant resident alien Japanese.[1835] "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under nondiscriminatory laws." Justice Black said for the Court that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." [1836]

Announcing "that classifications based on alienage . . . are inherently suspect and subject to close scrutiny," the Court struck down state statutes which either wholly disqualified resident aliens for welfare assistance or imposed a lengthy durational residency requirement on eligibility.[1837] Thereafter, in a series of decisions, the Court adhered to its conclusion that alienage was a suspect classification and voided a variety of restrictions. More recently, however, it has created a major "political function" exception to strict scrutiny review, which shows some potential of displacing the previous analysis almost entirely.

[1832] McGready v. Virginia, 94 U.S. 391 (1877); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (limiting aliens' rights to develop natural resources); Hauenstein v. Lynham, 100 U.S. 483 (1880); Blythe v. Hinckley, 180 U.S. 333 (1901) (restriction of devolution of property to aliens); Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923) (denial of right to own and acquire land); Heim v. McCall, 239 U.S. 175 (1915); People v. Crane, 214 N.Y. 154, 108 N.E. 427, aff'd, 239 U.S. 195 (1915) (barring public employment to aliens); Ohio ex rel. Clarke v. Deckebach, 274 U.S. 392 (1927) (prohibiting aliens from operating poolrooms). The Court struck down a statute restricting the employment of aliens by private employers, however. Truax v. Raich, 239 U.S. 33 (1915).

[1833] 320 U.S. 81, 100 (1943).

[1834] 323 U.S. 214, 216 (1944).

[1835] Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

[1836] 334 U.S. at 420. The decision was preceded by Oyama v. California, 332 U.S. 633 (1948), which was also susceptible of being read as questioning the premise of the earlier cases.

[1837] Graham v. Richardson, 403 U.S. 365, 372 (1971).

In *Sugarman v. Dougall*,[1838] the Court voided the total exclusion of aliens from a state's competitive civil service. A state's power "to preserve the basic conception of a political community" enables it to prescribe the qualifications of its officers and voters,[1839] the Court held, and this power would extend "also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."[1840] But a flat ban upon much of the state's career public service, both of policy-making and non-policy-making jobs, ran afoul of the requirement that in achieving a valid interest through the use of a suspect classification the state must employ means that are precisely drawn in light of the valid purpose.[1841]

State bars against the admission of aliens to the practice of law were also struck down, the Court holding that the state had not met the "heavy burden" of showing that its denial of admission to aliens was necessary to accomplish a constitutionally permissible and substantial interest. The state's admitted interest in assuring the requisite qualifications of persons licensed to practice law could be adequately served by judging applicants on a case-by-case basis and in no sense could the fact that a lawyer is considered to be an officer of the court serve as a valid justification for a flat prohibition.[1842] Nor could Puerto Rico offer a justification for excluding aliens from one of the "common occupations of the community," hence its bar on licensing aliens as civil engineers was voided.[1843]

[1838] 413 U.S. 634 (1973).

[1839] 413 U.S. at 647–49. *See also* Foley v. Connelie, 435 U.S. 291, 296 (1978). Aliens can be excluded from voting, Skatfe v. Rorex, 553 P.2d 830 (Colo. 1976), appeal dismissed for lack of substantial federal question, 430 U.S. 961 (1977), and can be excluded from service on juries. Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974) (3-judge court), aff'd, 426 U.S. 913 (1976).

[1840] Sugarman v. Dougall, 413 U.S. 634, 647 (1973). Such state restrictions are "not wholly immune from scrutiny under the Equal Protection Clause." Id. at 648.

[1841] Justice Rehnquist dissented. 413 U.S. at 649. In the course of the opinion, the Court held inapplicable the doctrine of "special public interest," the idea that a State's concern with the restriction of the resources of the State to the advancement and profit of its citizens is a valid basis for discrimination against out-of-state citizens and aliens generally, but it did not declare the doctrine invalid. Id. at 643–45. The "political function" exception is inapplicable to notaries public, who do not perform functions going to the heart of representative government. Bernal v. Fainter, 467 U.S. 216 (1984).

[1842] *In re* Griffiths, 413 U.S. 717 (1973). Chief Justice Burger and Justice Rehnquist dissented. Id. at 730, and 649 (*Sugarman* dissent also applicable to *Griffiths*).

[1843] Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976). Because the jurisdiction was Puerto Rico, the Court was not sure whether the requirement should be governed by the Fifth or Fourteenth Amendment but deemed the question immate-

In *Nyquist v. Mauclet*,[1844] the Court seemed to expand the doctrine. The statute that was challenged restricted the receipt of scholarships and similar financial support to citizens or to aliens who were applying for citizenship or who filed a statement affirming their intent to apply as soon as they became eligible. Therefore, because any alien could escape the limitation by a voluntary act, the disqualification was not aimed at aliens as a class, nor was it based on an immutable characteristic possessed by a "discrete and insular minority"—the classification that had been the basis for declaring alienage a suspect category in the first place. But the Court voided the statute. "The important points are that § 661(3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."[1845] Two proffered justifications were held insufficient to meet the high burden imposed by the strict scrutiny doctrine.

In the following Term, however, the Court denied that every exclusion of aliens was subject to strict scrutiny, "because to do so would 'obliterate all the distinctions between citizens and aliens, and thus deprecate the historic values of citizenship.'"[1846] Upholding a state restriction against aliens qualifying as state policemen, the Court reasoned that the permissible distinction between citizen and alien is that the former "is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized 'a State's historic power to exclude aliens from participation in its democratic political institutions,' . . . as part of the sovereign's obligation 'to preserve the basic conception of a political community.'"[1847] Discrimination by a state against aliens is not sub-

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rial, as the same result would be achieved in either case. The quoted expression is from Truax v. Raich, 239 U.S. 33, 41 (1915).

[1844] 432 U.S. 1 (1977).

[1845] 432 U.S. at 9. Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented. Id. at 12, 15, 17. Justice Rehnquist's dissent argued that the nature of the disqualification precluded it from being considered suspect.

[1846] Foley v. Connelie, 435 U.S. 291, 295 (1978). The opinion was by Chief Justice Burger and the quoted phrase was from his dissent in Nyquist v. Mauclet, 432 U.S. 1, 14 (1977). Justices Marshall, Stevens, and Brennan dissented. Id. at 302, 307.

[1847] 435 U.S. at 295–96. Formally following Sugarman v. Dougall, *supra*, the opinion considerably enlarged the exception noted in that case; *see also* Nyquist v. Mauclet, 432 U.S. 1, 11 (1977) (emphasizing the "narrowness of the exception"). Concurring in *Foley*, 435 U.S. at 300, Justice Stewart observed that "it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case." On the other hand, Justice Blackmun, who had written several of the past decisions, including *Mauclet*, concurred also, finding the case consistent. Id.

ject to strict scrutiny, but need meet only the rational basis test. It is therefore permissible to reserve to citizens offices having the "most important policy responsibilities," a principle drawn from *Sugarman*, but the critical factor in this case is its analysis finding that "the police function is . . . one of the basic functions of government . . . . The execution of the broad powers vested in [police officers] affects members of the public significantly and often in the most sensitive areas of daily life. . . . Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of 'the common occupations of the community.' . . . "[1848]

Continuing to enlarge the exception, the Court in *Ambach v. Norwick*[1849] upheld a bar to qualifying as a public school teacher for resident aliens who have not manifested an intention to apply for citizenship. The "governmental function" test took on added significance, the Court saying that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."[1850] Thus, "governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens."[1851] Teachers, the Court thought, because of the role of public education in inculcating civic values and in preparing children for participation in society as citizens and because of the responsibility and discretion they have in fulfilling that role, perform a task that "go[es] to the heart of representative government."[1852] The citizenship requirement need only bear a rational relationship to the state interest, and the Court concluded it clearly did so.

Then, in *Cabell v. Chavez-Salido*,[1853] the Court, by a 5-to-4 vote, sustained a state law imposing a citizenship requirement upon all positions designated as "peace officers," upholding in context that eligibility prerequisite for probation officers. First, the Court held that the extension of the requirement to an enormous range of people

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[1848] 35 U.S. at 296, 297, 298. In Elrod v. Burns, 427 U.S. 347 (1976), barring patronage dismissals of police officers, the Court had nonetheless recognized an exception for policymaking officers which it did not extend to the police.

[1849] 411 U.S. 68 (1979). The opinion, by Justice Powell, was joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. The disqualification standard was of course, that held invalid as a disqualification for receipt of educational assistance in Nyquist v. Mauclet, 432 U.S. 1 (1977).

[1850] Ambach v. Norwick, 441 U.S. 68, 75 (1979).

[1851] 441 U.S. at 75.

[1852] 441 U.S. at 75–80. The quotation, id. at 76, is from Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

[1853] 454 U.S. 432 (1982).

who were variously classified as "peace officers" did not reach so far nor was it so broad and haphazard as to belie the claim that the state was attempting to ensure that an important function of government be in the hands of those having a bond of citizenship. "[T]he classifications used need not be precise; there need only be a substantial fit."[1854] As to the particular positions, the Court held that "they, like the state troopers involved in *Foley*, sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens."[1855]

Thus, the Court so far has drawn a tripartite differentiation with respect to governmental restrictions on aliens. First, it has disapproved the earlier line of cases and now would foreclose attempts by the states to retain certain economic benefits, primarily employment and opportunities for livelihood, exclusively for citizens. Second, when government exercises principally its spending functions, such as those with respect to public employment generally and to eligibility for public benefits, its classifications with an adverse impact on aliens will be strictly scrutinized and usually fail. Third, when government acts in its sovereign capacity—when it acts within its constitutional prerogatives and responsibilities to establish and operate its own government—its decisions with respect to the citizenship qualifications of an appropriately designated class of public office holders will be subject only to traditional rational basis scrutiny.[1856] However, the "political function" standard is elastic, and so long as disqualifications are attached to specific occupations[1857] rather than to the civil service in general, as in *Sugarman*, the concept seems capable of encompassing the exclusion.

When confronted with a state statute that authorized local school boards to exclude from public schools alien children who were not legally admitted to the United States, the Court determined that an intermediate level of scrutiny was appropriate and found that the proffered justifications did not sustain the classification.[1858] Because it was clear that the undocumented status of the children was relevant to valid government goals, and because the Court had previously held that access to education was not a "fundamental interest" that triggered strict scrutiny of governmental distinctions relat-

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[1854] 454 U.S. at 442.

[1855] 454 U.S. at 445.

[1856] 454 U.S. at 438–39.

[1857] Thus, the statute in *Chavez-Salido* applied to such positions as toll-service employees, cemetery sextons, fish and game wardens, and furniture and bedding inspectors, and yet the overall classification was deemed not so ill-fitting as to require its voiding.

[1858] Plyler v. Doe, 457 U.S. 432 (1982). Joining the opinion of the Court were Justices Brennan, Marshall, Blackmun, Powell, and Stevens. Dissenting were Chief Justice Burger and Justices White, Rehnquist, and O'Connor. Id. at 242.

ing to education,[1859] the Court's decision to accord intermediate review was based upon an amalgam of at least three factors. First, alienage was a characteristic that provokes special judicial protection when used as a basis for discrimination. Second, the children were innocent parties who were having a particular onus imposed on them because of the misconduct of their parents. Third, the total denial of an education to these children would stamp them with an "enduring disability" that would harm both them and the state all their lives.[1860] The Court evaluated each of the state's attempted justifications and found none of them satisfying the level of review demanded.[1861] It seems evident that *Plyler v. Doe* is a unique case and that, whatever it may stand for doctrinally, a sufficiently similar factual situation calling for application of its standards is unlikely to arise.

Sex.—Shortly after ratification of the Fourteenth Amendment, the refusal of Illinois to license a woman to practice law was challenged before the Supreme Court, and the Court rejected the challenge in tones that prevailed well into the twentieth century. "The civil law, as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."[1862] On the same premise, a statute restricting the franchise to men was sustained.[1863]

[1859] In San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), while holding that education is not a fundamental interest, the Court expressly reserved the question whether a total denial of education to a class of children would infringe upon a fundamental interest. Id. at 18, 25 n.60, 37. The *Plyler* Court's emphasis upon the total denial of education and the generally suspect nature of alienage classifications left ambiguous whether the state discrimination would have been subjected to strict scrutiny if it had survived intermediate scrutiny. Justice Powell thought the Court had rejected strict scrutiny, 457 U.S. at 238 n.2 (concurring), while Justice Blackmun thought it had not reached the question, id. at 235 n.3 (concurring). Indeed, their concurring opinions seem directed more toward the disability visited upon innocent children than the broader complex of factors set out in the opinion of the Court. Id. at 231, 236.

[1860] 457 U.S. at 223–24.

[1861] Rejected state interests included preserving limited resources for its lawful residents, deterring an influx of illegal aliens, avoiding the special burden caused by these children, and serving children who were more likely to remain in the state and contribute to its welfare. 457 U.S. at 227–30.

[1862] Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873). The cases involving alleged discrimination against women contain large numbers of quaint quotations from unlikely sources. Upholding a law which imposed a fee upon all persons en-

The greater number of cases have involved legislation aimed to protect women from oppressive working conditions, as by prescribing maximum hours [1864] or minimum wages [1865] or by restricting some of the things women could be required to do.[1866] A 1961 decision upheld a state law that required jury service of men but that gave women the option of serving or not. "We cannot say that it is constitutionally impermissible for a State acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities." [1867] Another type of protective legislation for women that was sustained by the Court is that premised on protection of morals, as by forbidding the sale of liquor to women.[1868] In a highly controversial ruling, the Court sustained a state law that forbade the licensing of any female bartender, except for the wives or daughters of male owners. The Court purported to view the law as one for the protection of the health and morals of women generally, with the exception being justified by the consideration that such women would be under the eyes of a protective male.[1869]

A wide variety of sex discrimination by governmental and private parties, including sex discrimination in employment and even the protective labor legislation previously sustained, is now proscribed by federal law. In addition, federal law requires equal pay

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gaged in the laundry business, but excepting businesses employing not more than two women, Justice Holmes said: "If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference." Quong Wing v. Kirkendall, 223 U.S. 59, 63 (1912). And upholding a law prohibiting most women from tending bar, Justice Frankfurter said: "The fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. . . . The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." Goesaert v. Cleary, 335 U.S. 464, 466 (1948).

[1863] Minor v. Happersett, 88 U.S. (21 Wall) 162 (1875) (privileges and immunities).

[1864] Muller v. Oregon, 208 U.S. 412 (1908); Dominion Hotel v. Arizona, 249 U.S. 265 (1919).

[1865] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[1866] *E.g.*, Radice v. New York, 264 U.S. 292 (1924) (prohibiting night work by women in restaurants). A similar restriction set a maximum weight that women could be required to lift.

[1867] Hoyt v. Florida, 368 U.S. 57, 62 (1961).

[1868] Cronin v. Adams, 192 U.S. 108 (1904).

[1869] Goesaert v. Cleary, 335 U.S. 464 (1948).

for equal work.[1870] Some states have followed suit.[1871] While the proposed Equal Rights Amendment was before the states and ultimately failed to be ratified,[1872] the Supreme Court undertook a major evaluation of sex classification doctrine, first applying a "heightened" traditional standard of review (with bite) to void a discrimination and then, after coming within a vote of making sex a suspect classification, settling upon an intermediate standard. These standards continue, with some uncertainties of application and some tendencies among the Justices both to lessen and to increase the burden of governmental justification of sex classifications.

In *Reed v. Reed*,[1873] the Court held invalid a state probate law that gave males preference over females when both were equally entitled to administer an estate. Because the statute "provides that different treatment be accorded to the applicants on the basis of their sex," Chief Justice Burger wrote, "it thus establishes a classification subject to scrutiny under the Equal Protection Clause." The Court proceeded to hold that under traditional equal protection standards—requiring a classification to be reasonable and not arbitrarily related to a lawful objective—the classification made was an arbitrary way to achieve the objective the state advanced in defense of the law, that is, to reduce the area of controversy between otherwise equally qualified applicants for administration. Thus, the Court used traditional analysis but the holding seems to go somewhat further to say that not all lawful interests of a state may be advanced by a classification based solely on sex.[1874]

[1870] Thus, title VII of the Civil Rights Act of 1964, 80 Stat. 662, 42 U.S.C. §§ 2000e *et seq.*, bans discrimination against either sex in employment. *See*, *e.g.*, Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971); Dothard v. Rawlinson, 433 U.S. 321 (1977); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Arizona Governing Comm. for Tax Deferred Plans v. Norris, 463 U.S. 1073 (1983) (actuarially based lower monthly retirement benefits for women employees violates Title VII); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) ("hostile environment" sex harassment claim is actionable). Reversing rulings that pregnancy discrimination is not reached by the statutory bar on sex discrimination, General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), Congress enacted the Pregnancy Discrimination Act, Pub. L. 95–555 (1978), 92 Stat. 2076, amending 42 U.S.C. § 2000e. The Equal Pay Act, 77 Stat. 56 (1963), amending the Fair Labor Standards Act, 29 U.S.C. § 206(d), generally applies to wages paid for work requiring "equal skill, effort, and responsibility." *See* Corning Glass Works v. Brennan, 417 U.S. 188 (1974). On the controversial issue of "comparable worth" and the interrelationship of title VII and the Equal Pay Act, *see* County of Washington v. Gunther, 452 U.S. 161 (1981).

[1871] *See*, *e.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984) (state prohibition on gender discrimination in aspects of public accommodation, as applied to membership in a civic organization, is justified by compelling state interest).

[1872] On the Equal Rights Amendment, *see* discussion of "Ratification," *supra*.

[1873] 404 U.S. 71 (1971).

[1874] 404 U.S. at 75–77. *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972). A statute similar to that in *Reed* was before the Court in Kirchberg v. Feenstra, 450

It is now established that sex classifications, in order to withstand equal protection scrutiny, "must serve important governmental objectives and must be substantially related to achievement of those objectives." [1875] Thus, after several years in which sex distinctions were more often voided than sustained without a clear statement of the standard of review,[1876] a majority of the Court has arrived at the intermediate standard that many had thought it was applying in any event.[1877] The Court first examines the statutory or administrative scheme to determine if the purpose or objective is permissible and, if it is, whether it is important. Then, having ascertained the actual motivation of the classification, the Court engages in a balancing test to determine how well the classification

U.S. 455 (1981) (invalidating statute giving husband unilateral right to dispose of jointly owned community property without wife's consent).

[1875] Craig v. Boren, 429 U.S. 190, 197 (1976); Califano v. Goldfarb, 430 U.S. 199, 210–11 (1977) (plurality opinion); Califano v. Webster, 430 U.S. 313, 316–317 (1977); Orr v. Orr, 440 U.S. 268, 279 (1979); Caban v. Mohammed, 441 U.S. 380, 388 (1979); Massachusetts Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979); Califano v. Westcott, 443 U.S. 76, 85 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982). *But see* Michael M. v. Superior Court, 450 U.S. 464, 468–69 (1981) (plurality opinion); id. at 483 (Justice Blackmun concurring); Rostker v. Goldberg, 453 U.S. 57, 69–72 (1981). The test is the same whether women or men are disadvantaged by the classification, Orr v. Orr, 440 U.S. at 279; Caban v. Mohammed, 441 U.S. at 394; Mississippi Univ. for Women v. Hogan, 458 U.S. at 724, although Justice Rehnquist and Chief Justice Burger strongly argued that when males are disadvantaged only the rational basis test is appropriate. Craig v. Boren, 429 U.S. at 217, 218–21; Califano v. Goldfarb, 430 U.S. at 224. That adoption of a standard has not eliminated difficulty in deciding such cases should be evident by perusal of the cases following.

[1876] In Frontiero v. Richardson, 411 U.S. 677 (1973), four Justices were prepared to hold that sex classifications are inherently suspect and must therefore be subjected to strict scrutiny. Id. at 684–87 (Justices Brennan, Douglas, White, and Marshall). Three Justices, reaching the same result, thought the statute failed the traditional test and declined for the moment to consider whether sex was a suspect classification, finding that inappropriate while the Equal Rights Amendment was pending. Id. at 691 (Justices Powell and Blackmun and Chief Justice Burger). Justice Stewart found the statute void under traditional scrutiny and Justice Rehnquist dissented. Id. at 691. In Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982), Justice O'Connor for the Court expressly reserved decision whether a classification that survived intermediate scrutiny would be subject to strict scrutiny.

[1877] Although their concurrences in Craig v. Boren, 429 U.S. 190, 210, 211 (1976), indicate some reticence about express reliance on intermediate scrutiny, Justices Powell and Stevens have since joined or written opinions stating the test and applying it. *E.g.*, Caban v. Mohammed, 441 U.S. 380, 388 (1979) (Justice Powell writing the opinion of the Court); Parham v. Hughes, 441 U.S. 347, 359 (1979) (Justice Powell concurring); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (Justice Stevens concurring); Caban v. Mohammed, 441 U.S. at 401 (Justice Stevens dissenting). Chief Justice Burger and Justice Rehnquist have not clearly stated a test, although their deference to legislative judgment approaches the traditional scrutiny test. *But see* Califano v. Westcott, 443 U.S. at 93 (joining Court on substantive decision). *And cf.* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 734–35 (1982) (Justice Blackmun dissenting).

serves the end and whether a less discriminatory one would serve that end without substantial loss to the government.[1878]

Some sex distinctions were seen to be based solely upon "old notions," no longer valid if ever they were, about the respective roles of the sexes in society, and those distinctions failed to survive even traditional scrutiny. Thus, a state law defining the age of majority as 18 for females and 21 for males, entitling the male child to support by his divorced father for three years longer than the female child, was deemed merely irrational, grounded as it was in the assumption of the male as the breadwinner, needing longer to prepare, and the female as suited for wife and mother.[1879] Similarly, a state jury system that in effect excluded almost all women was deemed to be based upon an overbroad generalization about the role of women as a class in society, and the administrative convenience served could not justify it.[1880]

Even when the negative "stereotype" that is evoked is that of a stereotypical male, the Court has evaluated this as potential gender discrimination. In *J. E. B. v. Alabama ex rel. T. B.*,[1881] the Court addressed a paternity suit where men had been intentionally excluded from a jury through peremptory strikes. The Court rejected as unfounded the argument that men, as a class, would be more sympathetic to the defendant, the putative father. The Court also determined that gender-based exclusion of jurors would undermine the litigants' interest by tainting the proceedings, and in addition would harm the wrongfully excluded juror.

Assumptions about the relative positions of the sexes, however, are not without some basis in fact, and sex may sometimes be a reliable proxy for the characteristic, such as need, with which it is the legislature's actual intention to deal. But heightened scrutiny

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[1878] The test is thus the same as is applied to illegitimacy classifications, although with apparently more rigor when sex is involved.

[1879] Stanton v. Stanton, 421 U.S. 7 (1975). *See also* Stanton v. Stanton, 429 U.S. 501 (1977). Assumptions about the traditional roles of the sexes afford no basis for support of classifications under the intermediate scrutiny standard. *E.g.*, Orr v. Orr, 440 U.S. 268, 279–80 (1979); Parham v. Hughes, 441 U.S. 347, 355 (1979); Kirchberg v. Feenstra, 450 U.S. 455 (1981). Justice Stevens in particular has been concerned whether legislative classifications by sex simply reflect traditional ways of thinking or are the result of a reasoned attempt to reach some neutral goal, *e.g.*, Califano v. Goldfarb, 430 U.S. 199, 222–23 (1978) (concurring), and he will sustain some otherwise impermissible distinctions if he finds the legislative reasoning to approximate the latter approach. Caban v. Mohammed, 441 U.S. 380, 401 (1979) (dissenting).

[1880] Taylor v. Louisiana, 419 U.S. 522 (1975). The precise basis of the decision was the Sixth Amendment right to a representative cross section of the community, but the Court dealt with and disapproved the reasoning in Hoyt v. Florida, 368 U.S. 57 (1961), in which a similar jury selection process was upheld against due process and equal protection challenge.

[1881] 511 U.S. 127 (1994).

requires evidence of the existence of the distinguishing fact and its close correspondence with the condition for which sex stands as proxy. Thus, in the case that first expressly announced the intermediate scrutiny standard, the Court struck down a state statute that prohibited the sale of "non-intoxicating" 3.2 beer to males under 21 and to females under 18.[1882] Accepting the argument that traffic safety was an important governmental objective, the Court emphasized that sex is an often inaccurate proxy for other, more germane classifications. Taking the statistics offered by the state as of value, while cautioning that statistical analysis is a "dubious" business that is in tension with the "normative philosophy that underlies the Equal Protection Clause," the Court thought the correlation between males and females arrested for drunk driving showed an unduly tenuous fit to allow the use of sex as a distinction.[1883]

Invalidating an Alabama law imposing alimony obligations upon males but not upon females, the Court in *Orr v. Orr* acknowledged that assisting needy spouses was a legitimate and important governmental objective. Ordinarily, therefore, the Court would have considered whether sex was a sufficiently accurate proxy for dependency, and, if it found that it was, then it would have concluded that the classification based on sex had "a fair and substantial relation to the object of the legislation."[1884] However, the Court observed that the state already conducted individualized hearings with respect to the need of the wife, so that with little if any additional burden needy males could be identified and helped. The use of the sex standard as a proxy, therefore, was not justified because it needlessly burdened needy men and advantaged financially secure women whose husbands were in need.[1885]

Various forms of discrimination between unwed mothers and unwed fathers received different treatments based on the Court's per-

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[1882] Craig v. Boren, 429 U.S. 190 (1976).

[1883] 429 U.S. at 198, 199–200, 201–04.

[1884] 440 U.S. 268, 281 (1979).

[1885] 440 U.S. at 281–83. An administrative convenience justification was not available, therefore. Id. at 281 & n.12. Although such an argument has been accepted as a sufficient justification in at least some illegitimacy cases, Mathews v. Lucas, 427 U.S. 495, 509 (1976), it has neither wholly been ruled out nor accepted in sex cases. In *Lucas*, 427 U.S. at 509–10, the Court interpreted Frontiero v. Richardson, 411 U.S. 677 (1973), as having required a showing at least that for every dollar lost to a recipient not meeting the general purpose qualification a dollar is saved in administrative expense. In Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 152 (1980), the Court said that "[i]t may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny . . . , but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers." Justice Stevens apparently would demand a factual showing of substantial savings. Califano v. Goldfarb, 430 U.S. 199, 219 (1977) (concurring).

ception of the justifications and presumptions underlying each. A New York law permitted the unwed mother but not the unwed father of an illegitimate child to block his adoption by withholding consent. Acting in the instance of one who acknowledged his parenthood and who had maintained a close relationship with his child over the years, the Court could discern no substantial relationship between the classification and some important state interest. Promotion of adoption of illegitimates and their consequent legitimation was important, but the assumption that all unwed fathers either stood in a different relationship to their children than did the unwed mother or that the difficulty of finding the fathers would unreasonably burden the adoption process was overbroad, as the facts of the case revealed. No barrier existed to the state dispensing with consent when the father or his location is unknown, but disqualification of all unwed fathers may not be used as a shorthand for that step.[1886]

On the other hand, the Court sustained a Georgia statute that permitted the mother of an illegitimate child to sue for the wrongful death of the child but that allowed the father to sue only if he had legitimated the child and there is no mother.[1887] Similarly, the Court let stand, under the Fifth Amendment, a federal statute that required that, in order for an illegitimate child born overseas to gain citizenship, a citizen father, unlike a citizen mother, must acknowledge or legitimate the child before the child's 18th birthday.[1888] The Court emphasized the ready availability of proof of a child's maternity as opposed to paternity, but the dissent questioned whether

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[1886] Caban v. Mohammed, 441 U.S. 380 (1979). Four Justices dissented. Id. at 394 (Justice Stewart), 401 (Justices Stevens and Rehnquist and Chief Justice Burger). For the conceptually different problem of classification between different groups of women on the basis of marriage or absence of marriage to a wage earner, *see* Califano v. Boles, 443 U.S. 282 (1979).

[1887] Parham v. Hughes, 441 U.S. 347, 361 (1979). There was no opinion of the Court, but both opinions making up the result emphasized that the objective of the state—to avoid difficulties in proving paternity—was an important one and was advanced by the classification. The plurality opinion determined that the statute did not invidiously discriminate against men as a class; it was no overbroad generalization but proceeded from the fact that only men could legitimate children by unilateral action. The sexes were not similarly situated, therefore, and the classification recognized that. As a result, all that was required was that the means be a rational way of dealing with the problem of proving paternity. Id. at 353–58. Justice Powell found the statute valid because the sex-based classification was substantially related to the objective of avoiding problems of proof in proving paternity. He also emphasized that the father had it within his power to remove the bar by legitimating the child. Id. at 359. Justices White, Brennan, Marshall, and Blackmun, who had been in the majority in *Caban*, dissented.

[1888] Nguyen v. INS, 533 U.S. 53 (2001). *See also* Miller v. Albright, 523 U.S. 420 (1998) (opinion by Justice Stevens, joined by Justice Rehnquist) (equal protection not violated where paternity of a child of a citizen mother is established at birth, but child of citizen father must establish paternity by age 18).

such a distinction was truly justified under strict scrutiny considering the ability of modern techniques of DNA paternity testing to settle concerns about legitimacy.

As in the instance of illegitimacy classifications, the issue of sex qualifications for the receipt of governmental financial benefits has divided the Court and occasioned close distinctions. A statutory scheme under which a serviceman could claim his spouse as a "dependent" for allowances while a servicewoman's spouse was not considered a "dependent" unless he was shown in fact to be dependent upon her for more than one half of his support was held an invalid dissimilar treatment of similarly situated men and women, not justified by the administrative convenience rationale.[1889] In *Weinberger v. Wiesenfeld*,[1890] the Court struck down a Social Security provision that gave survivor's benefits based on the insured's earnings to the widow and minor children but gave such benefits only to the children and not to the widower of a deceased woman worker. Focusing not only upon the discrimination against the widower but primarily upon the discrimination visited upon the woman worker whose earnings did not provide the same support for her family that a male worker's did, the Court saw the basis for the distinction resting upon the generalization that a woman would stay home and take care of the children while a man would not. Because the Court perceived the purpose of the provision to be to enable the surviving parent to choose to remain at home to care for minor children, the sex classification ill-fitted the end and was invidiously discriminatory.

But, when, in *Califano v. Goldfarb*,[1891] the Court was confronted with a Social Security provision structured much as the benefit sections struck down in *Frontiero* and *Wiesenfeld*, even in the light of an express heightened scrutiny, no majority of the Court could be obtained for the reason for striking down the statute. The section provided that a widow was entitled to receive survivors' benefits based on the earnings of her deceased husband, regardless of dependency, but payments were to go to the widower of a deceased wife only upon proof that he had been receiving at least half of his support from her. The plurality opinion treated the discrimination

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[1889] Frontiero v. Richardson, 411 U.S. 677 (1973).

[1890] 420 U.S. 636 (1975).

[1891] 430 U.S. 199 (1977). The dissent argued that whatever the classification used, social insurance programs should not automatically be subjected to heightened scrutiny but rather only to traditional rationality review. Id. at 224 (Justice Rehnquist with Chief Justice Burger and Justices Stewart and Blackmun). In Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980), voiding a state workers' compensation provision identical to that voided in *Goldfarb*, only Justice Rehnquist continued to adhere to this view, although the others may have yielded only to precedent.

as consisting of disparate treatment of women wage-earners whose tax payments did not earn the same family protection as male wage earners' taxes. Looking to the purpose of the benefits provision, the plurality perceived it to be protection of the familial unit rather than of the individual widow or widower and to be keyed to dependency rather than need. The sex classification was thus found to be based on an assumption of female dependency that ill-served the purpose of the statute and was an ill-chosen proxy for the underlying qualification. Administrative convenience could not justify use of such a questionable proxy.[1892] Justice Stevens, concurring, accepted most of the analysis of the dissent but nonetheless came to the conclusion of invalidity. His argument was essentially that while either administrative convenience or a desire to remedy discrimination against female spouses could justify use of a sex classification, neither purpose was served by the sex classification actually used in this statute.[1893]

Again, the Court divided closely when it *sustained* two instances of classifications claimed to constitute sex discrimination. In *Rostker v. Goldberg*,[1894] rejecting presidential recommendations, Congress provided for registration only of males for a possible future military draft, excluding women altogether. The Court discussed but did not explicitly choose among proffered equal protection standards, but it apparently applied the intermediate test of *Craig v. Boren*. However, it did so in the context of its often-stated preference for extreme deference to military decisions and to congressional resolution of military decisions. Evaluating the congressional determination, the Court found that it has not been "unthinking" or "reflexively" based upon traditional notions of the differences between men and women; rather, Congress had extensively deliberated over its decision. It had found, the Court asserted, that the

[1892] 430 U.S. at 204–09, 212–17 (Justices Brennan, White, Marshall, and Powell). Congress responded by eliminating the dependency requirement but by adding a pension offset provision reducing spousal benefits by the amount of various other pensions received. Continuation in this context of the *Goldfarb* gender-based dependency classification for a five-year "grace period" was upheld in Heckler v. Mathews, 465 U.S. 728 (1984), as directly and substantially related to the important governmental interest in protecting against the effects of the pension offset the retirement plans of individuals who had based their plans on unreduced pre-*Goldfarb* payment levels.

[1893] 430 U.S. at 217. Justice Stevens adhered to this view in Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 154 (1980). Note the unanimity of the Court on the substantive issue, although it was divided on remedy, in voiding in Califano v. Westcott, 443 U.S. 76 (1979), a Social Security provision giving benefits to families with dependent children who have been deprived of parental support because of the unemployment of the father but giving no benefits when the mother is unemployed.

[1894] 453 U.S. 57 (1981). Joining the opinion of the Court were Justices Rehnquist, Stewart, Blackmun, Powell, and Stevens, and Chief Justice Burger. Dissenting were Justices White, Marshall, and Brennan. Id. at 83, 86.

purpose of registration was the creation of a pool from which to draw combat troops when needed, an important and indeed compelling governmental interest, and the exclusion of women was not only "sufficiently but closely" related to that purpose because they were ill-suited for combat, could be excluded from combat, and registering them would be too burdensome to the military system.[1895]

In *Michael M. v. Superior Court*,[1896] the Court expressly adopted the *Craig v. Boren* intermediate standard, but its application of the test appeared to represent a departure in several respects from prior cases in which it had struck down sex classifications. *Michael M.* involved the constitutionality of a statute that punished males, but not females, for having sexual intercourse with a nonspousal person under 18 years of age. The plurality and the concurrence generally agreed, but with some difference of emphasis, that, although the law was founded on a clear sex distinction, it was justified because it served an important governmental interest—the prevention of teenage pregnancies. Inasmuch as women may become pregnant and men may not, women would be better deterred by that biological fact, and men needed the additional legal deterrence of a criminal penalty. Thus, the law recognized that, for purposes of this classification, men and women were not similarly situated, and the statute did not deny equal protection.[1897]

Cases of "benign" discrimination, that is, statutory classifications that benefit women and disadvantage men in order to overcome the effects of past societal discrimination against women, have presented the Court with some difficulty. Although the first two cases were reviewed under apparently traditional rational basis scrutiny, the more recent cases appear to subject these classifications to the same intermediate standard as any other sex classification. *Kahn v. Shevin* [1898] upheld a state property tax exemption allowing wid-

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[1895] 453 U.S. at 69–72, 78–83. The dissent argued that registered persons would fill noncombat positions as well as combat ones and that drafting women would add to women volunteers providing support for combat personnel and would free up men in other positions for combat duty. Both dissents assumed without deciding that exclusion of women from combat served important governmental interests. Id. at 83, 93. The majority's reliance on an administrative convenience argument, it should be noted, id. at 81, was contrary to recent precedent. *See* discussion of *Orr v. Orr*, *supra*.

[1896] 450 U.S. 464 (1981). Joining the opinion of the Court were Justices Rehnquist, Stewart, and Powell, and Chief Justice Burger, constituting only a plurality. Justice Blackmun concurred in a somewhat more limited opinion. Id. at 481. Dissenting were Justices Brennan, White, Marshall, and Stevens. Id. at 488, 496.

[1897] 450 U.S. at 470–74, 481. The dissents questioned both whether the pregnancy deterrence rationale was the purpose underlying the distinction and whether, if it was, the classification was substantially related to achievement of the goal. Id. at 488, 496.

[1898] 416 U.S. 351 (1974).

ows but not widowers a $500 exemption. In justification, the state had presented extensive statistical data showing the substantial economic and employment disabilities of women in relation to men. The provision, the Court found, was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden." [1899] And, in *Schlesinger v. Ballard*,[1900] the Court sustained a provision requiring the mandatory discharge from the Navy of a male officer who has twice failed of promotion to certain levels, which in Ballard's case meant discharge after nine years of service, whereas women officers were entitled to 13 years of service before mandatory discharge for want of promotion. The difference was held to be a rational recognition of the fact that male and female officers were dissimilarly situated and that women had far fewer promotional opportunities than men had.

Although in each of these cases the Court accepted the proffered justification of remedial purpose without searching inquiry, later cases caution that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." [1901] Rather, after specifically citing the heightened scrutiny that all sex classifications are subjected to, the Court looks to the statute and to its legislative history to ascertain that the scheme does not actually penalize women, that it was actually enacted to compensate for past discrimination, and that it does not reflect merely "archaic and overbroad generalizations" about women in its moving force. But where a statute is "deliberately enacted to compensate for particular economic disabilities suffered by women," it serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective.[1902]

[1899] 416 U.S. at 355.

[1900] 419 U.S. 498 (1975).

[1901] Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977); Orr v. Orr, 440 U.S. 268, 280–82 (1979); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150–52 (1980). In light of the stiffened standard, Justice Stevens has called for overruling *Kahn*, Califano v. Goldfarb, 430 U.S. at 223–24, but Justice Blackmun would preserve that case. Orr v. Orr, 440 U.S. at 284. *Cf.* Regents of the Univ. of California v. Bakke, 438 U.S. 265, 302–03 (1978) (Justice Powell; less stringent standard of review for benign sex classifications).

[1902] Califano v. Webster, 430 U.S. 313, 316–18, 320 (1977). There was no doubt that the provision sustained in *Webster* had been adopted expressly to relieve past societal discrimination. The four *Goldfarb* dissenters concurred specially, finding no difference between the two provisions. Id. at 321.

Many of these lines of cases converged in *Mississippi University for Women v. Hogan*,[1903] in which the Court stiffened and applied its standards for evaluating claimed benign distinctions benefitting women and additionally appeared to apply the intermediate standard itself more strictly. The case involved a male nurse who wished to attend a female-only nursing school located in the city in which he lived and worked; if he could not attend this particular school he would have had to commute 147 miles to another nursing school that did accept men, and he would have had difficulty doing so and retaining his job. The state defended on the basis that the female-only policy was justified as providing "educational affirmative action for females." Recitation of a benign purpose, the Court said, was not alone sufficient. "[A] State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification." [1904] But women did not lack opportunities to obtain training in nursing; instead they dominated the field. In the Court's view, the state policy did not compensate for discriminatory barriers facing women, but it perpetuated the stereotype of nursing as a woman's job. "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification." [1905] Even if the classification was premised on the proffered basis, the Court concluded, it did not substantially and directly relate to the objective, because the school permitted men to audit the nursing classes and women could still be adversely affected by the presence of men.[1906]

[1903] 458 U.S. 718 (1982).

[1904] 458 U.S. at 728.

[1905] 458 U.S. at 730. In addition to obligating the state to show that in fact there was existing discrimination or effects from past discrimination, the Court also appeared to take the substantial step of requiring the state "to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination." Id. at 730 n.16. A requirement that the proffered purpose be the actual one and that it must be shown that the legislature actually had that purpose in mind would be a notable stiffening of equal protection standards.

[1906] In the major dissent, Justice Powell argued that only a rational basis standard ought to be applied to sex classifications that would " *expand* women's choices," but that the exclusion here satisfied intermediate review because it promoted diversity of educational opportunity and was premised on the belief that single-sex colleges offer "distinctive benefits" to society. Id. at 735, 740 (emphasis by Justice), 743. The Court noted that, because the state maintained no other single-sex public university or college, the case did not present "the question of whether States can provide 'separate but equal' undergraduate institutions for males and females," id. at 720 n.1, although Justice Powell thought the decision did preclude such institutions. Id. at 742–44. *See* Vorchheimer v. School Dist. of Philadelphia, 532 F. 2d 880 (3d Cir. 1976) (finding no equal protection violation in maintenance of two single-

In a 1996 case, the Court required that a state demonstrate "exceedingly persuasive justification" for gender discrimination. When a female applicant challenged the exclusion of women from the historically male-only Virginia Military Institute (VMI), the State of Virginia defended the exclusion of females as essential to the nature of training at the military school.[1907] The state argued that the VMI program, which included rigorous physical training, deprivation of personal privacy, and an "adversative model" that featured minute regulation of behavior, would need to be unacceptably modified to facilitate the admission of women. While recognizing that women's admission would require accommodation such as different housing assignments and physical training programs, the Court found that the reasons set forth by the state were not "exceedingly persuasive," and thus the state did not meet its burden of justification. The Court also rejected the argument that a parallel program established by the state at a private women's college served as an adequate substitute, finding that the program lacked the military-style structure found at VMI, and that it did not equal VMI in faculty, facilities, prestige or alumni network.

Another area presenting some difficulty is that of the relationship of pregnancy classifications to gender discrimination. In *Cleveland Board of Education v. LaFleur*,[1908] which was decided upon due process grounds, two school systems requiring pregnant school teachers to leave work four and five months respectively before the expected childbirths were found to have acted arbitrarily and irrationally in establishing rules not supported by anything more weighty than administrative convenience buttressed with some possible embarrassment of the school boards in the face of pregnancy. On the other hand, the exclusion of pregnancy from a state financed program of payments to persons disabled from employment was upheld against equal protection attack as supportable by legitimate state interests in the maintenance of a self-sustaining program with rates low enough to permit the participation of low-income workers at affordable levels.[1909] The absence of supportable reasons in one

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sex high schools of equal educational offerings, one for males, one for females), aff'd by an equally divided Court, 430 U.S. 703 (1977) (Justice Rehnquist not participating).

[1907] United States v. Virginia, 518 U.S. 515 (1996).

[1908] 414 U.S. 632 (1974). Justice Powell concurred on equal protection grounds. Id. at 651. *See also* Turner v. Department of Employment Security, 423 U.S. 44 (1975).

[1909] Geduldig v. Aiello, 417 U.S. 484 (1974). The Court denied that the classification was based upon "gender as such." Classification was on the basis of pregnancy, and while only women can become pregnant, that fact alone was not determinative. "The program divides potential recipients into two groups—pregnant woman and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Id. at 496 n.20. For a rejection of a similar at-

case and their presence in the other may well have made the significant difference.

Illegitimacy

After wrestling in a number of cases with the question of the permissibility of governmental classifications disadvantaging illegitimates and the standard for determining which classifications are sustainable, the Court arrived at a standard difficult to state and even more difficult to apply.[1910] Although "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations," the analogy is "not sufficient to require 'our most exacting scrutiny.'" The scrutiny to which it is entitled is intermediate, "not a toothless [scrutiny]," but somewhere between that accorded race and that accorded ordinary economic classifications. Basically, the standard requires a determination of a legitimate legislative aim and a careful review of how well the classification serves, or "fits," the aim.[1911] The common rationale of all the illegitimacy cases is not clear, is in many respects not wholly consistent,[1912] but the theme that seems to be imposed on them by the more recent cases is that

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tempted distinction, *see* Nyquist v. Mauclet, 432 U.S. 1, 9 (1977); and Trimble v. Gordon, 430 U.S. 762, 774 (1977). *See also* Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971). The Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), now extends protection to pregnant women.

[1910] The first cases set the stage for the lack of consistency. *Compare* Levy v. Louisiana, 391 U.S. 68 (1968), *and* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), invalidating laws that precluded wrongful death actions in cases involving the child or the mother when the child was illegitimate, in which scrutiny was strict, *with* Labine v. Vincent, 401 U.S. 532 (1971), involving intestate succession, in which scrutiny was rational basis, *and* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), involving a workers' compensation statute distinguishing between legitimates and illegitimates, in which scrutiny was intermediate.

[1911] Mathews v. Lucas, 427 U.S. 495, 503–06 (1976); Trimble v. Gordon, 430 U.S. 762, 766–67 (1977); Lalli v. Lalli, 439 U.S. 259, 265 (1978). Scrutiny in previous cases had ranged from negligible, Labine v. Vincent, 401 U.S. 532 (1971), to something approaching strictness, Jiminez v. Weinberger, 417 U.S. 628, 631–632 (1974). *Mathews* itself illustrates the uncertainty of statement, suggesting at one point that the *Labine* standard may be appropriate, 401 U.S. at 506, and at another that the standard appropriate to sex classifications is to be used, id. at 510, while observing a few pages earlier that illegitimacy is entitled to less exacting scrutiny than either race *or* sex. Id. at 506. *Trimble* settles on intermediate scrutiny but does not assess the relationship between its standard and the sex classification standard. *See* Parham v. Hughes, 441 U.S. 347 (1979), and Caban v. Mohammed, 441 U.S. 380 (1979) (both cases involving classifications reflecting both sex and illegitimacy interests).

[1912] The major inconsistency arises from three 5-to-4 decisions. Labine v. Vincent, 401 U.S. 532 (1971), was largely overruled by Trimble v. Gordon, 430 U.S. 762 (1977), which itself was substantially limited by Lalli v. Lalli, 439 U.S. 259 (1978). Justice Powell was the swing vote for different disposition of the latter two cases. Thus, while four Justices argued for stricter scrutiny and usually invalidation of such classifications, Lalli v. Lalli, 439 U.S. at 277 (Justices Brennan, White, Marshall, and Stevens dissenting), and four favor relaxed scrutiny and usually sustaining the classifications, Trimble v. Gordon, 430 U.S. at 776, 777 (Chief Justice Burger

so long as the challenged statute does not so structure its conferral of rights, benefits, or detriments that some illegitimates who would otherwise qualify in terms of the statute's legitimate purposes are disabled from participation, the imposition of greater burdens upon illegitimates or some classes of illegitimates than upon legitimates is permissible.[1913]

Intestate succession rights for illegitimates has divided the Court over the entire period. At first adverting to the broad power of the states over descent of real property, the Court employed relaxed scrutiny to sustain a law denying illegitimates the right to share equally with legitimates in the estate of their common father, who had acknowledged the illegitimates but who had died intestate.[1914] *Labine* was strongly disapproved, however, and virtually overruled in *Trimble v. Gordon*,[1915] which found an equal protection violation in a statute allowing illegitimate children to inherit by intestate succession from their mothers but from their fathers only if the father had "acknowledged" the child and the child had been legitimated by the marriage of the parents. The father in *Trimble* had not acknowledged his child, and had not married the mother, but a court had determined that he was in fact the father and had ordered that he pay child support. Carefully assessing the purposes asserted to be the basis of the statutory scheme, the Court found all but one to be impermissible or inapplicable and that one not served closely enough by the restriction. First, it was impermissible to attempt to influence the conduct of adults not to engage in illicit sexual activities by visiting the consequences upon the offspring.[1916] Second, the assertion that the statute mirrored the assumed intent of decedents, in that, knowing of the statute's operation, they would have acted to counteract it through a will or otherwise, was rejected as un-

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and Justices Stewart, Blackmun, and Rehnquist dissenting), Justice Powell applied his own intermediate scrutiny and selectively voided and sustained. *See* Lalli v. Lalli, *supra* (plurality opinion by Justice Powell).

[1913] A classification that absolutely distinguishes between legitimates and illegitimates is not alone subject to such review; one that distinguishes among classes of illegitimates is also subject to it, Trimble v. Gordon, 430 U.S. 762, 774 (1977), as indeed are classifications based on other factors. *E.g.*, Nyquist v. Mauclet, 432 U.S. 1, 9 (1977) (alienage).

[1914] Labine v. Vincent, 401 U.S. 532 (1971). Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170 (1972), had confined the analysis of *Labine* to the area of state inheritance laws in expanding review of illegitimacy classifications.

[1915] 430 U.S. 762 (1977). Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissented, finding the statute "constitutionally indistinguishable" from the one sustained in *Labine*. Id. at 776. Justice Rehnquist also dissented separately. Id. at 777.

[1916] 430 U.S. at 768–70. Although this purpose had been alluded to in Labine v. Vincent, 401 U.S. 532, 538 (1971), it was rejected as a justification in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 173, 175 (1972). Visiting consequences upon the parent appears to be permissible. Parham v. Hughes, 441 U.S. 347, 352–53 (1979).

proved and unlikely.[1917] Third, the argument that the law presented no insurmountable barrier to illegitimates inheriting since a decedent could have left a will, married the mother, or taken steps to legitimate the child, was rejected as inapposite.[1918] Fourth, the statute did address a substantial problem, a permissible state interest, presented by the difficulties of proving paternity and avoiding spurious claims. However, the court thought the means adopted, total exclusion, did not approach the "fit" necessary between means and ends to survive the scrutiny appropriate to this classification. The state court was criticized for failing "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws." [1919] Because the state law did not follow a reasonable middle ground, it was invalidated.

A reasonable middle ground was discerned, at least by Justice Powell, in *Lalli v. Lalli*,[1920] concerning a statute that permitted legitimate children to inherit automatically from both their parents, while illegitimates could inherit automatically only from their mothers, and could inherit from their intestate fathers only if a court of competent jurisdiction had, during the father's lifetime, entered an order declaring paternity. The child tendered evidence of paternity,

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[1917] Trimble v. Gordon, 430 U.S. 762, 774–76 (1977). The Court cited the failure of the state court to rely on this purpose and its own examination of the statute.

[1918] 430 U.S. at 773–74. This justification had been prominent in Labine v. Vincent, 401 U.S. 532, 539 (1971), and its absence had been deemed critical in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170–71 (1972). The *Trimble* Court thought this approach "somewhat of an analytical anomaly" and disapproved it. However, the degree to which one could conform to the statute's requirements and the reasonableness of those requirements in relation to a legitimate purpose are prominent in Justice Powell's reasoning in subsequent cases. Lalli v. Lalli, 439 U.S. 259, 266–74 (1978); Parham v. Hughes, 441 U.S. 347, 359 (1979) (concurring). *See also* Nyquist v. Mauclet, 432 U.S. 1 (1977) (alienage); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723 n.8 (1982) (sex); *and compare* id. at 736 (Justice Powell dissenting).

[1919] Trimble v. Gordon, 430 U.S. 762, 770–73 (1977). The result is in effect a balancing one, the means-ends relationship must be a substantial one in terms of the advantages of the classification as compared to the harms of the classification means. Justice Rehnquist's dissent is especially critical of this approach. Id. at 777, 781–86. Also not interfering with orderly administration of estates is application of *Trimble* in a probate proceeding ongoing at the time *Trimble* was decided; the fact that the death had occurred prior to *Trimble* was irrelevant. Reed v. Campbell, 476 U.S. 852 (1986).

[1920] 439 U.S. 259 (1978). The four *Trimble* dissenters joined Justice Powell in the result, although only two joined his opinion. Justices Blackmun and Rehnquist concurred because they thought *Trimble* wrongly decided and ripe for overruling. Id. at 276. The four dissenters, who had joined the *Trimble* majority with Justice Powell, thought the two cases were indistinguishable. Id. at 277.

including a notarized document in which the putative father, in consenting to his marriage, referred to him as "my son" and several affidavits by persons who stated that the elder Lalli had openly and frequently acknowledged that the younger Lalli was his child. In the prevailing view, the single requirement of entry of a court order during the father's lifetime declaring the child as his met the "middle ground" requirement of *Trimble*; it was addressed closely and precisely to the substantial state interest of seeing to the orderly disposition of property at death by establishing proof of paternity of illegitimate children and avoiding spurious claims against intestate estates. To be sure, some illegitimates who were unquestionably established as children of the decreased would be disqualified because of failure of compliance, but individual fairness is not the test. The test rather is whether the requirement is closely enough related to the interests served to meet the standard of rationality imposed. Also, although the state's interest could no doubt have been served by permitting other kinds of proof, that too is not the test of the statute's validity. Hence, the balancing necessitated by the Court's promulgation of standards in such cases caused it to come to different results on closely related fact patterns, making predictability quite difficult but perhaps manageable.[1921]

The Court's difficulty in arriving at predictable results has extended outside the area of descent of property. Thus, a Texas child support law affording legitimate children a right to judicial action to obtain support from their fathers while not affording the right to illegitimate children denied the latter equal protection. "[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers *there is no constitutionally sufficient justification* for denying such an essential right to a child simply because its natural father has not married its mother." [1922]

[1921] Illustrating the difficulty are two cases in which the fathers of illegitimate children challenged statutes treating them differently than mothers of such children were treated. In Parham v. Hughes, 441 U.S. 347 (1979), the majority viewed the distinction as a gender-based one rather than as an illegitimacy classification and sustained a bar to a wrongful death action by the father of an illegitimate child who had not legitimated him; in Caban v. Mohammed, 441 U.S. 380 (1980), again viewing the distinction as a gender-based one, the majority voided a state law permitting the mother but not the father of an illegitimate child to block his adoption by refusing to consent. Both decisions were 5-to-4.

[1922] Gomez v. Perez, 409 U.S. 535, 538 (1978) (emphasis added). Following the decision, Texas authorized illegitimate children to obtain support from their fathers. But the legislature required as a first step that paternity must be judicially determined, and imposed a limitations period within which suit must be brought of one

Similarly, the Court struck down a federal Social Security provision that made eligible for benefits, because of an insured parent's disability, all legitimate children as well as those illegitimate children capable of inheriting personal property under state intestacy law and those children who were illegitimate only because of a nonobvious defect in their parents' marriage, regardless of whether they were born after the onset of the disability, but that made all other illegitimate children eligible only if they were born prior to the onset of disability and if they were dependent upon the parent prior to the onset of disability. The Court deemed the purpose of the benefits to be to aid all children and rejected the argument that the burden on illegitimates was necessary to avoid fraud.[1923]

However, in a second case, an almost identical program, providing benefits to children of a deceased insured, was sustained because its purpose was found to be to give benefits to children who were dependent upon the deceased parent and the classifications served that purpose. Presumed dependent were all legitimate children as well as those illegitimate children who were able to inherit under state intestacy laws, who were illegitimate only because of the technical invalidity of the parent's marriage, who had been acknowledged in writing by the father, who had been declared to be the father's by a court decision, or who had been held entitled to the father's support by a court. Illegitimate children not covered by these presumptions had to establish that they were living with the

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year from birth of the child. If suit is not brought within that period the child could never obtain support at any age from his father. No limitation was imposed on the opportunity of a natural child to seek support, up to age 18. In Mills v. Habluetzel, 456 U.S. 91 (1982), the Court invalidated the one-year limitation. Although a state has an interest in avoiding stale or fraudulent claims, the limit must not be so brief as to deny such children a reasonable opportunity to show paternity. Similarly, a 2-year statute of limitations on paternity and support actions was held to deny equal protection to illegitimates in Pickett v. Brown, 462 U.S. 1 (1983), and a 6-year limit was struck down in Clark v. Jeter, 486 U.S. 456 (1988). In both cases the Court pointed to the fact that increasingly sophisticated genetic tests are minimizing the "lurking problems with respect to proof of paternity" referred to in *Gomez*, 409 U.S. at 538. Also, the state's interest in imposing the 2-year limit was undercut by exceptions (*e.g.*, for illegitimates receiving public assistance), and by different treatment for minors generally; similarly, the importance of imposing a 6-year limit was belied by that state's more recent enactment of a non-retroactive 18-year limit for paternity and support actions.

[1923] Jiminez v. Weinberger, 417 U.S. 628 (1974). *But cf.* Califano v. Boles, 443 U.S. 282 (1979). *See also* New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (limiting welfare assistance to households in which parents are ceremonially married and the children are legitimate or adopted denied illegitimate children equal protection); Richardson v. Davis, 409 U.S. 1069 (1972), aff'g 342 F. Supp. 588 (D. Conn.) (3-judge court), and Richardson v. Griffin, 409 U.S. 1069 (1972), aff'g 346 F. Supp. 1226 (D. Md.) (3-judge court) (Social Security provision entitling illegitimate children to monthly benefit payments only to extent that payments to widow and legitimate children do not exhaust benefits allowed by law denies illegitimates equal protection).

insured parent or were being supported by him when the parent died. According to the Court, all the presumptions constituted an administrative convenience, which was a permissible device because those illegitimate children who were entitled to benefits because they were in fact dependent would receive benefits upon proof of the fact and it was irrelevant that other children not dependent in fact also received benefits.[1924]

Fundamental Interests: The Political Process

"The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . . , absent of course the discrimination which the Constitution condemns."[1925] The Constitution provides that the qualifications of electors in congressional elections are to be determined by reference to the qualifications prescribed in the states for the electors of the most numerous branch of the legislature, and the states are authorized to determine the manner in which presidential electors are selected.[1926] The second section of the Fourteenth Amendment provides for a proportionate reduction in a state's representation in the House when it denies the franchise to its qualified male citizens[1927] and specific discriminations on the basis of race, sex, and age are addressed in other Amendments. "We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements, age, previous criminal record . . . are obvious examples indicating factors which a state may take into consideration in determining the qualification of voters. The ability to read

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[1924] Mathews v. Lucas, 427 U.S. 495 (1976). It can be seen that the only difference between *Jiminez* and *Lucas* is that in the former the Court viewed the benefits as owing to all children and not just to dependents, while in the latter the benefits were viewed as owing only to dependents and not to all children. But it is not clear that in either case the purpose determined to underlie the provision of benefits was compelled by either statutory language or legislative history. For a particularly good illustration of the difference such a determination of purpose can make and the way the majority and dissent in a 5-to-4 decision read the purpose differently, *see* Califano v. Boles, 443 U.S. 282 (1979).

[1925] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–51 (1959).

[1926] Article I, § 2, cl. 1 (House of Representatives); Seventeenth Amendment (Senators); Article II, § 1, cl. 2 (presidential electors); Article I, § 4, cl. 1 (times, places, and manner of holding elections).

[1927] Fourteenth Amendment, § 2. Justice Harlan argued that the inclusion of this provision impliedly permitted the states to discriminate with only the prescribed penalty in consequence and that therefore the equal protection clause was wholly inapplicable to state election laws. Reynolds v. Sims, 377 U.S. 533, 589 (1964) (dissenting); Carrington v. Rash, 380 U.S. 89, 97 (1965) (dissenting); Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (concurring and dissenting). Justice Brennan undertook a rebuttal of this position in Oregon v. Mitchell, 400 U.S. at 229, 250 (concurring and dissenting). *But see* Richardson v. Ramirez, 418 U.S. 24 (1974), where § 2 was relevant in precluding an equal protection challenge.

and write likewise has some relation to standards designed to promote intelligent use of the ballot." [1928]

The perspective of this 1959 opinion by Justice Douglas has now been revolutionized. "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized." [1929] "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. . . . Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest."

"And, for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. . . . [W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable." [1930] Using this analytical approach, the Court has established a regime of close review of a vast range of state restrictions on the eligibility to vote, on access to the ballot by candidates and parties, and on the weighing of votes cast through the devices of apportionment and districting. Changes in Court membership over the years has led to some relaxation in the application of principles, but even as the Court has drawn back in other areas it has tended to preserve, both doctrinally and in fact, the election cases.[1931]

[1928] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959).

[1929] Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

[1930] Kramer v. Union Free School Dist., 395 U.S. 621, 626–28 (1969). *See also* Hill v. Stone, 421 U.S. 289, 297 (1975). *But cf.* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).

[1931] Thus, in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 34–35 nn.74 & 78 (1973), a major doctrinal effort to curb the "fundamental interest" side of the "new" equal protection, the Court acknowledged that the right to vote did not come within its prescription that rights to be deemed fundamental must be explicitly or implicitly guaranteed in the Constitution. Nonetheless, citizens have a "constitution-

Voter Qualifications.—States may require residency as a qualification to vote, but "durational residence laws . . . are unconstitutional unless the State can demonstrate that such laws are *necessary* to promote a *compelling* governmental interest." [1932] The Court applies "[t]his exacting test" because the right to vote is "a fundamental political right, . . . preservative of all rights," and because a "durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel." [1933] The Court indicated that the states have "a legitimate and compelling interest" in preventing fraud by voters, but that "it is impossible to view durational residence requirements as necessary to achieve that state interest." [1934]

However, a 50-day durational residence requirement was sustained in the context of the closing of the registration process at 50 days prior to elections and of the mechanics of the state's registration process. The period, the Court found, was necessary to achieve the state's legitimate goals.[1935]

A state that exercised general criminal, taxing, and other jurisdiction over persons on certain federal enclaves within the state, the Court held, could not treat these persons as nonresidents for

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ally protected right to participate in elections," which is protected by the Equal Protection Clause. Dunn v. Blumstein, 405 U.S. 330, 336 (1972). The franchise is the guardian of all other rights. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[1932] Dunn v. Blumstein, 405 U.S. 330, 342 (1972) (internal quotation marks omitted, emphasis added by the Court) (striking down a Tennessee statute that imposed a requirement of one year in the state and three months in the county). The Court did not indicate what, if any, shorter duration it would permit, although it noted that, in the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. § 1973aa–1, "Congress outlawed State durational residence requirements for presidential and vice-presidential elections, and prohibited the States from closing registration more than 30 days before Congress prescribed a thirty-day period for purposes of voting in presidential elections." Id. at 344. Note also that it does not matter whether one travels interstate or intrastate. Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd*, 405 U.S. 1035 (1972).

[1933] 405 U.S. at 336, 338. *See also* Purcell v. Gonzalez, 549 U.S. 1, 2 (2006) (per curiam) (vacating an injunction against "requiring voters to present proof of citizenship when they register to vote and to present identification when they vote on election day," but expressing no opinion on the constitutionality of the requirement).

[1934] 405 U.S. at 345. Other asserted state interests—knowledgeability of voters, common interests, intelligent voting—were said either not to be served by the requirements or to be impermissible interests.

[1935] Marston v. Lewis, 410 U.S. 679 (1973). Registration was by volunteer workers who made statistically significant errors requiring corrections by county recorders before certification. Primary elections were held in the fall, thus occupying the time of the recorders, so that a backlog of registrations had to be processed before the election. A period of 50 days rather than 30, the Court thought, was justifiable. However, the same period was upheld for another state on the authority of *Marston* in the absence of such justification, but it appeared that the plaintiffs had not controverted the state's justifying evidence. Burns v. Fortson, 410 U.S. 686 (1973). Justices Brennan, Douglas, and Marshall dissented in both cases. Id. at 682, 688.

voting purposes.[1936] A statute that provided that anyone who entered military service outside the state could not establish voting residence in the state so long as he remained in the military was held to deny to such a person the opportunity such as all nonmilitary persons enjoyed of showing that he had established residence.[1937] Restricting the suffrage to those persons who had paid a poll tax was an invidious discrimination because it introduced a "capricious or irrelevant factor" of wealth or ability to pay into an area in which it had no place.[1938] Extending this ruling, the Court held that the eligibility to vote in local school elections may not be limited to persons owning property in the district or who have children in school,[1939] and denied states the right to restrict the vote to property owners in elections on the issuance of revenue bonds [1940] or general obligation bonds.[1941] By contrast, the Court upheld a statute that required voters to present a government-issued photo identification in order to vote, as the state had not "required voters to pay a tax or a fee to obtain a new photo identification." The Court added that, although obtaining a government-issued photo identification is an "inconvenience" to voters, it "surely does not qualify as a substantial burden." [1942]

The Court has also held that, because the activities of a water storage district fell so disproportionately on landowners as a group, a limitation of the franchise in elections for the district's board of directors to landowners, whether resident or not and whether natural persons or not, excluding non-landowning residents and lessees of land, and weighing the votes granted according to assessed valu-

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[1936] Evans v. Cornman, 398 U.S. 419 (1970).

[1937] Carrington v. Rash, 380 U.S. 89 (1965).

[1938] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). Justices Black, Harlan, and Stewart dissented. Id. at 670, 680. Poll tax qualifications had previously been upheld in Breedlove v. Suttles, 302 U.S. 277 (1937); and Butler v. Thompson, 341 U.S. 937 (1951).

[1939] Kramer v. Union Free School Dist., 395 U.S. 621 (1969). The Court assumed without deciding that the franchise in some circumstances could be limited to those "primarily interested" or "primarily affected" by the outcome, but found that the restriction permitted some persons with no interest to vote and disqualified others with an interest. Justices Stewart, Black, and Harlan dissented. Id. at 594.

[1940] Cipriano v. City of Houma, 395 U.S. 701 (1969). Justices Black, Harlan, and Stewart concurred specially. Id. at 707.

[1941] City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). Justice Stewart and Chief Justice Burger dissented. Id. at 215. In Hill v. Stone, 421 U.S. 289 (1975), the Court struck down a limitation on the right to vote on a general obligation bond issue to persons who have "rendered" or listed real, mixed, or personal property for taxation in the election district. It was not a "special interest" election since a general obligation bond issue is a matter of general interest.

[1942] Crawford v. Marion County Election Board, 128 S. Ct. 1610, 1621 (2008) (plurality). See Fourteenth Amendment, "Voting and Ballot Access," *infra*.

ation of land, comported with equal protection standards.[1943] Adverting to the reservation in prior local governmental unit election cases [1944] that some functions of such units might be so specialized as to permit deviation from the usual rules, the Court then proceeded to assess the franchise restrictions according to the traditional standards of equal protection rather than by those of strict scrutiny.[1945] Also narrowly approached was the issue of the effect of the District's activities, the Court focusing upon the assessments against landowners as the sole means of paying expenses rather than additionally noting the impact upon lessees and non-landowning residents of such functions as flood control. The approach taken in this case seems different in great degree from that in prior cases and could in the future alter the results in other local government cases. These cases were extended somewhat in *Ball v. James*,[1946] a 5-to-4 decision that sustained a system in which voting eligibility was limited to landowners and votes were allocated to these voters on the basis of the number of acres they owned. The entity was a water reclamation district that stores and delivers water to 236,000 acres of land in the state and subsidizes its water operations by selling electricity to hundreds of thousands of consumers in a nearby metropolitan area. The entity's board of directors was elected through a system in which the eligibility to vote was as described above. The Court thought the entity was a specialized and limited form to which its general franchise rulings did not apply.[1947]

Finding that prevention of "raiding"—the practice whereby voters in sympathy with one party vote in another's primary election in order to distort that election's results—is a legitimate and valid state goal, as one element in the preservation of the integrity of the electoral process, the Court sustained a state law requiring those voters eligible at that time to register to enroll in the party of their choice at least 30 days before the general election in order to be eligible to vote in the party's next primary election, 8 to 11 months hence. The law did not impose a prohibition upon voting but merely

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[1943] Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719 (1973). *See also* Associated Enterprises v. Toltec Watershed Improv. Dist., 410 U.S. 743 (1973) (limitation of franchise to property owners in the creation and maintenance of district upheld). Justices Douglas, Brennan, and Marshall dissented in both cases. Id. at 735, 745.

[1944] 410 U.S. at 727–28.

[1945] 410 U.S. at 730, 732. Thus, the Court posited reasons that might have moved the legislature to adopt the exclusions.

[1946] 451 U.S. 355 (1981).

[1947] The water district cases were distinguished in Quinn v. Millsap, 491 U.S. 95, 109 (1989), the Court holding that a "board of freeholders" appointed to recommend a reorganization of local government had a mandate "far more encompassing" than land use issues, as its recommendations "affect[ ] all citizens . . . regardless of land ownership."

imposed a time deadline for enrollment, the Court held, and it was because of the plaintiffs' voluntary failure to register that they did not meet the deadline.[1948] But a law that prohibited a person from voting in the primary election of a political party if he had voted in the primary election of any other party within the preceding 23 months was subjected to strict scrutiny and was voided, because it constituted a severe restriction upon a voter's right to associate with the party of his choice by requiring him to forgo participation in at least one primary election in order to change parties.[1949] A less restrictive "closed primary" system was also invalidated, the Court finding insufficient justification for a state's preventing a political party from allowing independents to vote in its primary.[1950]

It must not be forgotten, however, that it is only when a state extends the franchise to some and denies it to others that a "right to vote" arises and is protected by the Equal Protection Clause. If a state chooses to fill an office by means other than through an election, neither the Equal Protection Clause nor any other constitutional provision prevents it from doing so. Thus, in *Rodriguez v. Popular Democratic Party*,[1951] the Court unanimously sustained a Puerto Rico statute that authorized the political party to which an incumbent legislator belonged to designate his successor in office until the next general election upon his death or resignation. Neither the fact that the seat was filled by appointment nor the fact that the appointment was by the party, rather than by the governor or some other official, raised a constitutional question.

The right of unconvicted jail inmates and convicted misdemeanants (who typically are under no disability) to vote by absentee ballot remains unsettled. In an early case applying rational basis scrutiny, the Court held that the failure of a state to provide for absentee balloting by unconvicted jail inmates, when absentee ballots were available to other classes of voters, did not deny equal protection when it was not shown that the inmates could not vote in any other

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[1948] Rosario v. Rockefeller, 410 U.S. 752 (1973). Justices Powell, Douglas, Brennan, and Marshall dissented. Id. at 763.

[1949] Kusper v. Pontikes, 414 U.S. 51 (1973). Justices Blackmun and Rehnquist dissented. Id. at 61, 65.

[1950] Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). Although independents were allowed to register in a party on the day before a primary, the state's justifications for "protect[ing] the integrity of the Party against the Party itself" were deemed insubstantial. Id. at 224.

[1951] 457 U.S. 1 (1982). *See also* Fortson v. Morris, 385 U.S. 231 (1966) (legislature could select governor from two candidates having highest number of votes cast when no candidate received majority); Sailors v. Board of Elections, 387 U.S. 105 (1967) (appointment rather than election of county school board); Valenti v. Rockefeller, 292 F. Supp. 851 (S.D.N.Y. 1968) (three-judge court), aff'd, 393 U.S. 405 (1969) (gubernatorial appointment to fill United States Senate vacancy).

way.[1952] Subsequently, the Court held unconstitutional a statute denying absentee registration and voting rights to persons confined awaiting trial or serving misdemeanor sentences, but it is unclear whether the basis was the fact that persons confined in jails outside the county of their residences could register and vote absentee while those confined in the counties of their residences could not, or whether the statute's jumbled distinctions among categories of qualified voters on no rational standard made it wholly arbitrary.[1953]

Access to the Ballot.—The Equal Protection Clause applies to state specification of qualifications for elective and appointive office. Although one may "have no right" to be elected or appointed to an office, all persons "do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualification. The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." [1954] In *Bullock v. Carter*,[1955] the Court used a somewhat modified form of the strict test in passing upon a filing fee system for primary election candidates that imposed the cost of the election wholly on the candidates and that made no alternative provision for candidates unable to pay the fees; the reason for application of the standard, however, was that the fee system deprived some classes of voters of the opportunity to vote for certain candidates and it worked its classifications along lines of wealth. The system itself was voided because it was not reasonably connected with the state's interest in regulating the ballot and did not serve that interest and because the cost of the election could be met out of the state treasury, thus avoiding the discrimination.[1956]

Recognizing the state interest in maintaining a ballot of reasonable length in order to promote rational voter choice, the Court observed nonetheless that filing fees alone do not test the genuine-

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[1952] McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969). *But see* Goosby v. Osser, 409 U.S. 512 (1973) (*McDonald* does not preclude challenge to absolute prohibition on voting).

[1953] O'Brien v. Skinner, 414 U.S. 524 (1974). *See* American Party of Texas v. White, 415 U.S. 767, 794–95 (1974).

[1954] Turner v. Fouche, 396 U.S. 346, 362–63 (1970) (voiding a property qualification for appointment to local school board). *See also* Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977) (voiding a qualification for appointment as airport commissioner of ownership of real or personal property that is assessed for taxes in the jurisdiction in which airport is located); Quinn v. Millsap, 491 U.S. 95 (1989) (voiding property ownership requirement for appointment to board authorized to propose reorganization of local government). *Cf.* Snowden v. Hughes, 321 U.S. 1 (1944).

[1955] 405 U.S. 134, 142–44 (1972).

[1956] 405 U.S. at 144–49.

ness of a candidacy or the extent of voter support for an aspirant. Therefore, effectuation of the legitimate state interest must be achieved by means that do not unfairly or unnecessarily burden the party's or the candidate's "important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. . . . [T]he process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars." [1957] In the absence of reasonable alternative means of ballot access, the Court held, a state may not disqualify an indigent candidate unable to pay filing fees.[1958]

In *Clements v. Fashing*,[1959] the Court sustained two provisions of state law, one that barred certain officeholders from seeking election to the legislature during the term of office for which they had been elected or appointed, but that did not reach other officeholders whose terms of office expired with the legislators' terms and did not bar legislators from seeking other offices during their terms, and the other that automatically terminated the terms of certain officeholders who announced for election to other offices, but that did not apply to other officeholders who could run for another office while continuing to serve. The Court was splintered in such a way, however, that it is not possible to derive a principle from the decision applicable to other fact situations.

In *Williams v. Rhodes*,[1960] a complex statutory structure that had the effect of keeping off the ballot all but the candidates of the

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[1957] Lubin v. Panish, 415 U.S. 709, 716 (1974).

[1958] Concurring, Justices Blackmun and Rehnquist suggested that a reasonable alternative would be to permit indigents to seek write-in votes without paying a filing fee, 415 U.S. at 722, but the Court indicated this would be inadequate. Id. at 719 n.5.

[1959] 457 U.S. 957 (1982). A plurality of four contended that save in two circumstances—ballot access classifications based on wealth and ballot access classifications imposing burdens on new or small political parties or independent candidates—limitations on candidate access to the ballot merit only traditional rational basis scrutiny, because candidacy is not a fundamental right. The plurality found both classifications met the standard. Id. at 962–73 (Justices Rehnquist, Powell, O'Connor, and Chief Justice Burger). Justice Stevens concurred, rejecting the plurality's standard, but finding that inasmuch as the disparate treatment was based solely on the state's classification of the different offices involved, and not on the characteristics of the persons who occupy them or seek them, the action did not violate the Equal Protection Clause. Id. at 973. The dissent primarily focused on the First Amendment but asserted that the classifications failed even a rational basis test. Id. at 976 (Justices Brennan, White, Marshall, and Blackmun).

[1960] 393 U.S. 23 (1968). "[T]he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause." Id. at 34. Justices Douglas and Harlan would have relied solely on the First Amendment, id. at

two major parties was struck down under the strict test because it deprived the voters of the opportunity of voting for independent and third-party candidates and because it seriously impeded the exercise of the right to associate for political purposes. Similarly, a requirement that an independent candidate for office in order to obtain a ballot position must obtain 25,000 signatures, including 200 signatures from each of at least 50 of the state's 102 counties, was held to discriminate against the political rights of the inhabitants of the most populous counties, when it was shown that 93.4% of the registered voters lived in the 49 most populous counties.[1961] But to provide that the candidates of any political organization obtaining 20% or more of the vote in the last gubernatorial or presidential election may obtain a ballot position simply by winning the party's primary election, while requiring candidates of other parties or independent candidates to obtain the signatures of less than five percent of those eligible to vote at the last election for the office sought, is not to discriminate unlawfully, because the state placed no barriers of any sort in the way of obtaining signatures and because write-in votes were also freely permitted.[1962]

Reviewing under the strict test the requirements for qualification of new parties and independent candidates for ballot positions, the Court recognized as valid objectives and compelling interests the protection of the integrity of the nominating and electing process, the promotion of party stability, and the assurance of a modicum of order in regulating the size of the ballot by requiring a showing of some degree of support for independents and new parties before they can get on the ballot.[1963] "[T]o comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot." [1964] Decision whether or not a state statutory structure affords a feasible opportunity is a matter of degree, "very much a matter of 'consider[ing] the facts and circumstances behind the law,

35, 41, and Justices Stewart and White and Chief Justice Warren dissented. Id. at 48, 61, 63.

[1961] Moore v. Ogilvie, 394 U.S. 814 (1969) (overruling MacDougall v. Green, 335 U.S. 281 (1948)).

[1962] Jenness v. Fortson, 403 U.S. 431 (1971).

[1963] Storer v. Brown, 415 U.S. 724 (1974); American Party of Texas v. White, 415 U.S. 767 (1974); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979). *See also* Indiana Communist Party v. Whitcomb, 414 U.S. 441 (1974) (impermissible to condition ballot access upon a political party's willingness to subscribe to oath that party "does not advocate the overthrow of local, state or national government by force or violence," opinion of Court based on First Amendment, four Justices concurring on equal protection grounds).

[1964] Storer v. Brown, 415 U.S. 724, 746 (1974).

the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.'" [1965]

Thus, in order to assure that parties seeking ballot space command a significant, measurable quantum of community support, Texas was upheld in treating different parties in ways rationally constructed to achieve this objective. Candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election had to be nominated by primary elections and went on the ballot automatically, because the prior vote adequately demonstrated support. Candidates whose parties polled less than 200,000 but more than 2 percent could be nominated in primary elections or in conventions. Candidates of parties not coming within either of the first two categories had to be nominated in conventions and could obtain ballot space only if the notarized list of participants at the conventions totaled at least one percent of the total votes cast for governor in the last preceding general election or, failing this, if in the 55 succeeding days a requisite number of qualified voters signed petitions to bring the total up to one percent of the gubernatorial vote. "[W]hat is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot," but the Court thought that one percent, or 22,000 signatures in 1972, "falls within the outer boundaries of support the State may require." [1966] Similarly, independent candidates can be required to obtain a certain number of signatures as a condition to obtain ballot space.[1967] A state may validly require that each voter participate only once in each year's nominating process and it may therefore disqualify any person who votes in a primary election from signing nominating or supporting petitions for independent parties or candidates.[1968] Equally valid is a state requirement that a candidate for elective office, as an independent or in a regular party, must not have been affiliated with a political party, or with one other than the one of which he seeks its nomination, within one year prior to the primary election

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[1965] 415 U.S. at 730 (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968)).

[1966] American Party of Texas v. White, 415 U.S. 767, 783 (1974). In Storer v. Brown, 415 U.S. 724, 738–40 (1974), the Court remanded so that the district court could determine whether the burden imposed on an independent party was too severe, it being required in 24 days in 1972 to gather 325,000 signatures from a pool of qualified voters who had not voted in that year's partisan primary elections. *See also* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (voiding provision that required a larger number of signatures to get on ballot in subdivisions than statewide).

[1967] American Party of Texas v. White, 415 U.S. 767, 788–91 (1974). The percentages varied with the office but no more than 500 signatures were needed in any event.

[1968] 415 U.S. at 785–87.

at which nominations for the general election are made.[1969] So too, a state may limit access to the general election ballot to candidates who received at least 1% of the primary votes cast for the particular office.[1970] But it is impermissible to print the names of the candidates of the two major parties only on the absentee ballots, leaving off independents and other parties.[1971] Also invalidated was a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot.[1972]

Apportionment and Districting.—Prior to 1962, attacks in federal courts on the drawing of boundaries for congressional [1973] and legislative election districts or the apportionment of seats to previously existing units ran afoul of the "political question" doctrine.[1974] *Baker v. Carr*,[1975] however, reinterpreted the doctrine to a considerable degree and opened the federal courts to voter complaints founded on unequally populated voting districts. *Wesberry v. Sanders* [1976] found that Article I, § 2, of the Constitution required that, in the election of Members of the House of Representatives, districts were to be made up of substantially equal numbers

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[1969] Storer v. Brown, 415 U.S. 724, 728–37 (1974). Dissenting, Justices Brennan, Douglas and Marshall thought the state interest could be adequately served by a shorter time period than a year before the primary election, which meant in effect 17 months before the general election. Id. at 755.

[1970] Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

[1971] American Party of Texas v. White, 415 U.S. 767, 794–95 (1974). Upheld, however, was state financing of the primary election expenses that excluded convention expenses of the small parties. Id. at 791–94. But the major parties had to hold conventions simultaneously with the primary elections the cost of which they had to bear. For consideration of similar contentions in the context of federal financing of presidential elections, *see* Buckley v. Valeo, 424 U.S. 1, 93–97 (1976).

[1972] Anderson v. Celebrezze, 460 U.S. 780 (1983). State interests in assuring voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters.

[1973] This subject is also discussed under Article I, Section 2, Congressional Districting.

[1974] *See* discussion, supra. Applicability of the doctrine to cases of this nature was left unresolved in Smiley v. Holm, 285 U.S. 355 (1932), and Wood v. Broom, 287 U.S. 1 (1932), was supported by only a plurality in Colegrove v. Green, 328 U.S. 549 (1946), but became the position of the Court in subsequent cases. Cook v. Fortson, 329 U.S. 675 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947); MacDougall v. Green, 335 U.S. 281 (1948); South v. Peters, 339 U.S. 276 (1950); Hartsfield v. Sloan, 357 U.S. 916 (1958).

[1975] 369 U.S. 186 (1962).

[1976] 376 U.S. 1 (1964). Striking down a county unit system of electing a governor, the Court, in an opinion by Justice Douglas, had already coined a variant phrase of the more popular "one man, one vote." "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." Gray v. Sanders, 372 U.S. 368, 381 (1963).

of persons. In six decisions handed down on June 15, 1964, the Court required the alteration of the election districts for practically all the legislative bodies in the United States.[1977]

"We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the State." [1978] What was required was that each state "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." [1979]

Among the principal issues raised by these decisions were which units were covered by the principle, to what degree of exactness population equality had to be achieved, and to what other elements of the apportionment and districting process the Equal Protection Clause extended.

The first issue has largely been resolved, although a few problem areas persist. It has been held that a school board, the members of which were appointed by boards elected in units of disparate populations, and that exercised only administrative powers rather than legislative powers, was not subject to the principle of the apportionment ruling.[1980] *Avery v. Midland County* [1981] held that, when

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[1977] Reynolds v. Sims, 377 U.S. 533 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); Donis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964). In the last case, the Court held that approval of the apportionment plan in a vote of the people was insufficient to preserve it from constitutional attack. "An individual's constitutionally protected right to cast an equally weighed vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause." *Id.* at 736. In Reynolds v. Sims, Justice Harlan dissented wholly, denying that the Equal Protection Clause had any application at all to apportionment and districting and contending that the decisions were actually the result of a "reformist" nonjudicial attitude on the part of the Court. 377 U.S. at 589. Justices Stewart and Clark dissented in two and concurred in four cases on the basis of their view that the Equal Protection Clause was satisfied by a plan that was rational and that did not systematically frustrate the majority will. 377 U.S. at 741, 744.

[1978] Reynolds v. Sims, 377 U.S. 533, 568 (1964).

[1979] 377 U.S. at 577.

[1980] Sailors v. Board of Education, 387 U.S. 105 (1967).

[1981] 390 U.S. 474 (1968). Justice Harlan continued his dissent from the *Reynolds* line of cases, *id.* at 486, while Justices Fortas and Stewart called for a more

a state delegates lawmaking power to local government and provides for the election by district of the officials to whom the power is delegated, the districts must be established of substantially equal populations. But, in *Hadley v. Junior College District*,[1982] the Court abandoned much of the limitation that was explicit in these two decisions and held that, whenever a state chooses to vest "governmental functions" in a body and to elect the members of that body from districts, the districts must have substantially equal populations. The "governmental functions" should not be characterized as "legislative" or "administrative" or necessarily important or unimportant; it is the fact that members of the body are elected from districts that triggers the application.[1983]

The second issue has been largely but not precisely resolved. In *Swann v. Adams*,[1984] the Court set aside a lower court ruling "for the failure of the State to present or the District Court to articulate acceptable reasons for the variations among the populations of the various legislative districts. . . . *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy." Two congressional districting cases were disposed of on the basis of *Swann*,[1985] but, although the Court ruled that no congressional districting could be approved without "a good-faith effort to achieve precise mathematical equality" or the justification of "each variance, no matter how small," [1986] it did not apply

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discerning application and would not have applied the principle to the county council here. *Id.* at 495, 509.

[1982] 397 U.S. 50 (1970). The governmental body here was the board of trustees of a junior college district. Justices Harlan and Stewart and Chief Justice Burger dissented. *Id.* at 59, 70.

[1983] The Court observed that there might be instances "in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds*, *supra*, might not be required . . . ." 397 U.S. at 56. For cases involving such units, *see* Salyer Land Co. v. Tulare Water Storage Dist., 410 U.S. 719 (1973); Associated Enterprises v. Toltec Watershed Imp. Dist., 410 U.S. 743 (1973); Ball v. James, 451 U.S. 355 (1981). Judicial districts need not comply with *Reynolds*. Wells v. Edwards, 347 F. Supp. 453 (M.D. La. 1972) (three-judge court), aff'd, *per curiam*, 409 U.S. 1095 (1973).

[1984] 385 U.S. 440, 443–44 (1967). *See also* Kilgarlin v. Hill, 386 U.S. 120 (1967).

[1985] Kirkpatrick v. Preisler, 385 U.S. 450 (1967); Duddleston v. Grills, 385 U.S. 455 (1967).

[1986] Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969); Wells v. Rockefeller, 394 U.S. 542 (1969). The Court has continued to adhere to this strict standard for congressional districting, voiding a plan in which the maximum deviation between largest and smallest district was 0.7%, or 3,674 persons. Karcher v. Daggett, 462 U.S. 725 (1983) (rejecting assertion that deviations less than estimated census error are necessarily permissible).

this strict standard to state legislative redistricting.[1987] And, in *Abate v. Mundt*,[1988] the Court approved a plan for apportioning a county governing body that permitted a substantial population disparity, explaining that in the absence of a built-in bias tending to favor any particular area or interest, a plan could take account of localized factors in justifying deviations from equality that might in other circumstances invalidate a plan.[1989] The total population deviation allowed in *Abate* was 11.9%; the Court refused, however, to extend *Abate* to approve a total deviation of 78% resulting from an apportionment plan providing for representation of each of New York City's five boroughs on the New York City Board of Estimate.[1990]

Nine years after *Reynolds v. Sims*, the Court reexamined the population equality requirement of the apportionment cases. Relying upon language in prior decisions that distinguished state legislative apportionment from congressional districting as possibly justifying different standards of permissible deviations from equality, the Court held that more flexibility is constitutionally permissible with respect to the former than to the latter.[1991] But it was in determining how much greater flexibility was permissible that the Court

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[1987] The Court relied on *Swann* in disapproving of only slightly smaller deviations (roughly 28% and 25%) in Whitcomb v. Chavis, 403 U.S. 124, 161–63 (1971). In Connor v. Williams, 404 U.S. 549, 550 (1972), the Court said of plaintiffs' reliance on *Preisler* and *Wells* that "these decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment."

[1988] 403 U.S. 182 (1971).

[1989] In *Evenwel v. Abbott*, a case involving representation in the state legislature, the Court rejected the argument that the Equal Protection Clause prohibits states from using total population in determining voting districts and instead requires the use of the voting population. 578 U.S. ___, No. 14–940, slip op. (2016). The Court based its conclusion here, in part, on the debates over representation in the U.S. House and Senate at the time of the Constitution's framing, as well as subsequent debates over the Fourteenth Amendment at the time of its ratification. *Id.* at 8–12. The Court also noted prior decisions focusing on "equality of representation," and not "voter equality," *id.* at 16, and the settled practices of all fifty states and "countless local jurisdictions" in apportioning representation based on total population. *Id.* at 18. It is important to note, however, that the *Evenwel* Court declined to find that apportionment based on total population is constitutionally required, and the Court has, in other cases, upheld the use of districts based on voting population. *See* Burns v. Richardson, 384 U.S. 73 (1966) (rejecting a challenge to Hawaii's use of the registered-voter population).

[1990] New York City Bd. of Estimate v. Morris, 489 U.S. 688 (1989). Under the plan each of the City's five boroughs was represented on the board by its president and each of these members had one vote; three citywide elected officials (the mayor, the comptroller, and the president of the city council) were also placed on the board and given two votes apiece (except that the mayor had no vote on the acceptance or modification of his budget proposal). The Court also ruled that, when measuring population deviation for a plan that mixes at-large and district representation, the at-large representation must be taken into account. *Id.* at 699–701.

[1991] Mahan v. Howell, 410 U.S. 315, 320–25 (1973).

moved in new directions. First, applying the traditional standard of rationality rather than the strict test of compelling necessity, the Court held that a maximum 16.4% deviation from equality of population was justified by the state's policy of maintaining the integrity of political subdivision lines, or according representation to subdivisions *qua* subdivisions, because the legislature was responsible for much local legislation.[1992] Second, just as the first case "demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable. It is now time to recognize . . . that minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." [1993] This recognition of a *de minimis* deviation, below which no justification was necessary, was mandated, the Court felt, by the margin of error in census statistics, by the population change over the ten-year life of an apportionment, and by the relief it afforded federal courts by enabling them to avoid overinvolvement in essentially a political process. The "goal of fair and effective representation" is furthered by eliminating gross population variations among districts, but it is not achieved by mathematical equality solely. Other relevant factors are to be taken into ac-

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[1992] 410 U.S. at 325–30. The Court indicated that a 16.4% deviation "may well approach tolerable limits." *Id.* at 329. Dissenting, Justices Brennan, Douglas, and Marshall would have voided the plan; additionally, they thought the deviation was actually 23.6% and that the plan discriminated geographically against one section of the state, an issue not addressed by the Court. In Chapman v. Meier, 420 U.S. 1, 21–26 (1975), holding that a 20% variation in a court-developed plan was not justified, the Court indicated that such a deviation in a legislatively-produced plan would be quite difficult to justify. *See also* Summers v. Cenarrusa, 413 U.S. 906 (1973) (vacating and remanding for further consideration the approval of a 19.4% deviation). *But see* Voinovich v. Quilter, 507 U.S. 146 (1993) (vacating and remanding for further consideration the rejection of a deviation in excess of 10% intended to preserve political subdivision boundaries). In Brown v. Thomson, 462 U.S. 835 (1983), the Court held that a consistent state policy assuring each county at least one representative can justify substantial deviation from population equality when only the marginal impact of representation for the state's least populous county was challenged (the effect on plaintiffs, voters in larger districts, was that they would elect 28 of 64 members rather than 28 of 63), but there was indication in Justice O'Connor's concurring opinion that a broader-based challenge to the plan, which contained a 16% average deviation and an 89% maximum deviation, could have succeeded.

[1993] Gaffney v. Cummings, 412 U.S. 735, 745 (1973). The maximum deviation was 7.83%. The Court did not precisely indicate at what point a deviation had to be justified, but it applied the *de minimis* standard in White v. Regester, 412 U.S. 755 (1973), in which the maximum deviation was 9.9%. "Very likely, larger differences between districts would not be tolerable without justification . . . ." *Id.* at 764. Justices Brennan, Douglas, and Marshall dissented. *See also* Brown v. Thomson, 462 U.S. 835, 842 (1983): "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations [insufficient to make out a *prima facie* case]."

count.[1994] But when a judicially imposed plan is to be formulated upon state default, it "must ordinarily achieve the goal of population equality with little more than *de minimis* variation," and deviations from approximate population equality must be supported by enunciation of historically significant state policy or unique features.[1995]

Subsequently, in its 2016 decision in *Harris v. Arizona Independent Redistricting Commission*, the Court reiterated the significance of the 10% threshold in challenges to state legislative voting districts, observing that "attacks on deviations under 10% will succeed only rarely, in unusual cases." [1996] Instead, challengers must show that it is "more probable than not" that the deviation "reflects the predominance of illegitimate reapportionment factors rather than . . . legitimate considerations." [1997] The Court unanimously agreed that the challengers in *Harris* had failed to meet this burden, as the record supported the district court's conclusion that the deviation here—which was 8.8%—reflected the redistricting commission's efforts to achieve compliance with the Voting Rights Act, and not to secure political advantage for the Democratic party.[1998] In particular, the Court noted that the difference in population between Democratic- and Republican-leaning districts may simply reflect the residential and voting patterns of minorities, and the redistricting commission's efforts to maintain "ability-to-elect districts" (i.e., districts favorable to the election of minority candidates).[1999] In the Court's view, there was no showing of "illegitimate factors" here, unlike in certain earlier cases (e.g., the creation of districts that seem to have no relation to keeping counties whole or preserving the cores of prior districts).[2000] The Court further noted that its decision in *Shelby County v. Holder*,[2001] which held unconstitutional a section of the Voting Rights Act relevant to this case, did

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[1994] Gaffney v. Cummings, 412 U.S. 735, 748 (1973). By contrast, the Court has held that estimated margin of error for census statistics does not justify deviation from population equality in congressional districting. Karcher v. Daggett, 462 U.S. 725 (1983).

[1995] Chapman v. Meier, 420 U.S. 1, 27 (1975). The Court did say that court-ordered reapportionment of a state legislature need not attain the mathematical preciseness required for congressional redistricting. *Id.* at 27 n.19. Apparently, therefore, the Court's reference to both "*de minimis*" variations and "approximate population equality" must be read as referring to some range approximating the *Gaffney* principle. *See also* Connor v. Finch, 431 U.S. 407 (1977).

[1996] 578 U.S. ___, No. 14–232, slip op. at 5 (2016). *See also id.* (noting the "inherent difficulties" of measuring and comparing factors that may legitimately account for small deviations from strict mathematical equality).

[1997] *Id.* at 1.

[1998] *See id.* at 5–9.

[1999] *Id.* at 9–10.

[2000] *Id.* at 10.

[2001] 570 U.S. ___, No. 12–96, slip op. (2013).

not mean that Arizona's attempt to comply with the Act could not have been a legitimate state interest, as Arizona created the plan at issue in 2010, and *Shelby County* was not decided until 2013.[2002]

Gerrymandering and the permissible use of multimember districts present examples of the third major issue. It is clear that racially based gerrymandering is unconstitutional under the Fifteenth Amendment, at least when it is accomplished through the manipulation of district lines.[2003] Even if racial gerrymandering is intended to benefit minority voting populations, it is subject to strict scrutiny under the Equal Protection Clause if racial considerations are the dominant and controlling rationale in drawing district lines.[2004] Showing that a district's "bizarre" shape departs from traditional districting principles such as compactness, contiguity, and respect for political subdivision lines may serve to reinforce such a claim,[2005] although a plurality of the Justices would not preclude the creation of "reasonably compact" majority-minority districts in order to remedy past discrimination or to comply with the requirements of the Voting Rights Act of 1965.[2006] On the other hand, the Court appears to have more recently weakened a challenger's ability to establish equal protection claims by showing both a strong deference to a legislature's articulation of legitimate political explanations for districting decisions, and by allowing for a strong correlation between race and political affiliation.[2007]

[2002] *See* 578 U.S. ___, No. 14–232, slip op. at 10 (2016).

[2003] Gomillion v. Lightfoot, 364 U.S. 339 (1960); Wright v. Rockefeller, 376 U.S. 52 (1964); Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court). Hunt v. Cromartie, 526 U.S. 541 (1999).

[2004] *See* Shaw v. Hunt, 517 U.S. 899, 904–05 (1996); Miller v. Johnson, 515 U.S. 900, 920 (1995). In determining whether racial criteria predominate in the drawing of a district, the Court has noted that the determination must be made with respect to a specific electoral district and not with respect to a state as an undifferentiated whole. *See* Ala. Legislative Black Caucus v. Alabama, 575 U.S. ___, No. 13–895, slip op. at 6 (2015).

[2005] Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993). *See also* Shaw v. Hunt, 517 U.S. 899 (1996) (creating an unconventionally-shaped majority-minority congressional district in one portion of state in order to alleviate effect of fragmenting geographically compact minority population in another portion of state does not remedy a violation of § 2 of Voting Rights Act, and is thus not a compelling governmental interest).

[2006] Bush v. Vera, 517 U.S. 952, 979 (1996) (opinion of Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy) (also involving congressional districts).

[2007] *See* Easley v. Cromartie, 532 U.S. 234, 242 (2001) ("Caution is especially appropriate in this case, where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated."). Nonetheless, in considering a state's legitimate reasons for a particular redistricting decision, the Court has held that legislative efforts to create districts of approximately equal population should not be weighed against the use of race to determine whether race predominates, as the

Partisan or "political" gerrymandering raises more difficult issues. Several lower courts ruled that the issue was beyond judicial cognizance,[2008] and the Supreme Court itself, upholding an apportionment plan frankly admitted to have been drawn with the intent to achieve a rough approximation of the statewide political strengths of the two parties, recognized the goal as legitimate and observed that, while the manipulation of apportionment and districting is not wholly immune from judicial scrutiny, "we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States."[2009]

In 1986, however, in a decision of potentially major import reminiscent of *Baker v. Carr*, the Court in *Davis v. Bandemer*[2010] ruled that partisan gerrymandering in state legislative redistricting is justiciable under the Equal Protection Clause. But, although the vote was 6 to 3 in favor of justiciability, a majority of Justices could not agree on the proper test for determining whether particular gerrymandering is unconstitutional, and the lower court's holding of unconstitutionality was reversed by vote of 7 to 2.[2011] Thus, although courthouse doors were now ajar for claims of partisan gerrymandering, it was unclear what it would take to succeed on the merits.

On the justiciability issue, the Court viewed the "political question" criteria as no more applicable than they had been in *Baker v. Carr*. Because *Reynolds v. Sims* had declared "fair and effective representation for all citizens"[2012] to be "the basic aim of legislative apportionment," and because racial gerrymandering issues had been

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"equal population" goal is a "background rule" that animates all redistricting decisions. *See Ala. Legislative Black Caucus*, slip op. at 17.

[2008] *E.g.*, WMCA, Inc. v. Lomenzo, 238 F. Supp. 916 (S.D.N.Y. 1965) (three-judge court), aff'd, 382 U.S. 4 (1965); Sincock v. Gately, 262 F. Supp. 739 (D. Del. 1967) (three-judge court).

[2009] Gaffney v. Cummings, 412 U.S. 735, 751, 754 (1973).

[2010] 478 U.S. 109 (1986). The vote on justiciability was 6–3, with Justice White's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, Powell, and Stevens. This represented an apparent change of view by three of the majority Justices, who just two years earlier had denied that "the existence of noncompact or gerrymandered districts is by itself a constitutional violation." Karcher v. Daggett, 466 U.S. 910, 917 (1983) (Justice Brennan, joined by Justices White and Marshall, dissenting from denial of stay in challenge to district court's rejection of a remedial districting plan on the basis that it contained "an intentional gerrymander").

[2011] Only Justices Powell and Stevens thought the Indiana redistricting plan void; Justice White, joined by Justices Brennan, Marshall, and Blackmun, thought the record inadequate to demonstrate continuing discriminatory impact, and Justice O'Connor, joined by Chief Justice Burger and by Justice Rehnquist, would have ruled that partisan gerrymandering is nonjusticiable as constituting a political question not susceptible to manageable judicial standards.

[2012] 377 U.S. 533, 565–66 (1964). This phrase has had a life of its own in the commentary. *See* D. Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 SUP. CT. REV. 175, and sources cited therein. It is not

treated as justiciable, the Court viewed the representational issues raised by partisan gerrymandering as indistinguishable. Agreement as to the existence of "judicially discoverable and manageable standards for resolving" gerrymandering issues, however, did not result in a consensus as to what those standards are.[2013] Although a majority of Justices agreed that discriminatory effect as well as discriminatory intent must be shown, there was significant disagreement as to what constitutes discriminatory effect.

Justice White's plurality opinion suggested that there need be "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."[2014] Moreover, continued frustration of the chance to influence the political process cannot be demonstrated by the results of only one election; there must be a history of disproportionate results or a finding that such results will continue. Justice Powell, joined by Justice Stevens, did not formulate a strict test, but suggested that "a heavy burden of proof" should be required, and that courts should look to a variety of factors as they relate to "the fairness of a redistricting plan" in determining whether it contains invalid gerrymandering. Among these factors are the shapes of the districts, adherence to established subdivision lines, statistics relating to vote dilution, the nature of the legislative process by which the plan was formulated, and evidence of intent revealed in legislative history.[2015]

In the following years, however, litigants seeking to apply *Davis* against alleged partisan gerrymandering were generally unsuccessful. Then, when the Supreme Court revisited the issue in 2004, it all but closed the door on such challenges. In *Vieth v. Jubelirer,*[2016] a four-Justice plurality would have overturned *Davis v. Bandemer*'s holding that challenges to political gerrymandering are justiciable, but five Justices disagreed. The plurality argued that partisan considerations are an intrinsic part of establishing districts,[2017] that no judicially discernable or manageable standards exist to evaluate

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clear from its original context, however, that the phrase was coined with such broad application in mind.

[2013] The quotation is from the Baker v. Carr measure for existence of a political question, 369 U.S. 186, 217 (1962).

[2014] 478 U.S. at 133. Joining in this part of the opinion were Justices Brennan, Marshall, and Blackmun.

[2015] 478 U.S. at 173. A similar approach had been proposed in Justice Stevens' concurring opinion in Karcher v. Daggett, 462 U.S. 725, 744 (1983).

[2016] 541 U.S. 267 (2004).

[2017] 541 U.S. at 285–86.

unlawful partisan gerrymandering,[2018] and that the power to address the issue of political gerrymandering resides in Congress.[2019]

Of the five Justices who believed that challenges to political gerrymandering are justiciable, four dissented, but Justice Kennedy concurred with the four-Justice plurality's holding, thereby upholding Pennsylvania's congressional redistricting plan against a political gerrymandering challenge. Justice Kennedy agreed that the lack "of any agreed upon model of fair and effective representation" or "substantive principles of fairness in districting" left the Court with "no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."[2020] But, though he concurred in the holding, Justice Kennedy held out hope that judicial relief from political gerrymandering may be possible "if some limited and precise rationale were found" to evaluate partisan redistricting. *Davis v. Bandemer* was thus preserved.[2021]

In *League of United Latin American Citizens v. Perry*, a widely splintered Supreme Court plurality largely upheld a Texas congressional redistricting plan that the state legislature had drawn mid-decade, seemingly with the sole purpose of achieving a Republican congressional majority.[2022] The plurality did not revisit the justiciability question, but examined "whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."[2023] The plurality was "skeptical . . . of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted." For one thing, although "[t]he legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, . . . partisan aims did not guide every line it drew."[2024] Apart from that,

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[2018] 541 U.S. at 281–90 .

[2019] 541 U.S. at 271 (noting that Article I, § 4 provides that Congress may alter state laws regarding the manner of holding elections for Senators and Representatives).

[2020] 541 U.S. at 307–08 (Justice Kennedy, concurring).

[2021] 541 U.S. at 306 (Justice Kennedy, concurring). Although Justice Kennedy admitted that no workable model had been proposed either to evaluate the burden partisan districting imposed on representational rights or to confine judicial intervention once a violation has been established, he held out the possibility that such a standard may emerge, based on either equal protection or First Amendment principles.

[2022] 548 U.S. 399, 417 (2006). The design of one congressional district was held to violate the Voting Rights Act because it diluted the voting power of Latinos. Id. at 423–443.

[2023] 548 U.S. at 414.

[2024] 548 U.S. at 418, 417.

the "sole-motivation theory" fails to show what is necessary to identify an unconstitutional act of partisan gerrymandering: "a burden, as measured by a reliable standard, on the complainants' representational rights."[2025] Moreover, "[t]he sole-intent standard . . . is no more compelling when it is linked to . . . mid-decennial legislation. . . . [T]here is nothing inherently suspect about a legislature's decision to replace a mid-decade a court-ordered plan with one of its own. And even if there were, the fact of mid-decade redistricting alone is no sure indication of unlawful political gerrymanders."[2026] The plurality also found "that mid-decade redistricting for exclusively partisan purposes" did not in this case "violate[ ] the one-person, one-vote requirement."[2027] Because ordinary mid-decade districting plans do not necessarily violate the one-person, one-vote requirement, the only thing out of the ordinary with respect to the Texas plan was that it was motivated solely by partisan considerations, and the plurality had already rejected the sole-motivation theory.[2028] *League of United Latin American Citizens v. Perry* thus left earlier Court precedent essentially unchanged. Claims of unconstitutional partisan gerrymandering are justiciable, but a reliable measure of what constitutes unconstitutional partisan gerrymandering remains to be found.

It had been thought that the use of multimember districts to submerge racial, ethnic, and political minorities might be treated differently,[2029] but in *Whitcomb v. Chavis*[2030] the Court, while dealing with the issue on the merits, so enveloped it in strict standards of proof and definitional analysis as to raise the possibility that it might be beyond judicial review. In *Chavis* the Court held that inasmuch as the multimember districting represented a state policy of more than 100 years observance and could not therefore be said to be motivated by racial or political bias, only an actual showing that the multimember delegation in fact inadequately represented the allegedly submerged minority would suffice to raise a constitutional question. But the Court also rejected as impermissible the argument that any interest group had any sort of right to be represented in a legislative body, in proportion to its members' numbers

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[2025] 548 U.S. at 418.
[2026] 548 U.S. at 419.
[2027] 548 U.S. at 420–21.
[2028] 548 U.S. at 422.
[2029] Fortson v. Dorsey, 379 U.S. 433, 439 (1965); Burns v. Richardson, 384 U.S. 73, 88–89 (1965); Kilgarlin v. Hill, 386 U.S. 120, 125 n.3 (1967).
[2030] 403 U.S. 124 (1971). Justice Harlan concurred specially, id. at 165, and Justices Douglas, Brennan, and Marshall, dissented, finding racial discrimination in the operation of the system. Id. at 171.

or on some other basis, so that the failure of that group to elect anyone merely meant that alone or in combination with other groups it simply lacked the strength to obtain enough votes, whether the election be in single-member or in multimember districts. That fact of life was not of constitutional dimension, whether the group was composed of blacks, or Republicans or Democrats, or some other category of persons. Thus, the submerging argument was rejected, as was the argument of a voter in another county that the Court should require uniform single-member districting in populous counties because voters in counties that elected large delegations in blocs had in effect greater voting power than voters in other districts; this argument the Court found too theoretical and too far removed from the actualities of political life.

Subsequently, and surprisingly in light of *Chavis*, the Court in *White v. Regester* [2031] affirmed a district court invalidation of the use of multimember districts in two Texas counties on the ground that, when considered in the totality of the circumstances of discrimination in registration and voting and in access to other political opportunities, such use denied African-Americans and Mexican-Americans the opportunity to participate in the election process in a reliable and meaningful manner.[2032]

Doubt was cast on the continuing vitality of *White v. Regester*, however, by the badly split opinion of the Court in *City of Mobile v. Bolden*.[2033] A plurality undermined the earlier case in two respects, although it is not at all clear that a majority of the Court had been or could be assembled on either point. First, the plurality argued that an intent to discriminate on the part of the redistricting body must be shown before multimember districting can be held to violate the Equal Protection Clause.[2034] Second, the plurality read *White v. Regester* as being consistent with this principle and the various factors developed in that case to demonstrate the existence of un-

[2031] 412 U.S. 755, 765–70 (1973).

[2032] "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 765–66.

[2033] 446 U.S. 55 (1980).

[2034] 446 U.S. at 65–68 (Justices Stewart, Powell, Rehnquist, and Chief Justice Burger). On intent versus impact analysis, *see* discussion, supra. Justices Blackmun and Stevens concurred on other grounds, id. at 80, 83, and Justices White, Brennan, and Marshall dissented. Id. at 94, 103. Justice White agreed that purposeful discrimination must be found, id. at 101, while finding it to have been shown, Justice Blackmun assumed that intent was required, and Justices Stevens, Brennan, and Marshall would not so hold.

constitutional discrimination to be in fact indicia of intent; however, the plurality seemingly disregarded the totality of circumstances test used in *Regester* and evaluated instead whether each factor alone was sufficient proof of intent.[2035]

Again switching course, the Court in *Rogers v. Lodge* [2036] approved the findings of the lower courts that a multimember electoral system for electing a county board of commissioners was being maintained for a racially discriminatory purpose, although it had not been instituted for that purpose. Applying a totality of the circumstances test, and deferring to lower court factfinding, the Court, in an opinion by one of the *Mobile* dissenters, canvassed a range of factors that it held could combine to show a discriminatory motive, and largely overturned the limitations that the *Mobile* plurality had attempted to impose in this area. With the enactment of federal legislation specifically addressed to the issue of multimember districting and dilution of the votes of racial minorities, however, it may be that the Court will have little further opportunity to develop the matter in the context of constitutional litigation.[2037] In *Thornburg v. Gingles*,[2038] the Court held that multimember districting violates § 2 of the Voting Rights Act by diluting the voting power of a racial minority when that minority is "sufficiently large and geographically compact to constitute a majority in a single-member district," when it is politically cohesive, and when block voting by the majority "usually" defeats preferred candidates of the minority.

Finally, the Court has approved the discretionary exercise of equity powers by the lower federal courts in drawing district boundaries and granting other relief in districting and apportionment

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[2035] 446 U.S. at 68–74. Four Justices rejected this view of the plurality, while Justice Stevens also appeared to do so but followed a mode of analysis significantly different from that of any other Justice.

[2036] 458 U.S. 613 (1982). Joining the opinion of the Court were Justices White, Brennan, Marshall, Blackmun, O'Connor, and Chief Justice Burger. Dissenting were Justices Powell and Rehnquist, id. at 628, and Justice Stevens. Id. at 631.

[2037] On the legislation, *see* "Congressional Definition of Fourteenth Amendment Rights," *infra*.

[2038] 478 U.S. 30, 50–51 (1986). Use of multimember districting for purposes of political gerrymandering was at issue in Davis v. Bandemer, 478 U.S. 109 (1986), decided the same day as *Gingles*, but there was no agreement as to the appropriate constitutional standard. A plurality led by Justice White relied on the Whitcomb v. Chavis reasoning, suggesting that proof that multimember districts were constructed for the advantage of one political party falls short of the necessary showing of deprivation of opportunity to participate in the electoral process. 478 U.S. at 136–37. Two Justices thought the proof sufficient for a holding of invalidity, the minority party having won 46% of the vote but only 3 of 21 seats from the multimember districts, and "the only discernible pattern [being] the appearance of these districts in areas where their winner-take-all aspects can best be employed to debase [one party's] voting strength," (id. at 179–80, Justices Powell and Stevens), and three Justices thought political gerrymandering claims to be nonjusticiable.

cases,[2039] although that power is bounded by the constitutional violations found, so that courts do not have *carte blanche*, and they should ordinarily respect the structural decisions made by state legislatures and the state constitutions.[2040]

Counting and Weighing of Votes.—In *Bush v. Gore*,[2041] a case of dramatic result but of perhaps limited significance for equal protection, the Supreme Court ended a ballot dispute that arose during the year 2000 presidential election. The Florida Supreme Court had ordered a partial manual recount of the Florida vote for Presidential Electors, requiring that all ballots that contained a "clear indication of the intent of the voter" be counted, but allowing the relevant counties to determine what physical characteristics of a ballot would satisfy this test. The Court held that the Equal Protection Clause would be violated by allowing arbitrary and disparate methods of discerning voter intent in the recounting of ballots. The decision was surprising to many, as a lack of uniformity in voting standards and procedures is inherent in the American system of decentralized voting administration. The Court, however, limited its holding to "the present circumstances," where "a state court with the power to assure uniformity" fails to provide "minimal procedural safeguards."[2042] Citing the "many complexities" of application of equal protection "in election processes generally," the Court distinguished the many situations where disparate treatment of votes results from different standards being applied by different local jurisdictions.

In cases where votes are given more or less weight by operation of law, it is not the weighing of votes itself that may violate the 14th Amendment, but the manner in which it is done. *Gray v. Sanders*,[2043] for instance, struck down the Georgia county unit sys-

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[2039] *E.g.*, Reynolds v. Sims, 377 U.S. 533, 586–87 (1964); Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 195–200 (1972); White v. Weiser, 412 U.S. 783, 794–95 (1973); Upham v. Seamon, 456 U.S. 37, 41–42 (1982). When courts draw their own plans, the court is held to tighter standards than is a legislature and has to observe smaller population deviations and use single-member districts more than multi-member ones. Connor v. Johnson, 402 U.S. 690, 692 (1971); Chapman v. Meier, 420 U.S. 1, 14–21 (1975); Wise v. Lipscomb, 437 U.S. 535, 540 (1978). *Cf.* Mahan v. Howell, 410 U.S. 315, 333 (1973).

[2040] *E.g.*, Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972) (reduction of numbers of members); Whitcomb v. Chavis, 403 U.S. 124, 160–61 (1971) (disregard of policy of multimember districts not found unconstitutional); White v. Weiser, 412 U.S. 783, 794–95 (1973); Upham v. Seamon, 406 U.S. 37 (1982). *But see* Karcher v. Daggett, 466 U.S. 910 (1983) (denying cert. over dissent's suggestion that court-adopted congressional districting plan had strayed too far from the structural framework of the legislature's invalidated plan).

[2041] 531 U.S. 98 (2000).

[2042] 531 U.S. at 109.

[2043] 372 U.S. 368 (1963).

tem under which each county was allocated either two, four, or six votes in statewide elections and the candidate carrying the county received those votes. Because there were a few very populous counties and scores of poorly populated ones, the rural counties in effect dominated statewide elections and candidates with popular majorities statewide could be and were defeated. But *Gordon v. Lance* [2044] approved a provision requiring a 60-percent affirmative vote in a referendum election before constitutionally prescribed limits on bonded indebtedness or tax rates could be exceeded. The Court acknowledged that the provision departed from strict majority rule but stated that the Constitution did not prescribe majority rule; it instead proscribed discrimination through dilution of voting power or denial of the franchise because of some class characteristic—race, urban residency, or the like—and the provision at issue in this case was neither directed to nor affected any identifiable class.

The Right to Travel

The doctrine of the "right to travel" actually encompasses three separate rights, of which two have been notable for the uncertainty of their textual support. The first is the right of a citizen to move freely between states, a right venerable for its longevity, but still lacking a clear doctrinal basis.[2045] The second, expressly addressed by the first sentence of Article IV, provides a citizen of one state who is temporarily visiting another state the "Privileges and Immunities" of a citizen of the latter state.[2046] The third is the right of a new arrival to a state, who establishes citizenship in that state, to enjoy the same rights and benefits as other state citizens. This right is most often invoked in challenges to durational residency requirements, which require that persons reside in a state for a specified period of time before taking advantage of the benefits of that state's citizenship.

Durational Residency Requirements.—Challenges to durational residency requirements have traditionally been made under the Equal Protection Clause of the Fourteenth Amendment. In 1999, how-

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[2044] 403 U.S. 1 (1971).

[2045] Saenz v. Roe, 526 U.S. 489 (1999). "For the purposes of this case, we need not identify the source of [the right to travel] in the text of the Constitution. The right of 'free ingress and regress to and from' neighboring states which was expressly mentioned in the text of the Article of Confederation, may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'" Id. at 501 (citations omitted).

[2046] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) ("without some provision . . . removing from citizens of each State the disabilities of alienage in other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.").

ever, the Court approved a doctrinal shift, so that state laws that distinguished between their own citizens, based on how long they had been in the state, would be evaluated instead under the Privileges or Immunities Clause of the Fourteenth Amendment.[2047] The Court did not, however, question the continuing efficacy of the earlier cases.

A durational residency requirement creates two classes of persons: those who have been within the state for the prescribed period and those who have not.[2048] But persons who have moved recently, at least from state to state,[2049] have exercised a right protected by the Constitution, and the durational residency classification either deters the exercise of that right or penalizes those who have exercised it.[2050] Any such classification is invalid "unless shown to be necessary to promote a *compelling* governmental interest."[2051] The constitutional right to travel has long been recognized,[2052] but it is only relatively recently that the strict standard of equal protection review has been applied to nullify durational residency requirements.

Thus, in *Shapiro v. Thompson*,[2053] durational residency requirements conditioning eligibility for welfare assistance on one year's

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[2047] Saenz v. Roe, 526 U.S. 489, 502–03 (1999).

[2048] Dunn v. Blumstein, 405 U.S. 330, 334 (1972). Because the right to travel is implicated by state distinctions between residents and nonresidents, the relevant constitutional provision is the Privileges and Immunities Clause, Article IV, § 2, cl. 1.

[2049] Intrastate travel is protected to the extent that the classification fails to meet equal protection standards in some respect. *Compare* Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970) (three-judge court), aff'd. per curiam, 405 U.S. 1035 (1972), *with* Arlington County Bd. v. Richards, 434 U.S. 5 (1977). The same principle applies in the commerce clause cases, in which discrimination may run against in-state as well as out-of-state concerns. *Cf.* Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

[2050] Shapiro v. Thompson, 394 U.S. 618, 629–31, 638 (1969); Dunn v. Blumstein, 405 U.S. 330, 338–42 (1972); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Jones v. Helms, 452 U.S. 412, 420–21 (1981). *See also* Oregon v. Mitchell, 400 U.S. 112, 236–39 (1970) (Justices Brennan, White, and Marshall), and id. at 285–92 (Justices Stewart and Blackmun and Chief Justice Burger).

[2051] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis by Court); Graham v. Richardson, 403 U.S. 365, 375–76 (1971).

[2052] Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868); Edwards v. California, 314 U.S. 160 (1941) (both cases in context of direct restrictions on travel). The source of the right to travel and the reasons for reliance on the Equal Protection Clause are questions puzzled over and unresolved by the Court. United States v. Guest, 383 U.S. 745, 758, 759 (1966), and id. at 763–64 (Justice Harlan concurring and dissenting), id. at 777 n.3 (Justice Brennan concurring and dissenting); Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969), and id. at 671 (Justice Harlan dissenting); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 31–32 (1973); Jones v. Helms, 452 U.S. 412, 417–19 (1981); Zobel v. Williams, 457 U.S. 55, 60 & n.6 (1982), and id. at 66–68 (Justice Brennan concurring), 78–81 (Justice O'Connor concurring).

[2053] 394 U.S. 618 (1969).

residence in the state[2054] were voided. If the purpose of the requirements was to inhibit migration by needy persons into the state or to bar the entry of those who came from low-paying states to higher-paying ones in order to collect greater benefits, the Court said, the purpose was impermissible.[2055] If, on the other hand, the purpose was to serve certain administrative and related governmental objectives—the facilitation of the planning of budgets, the provision of an objective test of residency, minimization of opportunity for fraud, and encouragement of early entry of new residents into the labor force—then the requirements were rationally related to the purpose but they were not *compelling* enough to justify a classification that infringed a fundamental interest.[2056] In *Dunn v. Blumstein*,[2057] where the durational residency requirements denied the franchise to newcomers, such administrative justifications were found constitutionally insufficient to justify the classification.[2058] The Privileges or Immunities Clause of the Fourteenth Amendment was the basis for striking down a California law that limited welfare benefits for California citizens who had resided in the state for less than a year to the level of benefits that they would have received in the state of their prior residence.[2059]

However, a state one-year durational residency requirement for the initiation of a divorce proceeding was sustained in *Sosna v. Iowa*.[2060] Although it is not clear what the precise basis of the ruling is, it appears that the Court found that the state's interest in

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[2054] The durational residency provision established by Congress for the District of Columbia was also voided. 394 U.S. at 641–42.

[2055] 394 U.S. at 627–33. Gaddis v. Wyman, 304 F. Supp. 717 (N.D.N.Y. 1969), *aff'd sub nom.* Wyman v. Bowens, 397 U.S. 49 (1970), struck down a provision construed so as to bar only persons who came into the state solely to obtain welfare assistance.

[2056] 394 U.S. at 633–38. *Shapiro* was reaffirmed in Graham v. Richardson, 403 U.S. 365 (1971) (striking down durational residency requirements for aliens applying for welfare assistance), and in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (voiding requirement of one year's residency in county as condition to indigent's receiving nonemergency hospitalization or medical care at county's expense). When Connecticut and New York reinstituted the requirements, pleading a financial emergency as the compelling state interest, they were summarily rebuffed. Rivera v. Dunn, 329 F. Supp. 554 (D. Conn. 1971), aff'd per curiam, 404 U.S. 1054 (1972); Lopez v. Wyman, Civ. No. 1971–308 (W.D.N.Y. 1971), aff'd per curiam, 404 U.S. 1055 (1972). The source of the funds, state or federal, is irrelevant to application of the principle. Pease v. Hansen, 404 U.S. 70 (1971).

[2057] 405 U.S. 330 (1972). *But see* Marston v. Lewis, 410 U.S. 679 (1973), and Burns v. Fortson, 410 U.S. 686 (1973). Durational residency requirements of five and seven years respectively for candidates for elective office were sustained in Kanapaux v. Ellisor, 419 U.S. 891 (1974), and Sununu v. Stark, 420 U.S. 958 (1975).

[2058] For additional discussion of durational residence as a qualification to vote, see Voter Qualifications, supra.

[2059] Saenz v. Roe, 526 U.S. 489, 505 (1999).

[2060] 419 U.S. 393 (1975). Justices Marshall and Brennan dissented on the merits. Id. at 418.

requiring that those who seek a divorce from its courts be genuinely attached to the state and its desire to insulate divorce decrees from the likelihood of collateral attack justified the requirement.[2061] Similarly, durational residency requirements for lower in-state tuition at public colleges have been held constitutionally justifiable, again, however, without a clear statement of reason.[2062] More recently, the Court has attempted to clarify these cases by distinguishing situations where a state citizen is likely to "consume" benefits within a state's borders (such as the provision of welfare) from those where citizens of other states are likely to establish residency just long enough to acquire some portable benefit, and then return to their original domicile to enjoy them (such as obtaining a divorce decree or paying the in-state tuition rate for a college education).[2063]

A state scheme for returning to its residents a portion of the income earned from the vast oil deposits discovered within Alaska foundered upon the formula for allocating the dividends; that is, each adult resident received one unit of return for each year of residency subsequent to 1959, the first year of Alaska's statehood. The law thus created fixed, permanent distinctions between an ever-increasing number of classes of bona fide residents based on how long they had been in the state. The differences between the durational residency cases previously decided did not alter the bearing of the right to travel principle upon the distribution scheme, but the Court's decision went off on the absence of any permissible purpose underlying the apportionment classification and it thus failed even the rational basis test.[2064]

[2061] 419 U.S. at 409. But the Court also indicated that the plaintiff was not absolutely barred from the state courts, but merely required to wait for access (which was true in the prior cases as well and there held immaterial), and that possibly the state interests in marriage and divorce were more exclusive and thus more immune from federal constitutional attack than were the matters at issue in the previous cases. The Court also did not indicate whether it was using strict or traditional scrutiny.

[2062] Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), aff'd per curiam, 401 U.S. 985 (1971). *Cf.* Vlandis v. Kline, 412 U.S. 441, 452 & n.9 (1973), and id. at 456, 464, 467 (dicta). In Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974), the Court, noting the results, stated that "some waiting periods . . . may not be penalties" and thus would be valid.

[2063] Saenz v. Roe, 526 U.S. at 505.

[2064] Zobel v. Williams, 457 U.S. 55 (1982). Somewhat similar was the Court's invalidation on equal protection grounds of a veterans preference for state employment limited to persons who were state residents when they entered military service; four Justices also thought the preference penalized the right to travel. Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986).

Still unresolved are issues such as durational residency requirements for occupational licenses and other purposes.[2065] But this line of cases does not apply to state residency requirements themselves, as distinguished from durational provisions,[2066] and the cases do not inhibit the states when, having reasons for doing so, they bar travel by certain persons.[2067]

Marriage and Familial Relations

In *Zablocki v. Redhail*,[2068] importing into equal protection analysis the doctrines developed in substantive due process, the Court identified the right to marry as a "fundamental interest" that necessitates "critical examination" of governmental restrictions that "interfere directly and substantially" with the right.[2069] The Court struck down a statute that prohibited any resident under an obligation to support minor children from marrying without a court order; such order could only be obtained upon a showing that the support obligation had been and was being complied with and that the children were not and were not likely to become public charges. The plaintiff was an indigent wishing to marry but prevented from doing so because he was not complying with a court order to pay support to an illegitimate child he had fathered, and because the child was receiving public assistance. Applying "critical examination," the Court observed that the statutory prohibition could not be sustained unless it was justified by sufficiently important state interests and was closely tailored to effectuate only those interests.[2070] Two interests were offered that the Court was willing to accept as legitimate and substantial: requiring permission under the circum-

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[2065] La Tourette v. McMaster, 248 U.S. 465 (1919), upholding a two-year residence requirement to become an insurance broker, must be considered of questionable validity. Durational periods for admission to the practice of law or medicine or other professions have evoked differing responses by lower courts.

[2066] *E.g.*, McCarthy v. Philadelphia Civil Service Comm'n, 424 U.S. 645 (1976) (ordinance requiring city employees to be and to remain city residents upheld). *See* Memorial Hospital v. Maricopa County, 415 U.S. 250, 255 (1974). *See also* Martinez v. Bynum, 461 U.S. 321 (1983) (bona fide residency requirement for free tuition to public schools).

[2067] Jones v. Helms, 452 U.S. 412 (1981) (statute made it a misdemeanor to abandon a dependent child but a felony to commit the offense and then leave the state).

[2068] 434 U.S. 374 (1978).

[2069] Although the Court's due process decisions have broadly defined a protected liberty interest in marriage and family, no previous case had held marriage to be a fundamental right occasioning strict scrutiny. 434 U.S. at 396–397 (Justice Powell concurring).

[2070] 434 U.S. at 388. Although the passage is not phrased in the usual compelling interest terms, the concurrence and the dissent so viewed it without evoking disagreement from the Court. Id. at 396 (Justice Powell), 403 (Justice Stevens), 407 (Justice Rehnquist). Justices Powell and Stevens would have applied intermediate scrutiny to void the statute, both for its effect on the ability to marry and for its impact upon indigents. Id. at 400, 406 n.10.

stances furnished an opportunity to counsel applicants on the necessity of fulfilling support obligations, and the process protected the welfare of children who needed support, either by providing an incentive to make support payments or by preventing applicants from incurring new obligations through marriage. The first interest was not served, the Court found, there being no provision for counseling and no authorization of permission to marry once counseling had taken place. The second interest was found not to be effectuated by the means. Alternative devices to collect support existed, the process simply prevented marriage without delivering any money to the children, and it singled out obligations incurred through marriage without reaching any other obligations.

Other restrictions that relate to the incidents of or prerequisites for marriage were carefully distinguished by the Court as neither entitled to rigorous scrutiny nor put in jeopardy by the decision.[2071] For example, in *Califano v. Jobst*,[2072] a unanimous Court sustained a Social Security provision that revoked disabled dependents' benefits of any person who married, except when the person married someone who was also entitled to receive disabled dependents' benefits. Plaintiff, a recipient of such benefits, married someone who was also disabled but not qualified for the benefits, and his benefits were terminated. He sued, alleging that distinguishing between classes of persons who married eligible persons and who married ineligible persons infringed upon his right to marry. The Court rejected the argument, finding that benefit entitlement was not based upon need but rather upon actual dependency upon the insured wage earner; marriage, Congress could have assumed, generally terminates the dependency upon a parent-wage earner. Therefore, it was permissible as an administrative convenience to make marriage the terminating point but to make an exception when both marriage partners were receiving benefits, as a means of lessening hardship and recognizing that dependency was likely to continue. The marriage rule was therefore not to be strictly scrutinized or invalidated "simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby."[2073]

[2071] 434 U.S. at 386–87. Chief Justice Burger thought the interference here was "intentional and substantial," whereas the provision in *Jobst* was neither. Id. at 391 (concurring).

[2072] 434 U.S. 47 (1977).

[2073] 434 U.S. at 54. *See also* Mathews v. De Castro, 429 U.S. 181 (1976) (provision giving benefits to a married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying them to a divorced woman under 62 with dependents represents a rational judgment by Congress with respect to likely dependency of married but not divorced women and does not deny equal

It seems obvious, therefore, that the determination of marriage and familial relationships as fundamental will be a fruitful beginning of litigation in the equal protection area.[2074]

Sexual Orientation

In *Romer v. Evans*,[2075] the Supreme Court struck down a state constitutional amendment that both overturned local ordinances prohibiting discrimination against homosexuals, lesbians or bisexuals, and prohibited any state or local governmental action to either remedy discrimination or to grant preferences based on sexual orientation. The Court declined to follow the lead of the Supreme Court of Colorado, which had held that the amendment infringed on gays' and lesbians' fundamental right to participate in the political process.[2076] The Court also rejected the application of the heightened standard reserved for suspect classes, and sought only to establish whether the legislative classification had a rational relation to a legitimate end.

The Court found that the amendment failed even this restrained review. Animus against a class of persons was not considered by the Court as a legitimate goal of government: "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[2077] The Court then rejected arguments that the amendment protected the freedom of association rights of landlords and employers, or that it would conserve resources in fighting discrimination against other groups. The Court found that the scope of the law was unnecessarily broad to achieve these stated purposes, and that no other legitimate rationale existed for such a restriction.

In *United States v. Windsor*,[2078] the Court struck down Section 3 of the Defense of Marriage Act (DOMA), which provided that for

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protection); Califano v. Boles, 443 U.S. 282 (1979) (limitation of certain Social Security benefits to widows and divorced wives of wage earners does not deprive mother of illegitimate child who was never married to wage earner of equal protection).

[2074] *See*, *e.g.*, Quilloin v. Walcott, 434 U.S. 246 (1978) (state's giving to father of legitimate child who is divorced or separated from mother while denying to father of illegitimate child a veto over the adoption of the child by another does not under the circumstances deny equal protection. The circumstances were that the father never exercised custody over the child or shouldered responsibility for his supervision, education, protection, or care, although he had made some support payments and given him presents). *Accord*, Lehr v. Robertson, 463 U.S. 248 (1983).

[2075] 517 U.S. 620 (1996).

[2076] Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

[2077] 517 U.S. at 634, *quoting* Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

[2078] 570 U.S. ___, No. 12–307, slip op. (2013).

purposes of any federal act, ruling, regulation, or interpretation by an administrative agency, the word "spouse" would mean a person of the opposite sex who is a husband or a wife.[2079] In *Windsor*, the petitioner had been married to her same-sex partner in Canada and she lived in New York, where the marriage was recognized. After her partner died, the petitioner sought to claim a federal estate tax exemption for surviving spouses.[2080] In examining the federal statute, the Court initially noted that, while "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States,"[2081] Section 3 of DOMA took the "unusual" step of departing from the "history and tradition of reliance on state law to define marriage" in order to alter the reach of over 1,000 federal laws and limit the scope of federal benefits.[2082] Citing to *Romer*, the Court noted that discrimination of "unusual character" warranted more careful scrutiny.[2083]

In approving of same-sex marriages, the State of New York was conferring a "dignity and status of immense import,"[2084] and the federal government, with Section 3 of DOMA, was aiming to impose "restrictions and disabilities" on and "injure the very class" New York sought to protect.[2085] In so doing, the Court concluded that Section 3 of DOMA was motivated by improper animus or purpose because the law's avowed "purpose and practical" effect was to "impose a . . . stigma upon all who enter into same-sex marriages made lawful" by the states.[2086] Holding that "no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity,"[2087] the Court held that Section 3 of DOMA violates "basic due process and equal protection principles applicable to the Federal Government."[2088] In striking down Section 3, the Court did not

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[2079] Defense of Marriage Act, Pub. L. 104–199, § 3, 110 Stat. 2419, 1 U.S.C. § 7 (2006).

[2080] Section 3 also provided that "marriage" would mean only a legal union between one man and one woman.

[2081] *Windsor*, slip op. at 14–16.

[2082] *Id.* at 18–19.

[2083] *Id.* at 19 (citing Romer v. Evans, 517 U.S. 620, 633).

[2084] *Id.* at 18.

[2085] *Id.* at 19–20.

[2086] *Id.* at 21.

[2087] *Id.* at 25–26.

[2088] *Id.* at 20. Because the case was decided under the Due Process Clause of the Fifth Amendment, which comprehends both substantive due process and equal protection principles (as incorporated through the Fourteenth Amendment), this statement leaves unclear precisely how each of these doctrines bears on the presented issue.

expressly set out what test the government must meet to justify laws calling for differentiated treatment based on sexual orientation.

Two years after *Windsor*, the Court, in *Obergefell v. Hodges*, invalidated several state laws limiting the licensing and recognition of marriage to two people of the opposite sex.[2089] While the decision primarily rested on substantive due process grounds,[2090] the Court noted that the "right of same sex couples to marry" is "derived, too," from the Fourteenth Amendment's Equal Protection Clause.[2091] In so holding, the Court recognized a general "synergy" between the Due Process Clause and the Equal Protection Clause, noting that just as evolving societal norms inform the liberty rights of same-sex couples, so too do "new insights and societal understandings" about homosexuality reveal "unjustified inequality" with respect to traditional concepts about the institution of marriage.[2092] In this sense, the Court viewed marriage laws prohibiting the licensing and recognition of same-sex marriages as working a grave and continuing harm to same-sex couples, serving to "disrespect and subordinate them."[2093] As a result, the Court ruled that the Equal Protection Clause prevents states from excluding same-sex couples from civil marriage on the same terms and conditions as opposite sex couples.[2094]

Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection

Generally.—Whatever may be the status of wealth distinctions *per se* as a suspect classification,[2095] there is no doubt that when the classification affects some area characterized as or considered to be fundamental in nature in the structure of our polity—the ability of criminal defendants to obtain fair treatment throughout the system, the right to vote, to name two examples—then the classifying body bears a substantial burden in justifying what it has

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[2089] *See* 576 U.S. ___, No. 14–556, slip op. at 2 (2015).
[2090] *Id.* at 10–19.
[2091] *Id.* at 19.
[2092] *Id.* at 19–21.
[2093] *Id.* at 22.
[2094] *Id*. at 23. Interestingly, however, the *Obergefell* Court did not engage in any traditional equal protection analysis in which a government's classification is adjudged based on the nature of the classification and the relationship between the classification and the underlying justifications for the government policy. Instead the *Obergefell* Court concluded that state classifications distinguishing between opposite- and same-sex couples violated equal protection principles on their face and therefore were unconstitutional. *Id.* at 21–22; *see also supra* Equal Protection of the Laws: Equal Protection: Judging Classifications by Law: The New Standards: Active Review.
[2095] San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

done. The cases begin with *Griffin v. Illinois*,[2096] surely one of the most seminal cases in modern constitutional law. There, the state conditioned full direct appellate review—review to which all convicted defendants were entitled—on the furnishing of a bill of exceptions or report of the trial proceedings, in the preparation of which the stenographic transcript of the trial was usually essential. Only indigent defendants sentenced to death were furnished free transcripts; all other convicted defendants had to pay a fee to obtain them. "In criminal trials," Justice Black wrote in the plurality opinion, "a State can no more discriminate on account of poverty than on account of religion, race, or color." Although the state was not obligated to provide an appeal at all, when it does so it may not structure its system "in a way that discriminates against some convicted defendants on account of their poverty." The system's fault was that it treated defendants with money differently from defendants without money. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." [2097]

The principle of *Griffin* was extended in *Douglas v. California*,[2098] in which the court held to be a denial of due process and equal protection a system whereby in the first appeal as of right from a conviction counsel was appointed to represent indigents only if the appellate court first examined the record and determined that counsel would be of advantage to the appellant. "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself." [2099]

[2096] 351 U.S. 12 (1956).

[2097] 351 U.S. at 17, 18, 19. Although Justice Black was not explicit, it seems clear that the system was found to violate both the Due Process and Equal Protection Clauses. Justice Frankfurter's concurrence dealt more expressly with the premise of the Black opinion. "It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course, a State need not equalize economic conditions. . . . But when a State deems it wise and just that convictions be susceptible to review by an appellate court, it cannot by force of its exactions draw a line which precludes convicted indigent persons, forsooth erroneously convicted, from securing such a review merely by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were practical opportunity for review not foreclosed." Id. at 23.

[2098] 372 U.S. 353 (1963). Justice Clark dissented, protesting the Court's "new fetish for indigency," id. at 358, 359, and Justices Harlan and Stewart also dissented. Id. at 360.

[2099] 372 U.S. at 357–58.

From the beginning, Justice Harlan opposed reliance on the Equal Protection Clause at all, arguing that a due process analysis was the proper criterion to follow. "It is said that a State cannot discriminate between the 'rich' and the 'poor' in its system of criminal appeals. That statement of course commands support, but it hardly sheds light on the true character of the problem confronting us here. . . . All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action." A fee system neutral on its face was not a classification forbidden by the Equal Protection Clause. "[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against 'indigents' by name would be unconstitutional." [2100] As he protested in *Douglas*: "The States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws. But it is a far different thing to suggest that this provision prevents the State from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand, from making some effort to redress economic imbalances while not eliminating them entirely." [2101]

Due process furnished the standard, Justice Harlan felt, for determining whether fundamental fairness had been denied. Where an appeal was barred altogether by the imposition of a fee, the line might have been crossed to unfairness, but on the whole he did not see that a system that merely recognized differences between and among economic classes, which as in *Douglas* made an effort to ameliorate the fact of the differences by providing appellate scrutiny of cases of right, was a system that denied due process.[2102]

The Court has reiterated that both due process and equal protection concerns are implicated by restrictions on indigents' exercise of the right of appeal. "In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal." [2103]

[2100] Griffin v. Illinois, 351 U.S. 12, 34, 35 (1956).
[2101] Douglas v. California, 372 U.S. 353, 361 (1963).
[2102] 372 U.S. at 363–67.
[2103] Evitts v. Lucey, 469 U.S. 387, 405 (1985) (holding that due process requires that counsel provided for appeals as of right must be effective).

Criminal Procedure.—Criminal appeals" [I]t is now fundamental that, once established, . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[2104] "In all cases the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds. . . ."[2105] No state may condition the right to appeal[2106] or the right to file a petition for *habeas corpus*[2107] or other form of postconviction relief upon the payment of a docketing fee or some other type of fee when the petitioner has no means to pay. Similarly, although the states are not required to furnish full and complete transcripts of their trials to indigents when excerpted versions or some other adequate substitute is available, if a transcript is necessary to adequate review of a conviction, either on appeal or through procedures for postconviction relief, the transcript must be provided to indigent defendants or to others unable to pay.[2108] This right may not be denied by drawing a felony-misdemeanor distinction or by limiting it to those cases in which confinement is the penalty.[2109] A defendant's right to counsel is to be protected as well as the similar right of the defendant with funds.[2110] The right to counsel on appeal necessarily means the right to *effective* assistance of counsel.[2111]

[2104] Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

[2105] Draper v. Washington, 372 U.S. 487, 496 (1963).

[2106] Burns v. Ohio, 360 U.S. 252 (1959); Douglas v. Green, 363 U.S. 192 (1960).

[2107] Smith v. Bennett, 365 U.S. 708 (1961).

[2108] Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958) (unconstitutional to condition free transcript upon trial judge's certification that "justice will thereby be promoted"); Draper v. Washington, 372 U.S. 487 (1963) (unconstitutional to condition free transcript upon judge's certification that the allegations of error were not "frivolous"); Lane v. Brown, 372 U.S. 477 (1963) (unconstitutional to deny free transcript upon determination of public defender that appeal was in vain); Long v. District Court, 385 U.S. 192 (1966) (indigent prisoner entitled to free transcript of his habeas corpus proceeding for use on appeal of adverse decision therein); Gardner v. California, 393 U.S. 367 (1969) (on filing of new habeas corpus petition in appellate court upon an adverse nonappealable habeas ruling in a lower court where transcript was needed, one must be provided an indigent prisoner). *See also* Rinaldi v. Yeager, 384 U.S. 305 (1966). For instances in which a transcript was held not to be needed, *see* Britt v. North Carolina, 404 U.S. 266 (1971); United States v. MacCollom, 426 U.S. 317 (1976).

[2109] Williams v. Oklahoma City, 395 U.S. 458 (1969); Mayer v. City of Chicago, 404 U.S. 189 (1971).

[2110] Douglas v. California, 372 U.S. 353 (1963); Swenson v. Bosler, 386 U.S. 258 (1967); Anders v. California, 386 U.S. 738 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967). A rule requiring a court-appointed appellate counsel to file a brief explaining reasons why he concludes that a client's appeal is frivolous does not violate the client's right to assistance of counsel on appeal. McCoy v. Court of Appeals, 486 U.S. 429 (1988). The right is violated if the court allows counsel to withdraw by merely certifying that the appeal is "meritless" without also filing an *Anders* brief supporting the certification. Penson v. Ohio, 488 U.S. 75 (1988). *But see* Smith v. Robbins, 528 U.S. 259 (2000) (upholding California law providing that appellate counsel may

But, deciding a point left unresolved in *Douglas*, the Court held that neither the Due Process nor the Equal Protection Clause requires a state to furnish counsel to a convicted defendant seeking, after he had exhausted his appeals of right, to obtain discretionary review of his case in the state's higher courts or in the United States Supreme Court. Due process does not require that, after an appeal has been provided, the state must always provide counsel to indigents at every stage. "Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty." That essentially equal protection issue was decided against the defendant in the context of an appellate system in which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.[2112] Not even death row inmates have a constitutional right to an attorney to prepare a petition for collateral relief in state court.[2113]

This right to legal assistance, especially in the context of the constitutional right to the writ of habeas corpus, means that in the absence of other adequate assistance, as through a functioning public defender system, a state may not deny prisoners legal assistance of another inmate[2114] and it must make available certain minimal legal materials.[2115]

The Criminal Sentence.—A convicted defendant may not be imprisoned solely because of his indigency. *Williams v. Illinois*[2116] held that it was a denial of equal protection for a state to extend

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limit his or her role to filing a brief summarizing the case and record and requesting the court to examine record for non-frivolous issues). On the other hand, since there is no constitutional right to counsel for indigent prisoners seeking postconviction collateral relief, there is no requirement that withdrawal be justified in an *Anders* brief if a state has provided counsel for postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987) (counsel advised the court that there were no arguable bases for collateral relief).

[2111] Evitts v. Lucey, 469 U.S. 387 (1985).

[2112] Ross v. Moffitt, 417 U.S. 600 (1974). *See also* Fuller v. Oregon, 417 U.S. 40 (1974) (statute providing, under circumscribed conditions, that indigent defendant, who receives state-compensated counsel and other assistance for his defense, who is convicted, and who subsequently becomes able to repay costs, must reimburse state for costs of his defense in no way operates to deny him assistance of counsel or the equal protection of the laws).

[2113] Murray v. Giarratano, 492 U.S. 1 (1989) (upholding Virginia's system under which "unit attorneys" assigned to prisons are available for some advice prior to the filing of a claim, and a personal attorney is assigned if an inmate succeeds in filing a petition with at least one non-frivolous claim).

[2114] Johnson v. Avery, 393 U.S. 483 (1969).

[2115] Younger v. Gilmore, 404 U.S. 15 (1971); Bounds v. Smith, 430 U.S. 817 (1977).

[2116] 399 U.S. 235 (1970).

the term of imprisonment of a convicted defendant beyond the statutory maximum provided because he was unable to pay the fine that was also levied upon conviction. And *Tate v. Short*[2117] held that, in situations in which no term of confinement is prescribed for an offense but only a fine, the court may not jail persons who cannot pay the fine, unless it is impossible to develop an alternative, such as installment payments or fines scaled to ability to pay. Willful refusal to pay may, however, be punished by confinement.

Voting and Ballot Access.—Treatment of indigency in a civil type of "fundamental interest" analysis came in *Harper v. Virginia Bd. of Elections*,[2118] in which it was held that "a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." The Court emphasized both the fundamental interest in the right to vote and the suspect character of wealth classifications. "[W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."[2119]

The two factors—classification in effect along wealth lines and adverse effect upon the exercise of the franchise—were tied together in *Bullock v. Carter*[2120] in which the setting of high filing fees for certain offices was struck down under a standard that was stricter than the traditional equal protection standard but apparently less strict than the compelling state interest standard. The Court held that the high filing fees were not rationally related to the state's interest in allowing only serious candidates on the ballot because some serious candidates could not pay the fees whereas some frivolous candidates could and that the state could not finance the costs of holding the elections from the fees when the voters were thereby deprived of their opportunity to vote for candidates of their preferences.

[2117] 401 U.S. 395 (1971). The Court has not yet treated a case in which the permissible sentence is "$30 or 30 days" or some similar form where either confinement or a fine will satisfy the State's penal policy.

[2118] 383 U.S. 663, 666 (1966). The poll tax required to be paid as a condition of voting was $1.50 annually. Justices Black, Harlan, and Stewart dissented. Id. at 670, 680.

[2119] 383 U.S. at 668. The Court observed that "the right to vote is too precious, too fundamental to be so burdened or conditioned." Id. at 670.

[2120] 405 U.S. 134 (1972).

Extending *Bullock*, the Court held it impermissible for a state to deny indigents, and presumably other persons unable to pay filing fees, a place on the ballot for failure to pay filing fees, however reasonable in the abstract the fees may be. A state must provide such persons a reasonable alternative for getting on the ballot.[2121] Similarly, a sentencing court in revoking probation must consider alternatives to incarceration if the reason for revocation is the inability of the indigent to pay a fine or restitution.[2122]

In *Crawford v. Marion County Election Board*,[2123] however, a Court plurality held that a state may require citizens to present a government-issued photo identification in order to vote. Although Justice Stevens' plurality opinion acknowledged "the burden imposed on voters who cannot afford . . . a birth certificate" (but added that it was "not possible to quantify . . . the magnitude of the burden on this narrow class of voters"), it noted that the state had not "required voters to pay a tax or a fee to obtain a new photo identification," and that "the photo-identification cards issued by Indiana's BMV are also free."[2124] Justice Stevens also noted that a burden on voting rights, "[h]owever slight . . . must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation,' "[2125] and he found three state interests that were sufficiently weighty: election modernization (*i.e.*, complying with federal statutes that require or permit the use of state motor vehicle driver's license applications to serve various purposes connected with voter registration), deterring and detecting voter fraud, and safeguarding voter confidence. Justice Stevens' opinion, therefore, rejected a facial challenge to the statute,[2126] finding that, even though it was "fair to infer that partisan considerations may have played a significant role in the decision to enact" the statute, the statute was "supported by valid neutral justifications."[2127] Justice Scalia, in his concurring opinion, would not only have upheld the statute on its face, but would have ruled out as-applied challenges as well, on the ground that "[t]he Indiana photo-identification law is a gen-

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[2121] Lubin v. Panish, 415 U.S. 709 (1974). Note that the Court indicated that *Bullock* was decided on the basis of restrained review. Id. at 715.

[2122] Bearden v. Georgia, 461 U.S. 660 (1983).

[2123] 128 S. Ct. 1610 (2008). Justice Stevens' plurality opinion was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia wrote a concurring opinion that was joined by Justices Thomas and Alito, and Justices Souter, Ginsberg, and Breyer dissented.

[2124] 128 S. Ct. at 1622, 1621.

[2125] 128 S. Ct. at 1616.

[2126] "A facial challenge must fail where the statute has a plainly legitimate sweep." 128 S. Ct. at 1623 (internal quotation marks omitted).

[2127] 128 S. Ct. at 1624. "[A]ll of the Republicans in the [Indiana] General Assembly voted in favor of [the statute] and the Democrats were unanimous in opposing it." Id. at 1623.

erally applicable, nondiscriminatory voting regulation," and, "without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional."[2128] Justice Souter, in his dissenting opinion, found the statute unconstitutional because "a State may not burden the right to vote merely by invoking abstract interests, be they legitimate or even compelling, but must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed. . . . The Indiana Voter ID Law is thus unconstitutional: the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old."[2129]

Access to Courts.—In *Boddie v. Connecticut*,[2130] Justice Harlan carried a majority of the Court with him in using a due process analysis to evaluate the constitutionality of a state's filing fees in divorce actions that a group of welfare assistance recipients attacked as preventing them from obtaining divorces. The Court found that, when the state monopolized the avenues to a pacific settlement of a dispute over a fundamental matter such as marriage—only the state could terminate the marital status—then it denied due process by inflexibly imposing fees that kept some persons from using that avenue. Justice Harlan's opinion averred that a facially neutral law or policy that did in fact deprive an individual of a protected right would be held invalid even though as a general proposition its enforcement served a legitimate governmental interest. The opinion concluded with a cautioning observation that the case was not to be taken as establishing a general right to access to the courts.

The *Boddie* opinion left unsettled whether a litigant's interest in judicial access to effect a pacific settlement of some dispute was an interest entitled to some measure of constitutional protection as a value of independent worth or whether a litigant must be seeking to resolve a matter involving a fundamental interest in the only forum in which any resolution was possible. Subsequent decisions established that the latter answer was the choice of the Court. In *United States v. Kras*,[2131] the Court held that the imposition of filing fees that blocked the access of an indigent to a discharge of his debts in bankruptcy denied the indigent neither due process nor equal protection. The marital relationship in *Boddie* was a fundamental interest, the Court said, and upon its dissolution depended associational interests of great importance; however, an interest in

[2128] 128 S. Ct. at 1625, 1626.
[2129] 128 S. Ct. 1627, 1643 (citations omitted).
[2130] 401 U.S. 371 (1971).
[2131] 409 U.S. 434 (1973).

the elimination of the burden of debt and in obtaining a new start in life, while important, did not rise to the same constitutional level as marriage. Moreover, a debtor's access to relief in bankruptcy had not been monopolized by the government to the same degree as dissolution of a marriage; one may, "in theory, and often in actuality," manage to resolve the issue of his debts by some other means, such as negotiation. While the alternatives in many cases, such as *Kras*, seem barely likely of successful pursuit, the Court seemed to be suggesting that absolute preclusion was a necessary element before a right of access could be considered.[2132]

Subsequently, on the initial appeal papers and without hearing oral argument, the Court summarily upheld the application to indigents of filing fees that in effect precluded them from appealing decisions of a state administrative agency reducing or terminating public assistance.[2133]

The continuing vitality of *Griffin v. Illinois*, however, is seen in *M.L.B. v. S.L.J.*,[2134] where the Court considered whether a state seeking to terminate the parental rights of an indigent must pay for the preparation of the transcript required for pursuing an appeal. Unlike in *Boddie*, the state, Mississippi, had afforded the plaintiff a trial on the merits, and thus the "monopolization" of the avenues of relief alleged in *Boddie* was not at issue. As in *Boddie*, however, the Court focused on the substantive due process implications of the state's limiting "[c]hoices about marriage, family life, and the upbringing of children,"[2135] while also referencing cases establishing a right of equal access to criminal appellate review. Noting that even a petty offender had a right to have the state pay for

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[2132] 409 U.S. at 443–46. The equal protection argument was rejected by using the traditional standard of review, bankruptcy legislation being placed in the area of economics and social welfare, and the use of fees to create a self-sustaining bankruptcy system being considered to be a rational basis. Dissenting, Justice Stewart argued that *Boddie* required a different result, denied that absolute preclusion of alternatives was necessary, and would have evaluated the importance of an interest asserted rather than providing that it need be fundamental. Id. at 451. Justice Marshall's dissent was premised on an asserted constitutional right to be heard in court, a constitutional right of access regardless of the interest involved. Id. at 458. Justices Douglas and Brennan concurred in Justice Stewart's dissent, as indeed did Justice Marshall.

[2133] Ortwein v. Schwab, 410 U.S. 656 (1973). The division was the same 5-to-4 that prevailed in *Kras*. *See also* Lindsey v. Normet, 405 U.S. 56 (1972). But cases involving the *Boddie* principle do continue to arise. Little v. Streater, 452 U.S. 1 (1981) (in paternity suit that State required complainant to initiate, indigent defendant entitled to have State pay for essential blood grouping test); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (recognizing general right of indigent parent to appointed counsel when state seeks to terminate parental status, but using balancing test to determine that right was not present in this case).

[2134] 519 U.S. 102 (1996).

[2135] 519 U.S. at 106. *See* Boddie v. Connecticut, 401 U.S. 371 (1971).

the transcript needed for an effective appeal,[2136] and that the forced dissolution of parental rights was "more substantial than mere loss of money," [2137] the Court ordered Mississippi to provide the plaintiff the court records necessary to pursue her appeal.

Educational Opportunity.—Making even clearer its approach in *de facto* wealth classification cases, the Court in *San Antonio School District v. Rodriguez* [2138] rebuffed an intensive effort with widespread support in lower court decisions to invalidate the system prevalent in 49 of the 50 states of financing schools primarily out of property taxes, with the consequent effect that the funds available to local school boards within each state were widely divergent. Plaintiffs had sought to bring their case within the strict scrutiny—compelling state interest doctrine of equal protection review by claiming that under the tax system there resulted a *de facto* wealth classification that was "suspect" or that education was a "fundamental" right and the disparity in educational financing could not therefore be justified. The Court held, however, that there was neither a suspect classification nor a fundamental interest involved, that the system must be judged by the traditional restrained standard, and that the system was rationally related to the state's interest in protecting and promoting local control of education.[2139]

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the Court noted that plaintiffs had not identified the "class of disadvantaged 'poor'" in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however defined, did not correlate with property-tax-poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did property-rich districts, except in random instances. Second, the Court held, there must be an absolute deprivation of some right or interest rather than merely a relative one before the deprivation because of inability to pay will bring into play strict scrutiny. "The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely un-

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[2136] Mayer v. Chicago, 404 U.S. 189 (1971).

[2137] 519 U.S. at 121 (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)).

[2138] 411 U.S. 1 (1973). The opinion by Justice Powell was concurred in by the Chief Justice and Justices Stewart, Blackmun, and Rehnquist. Justices Douglas, Brennan, White, and Marshall dissented. Id. at 62, 63, 70.

[2139] 411 U.S. at 44–55. Applying the rational justification test, Justice White would have found that the system did not use means rationally related to the end sought to be achieved. Id. at 63.

able to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[2140] No such class had been identified here and more importantly no one was being absolutely denied an education; the argument was that it was a lower quality education than that available in other districts. Even assuming that to be the case, however, it did not create a suspect classification.

Education is an important value in our society, the Court agreed, being essential to the effective exercise of freedom of expression and intelligent utilization of the right to vote. But a right to education is not expressly protected by the Constitution, continued the Court, nor should it be implied simply because of its undoubted importance. The quality of education increases the effectiveness of speech or the ability to make informed electoral choice but the judiciary is unable to determine what level of quality would be sufficient. Moreover, the system under attack did not deny educational opportunity to any child, whatever the result in that case might be; it was attacked for providing relative differences in spending and those differences could not be correlated with differences in educational quality.[2141]

Rodriguez clearly promised judicial restraint in evaluating challenges to the provision of governmental benefits when the effect is relatively different because of the wealth of some of the recipients or potential recipients and when the results, what is obtained, vary in relative degrees. Wealth or indigency is not a *per se* suspect classification but it must be related to some interest that is fundamental, and *Rodriguez* doctrinally imposed a considerable barrier to the discovery or creation of additional fundamental interests. As the decisions reviewed earlier with respect to marriage and the family reveal, that barrier has not held entirely firm, but within a range of interests, such as education,[2142] the case remains strongly viable. Relying on *Rodriguez* and distinguishing *Plyler*, the Court in *Kadrmas v. Dickinson Public Schools*[2143] rejected an indigent student's equal protection challenge to a state statute permitting school districts to charge a fee for school bus service, in the process rejecting argu-

[2140] 411 U.S. at 20. *But see* id. at 70, 117–24 (Justices Marshall and Douglas dissenting).

[2141] 411 U.S. at 29–39. *But see* id. at 62 (Justice Brennan dissenting), 70, 110–17 (Justices Marshall and Douglas dissenting).

[2142] *Cf.* Plyler v. Doe, 457 U.S. 202 (1982). The case is also noted for its proposition that there were only two equal protection standards of review, a proposition even the author of the opinion has now abandoned.

[2143] 487 U.S. 450 (1988). This was a 5–4 decision, with Justice O'Connor's opinion of the Court being joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy, and with Justices Marshall, Brennan, Stevens, and Blackmun dissenting.

ments that either "strict" or "heightened" scrutiny is appropriate. Moreover, the Court concluded, there is no constitutional obligation to provide bus transportation, or to provide it for free if it is provided at all.[2144]

Abortion.—*Rodriguez* furnished the principal analytical basis for the Court's subsequent decision in *Maher v. Roe*,[2145] holding that a state's refusal to provide public assistance for abortions that were not medically necessary under a program that subsidized all medical expenses otherwise associated with pregnancy and childbirth did not deny to indigent pregnant women equal protection of the laws. As in *Rodriguez*, the Court held that the indigent are not a suspect class.[2146] Again, as in *Rodriguez* and in *Kras*, the Court held that, when the state has not monopolized the avenues for relief and the burden is only relative rather than absolute, a governmental failure to offer assistance, while funding alternative actions, is not undue governmental interference with a fundamental right.[2147] Expansion of this area of the law of equal protection seems especially limited.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the pro-

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[2144] 487 U.S. at 462. The plaintiff child nonetheless continued to attend school, so the requirement was reviewed as an additional burden but not a complete obstacle to her education.

[2145] 432 U.S. 464 (1977).

[2146] 432 U.S. at 470–71.

[2147] 432 U.S. at 471–74. *See also* Harris v. McRae, 448 U.S. 297, 322–23 (1980). Total deprivation was the theme of *Boddie* and was the basis of concurrences by Justices Stewart and Powell in Zablocki v. Redhail, 434 U.S. 374, 391, 396 (1978), in that the State imposed a condition indigents could not meet and made no exception for them. The case also emphasized that Dandridge v. Williams, 397 U.S. 471 (1970), imposed a rational basis standard in equal protection challenges to social welfare cases. *But see* Califano v. Goldfarb, 430 U.S. 199 (1977), where the majority rejected the dissent's argument that this should always be the same.

portion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

APPORTIONMENT OF REPRESENTATION

With the abolition of slavery by the Thirteenth Amendment, African-Americans, who formerly counted as three-fifths of a person, would be fully counted in the apportionment of seats in the House of Representatives, increasing as well the electoral vote, and there appeared the prospect that the readmitted Southern states would gain a political advantage in Congress when combined with Democrats from the North. Because the South was adamantly opposed to African-American suffrage, all the congressmen would be elected by whites. Many wished to provide for the enfranchisement of African-Americans and proposals to this effect were voted on in both the House and the Senate, but only a few Northern states permitted African-Americans to vote and a series of referenda on the question in Northern States revealed substantial white hostility to the proposal. Therefore, a compromise was worked out, to effect a reduction in the representation of any state that discriminated against males in the franchise.[2148]

No serious effort was ever made in Congress to effectuate § 2, and the only judicial attempt was rebuffed.[2149] With subsequent constitutional amendments adopted and the use of federal coercive powers to enfranchise persons, the section is little more than an historical curiosity.[2150]

However, in *Richardson v. Ramirez*,[2151] the Court relied upon the implied approval of disqualification upon conviction of crime to uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state interests involved and to evaluate the necessity of the rule, holding

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[2148] *See generally* J. James, The Framing of the Fourteenth Amendment (1956).

[2149] Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946).

[2150] The section did furnish a basis to Justice Harlan to argue that inasmuch as § 2 recognized a privilege to discriminate subject only to the penalty provided, the Court was in error in applying § 1 to questions relating to the franchise. *Compare* Oregon v. Mitchell, 400 U.S. 112, 152 (1970) (Justice Harlan concurring and dissenting), *with* id. at 229, 250 (Justice Brennan concurring and dissenting). The language of the section recognizing 21 as the usual minimum voting age no doubt played some part in the Court's decision in Oregon v. Mitchell as well. It should also be noted that the provision relating to "Indians not taxed" is apparently obsolete now in light of an Attorney General ruling that all Indians are subject to taxation. 39 Op. Att'y Gen. 518 (1940).

[2151] 418 U.S. 24 (1974). Justices Marshall, Douglas, and Brennan dissented. Id. at 56, 86.

rather that because of § 2 the Equal Protection Clause was simply inapplicable.

SECTIONS 3 AND 4. No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

DISQUALIFICATION AND PUBLIC DEBT

The right to remove disabilities imposed by this section was exercised by Congress at different times on behalf of enumerated individuals.[2152] In 1872, the disabilities were removed, by a blanket act, from all persons "except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States."[2153] Twenty-six

[2152] *E.g.*, and notably, the Private Act of December 14, 1869, ch.1, 16 Stat. 607.
[2153] Ch. 193, 17 Stat. 142.

years later, Congress enacted that "the disability imposed by section 3 . . . incurred heretofore, is hereby removed."[2154]

Although § 4 "was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. . . . '[T]he validity of the public debt' . . . [embraces] whatever concerns the integrity of the public obligations," and applies to government bonds issued after as well as before adoption of the Amendment.[2155]

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ENFORCEMENT

Generally

In the aftermath of the Civil War, Congress, in addition to proposing to the states the Thirteenth, Fourteenth, and Fifteenth Amendments, enacted seven statutes designed in a variety of ways to implement the provisions of these Amendments.[2156] Several of these laws were general civil rights statutes that broadly attacked racial and other discrimination on the part of private individuals and groups as well as by the states, but the Supreme Court declared unconstitutional or rendered ineffective practically all of these laws over the course of several years.[2157] In the end, Reconstruction was aban-

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[2154] Act of June 6, 1898, ch. 389, 30 Stat. 432. Legislation by Congress providing for removal was necessary to give effect to the prohibition of § 3, and until removed in pursuance of such legislation persons in office before promulgation of the Fourteenth Amendment continued to exercise their functions lawfully. *Griffin's Case*, 11 Fed. Cas. 7 (C.C.D.Va. 1869) (No. 5815). Nor were persons who had taken part in the Civil War and had been pardoned by the President before the adoption of this Amendment precluded by this section from again holding office under the United States. 18 Op. Att'y Gen. 149 (1885). On the construction of "engaged in rebellion," *see* United States v. Powell, 27 Fed. Cas. 605 (C.C.D.N.C. 1871) (No. 16,079).

[2155] Perry v. United States, 294 U.S. 330, 354 (1935), in which the Court concluded that the Joint Resolution of June 5, 1933, insofar as it attempted to override the gold-clause obligation in a Fourth Liberty Loan Gold Bond "went beyond the congressional power." On a Confederate bond problem, *see* Branch v. Haas, 16 F. 53 (C.C.M.D. Ala. 1883) (citing Hanauer v. Woodruff, 82 U.S. (15 Wall.) 439 (1873), and Thorington v. Smith, 75 U.S. (8 Wall.) 1 (1869)). *See also The Pietro Campanella*, 73 F. Supp. 18 (D. Md. 1947).

[2156] Civil Rights Act of 1866, ch. 31, 14 Stat. 27; the Enforcement Act of 1870, ch. 114, 16 Stat. 140; Act of February 28, 1871, ch. 99, 16 Stat. 433; the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875; 18 Stat. 335. The modern provisions surviving of these statutes are 18 U.S.C. §§ 241, 242, 42 U.S.C. §§ 1981–83, 1985–1986, and 28 U.S.C. § 1343. Two lesser statutes were the Slave Kidnaping Act of 1866, ch. 86, 14 Stat. 50, and the Peonage Abolition Act, ch. 187, 14 Stat. 546, 18 U.S.C. §§ 1581–88, and 42 U.S.C. § 1994.

[2157] *See generally* R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD (1947).

doned and with rare exceptions no cases were brought under the remaining statutes until fairly recently.[2158] Beginning with the Civil Rights Act of 1957, however, Congress generally acted pursuant to its powers under the Commerce Clause [2159] until Supreme Court decisions indicated an expansive concept of congressional power under the Civil War amendments,[2160] which culminated in broad provisions against private interference with civil rights in the 1968 legislation.[2161] The story of these years is largely an account of the "state action" doctrine in terms of its limitation on congressional powers; [2162] lately, it is the still-unfolding history of the lessening of the doctrine combined with a judicial vesting of discretion in Congress to reinterpret the scope and content of the rights guaranteed in these three constitutional amendments.

State Action

In enforcing by appropriate legislation the Fourteenth Amendment guarantees against state denials, Congress has the discretion to adopt remedial measures, such as authorizing persons being denied their civil rights in state courts to remove their cases to federal courts,[2163] and to provide criminal [2164] and civil [2165] liability for state officials and agents [2166] or persons associated with them [2167]

[2158] For cases under 18 U.S.C. §§ 241 and 242 in their previous codifications, *see* United States v. Mosley, 238 U.S. 383 (1915); United States v. Gradwell, 243 U.S. 476 (1917); United States v. Bathgate, 246 U.S. 220 (1918); United States v. Wheeler, 254 U.S. 281 (1920). The resurgence of the use of these statutes began with United States v. Classic, 313 U.S. 299 (1941), and Screws v. United States, 325 U.S. 91 (1945).

[2159] The 1957 and 1960 Acts primarily concerned voting; the public accommodations provisions of the 1964 Act and the housing provisions of the 1968 Act were premised on the commerce power.

[2160] United States v. Guest, 383 U.S. 745 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966). The development of congressional enforcement powers in these cases was paralleled by a similar expansion of the enforcement powers of Congress with regard to the Thirteenth Amendment, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[2161] 82 Stat. 73, 18 U.S.C. § 245.

[2162] On the "state action" doctrine in the context of the direct application of § 1 of the Fourteenth Amendment, *see* discussion, supra.

[2163] Section 3 of the Civil Rights Act of 1866, 14 Stat. 27, 28 U.S.C. § 1443. *See* Virginia v. Rives, 100 U.S. 313, 318 (1880); Strauder v. West Virginia, 100 U.S. 303 (1880). The statute is of limited utility because of the interpretation placed on it almost from the beginning. *Compare* Georgia v. Rachel, 384 U.S. 780 (1966), *with* City of Greenwood v. Peacock, 384 U.S. 808 (1966).

[2164] 18 U.S.C. §§ 241, 242. *See* Screws v. United States, 325 U.S. 91 (1945); Williams v. United States, 341 U.S. 97 (1951); United States v. Guest, 383 U.S. 745 (1966); United States v. Price, 383 U.S. 787 (1966); United States v. Johnson, 390 U.S. 563 (1968).

[2165] 42 U.S.C. § 1983. *See* Monroe v. Pape, 365 U.S. 167 (1961); *see also* 42 U.S.C. § 1985(3), construed in Griffin v. Breckenridge, 403 U.S. 88 (1971).

[2166] *Ex parte* Virginia, 100 U.S. 339 (1880).

[2167] United States v. Price, 383 U.S. 787 (1966).

who violate protected rights. These statutory measures designed to eliminate discrimination "under color of law"[2168] present no problems of constitutional foundation, although there may well be other problems of application.[2169] But the Reconstruction Congresses did not stop with statutory implementation of rights guaranteed against state infringement, moving as well against private interference.

Thus, in the Civil Rights Act of 1875[2170] Congress had proscribed private racial discrimination in the admission to and use of inns, public conveyances, theaters, and other places of public amusement. The *Civil Rights Cases*[2171] found this enactment to be beyond Congress's power to enforce the Fourteenth Amendment. The Court observed that § 1 prohibited only state action and did not reach private conduct. Therefore, Congress's power under § 5 to enforce § 1 by appropriate legislation was held to be similarly limited. "It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[2172] The holding in this case had already been preceded by *United States v. Cruikshank*[2173] and by *United States v. Harris*[2174] in which the Federal Government had prosecuted individuals for killing and injuring African-Americans. The Amendment did not increase the power of the Fed-

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[2168] Both 18 U.S.C. § 242 and 42 U.S.C. § 1983 contain language restricting application to deprivations under color of state law, whereas 18 U.S.C. § 241 lacks such language. The newest statute, 18 U.S.C. § 245, contains, of course, no such language. On the meaning of "custom" as used in the "under color of" phrase, *see* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).

[2169] *E.g.*, the problem of "specific intent" in Screws v. United States, 325 U.S. 91 (1945), and Williams v. United States, 341 U.S. 97 (1951), and the problem of what "right or privilege" is "secured" to a person by the Constitution and laws of the United States, which divided the Court in United States v. Williams, 341 U.S. 70 (1951), and which was resolved in United States v. Price, 383 U.S. 787 (1966).

[2170] 18 Stat. 335, §§ 1, 2.

[2171] 109 U.S. 3 (1883). The Court also rejected the Thirteenth Amendment foundation for the statute, a foundation revived by Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[2172] 109 U.S. at 11. Justice Harlan's dissent reasoned that Congress had the power to protect rights secured by the Fourteenth Amendment against invasion by both state and private action, but also viewed places of public accommodation as serving a quasi-public function that satisfied the state action requirement in any event. Id. at 46–48, 56–57.

[2173] 92 U.S. 542 (1876). The action was pursuant to § 6 of the 1870 Enforcement Act, ch. 114, 16 Stat. 140, the predecessor of 18 U.S.C. § 241.

[2174] 106 U.S. 629 (1883). The case held unconstitutional a provision of § 2 of the 1871 Act, ch. 22, 17 Stat. 13.

eral Government vis-a-vis individuals, the Court held, only with regard to the states themselves.[2175]

Cruikshank did, however, recognize a small category of federal rights that Congress could protect against private deprivation, rights that the Court viewed as deriving particularly from one's status as a citizen of the United States and that Congress had a general police power to protect.[2176] These rights included the right to vote in federal elections, general and primary,[2177] the right to federal protection while in the custody of federal officers,[2178] and the right to inform federal officials of violations of federal law.[2179] The right of interstate travel is a basic right derived from the Federal Constitution, which Congress may protect.[2180] In *United States v. Williams*,[2181] in the context of state action, the Court divided four-to-four over whether the predecessor of 18 U.S.C. § 241 in its reference to a "right or privilege secured . . . by the Constitution or laws of the United States" encompassed rights guaranteed by the Fourteenth Amendment, or was restricted to those rights "which Congress can beyond doubt constitutionally secure against interference by private individuals." This issue was again reached in *United States v. Price* [2182] and *United States v. Guest*,[2183] again in the context of state action, in which the Court concluded that the statute included within its scope rights guaranteed by the Due Process and Equal Protection Clauses.

Because the Court found that both *Price* and *Guest* concerned sufficient state action, it did not then have to reach the question of § 241's constitutionality when applied to private action that interfered with rights not the subject of a general police power. But Justice Brennan, responding to what he apparently intepreted as language in the Court's opinion construing Congress's power under § 5 of the Fourteenth Amendment to be limited by the state action re-

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[2175] *See also* Baldwin v. Franks, 120 U.S. 678 (1887); Hodges v. United States, 203 U.S. 1 (1906); United States v. Wheeler, 254 U.S. 281 (1920). Under the Fifteenth Amendment, *see* James v. Bowman, 190 U.S. 127 (1903).

[2176] United States v. Cruikshank, 92 U.S. 542, 552–53, 556 (1876). The rights that the Court assumed the United States could protect against private interference were the right to petition Congress for a redress of grievances and the right to vote free of interference on racial grounds in a federal election.

[2177] *Ex parte* Yarbrough , 110 U.S. 651 (1884); United States v. Classic, 313 U.S. 299 (1941).

[2178] Logan v. United States, 144 U.S. 263 (1892).

[2179] *In re* Quarles and Butler, 158 U.S. 532 (1895). *See also* United States v. Waddell, 112 U.S. 76 (1884) (right to homestead).

[2180] United States v. Guest, 383 U.S. 745 (1966); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[2181] 341 U.S. 70 (1951).

[2182] 383 U.S. 787 (1966) (due process clause).

[2183] 383 U.S. 745 (1966) (Equal Protection Clause).

quirement, appended a lengthy statement, which a majority of the Justices joined, arguing that Congress's power was broader.[2184] "Although the Fourteenth Amendment itself . . . 'speaks to the State or to those acting under the color of its authority,' legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection."[2185] The Justice throughout the opinion refers to "Fourteenth Amendment rights," by which he meant rights that, in the words of 18 U.S.C. § 241, are "secured . . . by the Constitution," *i.e.*, by the Fourteenth Amendment through prohibitory words addressed only to governmental officers. Thus, the Equal Protection Clause commands that all "public facilities owned or operated by or on behalf of the State," be available equally to all persons; that access is a right granted by the Constitution, and § 5 is viewed "as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equality for all citizens." Within this discretion is the "power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals" who would deny such access.[2186]

The Court, however, ultimately rejected this expansion of the powers of Congress in *United States v. Morrison*.[2187] In *Morrison*, the Court invalidated a provision of the Violence Against Women Act[2188] that established a federal civil remedy for victims of gender-motivated violence. The case involved a university student who brought

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[2184] Justice Brennan's opinion, 383 U.S. at 774, was joined by Chief Justice Warren and Justice Douglas. His statement that "[a] majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy," id. at 782 (emphasis by the Justice), was based upon the language of Justice Clark, joined by Justices Black and Fortas, id. at 761, that, because Justice Brennan had reached the issue, the three Justices were also of the view "that there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." Id. at 762. In the opinion of the Court, Justice Stewart disclaimed any intention of speaking of Congress's power under § 5. Id. at 755.

[2185] 383 U.S. at 782.

[2186] 383 U.S. at 777–79, 784.

[2187] 529 U.S. 598 (2000).

[2188] Pub. L. 103–322, § 40302, 108 Stat. 1941, 42 U.S.C. § 13981.

a civil action against other students who allegedly raped her. The argument was made that there was a pervasive bias against victims of gender-motivated violence in state justice systems, and that the federal remedy would offset and deter this bias. The Court first reaffirmed the state action requirement for legislation passed under the Fourteenth Amendment,[2189] dismissing the *dicta* in *Guest*, and reaffirming the precedents of the *Civil Rights Cases* and *United States v. Harris*. The Court also rejected the assertion that the legislation was "corrective" of bias in the courts, as the suits are not directed at the state or any state actor, but rather at the individuals committing the criminal acts.[2190]

Congressional Definition of Fourteenth Amendment Rights

In the *Civil Rights Cases*,[2191] the Court observed that "the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation," that is, laws to counteract and overrule those state laws that § 1 forbids the states to adopt. The Court was quite clear that, under its responsibilities of judicial review, it was the body that would determine that a state law was impermissible and that a federal

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[2189] 529 U.S. at 621 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948), for the proposition that the Amendment "erects no shield against merely private conduct, however discriminatory or wrongful").

[2190] This holding may have broader significance for federal civil rights law. For instance, 42 U.S.C. § 1985(3) (a civil statute paralleling the criminal statute held unconstitutional in United States v. Harris) lacks a "color of law" requirement. Although the requirement was read into it in Collins v. Hardyman, 341 U.S. 651 (1951), to avoid constitutional problems, it was read out again in Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (although it might be "difficult to conceive of what might constitute a deprivation of the equal protection of the laws by private persons . . . there is nothing inherent in the phrase that requires the action working the deprivation to come from the State"). What the unanimous Court held in *Griffin* was that an "intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id. at 102. As so construed, the statute was held constitutional as applied in the complaint before the Court on the basis of the Thirteenth Amendment and the right to travel; there was no necessity therefore, to consider Congress's powers under § 5 of the 14th Amendment. Id. at 107.

The lower courts have been quite divided with respect to what constitutes a non-racial, class-based animus, and what constitutional protections must be threatened before a private conspiracy can be reached under § 1985(3). *See*, *e.g.*, Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971); Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Great American Fed. S. & L. Ass'n v. Novotny, 584 F.2d 1235 (3d Cir. 1978) (en banc), *rev'd*, 442 U.S. 366 (1979); Scott v. Moore, 680 F.2d 979 (5th Cir. 1982) (en banc). The Court's decision in *Morrison*, however, appears to preclude the use of § 1985(3) in relation to Fourteenth Amendment rights absent some state action.

[2191] 109 U.S. 3, 13–14 (1883).

law passed pursuant to § 5 was necessary and proper to enforce § 1.[2192] But, in *United States v. Guest*,[2193] Justice Brennan protested that this view "attributes a far too limited objective to the Amendment's sponsors," that in fact "the primary purpose of the Amendment was to augment the power of Congress, not the judiciary."

In *Katzenbach v. Morgan*,[2194] Justice Brennan, this time speaking for the Court, in effect overrode the limiting view and posited a doctrine by which Congress was to define the substance of what the legislation enacted pursuant to § 5 must be appropriate to. That is, in upholding the constitutionality of a provision of the Voting Rights Act of 1965 [2195] barring the application of English literacy requirements to a certain class of voters, the Court rejected a state argument "that an exercise of congressional power under § 5 . . . that prohibits the enforcement of a state law can only be sustained if the judicial branch determines that the state law is prohibited by the provisions of the Amendment that Congress sought to enforce." [2196] Because the Court had previously upheld an English literacy requirement under equal protection challenge,[2197] acceptance of the argument would have doomed the federal law. But, said Justice Brennan, Congress itself might have questioned the justifications put forward by the state in defense of its law and might have concluded that, instead of being supported by acceptable reasons, the requirements were unrelated to those justifications and discriminatory in intent and effect. The Court would not evaluate the competing considerations that might have led Congress to its conclusion; because Congress "brought a specially informed legislative competence" to an appraisal of voting requirements, "it was Congress's prerogative to weigh" the considerations and the Court would sustain the conclusion if "we perceive a basis upon which Congress might predicate a judgment" that the requirements constituted invidious discrimination.[2198]

[2192] *Cf.* Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[2193] 383 U.S. 745, 783 and n.7 (1966) (concurring and dissenting).

[2194] 384 U.S. 641 (1966). Besides the ground of decision discussed here, Morgan also advanced an alternative ground for upholding the statute. That is, Congress might have overridden the state law not because the law itself violated the Equal Protection Clause but because being without the vote meant the class of persons was subject to discriminatory state and local treatment and giving these people the ballot would afford a means of correcting that situation. The statute therefore was an appropriate means to enforce the Equal Protection Clause under "necessary and proper" standards. Id. at 652–653. A similar "necessary and proper" approach underlay South Carolina v. Katzenbach, 383 U.S. 301 (1966), under the Fifteenth Amendment's enforcement clause.

[2195] 79 Stat. 439, 42 U.S.C. § 1973b(e).

[2196] 384 U.S. at 648.

[2197] Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[2198] Katzenbach v. Morgan, 384 U.S. 641, 653–56 (1966).

In dissent, Justice Harlan protested that "[i]n effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 'discretion' by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court."[2199] Justice Brennan rejected this reasoning: "We emphasize that Congress's power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."[2200] Congress responded, however, in both fashions. On the one hand, in the 1968 Civil Rights Act it relied on *Morgan* in expanding federal powers to deal with private violence that is racially motivated, and to some degree in outlawing most private housing discrimination;[2201] on the other hand, it enacted provisions of law purporting to overrule the Court's expansion of the self-incrimination and right-to-counsel clauses of the Bill of Rights, expressly invoking *Morgan*.[2202]

Congress's power under *Morgan* returned to the Court's consideration when several states challenged congressional legislation[2203] lowering the voting age in all elections to 18 and prescribing residency and absentee voting requirements for the conduct of presidential elections. In upholding the latter provision and in dividing over the former, the Court revealed that *Morgan's* vitality was in some considerable doubt, at least with regard to the reach that many observers had previously seen.[2204] Four Justices accepted *Morgan* in full,[2205] while one Justice rejected it totally[2206] and another would have limited it to racial cases.[2207] The other three Justices seemingly restricted *Morgan* to its alternate rationale in passing on the age reduction provision but the manner in which

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[2199] 384 U.S. at 668. Justice Stewart joined this dissent.

[2200] 384 U.S. at 651 n.10. Justice O'Connor for the Court quoted and reiterated Justice Brennan's language in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731–33 (1982).

[2201] 82 Stat. 73, 18 U.S.C. § 245. *See* S. REP. NO. 721, 90th Congress, 1st Sess. 6–7 (1967). *See also* 82 Stat. 81, 42 U.S.C. §§ 3601 *et seq.*

[2202] Title II, Omnibus Safe Streets and Crime Control Act, 82 Stat. 210, 18 U.S.C. §§ 3501, 3502. *See* S. REP. NO. 1097, 90th Congress, 2d Sess. 53–63 (1968). The cases that were subjects of the legislation were Miranda v. Arizona, 384 U.S. 436 (1966), and United States v. Wade, 388 U.S. 218 (1967), insofar as federal criminal trials were concerned.

[2203] Titles II and III of the Voting Rights Act Amendments of 1970, 84 Stat. 316, 42 U.S.C. §§ 1973aa–1, 1973bb.

[2204] Oregon v. Mitchell, 400 U.S. 112 (1970).

[2205] 400 U.S. at 229, 278–81 (Justices Brennan, White, and Marshall), id. at 135, 141–44 (Justice Douglas).

[2206] 400 U.S. at 152, 204–09 (Justice Harlan).

[2207] 400 U.S. at 119, 126–31 (Justice Black).

they dealt with the residency and absentee voting provision afforded Congress some degree of discretion in making substantive decisions about what state action is discriminatory above and beyond the judicial view of the matter.[2208]

More recent decisions read broadly Congress's power to make determinations that appear to be substantive decisions with respect to constitutional violations.[2209] Acting under both the Fourteenth and Fifteenth Amendments, Congress has acted to reach state electoral practices that "result" in diluting the voting power of minorities, although the Court apparently requires that it be shown that electoral procedures must have been created or maintained with a discriminatory animus before they may be invalidated under the two Amendments.[2210] Moreover, movements have been initiated in Congress by opponents of certain of the Court's decisions, notably the abortion rulings, to use § 5 powers to curtail the rights the Court has derived from the Due Process Clause and other provisions of the Constitution.[2211]

City of Boerne v. Flores,[2212] however, illustrates that the Court will not always defer to Congress's determination as to what legislation is appropriate to "enforce" the provisions of the Fourteenth Amendment. In *Flores*, the Court held that the Religious Freedom

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[2208] The age reduction provision could be sustained "only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are 'compelling.'" 400 U.S. at 296 (Justices Stewart and Blackmun and Chief Justice Burger). In their view, Congress did not have that power and *Morgan* did not confer it. But in voting to uphold the residency and absentee provision, the Justices concluded that "Congress could rationally conclude that the imposition of durational residency requirements unreasonably burdens and sanctions the privilege of taking up residence in another State" without reaching an independent determination of their own that the requirements did in fact have that effect. Id. at 286.

[2209] *See* discussion of City of Rome v. United States, 446 U.S. 156, 173–83 (1980), under the Fifteenth Amendment, *infra*. *See also* Fullilove v. Klutznick, 448 U.S. 448, 476–78 (1980) (plurality opinion by Chief Justice Burger), and id. at 500–02 (Justice Powell concurring).

[2210] The Voting Rights Act Amendments of 1982, Pub. L. 97–205, 96 Stat. 131, amending 42 U.S.C. § 1973, were designed to overturn City of Mobile v. Bolden, 446 U.S. 55 (1980). A substantial change of direction in Rogers v. Lodge, 458 U.S. 613 (1982), handed down coextensively with congressional enactment, seems to have brought Congress and the Court into essential alignment, thereby avoiding a possible constitutional conflict.

[2211] *See The Human Life Bill: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 97th Congress, lst Sess. (1981). An elaborate constitutional analysis of the bill appears in Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed 'Human Life' Legislation*, 68 VA. L. REV. 333 (1982).

[2212] 521 U.S. 507 (1997).

Restoration Act,[2213] which expressly overturned the Court's narrowing of religious protections under *Employment Division v. Smith*,[2214] exceeded congressional power under § 5 of the Fourteenth Amendment. Although the Court allowed that Congress's power to legislate to deter or remedy constitutional violations may include prohibitions on conduct that is not itself unconstitutional, the Court also held that there must be "a congruence and proportionality" between the means adopted and the injury to be remedied.[2215] Unlike the pervasive suppression of the African-American vote in the South that led to the passage of the Voting Rights Act, there was no similar history of religious persecution constituting an "egregious predicate" for the far-reaching provision of the Religious Freedom Restoration Act. Also, unlike the Voting Rights Act, the Religious Freedom Restoration Act contained no geographic restrictions or termination dates.[2216]

A reinvigorated Eleventh Amendment jurisprudence has led to a spate of decisions applying the principles the Court set forth in *Boerne*, as litigants precluded from arguing that a state's sovereign immunity has been abrogated under Article I congressional powers[2217] seek alternative legislative authority in § 5. For instance, in *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*,[2218] a bank that had patented a financial method designed to guarantee investors sufficient funds to cover the costs of college tuition sued the State of Florida for administering a similar program, arguing that the state's sovereign immunity had been abrogated by Congress in exercise of its Fourteenth Amendment enforcement power. The Court, however, held that application of the federal patent law to the states was not properly tailored to remedy or prevent due process violations. The Court noted that Congress had identified no pattern of patent infringement by the states, nor a systematic denial of state remedy for such violations such as would constitute a deprivation of property without due process.[2219]

[2213] Pub. L. 103–141, 107 Stat. 1488, 42 U.S.C. §§ 2000bb *et seq.*

[2214] 494 U.S. 872 (1990).

[2215] 521 U.S. at 533.

[2216] 521 U.S. at 532–33. The Court found that the Religious Freedom Restoration Act was "so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Id.

[2217] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (Article I powers may not be used to abrogate a state's Eleventh Amendment immunity, but Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), holding that Congress may abrogate Eleventh Amendment immunity in exercise of Fourteenth Amendment enforcement power, remains good law). See discussion pp. 1533–37.

[2218] 527 U.S. 627 (1999).

[2219] 527 U.S. at 639–46. *See also* College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., , 527 U.S. 666 (1999) (Trademark Remedy Clarifica-

A similar result was reached regarding the application of the Age Discrimination in Employment Act to state agencies in *Kimel v. Florida Bd. of Regents*.[2220] In determining that the Act did not meet the "congruence and proportionality" test, the Court focused not just on whether state agencies had engaged in age discrimination, but on whether states had engaged in unconstitutional age discrimination. This was a particularly difficult test to meet, as the Court has generally rejected constitutional challenges to age discrimination by states, finding that there is a rational basis for states to use age as a proxy for other qualities, abilities and characteristics.[2221] Noting the lack of a sufficient legislative record establishing broad and unconstitutional state discrimination based on age, the Court found that the ADEA, as applied to the states, was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to or designed to prevent unconstitutional behavior." [2222]

Despite what was considered by many to be a better developed legislative record, the Court in *Board of Trustees of Univ. of Ala. v. Garrett* [2223] also rejected the recovery of money damages against states, this time under of the Americans with Disabilities Act of 1990 (ADA).[2224] Title I of the ADA prohibits employers, including states, from "discriminating against a qualified individual with a disability" [2225] and requires employers to "make reasonable accommodations [for] . . . physical or mental limitations . . . . unless [to do so] . . . would impose an undue hardship on the . . . business." [2226] Although the Court had previously overturned discriminatory legislative classifications based on disability in *City of Cleburne v. Cleburne Living Center*,[2227] the Court had held that determinations of when states had violated the Equal Protection Clause in such cases were to be made under the relatively deferential standard of rational ba-

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tion Act amendment to Lanham Act subjecting states to suits for false advertising is not a valid exercise of Fourteenth Amendment power; neither the right to be free from a business competitor's false advertising nor a more generalized right to be secure in one's business interests qualifies as a "property" right protected by the Due Process Clause).

[2220] 528 U.S. 62 (2000). Again, the issue of the Congress's power under § 5 of the Fourteenth Amendment arose because sovereign immunity prevents private actions against states from being authorized under Article I powers such as the commerce clause.

[2221] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (applying rational basis test to uphold mandatory retirement age of 70 for state judges).

[2222] 528 U.S. at 86, quoting *City of Boerne*, 521 U.S. at 532.

[2223] 531 U.S. 356 (2001).

[2224] 42 U.S.C. §§ 12111–12117.

[2225] 42 U.S.C. § 12112(a).

[2226] 42 U.S.C. § 12112(b)(5)(A).

[2227] 473 U.S. 432 (1985).

sis review. Thus, failure of an employer to provide the kind "reasonable accommodations" required under the ADA would not generally rise to the level of a violation of the Fourteenth Amendment, and instances of such failures did not qualify as a "history and pattern of unconstitutional employment discrimination."[2228] Thus, according the Court, not only did the legislative history developed by the Congress not establish a pattern of unconstitutional discrimination against the disabled by states,[2229] but the requirements of the ADA would be out of proportion to the alleged offenses.

The Court's more recent decisions in this area, however, seem to de-emphasize the need for a substantial legislative record when the class being discriminated against is protected by heightened scrutiny of the government's action. In *Nevada Department of Human Resources v. Hibbs*,[2230] the Court considered the recovery of monetary damages against states under the Family and Medical Leave Act. This Act provides, among other things, that both male and female employees may take up to twelve weeks of unpaid "family care" leave to care for a close relative with a serious health condition. Noting that § 5 could be used to justify prophylactic legislation, the Court accepted the argument that the Act was intended to prevent gender-based discrimination in the workplace tracing to the historic stereotype that women are the primary caregivers. Congress had documented historical instances of discrimination against women by state governments, and had found that women were provided maternity leave more often than were men.

Although there was a relative absence of proof that states were still engaged in wholesale gender discrimination in employment, the Court distinguished *Garrett* and *Kimel*, which had held Congress to a high standard for justifying legislation attempting to remedy classifications subject only to rational basis review. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test . . . it was easier for Congress to show a pattern of state constitutional violations."[2231] Consequently, the Court upheld an across-the-board, routine employment benefit for all eligible employees as a

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[2228] 531 U.S. at 368.

[2229] As Justice Breyer pointed out in the dissent, however, the Court seemed determined to accord Congress a degree of deference more commensurate with review of an agency action, discounting portions of the legislative history as based on secondary source materials, unsupported by evidence and not relevant to the inquiry at hand.

[2230] 538 U.S. 721 (2003).

[2231] 538 U.S. at 736. Statutory classifications that distinguish between males and females are subject to heightened scrutiny, Craig v. Boren, 429 U.S. 190, 197–199 (1976), so they must be substantially related to the achievement of important governmental objectives, United States v. Virginia, 518 U.S. 515, 533 (1996).

congruent and proportional response to the "state-sanctioned" gender stereotypes.

Nine years after *Hibbs*, the Court returned to the Family and Medical Leave Act, this time to consider the Act's "self care" (personal medical) leave provisions. There, in *Coleman v. Court of Appeals of Md.*, a four-Justice plurality, joined by concurring Justice Scalia, found the self care provisions too attenuated from the gender protective roots of the family care provisions to merit heightened consideration.[2232] According to the plurality, the self care provisions were intended to ameliorate discrimination based on illness, not sex. The plurality observed that paid sick leave and disability protection were almost universally available to state employees without intended or incidental gender bias. The addition of unpaid self care leave to this state benefit might help some women suffering pregnancy related illness, but the establishment of a broad self care leave program under the FMLA was not a proportional or congruent remedy to protect any constitutionally based right under the circumstances.[2233]

The Court in *Tennessee v. Lane* [2234] held that Congress could authorize damage suits against a state for failing to provide disabled persons physical access to its courts. Title II of the Americans with Disabilities Act provides that no qualified person shall be excluded or denied the benefits of a public program by reason of a disability,[2235] but since disability is not a suspect class, the application of Title II against states would seem questionable under the reasoning of *Garrett*.[2236] Here, however, the Court evaluated the case as a limit on access to court proceedings, which, in some instances, has been held to be a fundamental right subject to heightened scrutiny under the Due Process Clause.[2237]

Reviewing the legislative history of the ADA, the Court found that Title II, as applied, was a congruent and proportional response to a Congressional finding of "a backdrop of pervasive un-

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[2232] 566 U.S. ___, No. 10–1016, slip op. (2012) (male state employee denied unpaid sick leave).

[2233] Justice Ginsburg, writing for herself and three others, extensively reviewed the historical and legislative record and concluded that the family care and the self care provisions were of the same cloth. Both provisions grew out of concern for discrimination against pregnant workers, and, the FMLA's leave provisions were not, in the dissent's opinion, susceptible to being rent into separate pieces for analytical purposes.

[2234] 541 U.S. 509 (2004).

[2235] 42 USCS § 12132.

[2236] 531 U.S. 356 (2001).

[2237] *See, e.g.,* Faretta v. California, 422 U.S. 806, 819, n.15 (1975) (a criminal defendant has a right to be present at all stages of a trial where his absence might frustrate the fairness of the proceedings).

equal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." [2238] However, as Justice Rehnquist pointed out in dissent, the deprivations the majority relied on were not limited to instances of imposing unconstitutional deprivations of court access to disabled persons.[2239] Rather, in an indication of a more robust approach where protection of fundamental rights is at issue, the majority also relied more broadly on a history of state limitations on the rights of the disabled in areas such as marriage or voting, and on limitations of access to public services beyond the use of courts.[2240]

Congress's authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity is strongest when a state's conduct at issue in a case is alleged to have actually violated a constitutional right. In *United States v. Georgia*,[2241] a disabled state prison inmate who used a wheelchair for mobility alleged that his treatment by the State of Georgia and the conditions of his confinement violated, among other things, Title II of the ADA and the Eighth Amendment (as incorporated by the Fourteenth Amendment). A unanimous Court found that, to the extent that the prisoner's claims under Title II for money damages were based on conduct that independently violated the provisions of the Fourteenth Amendment, they could be applied against the state. In doing so, the Court declined to apply the congruent and proportional response test, distinguishing the cases applying that standard (discussed above) as not generally involving allegations of direct constitutional violations.[2242]

[2238] 541 U.S. at 524.

[2239] 541 U.S. at 541–42 (Rehnquist, J., dissenting).

[2240] 541 U.S. at 524–25. Justice Rehnquist, in dissent, disputed the reliance of the Congress on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. Id. at 542–43. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977), and that the action of non-state actors had previously been considered in such pre-*Boerne* cases as South Carolina v. Katzenbach, 383 U.S. 301, 312–15 (1966).

[2241] 546 U.S. 151 (2006).

[2242] "While the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." 546 U.S. at 158 (citations omitted).

FIFTEENTH AMENDMENT

RIGHT OF CITIZENS TO VOTE

CONTENTS

RIGHT OF CITIZENS TO VOTE

FIFTEENTH AMENDMENT

SECTIONS 1 AND 2. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

The Congress shall have power to enforce this article by appropriate legislation.

ABOLITION OF SUFFRAGE QUALIFICATIONS ON BASIS OF RACE

Adoption and Judicial Enforcement

Adoption.—The final decision of Congress not to include anything relating to the right to vote in the Fourteenth Amendment, aside from the provisions of section 2,[1] left the issue of Negro suffrage solely with the states, and Northern states were generally as loath as Southern to grant the ballot to African-Americans, both the newly freed and those who had never been slaves.[2] But, in the second session of the 39th Congress, the right to vote was extended to African-Americans by statute in the District of Columbia and the territories, and the seceded states as a condition of readmission had to guarantee Negro suffrage.[3] Following the election of President Grant, the "lame duck" third session of the Fortieth Congress sent the proposed Fifteenth Amendment to the states for ratification. The struggle was intense because Congress was divided into roughly three factions: those who opposed any federal constitutional guarantee of Negro suffrage, those who wanted to go beyond a limited guarantee and enact universal male suffrage, including abolition of all educational and property-holding tests, and those who wanted or who

[1] *See* discussion under "Apportionment of Representation," *supra*. Of course, the Equal Protection Clause has been extensively used by the Court to protect the right to vote. *See* "Fundamental Interests: The Political Process," *supra*.

[2] W. GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 25–28 (1965).

[3] Id. at 29–31; ch. 6, 14 Stat. 375 (1866) (District of Columbia); ch. 15, 14 Stat. 379 (1867) (territories); ch. 36, 14 Stat. 391 (1867) (admission of Nebraska to statehood upon condition of guaranteeing against racial qualifications in voting); ch. 153, 14 Stat. 428 (1867) (First Reconstruction Act).

were willing to settle for an amendment merely proscribing racial qualifications in determining who could vote under any other standards the states wished to have.[4] The latter group ultimately prevailed.

The Judicial View of the Amendment.—In its initial appraisals of this Amendment, the Supreme Court appeared disposed to emphasize only its purely negative aspects. "The Fifteenth Amendment," it announced, did "not confer the right . . . [to vote] upon any one," but merely "invested the citizens of the United States with a new constitutional right which is . . . exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude."[5] But in subsequent cases, the Court, conceding "that this article" has originally been construed as giving "no affirmative right to the colored man to vote" and as having been "designed primarily to prevent discrimination against him," professed to be able "to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because . . . it annulled the discriminating word white, and this left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which would give the right of voting exclusively to white people. . . ."[6]

Although "the immediate concern of the Amendment was to guarantee to the emancipated slaves the right to vote," the Amendment "is cast in fundamental terms, terms transcending the particular controversy," and "grants protection to all persons, not just members of a particular race."[7] Moreover, the Court has construed "race" broadly to comprehend classifications based on ancestry as well as those based on race.[8] "Ancestry can be a proxy for race," the Court has explained, finding such a proxy in Hawaii's limitation of the right to vote in a statewide election for an office responsible for ad-

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[4] Gillette, supra, at 46–78. The congressional debate is conveniently collected in 1 B. Schwartz, Statutory History of the United States: Civil Rights 372 (1971).

[5] United States v. Reese, 92 U.S. 214, 217–18 (1876); United States v. Cruikshank, 92 U.S. 542, 566 (1876).

[6] *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884); Guinn v. United States, 238 U.S. 347, 363 (1915). A state constitutional provision limiting the right of suffrage to whites was automatically nullified by ratification of the Fifteenth Amendment. Neal v. Delaware, 103 U.S. 370 (1881).

[7] Rice v. Cayetano, 528 U.S. 495 (2000).

[8] Guinn v. United States, 238 U.S. 347 (1915) (invalidating Oklahoma exception to literacy requirement for any "lineal descendants" of persons entitled to vote in 1866).

ministering a trust for the benefit of persons who can trace their ancestry to Hawaiian inhabitants of 1778.[9]

Grandfather Clauses.—Until quite recently, the history of the Fifteenth Amendment has been largely a record of belated judicial condemnation of various state efforts to disenfranchise African-Americans either overtly through statutory enactment or covertly through inequitable administration of electoral laws and toleration of discriminatory membership practices of political parties. Of several devices that have been held unconstitutional, one of the first was the "grandfather clause." Beginning in 1895, several states enacted temporary laws whereby persons who had been voters, or descendants of those who had been voters, on January 1, 1867, could be registered notwithstanding their inability to meet any literacy requirement. Unable because of the date to avail themselves of the exemption, African-Americans were disabled to vote on grounds of illiteracy or through discriminatory administration of literacy tests, while illiterate whites were permitted to register without taking any tests. With the achievement of the intended result, most states permitted their laws to lapse, but Oklahoma's grandfather clause had been enacted as a permanent amendment to the state constitution. A unanimous Court condemned the device as recreating and perpetuating "the very conditions which the [Fifteenth] Amendment was intended to destroy." [10]

The Court did not experience any difficulty in voiding a subsequent Oklahoma statute of 1916 that provided that all persons, except those who voted in 1914, who were qualified to vote in 1916 but who failed to register between April 30 and May 11, 1916, with some exceptions for sick and absent persons who were given an additional brief period to register, should be perpetually disenfranchised. The Fifteenth Amendment, Justice Frankfurter declared for the Court, nullified "sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." [11] The impermissible effect of the statute, the Court said, was automatically to continue as permanent voters, without their being obliged to register again, all white persons who were on registration lists in 1914 by virtue of the previously invalidated grandfather clause, whereas African-Americans, prevented from registering by that clause, had been afforded only a 20-day registration opportunity to avoid permanent disenfranchisement.

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[9] Rice v. Cayetano, 528 U.S. 495, 514 (2000).
[10] Guinn v. United States, 238 U.S. 347 (1915).
[11] Lane v. Wilson, 307 U.S. 268, 275 (1939).

The White Primary.—The Court displayed indecision, however, when it was called upon to deal with the exclusion of African-Americans from participation in primary elections. Prior to its becoming convinced that primary contests were in fact elections to which federal constitutional guarantees applied,[12] the Court had relied upon the Equal Protection Clause to strike down the Texas White Primary Law [13] as well as a later Texas statute that contributed to a similar exclusion by limiting voting in primary elections to members of state political parties as determined by the central committees of such parties.[14] When exclusion of African-Americans was thereafter perpetuated by political parties not acting in obedience to any statutory command, this discrimination was for a time viewed as not constituting state action and therefore as not prohibited by either the Fourteenth or the Fifteenth Amendments.[15] This holding was reversed nine years later when the Court declared that, where the selection of candidates for public office is entrusted by statute to political parties, a political party in making its selection at a primary election is a state agency, and consequently may not under the Fifteenth Amendment exclude African-Americans from such elections.[16] An effort by South Carolina to escape the effects of this ruling by repealing all statutory provisions regulating primary elections and political organizations conducting them was nullified by a lower federal court with no doctrinal difficulty,[17] but the Supreme Court, although nearly unanimous on the result, was unable to come to a majority agreement with regard to the exclusion of African-Americans by the Jaybird Association, a countywide organization that, independently of state laws and the use of state election machinery or funds, nearly monopolized access to Democratic nomination for local offices. The exclusionary policy was held unconstitutional but there was no opinion of the Court.[18]

Literacy Tests.—At an early date the Court held that literacy tests that are drafted so as to apply alike to all applicants for the voting franchise would be deemed to be fair on their face and in the absence of proof of discriminatory enforcement could not be said

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[12] United States v. Classic, 313 U.S. 299 (1941); Smith v. Allwright, 321 U.S. 649 (1944).

[13] Nixon v. Herndon, 273 U.S. 536 (1927).

[14] Nixon v. Condon, 286 U.S. 73 (1932).

[15] Grovey v. Townsend, 295 U.S. 45 (1935).

[16] Smith v. Allwright, 321 U.S. 649 (1944).

[17] Rice v. Elmore, 165 F.2d 387 (4th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); *see also* Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949).

[18] Terry v. Adams, 345 U.S. 461 (1953). For analysis of the opinions, *see* "State Action," *supra*.

to deny equal protection .Voter qualifications [19] But an Alabama constitutional amendment, the legislative history of which disclosed that both its object and its intended administration were to disenfranchise African-Americans, was held to violate the Fifteenth Amendment.[20]

Racial Gerrymandering.—The Court's series of decisions interpreting the Equal Protection Clause as requiring the apportionment and districting of state legislatures solely on the basis of population [21] had its beginning in *Gomillion v. Lightfoot*,[22] in which the Court found a violation of the Fifteenth Amendment in the redrawing of a municipal boundary line into a 28-sided figure that excluded from the city all but four or five of 400 African-Americans but no whites, and that thereby continued white domination of municipal elections. Subsequent decisions, particularly concerning the validity of multi-member districting and alleged dilution of minority voting power, were decided under the Equal Protection Clause,[23] and, in *City of Mobile v. Bolden*,[24] in the course of a considerably divided decision with respect to the requirement of discriminatory motivation in Fifteenth Amendment cases,[25] a plurality of the Court sought to restrict the Fifteenth Amendment to cases in which there is official denial or abridgment of the right to register and vote, and to exclude indirect dilution claims.[26] Congressional amendment of section 2 of the Voting Rights Act may obviate the further development of constitutional jurisprudence in this area, however.[27]

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[19] Williams v. Mississippi, 170 U.S. 213 (1898); *Cf.* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[20] Davis v. Schnell, 81 F. Supp. 872 (M.D. Ala. 1949), *aff'd*, 336 U.S. 933 (1949).

[21] *See* "Apportionment and Districting," *supra*.

[22] 364 U.S. 339 (1960). *See also* Wright v. Rockefeller, 376 U.S. 52 (1964).

[23] *E.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973).

[24] 446 U.S. 55 (1980).

[25] On the issue of motivation versus impact under the equal protection clause, *see* discussion of "Testing Facially Neutral Classifications Which Impact on Minorities" in the Fourteenth Amendment, *supra*. On the plurality's view, *see* 446 U.S. at 61–65. Justice White appears clearly to agree that purposeful discrimination is a necessary component of equal protection clause violation, and may have agreed as well that the same requirement applies under the Fifteenth Amendment. Id. at 94–103. Only Justice Marshall unambiguously adhered to the view that discriminatory effect is sufficient. Id. at 125. *See also* Beer v. United States, 425 U.S. 130, 146–49 & nn.3–5 (1976) (dissenting).

[26] 446 U.S. at 65. At least three Justices disagreed with this view and would apply the Fifteenth Amendment to vote dilution claims. Id. at 84 n.3 (Justice Stevens concurring), 102 (Justice White dissenting), 125–35 (Justice Marshall dissenting). The issue was reserved in Rogers v. Lodge, 458 U.S. 613, 619 n.6 (1982).

[27] *See* Voting Rights Act Amendments of 1982, Pub. L. 97–205, 96 Stat. 131, amending 42 U.S.C. § 1973. The Supreme Court interpreted the 1982 amendments to section 2 in Thornburg v. Gingles, 478 U.S. 30 (1986), determining that Congress

Congressional Enforcement

Although the Fifteenth Amendment is "self-executing," [28] the Court early emphasized that the right granted to be free from racial discrimination "should be kept free and pure by congressional enactment whenever that is necessary." [29] Following ratification of the Fifteenth Amendment in 1870, Congress passed the Enforcement Act of 1870,[30] which had started out as a bill to prohibit state officers from restricting suffrage on racial grounds and providing criminal penalties and ended up as a comprehensive measure aimed as well at private action designed to interfere with the rights guaranteed under the Fourteenth and Fifteenth Amendments. Insofar as this legislation reached private action, it was largely nullified by the Supreme Court and the provisions aimed at official action proved ineffectual and much of it was later repealed.[31] More recent legislation has been much more far-reaching in this respect and has been sustained.

State Action.—Like section 1 of the Fourteenth, section 1 of the Fifteenth Amendment prohibits official denial of the rights therein guaranteed, giving rise to the "state action" doctrine.[32] Nevertheless, the Supreme Court in two early cases seemed to be of the opinion that Congress could protect the rights against private deprivation, on the theory that Congress impliedly had power to protect the enjoyment of every right conferred by the Constitution against deprivation from any source.[33] In *James v. Bowman,*[34] however, the

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had effectively overruled the *City of Mobile* intent standard in returning to a "totality of the circumstances" results test.

[28] Guinn v. United States, 238 U.S. 347, 362–63 (1915).

[29] *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884).

[30] 16 Stat. 140. Debate on the Act is collected in 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 454 (1971). *See also* The Enforcement Act of 1871, ch. 99, 16 Stat. 433.

[31] Ch. 25, 28 Stat 36 (1894); ch. 321, 35 Stat. 1153 (1909). *See* R. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 35–55 (1947), for a brief history of the enactment and repeal of the statutes. The surviving statutes of this period are 18 U.S.C. §§ 241–42, and 42 U.S.C. §§ 1971(a), 1983, and 1985(3).

[32] *See* "State Action," under the Fourteenth Amendment, *supra*. "The State . . . must mean not private citizens but those clothed with the authority and influence which official position affords. The application of the prohibition of the Fifteenth Amendment to 'any State' is translated by legal jargon to read 'State action.' This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored." Terry v. Adams, 345 U.S. 461, 473 (1953) (Justice Frankfurter concurring).

[33] The idea was fully spelled out in Justice Bradley's opinion on circuit in United States v. Cruikshank, 25 Fed. Cas. 707, 712, 713 (No. 14,897) (C.C.D. La. 1874). The Supreme Court's decision in United States v. Cruikshank, 92 U.S. 542, 555–56

Court held that legislation based on the Fifteenth Amendment that attempted to prohibit private as well as official interference with the right to vote on racial grounds was unconstitutional. That interpretation was not questioned until 1941.[35] But the Court's interpretation of the "state action" requirement in cases brought under section 1 of the Fifteenth Amendment narrowed the requirement there and opened the possibility, when these decisions are considered with cases decided under the Fourteenth Amendment, that Congress is not limited to legislation directed to official discrimination.[36]

Thus, in *Smith v. Allwright*,[37] the exclusion of African-Americans from political parties without the compulsion or sanction of state law was nonetheless held to violate the Fifteenth Amendment because political parties were so regulated otherwise as to be in effect agents of the state and thus subject to the Fifteenth Amendment; additionally, in one passage the Court suggested that the failure of the state to prevent the racial exclusion might be the act implicating the Amendment.[38] Then, in *Terry v. Adams*,[39] the political organization was not regulated by the state at all and selected its candidates for the Democratic primary election by its own processes; all eligible white voters in the jurisdiction were members of the organization but African-Americans were excluded. Nevertheless, the Court held that this exclusion violated the Fifteenth Amendment, although a majority of the Justices did not agree on a rationale for the holding. Four of them thought the case simply indistinguishable from *Smith v. Allwright*, and they therefore did not deal with the central issue.[40] Justice Frankfurter thought the participation of local elected officials in the processes of the organi-

(1876), and United States v. Reese, 92 U.S. 214, 217–18 (1876), may be read to support the contention. *Ex parte* Yarbrough, 110 U.S. 651 (1884), involved a federal election and the assertion of congressional power to reach private interference with the right to vote in federal elections, but the Court went further to broadly state the power of Congress to protect the citizen in the exercise of rights conferred by the Constitution, among which was the right to be free from discrimination in voting protected by the Fifteenth Amendment. Id. at 665–66.

[34] 190 U.S. 127 (1903), holding unconstitutional Rev. Stat. § 5507, which was section 5 of the Enforcement Act of 1870, ch. 114, 16 Stat. 140.

[35] *E.g.*, United States v. Classic, 313 U.S. 299, 315 (1941); United States v. Williams, 341 U.S. 70, 77 (1951).

[36] *See* "Congressional Definition of Fourteenth Amendment Rights," *supra*.

[37] 321 U.S. 649 (1944).

[38] "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restrictions by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied." 321 U.S. at 664.

[39] 345 U.S. 461 (1953).

[40] 345 U.S. at 477 (Justices Clark, Reed, and Jackson, and Chief Justice Vinson).

zation was sufficient to implicate state action.[41] Three Justices thought that when a purportedly private organization is permitted by the state to assume the functions normally performed by an agency of the state, then that association is subject to federal constitutional restrictions,[42] but this opinion also, in citing selected passages of *Yarbrough* and *Reese* and Justice Bradley's circuit opinion in *Cruikshank*, appeared to be suggesting that the state action requirement is not indispensable.[43] The 1957 Civil Rights Act[44] included a provision prohibiting private action with intent to intimidate or coerce persons in respect of voting in federal elections and authorized the Attorney General to seek injunctive relief against such private actions regardless of the character of the election. The 1965 Voting Rights Act[45] went further and prohibited and penalized private actions to intimidate voters in federal, state, or local elections. The Supreme Court has yet to consider the constitutionality of these sections.

Federal Remedial Legislation.—The history of federal remedial legislation is of modern vintage.[46] The 1957 Civil Rights Act[47] authorized the Attorney General of the United States to seek injunctive relief to prevent interference with the voting rights of citizens. The 1960 Civil Rights Act[48] expanded on this authorization by permitting the Attorney General to seek a court finding of "pattern or practice" of discrimination in any particular jurisdiction and authorizing upon the entering of such a finding the registration of all qualified persons in the jurisdiction of the race discriminated against

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[41] 345 U.S. at 470.

[42] 345 U.S. at 462, 468–69, 470 (Justices Black, Douglas, and Burton).

[43] 345 U.S. at 466–68. Justice Minton understood Justice Black's opinion to do away with the state action requirement. Id. at 485 (dissenting).

[44] 71 Stat. 637, 42 U.S.C. §§ 1971(b), 1971(c). In a suit to enjoin state officials from violating 42 U.S.C. § 1971(a), derived from Rev. Stat. 2004, applying to all elections, the defendants challenged the constitutionality of the law because it applied to private action as well as state. The Court held that inasmuch as the statute could constitutionally be applied to the defendants it would not hear their contention that as applied to others it would be void. United States v. Raines, 362 U.S. 17 (1960), disapproving the approach of United States v. Reese, 92 U.S. 214 (1876).

[45] Pub. L. 89–110, §§ 11–12, 79 Stat. 443, 42 U.S.C. §§ 1973i, 1973j.

[46] The 1871 Act, ch. 99, 16 Stat. 433, provided for a detailed federal supervision of the electoral process, from registration to the certification of returns. It was repealed in 1894. ch. 25, 28 Stat. 36. In Giles v. Harris, 189 U.S. 475 (1903), the Court, in an opinion by Justice Holmes, refused to order the registration of 6,000 African-Americans who alleged that they were being wrongly denied the franchise, the Court observing that no judicial order would do them any good in the absence of judicial supervision of the actual voting, which it was not prepared to do, and suggesting that the petitioners apply to Congress or the President for relief.

[47] Pub. L. 85–315, 71 Stat. 634. *See* United States v. Raines, 362 U.S. 17 (1960); United States v. Alabama, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir.), *aff'd*, 371 U.S. 37 (1962).

[48] Pub. L. 86–449, 74 Stat. 86.

by court-appointed referees. This authorization moved the vindication of voting rights beyond a case-by-case process. Further amendments were added in 1964.[49] Finally, in the Voting Rights Act of 1965,[50] Congress went substantially beyond what it had done before. It provided that if the Attorney General determined that any state or political subdivision maintained on November 1, 1964, any "test or device"[51] and that less than 50 per cent of the voting age population in that jurisdiction was registered on November 1, 1964, or voted in the 1964 presidential election, such tests or devices were to be suspended for five years and no person should be denied the right to vote on the basis of such a test or device. A state could reinstitute such a test or device within the prescribed period only by establishing in a three-judge court in the District of Columbia that the test or device did not have a discriminatory intent or effect and the covered jurisdiction could only change its election laws in that period by obtaining the approval of the Attorney General or a three-judge court in the District of Columbia. The Act also provided for the appointment of federal examiners who could register persons meeting nondiscriminatory state qualifications who then must be permitted to vote.

But, it was in upholding the constitutionality of the 1965 Act in *South Carolina v. Katzenbach* that the Court sketched the outlines of a broad power in Congress to enforce the Fifteenth Amendment.[52] Although Section 1 authorized the courts to strike down state statutes and procedures that denied the vote on the basis of race, the Court held Section 2 authorized Congress to go beyond proscribing certain discriminatory statutes and practices to "enforce" the

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[49] Pub. L. 88–352, 78 Stat. 241.

[50] Pub. L. 89–110, 79 Stat. 437, 42 U.S.C. §§ 1973 *et seq.*

[51] The phrase "test or device" was defined as any requirement for (1) demonstrating the ability to read, write, understand, or interpret any matter, (2) demonstrating any educational achievement or knowledge, (3) demonstrating good moral character, (4) proving qualifications by vouching of registered voters. Aimed primarily at literacy tests, South Carolina v. Katzenbach, 383 U.S. 301, 333–34 (1966), the Act was considerably broadened through the Court's interpretation of section 5, 42 U.S.C. § 1973c, which require the approval either of the Attorney General or a three-judge court in the District of Columbia before a state could put into effect any new voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting, to include such changes as apportionment and districting, adoption of at-large instead of district elections, candidate qualification regulations, provisions for assistance of illiterate voters, movement of polling places, adoption of appointive instead of elective positions, annexations, and public employer restrictions upon employees running for elective office. Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Perkins v. Matthews, 400 U.S. 379 (1971); Georgia v. United States, 411 U.S. 526 (1973); Dougherty County Bd. of Educ. v. White, 439 U.S. 32 (1978). *See also* United States v. Board of Comm'rs of Sheffield, 435 U.S. 110 (1978) (pre-coverage provisions apply to all entities having power over any aspect of voting, not just "political subdivisions" as defined in Act).

[52] 383 U.S. 301 (1966).

guarantee by any rational means at its disposal.[53] Congress was therefore justified in deciding that certain areas of the nation were the primary locations of voting discrimination and in directing its remedial legislation to those areas.[54] The Court concluded that Congress chose a rational formula based on the existence of voting tests that could be used to discriminate and on low registration or voting rates, which demonstrated the likelihood that the tests had been so used; that Congress could properly suspend for a period all literacy tests in the affected areas upon findings that they had been administered discriminatorily and that illiterate whites had been registered while both literate and illiterate African-Americans had not been; and that Congress could require the states to seek federal permission to reinstitute old tests or institute new ones; and it could provide for federal examiners to register qualified voters.[55]

The *Katzenbach* decision appeared to afford Congress discretion to enact measures designed to enforce the Amendment through broad affirmative prescriptions rather than through proscriptions of specific practices.[56] Subsequent decisions of the Burger Court confirmed the reach of this power. In one case, the Court held that evidence of past discrimination in the educational opportunities available to African-American children precluded a North Carolina county from reinstituting a literacy test.[57] And, in 1970, when Congress suspended for a five-year period literacy tests throughout the nation,[58] the Court unanimously sustained the action as a valid measure to enforce the Fifteenth Amendment.[59]

Moreover, in *City of Rome v. United States*,[60] the Court read the scope of Congress's remedial powers under Section 2 of the Fifteenth Amendment to parallel similar reasoning under Section 5 of the Fourteenth Amendment. In *City of Rome*, the City had sought to escape from coverage of the Voting Rights Act by showing that it had not utilized any discriminatory practices within the prescribed period.[61] The lower court found that the City had engaged in practices without any discriminatory motive, but that its practices had

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[53] *Id.* at 325–26.
[54] *Id.* at 331.
[55] *Id.* at 333–37.
[56] Justice Black dissented from the portion of the decision that upheld the requirement that before a state could change its voting laws it must seek approval of the Attorney General or a federal court. *Id.* at 355 (Black, J., dissenting).
[57] Gaston Cty. v. United States, 395 U.S. 285 (1969).
[58] 84 Stat. 315, 42 U.S.C. § 1973aa (transferred to 52 U.S.C. § 10501 (2012)).
[59] Oregon v. Mitchell, 400 U.S. 112, 131–34, 144–47, 216–17, 231–36, 282–84 (1970).
[60] 446 U.S. 156 (1980).
[61] *Id.* at 172.

had a discriminatory impact.[62] The City thus argued that, because the Fifteenth Amendment reached only purposeful discrimination, the Act's proscription of effect, as well as of purpose, went beyond Congress's power.[63] The Court held, however, that, even if discriminatory intent was a prerequisite to finding a violation of Section 1 of the Fifteenth Amendment,[64] Congress still had authority to proscribe electoral devices that had the effect of discriminating.[65] The Court held that Section 2, like Section 5 of the Fourteenth Amendment, was in effect a "Necessary and Proper Clause," which enabled Congress to enact enforcement legislation that was rationally related to the end sought, and that section 2 of the Fifteenth Amendment did not prohibit such legislation since the legislation was consistent with the letter and spirit of the Constitution, even though the actual practice, which the legislation outlawed or restricted, would not, in itself, violate the Fifteenth Amendment.[66] In so acting, Congress could prohibit state action that perpetuated the effect of past discrimination, or that, because of the existence of past purposeful discrimination, raised a risk of purposeful discrimination that might not lend itself to judicial invalidation.[67] The Court stated:

> It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are "appropriate," as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia* . . . . Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.[68]

In 1975 and 1982, Congress extended and revised the Voting Rights Act.[69] Congress used the 1982 Amendments to revitalize Sec-

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[62] *Id.*

[63] *Id.* at 173.

[64] *Cf.* City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980).

[65] *See City of Rome*, 446 U.S. at 173.

[66] *Id.* at 174–77.

[67] *Id.* at 175–76.

[68] City of Rome v. United States, 446 U.S. 156, 177 (1980). In *Lopez v. Monterey Cty.*, 525 U.S. 266 (1999), the Court reiterated its prior holdings that Congress may exercise its enforcement power based on discriminatory effects, and without any finding of discriminatory intent.

[69] The 1975 amendments, Pub. L. 94–73, 89 Stat. 400, extended the Act for seven years; expanded it to include those areas having minorities distinguished by their language, i.e., "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," *id.* at § 207, in which certain statistical tests are met; and required election materials to be provided in an alternative language if more than five percent of the voting age citizens of a political subdivision are members of a single language minority group whose illiteracy rate is higher than the national rate.

tion 2 of the Act, which, unlike Section 5, applies nationwide.[70] As enacted in 1965, Section 2 largely tracked the language of the Fifteenth Amendment. In *City of Mobile v. Bolden*,[71] a majority of the Court agreed that the Fifteenth Amendment and Section 2 of the Act were coextensive, but the Justices did not agree on the meaning to be ascribed to the statute. A plurality believed that, because the constitutional provision reached only purposeful discrimination, Section 2 was similarly limited. A major purpose of Congress in 1982 had been to set aside this possible interpretation and to provide that any electoral practice "which results in a denial or abridgement" of the right to vote on account of race or color will violate the Act.[72]

The Court in *Shelby County v. Holder*,[73] however, emphasized the limits to the enforcement power of the Fifteenth Amendment in striking down Section 4 of the Act, which provided the formula that determined which states or electoral districts are required to submit electoral changes to the Department of Justice or a federal court for preclearance under Section 5 of the Act. In 2006, Congress had reauthorized the Act for twenty-five years and provided that the preclearance requirement extended to jurisdictions that had

§ 301. The 1982 amendments, Pub. L. 97–205, 96 Stat. 131, in addition to the Section 2 revision, provided that a covered jurisdiction may remove itself from the Act's coverage by proving to the special court in the District of Columbia that the jurisdiction has complied with the Act for the previous ten years and that it has taken positive steps both to encourage minority political participation and to remove structural barriers to minority electoral influence. § 2. Moreover, the 1982 amendments changed the result in *Beer v. United States*, 425 U.S. 130 (1976), in which the Court had held that a covered jurisdiction was precluded from altering a voting practice covered by the Act only if the change would lead to a retrogression in the position of racial minorities; if a change in voting practice merely perpetuated a practice that was not covered by the Voting Rights Act because it was enacted prior to November 1964, the jurisdiction could implement it. The 1982 amendments provide that the change may not be approved if it would "perpetuate voting discrimination," in effect applying the new Section 2 results test to preclearance procedures. S. REP. NO. 97–417, at 12 (1982); H.R. REP. NO. 97–227, at 28 (1981).

[70] Private parties may bring suit to challenge electoral practices under Section 2.

[71] 446 U.S. 55 (1980). *See id.* at 60–61 (Burger, C.J., Stewart, Powell, Rehnquist, JJ.), and *id.* at 105 n.2 (Marshall, J. dissenting).

[72] Before the 1982 amendments, Section 2 provided that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Pub. L. 89–110, § 2, 79 Stat. 437. Section 3 of the 1982 amendments amended Section 2 of the Act by inserting the language quoted and by setting out a nonexclusive list of factors making up a "totality of circumstances test" by which a violation of Section 2 would be determined. 96 Stat. 131, 134, amending 42 U.S.C. § 1973. Without any discussion of the Fifteenth Amendment, the Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), interpreted and applied the "totality of the circumstances" test in the context of multimember districting. *Id.* at 80.

[73] 570 U.S. ___, No. 12–96, slip op. (2013).

a voting test and less than 50 percent voter registration or turnout as of 1972.[74]

In *Shelby County*, the Court described the Section 5 preclearance process as an "extraordinary departure from the traditional course of relations between the States and the Federal Government" [75] and as "extraordinary legislation otherwise unfamiliar to our federal system." [76] This led the Court to find the formula in Section 4 violated the "fundamental principle of equal sovereignty" among states because the section, by definition, applied to only some states and not others.[77] While the Court acknowledged that the disparate treatment of states under Section 4 could be justified by "unique circumstances," such as those before Congress at the time of enactment of the Voting Rights Act,[78] the Court held that "Congress could no longer distinguish between States in such a fundamental way based on 40-year-old-data, when today's statistics tell an entirely different story" with respect to racial discrimination in covered jurisdictions.[79] The Court added, however, that Congress could "draft another formula [for pre-clearance] based on current conditions" that demonstrate "that exceptional conditions still exist justifying such an 'exceptional departure from the traditional course of relations between the States and the Federal Government.'" [80]

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[74] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, Pub. L. 109–246, 120 Stat. 577 (2006).

[75] *Shelby County*, slip op. at 12.

[76] *Id.* (citation omitted).

[77] *Id.* at 9 (quoting Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)). The significance of the principle of equal sovereignty as enunciated in *Coyle v. Smith* had been considered by the Court in a previous challenge to the Act. *See* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966). Considering the disparate treatment of states under the Section 5 preclearance requirement, the *Katzenbach* Court had referenced the case of *Coyle v. Smith*, 221 U.S. 559 (1911), which upheld the authority of Oklahoma to move its state capitol despite language to the contrary in the enabling act providing for its admission as a state. This case, while based on the theory that the United States "was and is a union of States, equal in power, dignity and authority," 221 U.S. at 580, was distinguished by the Court in *Katzenbach* as concerning only the admission of new states and not remedies for actions occurring subsequent to that event. The Court in *Shelby County* held, however, that a broader principle regarding equal sovereignty "remains highly pertinent in assessing subsequent disparate treatment of States." *Shelby County*, slip op. at 11 (citing *Nw. Austin*, 557 U.S. at 203).

[78] *Shelby County*, slip op. at 12–13 (quoting *Katzenbach*, 383 U.S. at 334–335).

[79] *Id.* at 13, 23–24.

[80] *Id.* at 24 (quoting Presley v. Etowah Cty. Comm'n, 502 U.S. 491, 500–01 (1992)).

SIXTEENTH AMENDMENT

INCOME TAX

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INCOME TAX

SIXTEENTH AMENDMENT

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

INCOME TAX

History and Purpose of the Amendment

The ratification of the Sixteenth Amendment was the direct consequence of the Court's 1895 decision in *Pollock v. Farmers' Loan & Trust Co.*[1] holding unconstitutional Congress's attempt of the previous year to tax incomes uniformly throughout the United States.[2] A tax on incomes derived from property,[3] the Court declared, was a "direct tax," which Congress, under the terms of Article I, § 2, and § 9, could impose only by the rule of apportionment according to population. Scarcely fifteen years earlier the Justices had unanimously sustained[4] the collection of a similar tax during the Civil War,[5] the only other occasion preceding the Sixteenth Amendment in which Congress had used this method of raising revenue.[6]

During the years between the *Pollock* decision in 1895 and the ratification of the Sixteenth Amendment in 1913, the Court gave evidence of a greater awareness of the dangerous consequences to national solvency that *Pollock* threatened, and partially circumvented the threat, either by taking refuge in redefinitions of "direct tax" or by emphasizing the history of excise taxation. Thus, in a series of cases, notably *Nicol v. Ames*,[7] *Knowlton v. Moore*,[8] and *Pat-*

[1] 157 U.S. 429 (1895); 158 U.S. 601 (1895).

[2] Ch. 349, § 27, 28 Stat. 509, 553.

[3] The Court conceded that taxes on incomes from "professions, trades, employments, or vocations" levied by this act were excise taxes and therefore valid. The entire statute, however, was voided on the ground that Congress never intended to permit the entire "burden of the tax to be borne by professions, trades, employments, or vocations" after real estate and personal property had been exempted, 158 U.S. at 635.

[4] Springer v. United States, 102 U.S. 586 (1881).

[5] Ch. 173, § 116, 13 Stat. 223, 281 (1864).

[6] For an account of the *Pollock* decision, *see* "From the Hylton to the Pollock Case," under Art. I, § 9, cl. 4, *supra*.

[7] 173 U.S. 509 (1899).

[8] 178 U.S. 41 (1900).

ton v. Brady,[9] the Court held the following taxes to have been levied merely upon one of the "incidents of ownership" and hence to be excises: a tax that involved affixing revenue stamps to memoranda evidencing the sale of merchandise on commodity exchanges, an inheritance tax, and a war revenue tax upon tobacco on which the hitherto imposed excise tax had already been paid and that was held by the manufacturer for resale.

Under this approach, the Court found it possible to sustain a corporate income tax as an excise "measured by income" on the privilege of doing business in corporate form.[10] The adoption of the Sixteenth Amendment, however, put an end to speculation whether the Court, unaided by constitutional amendment, would persist along these lines of construction until it had reversed its holding in *Pollock*. Indeed, in its initial appraisal[11] of the Amendment, it classified income taxes as being inherently "indirect." "[T]he command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the *Pollock Case* by which alone such taxes were removed from the great class of excises, duties and imports subject to the rule of uniformity and were placed under the other or direct class."[12] "[T]he Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged . . . ."[13]

Income Subject to Taxation

Building upon definitions formulated in cases construing the Corporation Tax Act of 1909,[14] the Court initially described income as the "gain derived from capital, from labor, or from both combined," inclusive of the "profit gained through a sale or conversion of capital assets";[15] in the following array of factual situations it subsequently applied this definition to achieve results that have been productive of extended controversy.

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[9] 184 U.S. 608 (1902).

[10] Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

[11] Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916); Stanton v. Baltic Mining Co., 240 U.S. 103 (1916); Tyee Realty Co. v. Anderson, 240 U.S. 115 (1916).

[12] Brushaber v. Union Pac. R.R., 240 U.S. 1, 18–19 (1916).

[13] Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916).

[14] Stratton's Independence, Ltd. v. Howbert, 231 U.S. 399 (1913); Doyle v. Mitchell Bros. Co., 247 U.S. 179 (1918).

[15] Eisner v. Macomber, 252 U.S. 189, 207 (1920); Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926).

Corporate Dividends: When Taxable.—Rendered in conformity with the belief that all income "in the ordinary sense of the word" became taxable under the Sixteenth Amendment, the earliest decisions of the Court on the taxability of corporate dividends occasioned little comment. Emphasizing that in all such cases the stockholder is to be viewed as "a different entity from the corporation," the Court in *Lynch v. Hornby*,[16] held that a cash dividend equal to 24 percent of the par value of the outstanding stock and made possible largely by the conversion into money of assets earned prior to the adoption of the Amendment, was income taxable to the stockholder for the year in which he received it, notwithstanding that such an extraordinary payment might appear "to be a mere realization in possession of an inchoate and contingent interest . . . [of] the stockholder . . . in a surplus of corporate assets previously existing." In *Peabody v. Eisner*,[17] decided on the same day and deemed to have been controlled by the preceding case, the Court ruled that a dividend paid in the stock of another corporation, although representing earnings that had accrued before ratification of the Amendment, was also taxable to the shareholder as income. The dividend was likened to a distribution in specie.

Two years later, the Court decided *Eisner v. Macomber*,[18] and the controversy that that decision precipitated still endures. Departing from the interpretation placed upon the Sixteenth Amendment in the earlier cases, *i.e.*, that the purpose of the Amendment was to correct the "error" committed in *Pollock* and to restore income taxation to "the category of indirect taxation to which it inherently belonged," [19] Justice Pitney, speaking for the Court in *Eisner*, indicated that the Sixteenth Amendment "did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income." [20] The decision gave the term "income" a restrictive meaning.

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[16] 247 U.S. 339, 344 (1918). On the other hand, in Lynch v. Turrish, 247 U.S. 221 (1918), the single and final dividend distributed upon liquidation of the entire assets of a corporation, although equaling twice the par value of the capital stock, was declared to represent only the intrinsic value of the latter earned prior to the effective date of the Amendment, and hence was not taxable as income to the shareholder in the year in which actually received. Similarly, in Southern Pacific Co. v. Lowe, 247 U.S. 330 (1918), dividends paid out of surplus accumulated before the effective date of the Amendment by a railway company whose entire capital stock was owned by another railway company and whose physical assets were leased to and used by the latter was declared to be a nontaxable bookkeeping transaction between virtually identical corporations.

[17] 247 U.S. 347 (1918).

[18] 252 U.S. 189 (1920).

[19] Stanton v. Baltic Mining Co., 240 U.S. 103, 112 (1916).

[20] 252 U.S. at 206.

Specifically, the Court held that a stock dividend was capital when received by a stockholder of the issuing corporation and did not become taxable as "income" until sold or converted, and then only to the extent that a gain was realized upon the proportion of the original investment that such stock represented. A stock dividend, Justice Pitney maintained, "[f]ar from being a realization of profits of the stockholder, . . . tends rather to postpone such realization, in that the fund represented by the new stock has been transferred from surplus to capital, and no longer is available for actual distribution. . . . We are clear that not only does a stock dividend really take nothing from the property of the corporation and add nothing to that of the shareholder, but that the antecedent accumulation of profits evidenced thereby, while indicating that the shareholder is richer because of an increase of his capital, at the same time shows [that] he has not realized or received any income in the transaction."[21] But conceding that a stock dividend represented a gain, the Justice concluded that the only gain taxable as "income" under the Amendment was "a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being '*derived*,' that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description," including "a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment."[22]

Although the Court has not overturned the principle it asserted in *Eisner v. Macomber*,[23] it has significantly narrowed its application. The Court treated as taxable income new stock issued in connection with a corporate reorganization designed to move the place of incorporation. The fact that a comparison of the market value of the shares in the older corporation immediately before, with the aggregate market value of those shares plus the dividend shares immediately after, the dividend showed that the stockholders experienced no increase in aggregate wealth was declared not to be a proper

[21] 252 U.S. at 211, 212.

[22] 252 U.S. at 207. This decision has been severely criticized, chiefly on the ground that gains accruing to capital over a period of years are not income and are not transformed into income by being dissevered from capital through sale or conversion. Critics have also experienced difficulty in understanding how a tax on income that has been severed from capital can continue to be labeled a "direct" tax on the capital from which the severance has thus been made. Finally, the contention has been made that, in stressing the separate identities of a corporation and its stockholders, the Court overlooked the fact that when a surplus has been accumulated, the stockholders are thereby enriched, and that a stock dividend may therefore be appropriately viewed simply as a device whereby the corporation reinvests money earned in their behalf. *See also* Merchants' L. & T. Co. v. Smietanka, 255 U.S. 509 (1921).

[23] Reconsideration was refused in Helvering v. Griffiths, 318 U.S. 371 (1943).

test for determining whether taxable income had been received by these stockholders.[24] The Court viewed the shareholders as essentially exchanging a stock in the old corporation for stock in the new corporation. By contrast, the Court held that no taxable income resulted from the mere receipt by a stockholder of rights to subscribe for shares in a new issue of capital stock, the intrinsic value of which was assumed to be in excess of the issuing price. The right to subscribe was declared to be analogous to a stock dividend, and "only so much of the proceeds obtained upon the sale of such rights as represents a realized profit over cost" to the stockholders was deemed to be taxable income.[25] Similarly, on grounds of consistency with *Eisner v. Macomber*, the Court has ruled that a dividend in common stock paid to holders of preferred stock,[26] and a dividend in preferred stock paid to holders of common stock,[27] because they gave the stockholders an interest different from that represented by their prior holdings, constituted income taxable under the Sixteenth Amendment.

Corporate Earnings: When Taxable.—On at least two occasions the Court has rejected as untenable the contention that a tax on undistributed corporate profits is essentially a penalty rather than a tax or that it is a direct tax on capital and hence is not exempt from the requirement of apportionment. Because the exaction was permissible as a tax, its validity was held not to be impaired by its penal objective, which was "to force corporations to distribute earnings in order to create a basis for taxation against the stockholders." As to the added contention that, because liability was assessed upon a mere purpose to evade imposition of surtaxes against stockholders, the tax was a direct tax on a state of mind, the Court replied that while "the existence of the defined purpose was a con-

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[24] United States v. Phellis, 257 U.S. 156 (1921); Rockefeller v. United States, 257 U.S. 176 (1921). *See also* Cullinan v. Walker, 262 U.S. 134 (1923). In Marr v. United States, 268 U.S. 536 (1925), the Court held that the increased market value of stock issued by a new corporation in exchange for stock of an older corporation, the assets of which it was organized to absorb, was subject to taxation as income to the holder, notwithstanding that the income represented profits of the older corporation and that the capital remained invested in the same general enterprise. The Court likened Weiss v. Stearn, 265 U.S. 242 (1924), to Eisner v. Macomber, and distinguished it from the aforementioned cases on the ground of preservation of corporate identity. Although the "new corporation had . . . been organized to take over the assets and business of the old . . . [,] the corporate identity was deemed to have been substantially maintained because the new corporation was organized under the laws of the same State with presumably the same powers as the old. There was also no change in the character of the securities issued. By reason of these facts, the proportional interest of the stockholder after the distribution of the new securities was deemed to be exactly the same . . . ." *Marr*, 268 U.S. at 541.

[25] Miles v. Safe Deposit Co., 259 U.S. 247 (1922).

[26] Koshland v. Helvering, 298 U.S. 441 (1936).

[27] Helvering v. Gowran, 302 U.S. 238 (1937).

dition precedent to the imposition of the tax liability, . . . [did] not prevent it from being a true income tax within the meaning of the Sixteenth Amendment."[28] Subsequently, in *Helvering v. Northwest Steel Mills*,[29] this appraisal of the constitutionality of the undistributed profits tax was buttressed by the following observation: "It is true that the surtax is imposed upon the annual income only if it is not distributed, but this does not serve to make it anything other than a true tax on income within the meaning of the Sixteenth Amendment. Nor is it true . . . that because there might be an impairment of the capital stock, the tax on the current annual profit would be the equivalent of a tax upon capital. Whether there was an impairment of the capital stock or not, the tax . . . was imposed on profits earned during a definite period—a tax year—and therefore on profits constituting income within the meaning of the Sixteenth Amendment."[30]

Likening a cooperative to a corporation, federal courts have also declared to be taxable income the net earnings of a farmers' cooperative, a portion of which was used to pay dividends on capital stock without reference to patronage. The argument that such earnings were in reality accumulated savings of its patrons that the cooperative held as their bailee was rejected as unsound because, "while those who might be entitled to patronage dividends have . . . an interest in such earnings, such interest never ripens into an individual ownership . . . until and if a patronage dividend be declared." Had such net earnings been apportioned to all of the patrons during the year, "there might be . . . a more serious question as to whether such earnings constituted 'income' [of the cooperative] within the Amendment."[31] Similarly, the power of Congress to tax the income of an unincorporated joint stock association has been held to be unaffected by the fact that under state law the association is not a legal entity and cannot hold title to property, or by the fact that the shareholders are liable for its debts as partners.[32]

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[28] Helvering v. National Grocery Co., 304 U.S. 282, 288–89 (1938). In Helvering v. Mitchell, 303 U.S. 391 (1938), the defendant contended the collection of fifty per cent of any deficiency in addition to the deficiency alleged to have resulted from a fraudulent intent to evade the income tax amounted to the imposition of a criminal penalty. The Court, however, described the additional sum as a civil and not a criminal sanction, and one which could be constitutionally employed to safeguard the government against loss of revenue. In contrast, the exaction upheld in Helvering v. National Grocery Co., though conceded to possess the attributes of a civil sanction, was declared to be sustainable as a tax.

[29] 311 U.S. 46 (1940). *See also* Crane-Johnson Co. v. Helvering, 311 U.S. 54 (1940).

[30] 311 U.S. at 53.

[31] Farmers Union Co-op v. Commissioner, 90 F.2d 488, 491, 492 (8th Cir. 1937).

[32] Burk-Waggoner Ass'n v. Hopkins, 269 U.S. 110 (1925).

Whether subsidies paid to corporations in money or in the form of grants of land or other physical property constitute taxable income has also concerned the Court. In *Edwards v. Cuba Railroad*,[33] it ruled that subsidies of lands, equipment, and money paid by Cuba for the construction of a railroad were not taxable income but were to be viewed as having been received by the railroad as a reimbursement for capital expenditures in completing such project. On the other hand, sums paid out by the Federal Government to fulfill its guarantee of minimum operating revenue to railroads during the six months following relinquishment of their control by that government were found to be taxable income. Such payments were distinguished from those excluded from computation of income in the preceding case in that the former were neither bonuses, nor gifts, nor subsidies, "that is, contributions to capital."[34] Other corporate receipts deemed to be taxable as income include the following: (1) "insiders profits" realized by a director and stockholder of a corporation from transaction in its stock, which, as required by the Securities and Exchange Act,[35] are paid over to the corporation;[36] (2) money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble damage antitrust recovery;[37] and (3) compensation awarded for the fair rental value of trucking facilities operated by the taxpayer under control and possession of the government during World War II, for in the last instance the government never acquired title to the property and had not damaged it beyond ordinary wear.[38]

Gains: When Taxable.—Although "economic gain is not always taxable as income, it is settled that the realization of gain need not be in cash derived from the sale of an asset."[39] Thus, when through forfeiture of a lease, a landlord became possessed of a new building erected on his land by the outgoing tenant, the resulting gain to the former was taxable to him in that same year. "The fact that the gain is a portion of the value of the property received by the . . . [landlord] does not negative its realization. . . . It is not necessary to recognition of taxable gain that . . . [the landlord] should be able to sever the improvement begetting the gain from his original capital." Hence, the taxpayer was incorrect in contending "that the Amendment does not permit the taxation of such [a] gain with-

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[33] 268 U.S. 628 (1925).

[34] Texas & Pacific Ry. Co. v. United States, 286 U.S. 285, 289 (1932); Continental Tie & L. Co. v. United States, 286 U.S. 290 (1932).

[35] 15 U.S.C. § 78p.

[36] General American Investors Co. v. Commissioner, 348 U.S. 434 (1955).

[37] Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

[38] Commissioner v. Gillette Motor Co., 364 U.S. 130 (1960).

[39] Helvering v. Bruun, 309 U.S. 461, 469 (1940).

out apportionment amongst the states."[40] Consistent with this holding, the Court has also ruled that, when an apartment house was acquired by bequest subject to an unassumed mortgage, and several years later was sold for a price slightly in excess of the mortgage, the basis for determining the gain from that sale was the difference between the selling price, undiminished by the amount of the mortgage, and the value of the property at the time of the acquisition, less deductions for depreciation during the years the building was held by the taxpayer. The latter's contention that the Revenue Act, as thus applied, taxed something that was not revenue, was declared to be unfounded.[41]

As against the argument of a donee that a gift of stock became a capital asset when received and that therefore, when disposed of, no part of that value could be treated as taxable income to said donee, the Court has declared that it was within the power of Congress to require a donee of stock, who sells it at a profit, to pay income tax on the difference between the selling price and the value when the donor acquired it.[42] Moreover, "receipt in cash or property . . . not [being] the only characteristic of realization of income to a taxpayer on the cash receipt basis," it follows that one who is normally taxable only on the receipt of interest payments cannot escape taxation thereon by giving away his right to such income in advance of payment. When "the taxpayer does not receive payment of income in money or property[,] realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him." Hence an owner of bonds, reporting on the cash receipts basis, who clipped interest coupons therefrom before their due date and gave them to his son, was held to have realized taxable income in the amount of said coupons, notwithstanding that his son had collected them upon maturity later in the year.[43]

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[40] 309 U.S. at 469, 468.

[41] Crane v. Commissioner, 331 U.S. 1, 15–16 (1947).

[42] The donor could not, "by mere gift, enable another to hold this stock free from . . . [the] right . . . [of] the sovereign to take part of any increase in its value when separated through sale or conversion and reduced to possession." Taft v. Bowers, 278 U.S. 470, 482, 484 (1929). However, when a husband, as part of a divorce settlement, transfers his own corporate stock to his wife, he is deemed to have exchanged the stock for the release of his wife's inchoate, marital rights, the value of which are presumed to be equal to the current, market value of the stock, and, accordingly, he incurs a taxable gain measured by the difference between the initial purchase price of the stock and said market value upon transfer. United States v. Davis, 370 U.S. 65 (1962).

[43] Helvering v. Horst, 311 U.S. 112, 115 (1940). The Court was also called upon to resolve questions as to whether gains, realized after 1913, on transactions consummated prior to ratification of the Sixteenth Amendment are taxable, and if so, how such tax is to be determined. The Court's answer generally has been that if the

Income from Illicit Transactions.—In *United States v. Sullivan*,[44] the Court held that gains derived from illicit traffic were taxable income under the act of 1921.[45] Justice Holmes wrote, for the unanimous Court: "We see no reason . . . why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay."[46] Consistent with that decision, although not without dissent, the Court ruled that Congress has the power to tax as income moneys received by an extortioner,[47] and, more recently, that embezzled money is taxable income of an embezzler in the year of embezzlement. "When a taxpayer acquires earnings,

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gain to the person whose income is under consideration became such subsequent to the date at which the amendment went into effect, namely, March 1, 1913, and is a real, and not merely an apparent, gain, said gain is taxable. Thus, one who purchased stock in 1912 for $500 could not limit his taxable gain to the difference, $695, the value of the stock on March 1, 1913 and $13,931, the price obtained on the sale thereof, in 1916; but was obliged to pay tax on the entire gain, that is the difference between the original purchase price and the proceeds of the sale, Goodrich v. Edwards, 255 U.S. 527 (1921). Conversely, one who acquired stock in 1912 for $291,600 and who sold the same in 1916 for only $269,346, incurred a loss and could not be taxed at all, notwithstanding the fact that on March 1, 1913, his stock had depreciated to $148,635. Walsh v. Brewster, 255 U.S. 536 (1921). On the other hand, although the difference between the amount of life insurance premiums paid as of 1908, and the amount distributed in 1919, when the insured received the amount of his policy plus cash dividends apportioned thereto since 1908, constituted a gain, that portion of the latter that accrued between 1908 and 1913 was deemed to be an accretion of capital and hence not taxable. Lucas v. Alexander, 279 U.S. 473 (1929).

However, a litigant who, in 1915, reduced to judgment a suit pending on February 26, 1913, for an accounting under a patent infringement, was unable to have treated as capital, and excluded from the taxable income produced by such settlement, that portion of his claim that had accrued prior to March 1, 1913. Income within the meaning of the Amendment was interpreted to be the fruit that is born of capital, not the potency of fruition. All that the taxpayer possessed in 1913 was a contingent chose in action that was inchoate, uncertain, and contested. United States v. Safety Car Heating Co., 297 U.S. 88 (1936).

Similarly, purchasers of coal lands subject to mining leases executed before adoption of the Amendment could not successfully contend that royalties received during 1920–1926 were payments for capital assets sold before March 1, 1913, and hence not taxable. Such an exemption, these purchasers argued, would have been in harmony with applicable local law under which title to coal passes immediately to the lessee on execution of such leases. To the Court, however, such leases were not to be viewed "as a 'sale' of the mineral content of the soil," as minerals "may or may not be present in the leased premises, and may or may not be found [therein]. . . . If found, their abstraction . . . is a time-consuming operation and the payments made by the lessee to the lessor do not normally become payable as the result of a single transaction. . . ." The result for tax purposes would have been the same even had the lease provided that title to the minerals would pass only "on severance by the lessee." Burnet v. Harmel, 287 U.S. 103, 107, 106, 111 (1932).

[44] 274 U.S. 259 (1927).

[45] 42 Stat. 227, 250, 268.

[46] 274 U.S. at 263. Profits from illegal undertakings being taxable as income, expenses in the form of salaries and rentals incurred by bookmakers are deductible. Commissioner v. Sullivan, 356 U.S. 27 (1958).

[47] Rutkin v. United States, 343 U.S. 130 (1952). Four Justices—Black, Reed, Frankfurter, and Douglas—dissented.

lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.'"[48]

Deductions and Exemptions.—The authorization contained in the Sixteenth Amendment to tax income "from whatever source derived" does not preclude Congress from granting exemptions.[49] Thus, the fact that, "[u]nder the Revenue Acts of 1913, 1916, 1917 and 1918, stock fire insurance companies were taxed upon their income, including gains realized from the sale or other disposition of property accruing subsequent to March 1, 1913," but were not so taxed by the Revenue Acts of 1921, 1924, and 1926, did not prevent Congress, under the terms of the Revenue Act of 1928, from taxing all the gain attributable to increase in value after March 1, 1913, that such a company realized from a sale of property in 1928. The constitutional power of Congress to tax a gain being well-established, the Court found Congress competent to choose "the moment of its realization and the amount realized"; and "[i]ts failure to impose a tax upon the increase in value in the earlier years . . . cannot preclude it from taxing the gain in the year when realized . . . ."[50] Congress is equally well-equipped with the "power to condition, limit, or deny deductions from gross incomes in order to arrive at the net that it chooses to tax."[51] Accordingly, even though the rental value of a building used by its owner does not constitute income within the meaning of the Amendment,[52] Congress was competent to provide that an insurance company shall not be entitled to deductions for depreciation, maintenance, and property taxes on real estate owned and occupied by it unless it includes in its computation of gross income the rental value of the space thus used.[53]

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[48] James v. United States, 366 U.S. 213, 219 (1961) (overruling Commissioner v. Wilcox, 327 U.S. 404 (1946)).

[49] Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916).

[50] MacLaughlin v. Alliance Ins. Co., 286 U.S. 244, 247, 250 (1932).

[51] Helvering v. Independent Life Ins. Co., 292 U.S. 371, 381 (1934); Helvering v. Winmill, 305 U.S. 79, 84 (1938).

[52] A tax on the rental value of property so occupied is a direct tax on the land and must be apportioned. Helvering v. Independent L. Ins. Co., 292 U.S. 371, 378–79 (1934).

[53] 292 U.S. at 381. Expenditures incurred in the prosecution of work under a contract for the purpose of earning profits are not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income. Accordingly, a dredging contractor, recovering a judgment for breach of warranty of the character of the material to be dredged, must include the amount thereof in the gross income of the year in which it was received, rather than of the years during which the contract was performed, even though it

Also, a taxpayer who erected a $3,000,000 office building on land, the unimproved worth of which was $660,000, and who subsequently purchased the lease on the latter for $2,100,000 is entitled to compute depreciation over the remaining useful life of the building on that portion of $1,440,000, representing the difference between the price and the unimproved value, as may be allocated to the building; but he cannot deduct the $1,440,000 as a business expense incurred in eliminating the cost of allegedly excessive rentals under the lease, nor can he treat that sum as a prepayment of rent to be amortized over the 21-year period that the lease was to run.[54]

Diminution of Loss.—Mere diminution of loss is neither gain, profit, nor income. Accordingly, one who in 1913 borrowed a sum of money to be repaid in German marks and who subsequently lost the money in a business transaction cannot be taxed on the curtailment of debt effected by using depreciated marks in 1921 to settle a liability of $798,144 for $113,688, the "saving" having been exceeded by a loss on the entire operation.[55]

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merely represents a return of expenditures made in performing the contract and resulting in a loss. The gain or profit subject to tax under the Sixteenth Amendment is the excess of receipts over allowable deductions during the accounting period, without regard to whether or not such excess represents a profit ascertained on the basis of particular transactions of the taxpayer when they are brought to a conclusion. Burnet v. Sanford & Brooks Co., 282 U.S. 359 (1931).

The grant on denial of deductions is not based on the taxpayers' engagement in constitutionally protected activities, and, accordingly, no deduction is granted for sums expended in combating legislation, enactment of which would destroy taxpayer's business. Cammarano v. United States, 358 U.S. 498 (1959).

Likewise, when tank truck owners, either intentionally for business reasons or unintentionally, violate state maximum weight laws, and incur fines, the latter are not deductible, for fines are penalties rather than tolls for the use of highways, and Congress is not to be viewed as having intended to encourage enterprises to violate state policy. Tank Truck Rentals v. Commissioner, 356 U.S. 30 (1958); Hoover Express Co. v. United States, 356 U.S. 38 (1958).

[54] Millinery Corp. v. Commissioner, 350 U.S. 456 (1956).

[55] Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926).

POPULAR ELECTION OF SENATORS

SEVENTEENTH AMENDMENT

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of each State shall issue writs of election to fill such vacancies: Provided That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

POPULAR ELECTION OF SENATORS

The ratification of the Seventeenth Amendment was the outcome of increasing popular dissatisfaction with the operation of the originally established method of electing Senators. As the franchise became exercisable by greater numbers of people, the belief became widespread that Senators ought to be popularly elected in the same manner as Representatives. Acceptance of this idea was fostered by the mounting accumulation of evidence of the practical disadvantages and malpractices attendant upon legislative selection, such as deadlocks within legislatures resulting in vacancies remaining unfilled for substantial intervals, the influencing of legislative selection by corrupt political organizations and special interest groups through purchase of legislative seats, and the neglect of other duties by legislators as a consequence of protracted electoral contests.

Prior to ratification, however, many states had perfected arrangements calculated to afford the voters more effective control over the selection of Senators. State laws were amended so as to enable vot-

ers participating in primary elections to designate their preference for one of several party candidates for a senatorial seat, and nominations unofficially effected thereby were transmitted to the legislature. Although their action rested upon no stronger foundation than common understanding, the legislatures generally elected the winning candidate of the majority, and, indeed, in two states, candidates for legislative seats were required to promise to support, without regard to party ties, the senatorial candidate polling the most votes. As a result of such developments, at least 29 states by 1912, one year before ratification, were nominating Senators on a popular basis, and, as a consequence, the constitutional discretion of the legislatures had been reduced to little more than that retained by presidential electors.[1]

Very shortly after ratification it was established that, if a person possessed the qualifications requisite for voting for a Senator, his right to vote for the Senator was not derived merely from the constitution and laws of the state that chose the Senator, but had its foundation in the Constitution of the United States.[2] Consistent with this view, federal courts declared that, when local party authorities, acting pursuant to regulations prescribed by a party's state executive committee, refused to permit an African-American, on account of his race, to vote in a primary to select candidates for the office of U.S. Senator, they deprived him of a right secured to him by the Constitution and laws, in violation of this Amendment.[3] An Illinois statute, by contrast, that required that a petition to form, and to nominate candidates for, a new political party be signed by at least 25,000 voters from at least 50 counties was held not to impair any right under the Seventeenth Amendment, notwithstanding that 52 percent of the state's voters were residents of one county, 87 percent were residents of 49 counties, and only 13 percent resided in the 53 least populous counties.[4]

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[1] 1 G. HAYNES, THE SENATE OF THE UNITED STATES 79–117 (1938).

[2] United States v. Aczel, 219 F. 917, 929–30 (D. Ind. 1915) (citing *Ex parte* Yarbrough, 110 U.S. 651 (1884)).

[3] Chapman v. King, 154 F.2d 460 (5th Cir. 1946), *cert. denied*, 327 U.S. 800 (1946).

[4] MacDougall v. Green, 355 U.S. 281 (1948), overruled on equal protection grounds in Moore v. Ogilvie, 394 U.S. 814 (1969). *See* Forssenius v. Harman, 235 F. Supp. 66 (E.D.Va. 1964), *aff'd on other grounds*, 380 U.S. 529 (1965), where a three-judge District Court held that the certificate of residence requirement established by the Virginia legislature as an alternative to payment of a poll tax in federal elections was an additional qualification to voting in violation of the Seventeenth Amendment and Art. I, § 2.

PROHIBITION OF INTOXICATING LIQUORS

EIGHTEENTH AMENDMENT

SECTIONS 1–3. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

PROHIBITION

Validity of Adoption

Cases relating to this question are presented and discussed under Article V.

Enforcement

Cases produced by enforcement and arising under the Fourth and Fifth Amendments are considered in the discussion appearing under the those Amendments.

Repeal

The Eighteenth Amendment was repealed by the Twenty-first Amendment, and titles I and II of the National Prohibition Act [1] were subsequently specifically repealed by the act of August 27, 1935.[2] Federal prohibition laws effective in various Districts and Territories were repealed as follows: District of Columbia-April 5, 1933,

[1] Ch. 85, 41 Stat. 305.
[2] Ch. 740, 49 Stat. 872.

and January 24, 1934;[3] Puerto Rico and Virgin Islands-March 2, 1934;[4] Hawaii-March 26, 1934;[5] and Panama Canal Zone-June 19, 1934.[6]

Taking judicial notice of the fact that ratification of the Twenty-first Amendment was consummated on December 5, 1933, the Supreme Court held that the National Prohibition Act, insofar as it rested upon a grant of authority to Congress by the Eighteenth Amendment, thereupon become inoperative, with the result that prosecutions for violations of the National Prohibition Act, including proceedings on appeal, pending on, or begun after, the date of repeal, had to be dismissed for want of jurisdiction. Only final judgments of conviction rendered while the National Prohibition Act was in force remained unaffected.[7] Likewise a heavy "special excise tax," insofar as it could be construed as part of the machinery for enforcing the Eighteenth Amendment, was deemed to have become inapplicable automatically upon the Amendment's repeal.[8] However, liability on a bond conditioned upon the return on the day of trial of a vessel seized for illegal transportation of liquor was held not to have been extinguished by repeal when the facts disclosed that the

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[3] Ch. 19, 48 Stat. 25; ch. 4, 48 Stat. 319.

[4] Ch. 37, 48 Stat. 361.

[5] Ch. 88, 48 Stat. 467.

[6] Ch. 657, 48 Stat. 1116.

[7] United States v. Chambers, 291 U.S. 217, 222–26 (1934). *See also* Ellerbee v. Aderhold, 5 F. Supp. 1022 (N.D. Ga. 1934); United States ex rel. Randall v. United States Marshal, 143 F.2d 830 (2d Cir. 1944). Because the Twenty-first Amendment contains "no saving clause as to prosecutions for offenses therefore committed," these holdings were rendered unavoidable by virtue of the well-established principle that after "the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force. . . ." *The General Pinkney*, 9 U.S. (5 Cr.) 281, 283 (1809), *quoted in* United States v. Chambers, 291 U.S. at 223.

[8] United States v. Constantine, 296 U.S. 287 (1935). The Court also took the position that, even if the statute embodying this "tax" had not been "adopted to penalize violations of the Amendment," but merely to obtain a penalty for violations of state liquor laws, "it ceased to be enforceable at the date of repeal," for with the lapse of the unusual enforcement powers contained in the Eighteenth Amendment, Congress could not, without infringing upon powers reserved to the states by the Tenth Amendment, "impose cumulative penalties above and beyond those specified by State law for infractions of . . . [a] State's criminal code by its own citizens." Justice Cardozo, joined by Justices Brandeis and Stone, dissented on the ground that, on its face, the statute levying this "tax" was "an appropriate instrument of . . . fiscal policy. . . . Classification by Congress according to the nature of the calling affected by a tax . . . does not cease to be permissible because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state." Id. at 294, 296, 297–98. In earlier cases, the Court nevertheless recognized that Congress also may tax what it forbids and that the basic tax on distilled spirits remained valid and enforceable during as well as after the life of the Amendment. *See* United States v. Yuginovich, 256 U.S. 450, 462 (1921); United States v. Stafoff, 260 U.S. 477 (1923); United States v. Rizzo, 297 U.S. 530 (1936).

trial took place in 1931 and had resulted in conviction of the crew. The liability became complete upon occurrence of the breach of the express contractual condition and a civil action for recovery was viewed as unaffected by the loss of penal sanctions.[9]

[9] United States v. Mack, 295 U.S. 480 (1935).

WOMEN'S SUFFRAGE RIGHTS

NINETEENTH AMENDMENT

SECTIONS 1 AND 2. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

WOMEN'S SUFFRAGE

The Nineteenth Amendment was adopted after a long campaign by its advocates, who had largely despaired of attaining their goal through modification of individual state laws. Agitation in behalf of women's suffrage was recorded as early as the Jackson Administration, but the initial results were meager. Beginning in 1838, Kentucky authorized women to vote in school elections and its action was later copied by a number of other states. Kansas in 1887 granted women unlimited rights to vote in municipal elections. Not until 1869, however, when the Wyoming Territory accorded women suffrage rights on an equal basis with men and continued the practice following admission to statehood, did these advocates register a notable victory. Progress continued to be discouraging, only ten additional states having joined Wyoming by 1914, and, judicial efforts having failed.[1] A vigorous campaign brought congressional passage of a proposed Amendment in 1919 and the necessary state ratifications in 1920.[2]

Following the Supreme Court's interpretation of the Fifteenth Amendment, the state courts that passed on the effect of the Amendment ruled that it did not confer upon women the right to vote, but only the right not to be discriminated against on the basis of their sex in the setting of voting qualifications,[3] a formalistic distinction to be sure, but one that has restrained the possible applications of the Amendment. In only one case has the Supreme Court itself dealt with the Amendment's effect, holding that a Georgia poll

[1] Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875), a challenge under the Privileges or Immunities Clause of the Fourteenth Amendment.

[2] E. FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES (1959).

[3] State v. Mittle, 120 S.C. 526 (1922), *writ of error dismissed*, 260 U.S. 705 (1922); Graves v. Eubank, 205 Ala. 174 (1921); *In re* Cavelier, 287 N.Y.S. 739 (1936).

tax statute that exempted from payment women who did not register to vote did not discriminate in any manner against the right of men to vote, although it did note that the Amendment "applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or State."[4]

[4] Breedlove v. Suttles, 302 U.S. 277 (1937).

COMMENCEMENT OF THE TERMS OF OFFICE

TWENTIETH AMENDMENT

SECTIONS 1–6. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the

persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

PURPOSE OF THE AMENDMENT

In its report on the proposed Twentieth Amendment, the Senate Committee on the Judiciary suggested several reasons for its passage and ratification. It said in part:

"[W]hen our Constitution was adopted there was some reason for such a long intervention of time between the election and the actual commencement of work by the new Congress. . . . Under present conditions [of communication and transportation] the result of elections is known all over the country within a few hours after the polls close, and the Capital City is within a few days' travel of the remotest portions of the country. . . ."

"Another effect of the amendment would be to abolish the so-called short session of Congress. . . . Every other year, under our Constitution, the terms of Members of the House and one-third of the Members of the Senate expire on the 4th day of March. . . . Experience has shown that this brings about a very undesirable legislative condition. It is a physical impossibility during such a short session for Congress to give attention to much general legislation for the reason that it requires practically all of the time to dispose of the regular appropriation bills. . . . The result is a congested condition that brings about either no legislation or illy considered legislation. . . ."

"If it should happen that in the general election in November in presidential years no candidate for President had received a majority of all the electoral votes, the election of a President would then be thrown into the House of Representatives and the memberships of the House of Representatives called upon to elect a President would be the old Congress and not the new one just elected by the people. It might easily happen that the Members of the House of Representative, upon whom devolved the solemn duty of electing a Chief Magistrate for 4 years, had themselves been repudiated at

the election that had just occurred, and the country would be confronted with the fact that a repudiated House, defeated by the people themselves at the general election, would still have the power to elect a President who would be in control of the country for the next 4 years. It is quite apparent that such a power ought not to exist, and that the people having expressed themselves at the ballot box should through the Representatives then selected, be able to select the President for the ensuing term. . . .”

“The question is sometimes asked, Why is an amendment to the Constitution necessary to bring about this desirable change? The Constitution [before this amendment] does not provide the date when the terms of Senators and Representatives shall begin. It does fix the term of Senators at 6 years and of Members of the House of Representatives at 2 years. The commencement of the terms of the first President and Vice President and of Senators and Representatives composing the First Congress was fixed by an act of [the Continental] Congress adopted September 13, 1788, and that act provided ‘that the first Wednesday in March next to be the time for commencing proceedings under the Constitution.’ It happened that the first Wednesday in March was the 4th day of March, and hence the terms of the President and Vice President and Members of Congress began on the 4th day of March. Since the Constitution provides that the term of Senators shall be 6 years and the term of Members of the House of Representatives 2 years, it follows that this change cannot be made without changing the terms of office of Senators and Representatives, which would in effect be a change of the Constitution. By another act (the act of March 1, 1792) Congress provided that the terms of President and Vice President should commence on the 4th day of March after their election. It seems clear, therefore, that an amendment to the Constitution is necessary to give relief from existing conditions.” [1]

As thus stated, the exact term of the President and Vice President was fixed by the Constitution, Art. II, § 1, cl. 1, at 4 years, and became actually effective, by resolution of the Continental Congress, on the 4th of March 1789. Since this amendment was declared adopted on February 6, 1933, § 1 in effect shortened, by the interval between January 20 and March 4, 1937, the terms of the President and Vice President elected in 1932.

Similarly, it shortened, by the intervals between January 3 and March 4, the terms of Senators elected for terms ending March 4, 1935, 1937, and 1939; and thus temporarily modified the Seventeenth Amendment, fixing the terms of Senators at 6 years. It also

[1] S. Rep. No. 26, 72d Cong., 1st Sess. 2, 4, 5, 6 (1932).

shortened the terms of Representatives elected to the Seventy-third Congress, by the interval between January 3 and March 4, 1935, and temporarily modified Article I, § 2, clause 1, fixing the terms of Representatives at 2 years.

Section 1 further modifies the Twelfth Amendment in its reference to March 4 as the date by which the House must exercise its choice of a President.

Section 2 supersedes clause 2 of § 4 of Article I. The setting of an exact hour for meeting constitutes a recognition of the long practice of Congress, which in 1867 was for the first time enacted into permanent law,[2] only to be repealed in 1871.[3]

When the 3d of January fell on Sunday (in 1937), Congress did by law appoint a different day for its assemblage.[4]

Pursuant to the authority conferred upon it by § 3 of this amendment, Congress shaped the Presidential Succession Act of 1948[5] to meet the situation which would arise from the failure of both President elect and Vice President elect to qualify on or before the time fixed for the beginning of the new Presidential term.

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[2] Ch. 10, 14 Stat. 378.

[3] Ch. 21, § 30, 17 Stat. 12. *See* 1 A. HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 11 (1907).

[4] Ch. 713, 49 Stat. 1826.

[5] Ch. 644, 62 Stat. 672, as amended, 3 U.S.C. § 19. *See also* the discussion of "Presidential Succession" under the Twenty-fifth Amendment, *infra*.

TWENTY-FIRST AMENDMENT

REPEAL OF THE EIGHTEENTH AMENDMENT

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REPEAL OF THE EIGHTEENTH AMENDMENT

TWENTY-FIRST AMENDMENT

SECTIONS 1–3. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

REPEAL OF THE EIGHTEENTH AMENDMENT

Effect of Repeal

The operative effect of section 1, repealing the Eighteenth Amendment, is considered in the commentary dealing with that Amendment.

Scope of Regulatory Power Conferred upon the States

Discrimination Between Domestic and Imported Products.—In a series of decisions rendered shortly after ratification of the Twenty-first Amendment, the Court established the proposition that states are competent to adopt legislation discriminating against imported intoxicating liquors in favor of those of domestic origin and that such discrimination offends neither the Commerce Clause of Article I nor the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Modern cases, however, have recognized that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." [1]

Initially, the Court upheld a California statute that exacted a $500 annual license fee for the privilege of importing beer from other

[1] Granholm v. Heald, 544 U.S. 460, 487 (2005).

states and a $750 fee for the privilege of manufacturing beer,[2] and a Minnesota statute that prohibited a licensed manufacturer or wholesaler from importing any brand of intoxicating liquor containing more than 25 percent alcohol by volume and ready for sale without further processing, unless such brand was registered in the United States Patent Office.[3] Also validated were retaliation laws prohibiting sale of beer from states that discriminated against sale of beer from the enacting state.[4]

Conceding, in *State Board of Equalization v. Young's Market Co.*,[5] that, "[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for [the privilege of importation] . . . even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the [seller's] place of business," the Court proclaimed that this Amendment "abrogated the right to import free, so far as concerns intoxicating liquors." Because the Amendment was viewed as conferring on states an unconditioned authority to prohibit totally the importation of intoxicating beverages, it followed that any discriminatory restriction falling short of total exclusion was equally valid, notwithstanding the absence of any connection between such restriction and public health, safety, or morals. As to the contention that the unequal treatment of imported beer would contravene the Equal Protection Clause, the Court succinctly observed that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[6]

In *Seagram & Sons v. Hostetter*[7] the Court upheld a state statute regulating the price of intoxicating liquors, asserting that the Twenty-first Amendment bestowed upon the states broad regulatory power over the liquor sales within their territories.[8] The Court also noted that states are not totally bound by traditional Commerce Clause limitations when they restrict the importation of intoxicants destined for use, distribution, or consumption within their

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[2] State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

[3] Mahoney v. Triner Corp., 304 U.S. 401 (1938).

[4] Brewing Co. v. Liquor Comm'n, 305 U.S. 391 (1939) (Michigan law); Finch & Co. v. McKittrick, 305 U.S. 395 (1939) (Missouri law).

[5] 299 U.S. 59, 62 (1936).

[6] 299 U.S. at 64. In the three decisions rendered subsequently, the Court merely restated these conclusions. The contention that discriminatory regulation of imported liquors violated the Due Process Clause was summarily rejected in Brewing Co. v. Liquor Comm'n, 305 U.S. 391, 394 (1939).

[7] 384 U.S. 35 (1966).

[8] 384 U.S. at 42. *See* United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945) and Nippert v. City of Richmond, 327 U.S. 416 (1946).

borders.[9] In such a situation the Twenty-first Amendment demands wide latitude for regulation by the state.[10] The Court added that there was nothing in the Twenty-first Amendment or any other part of the Constitution that required state laws regulating the liquor business to be motivated exclusively by a desire to promote temperance.[11]

More recent cases undercut the expansive interpretation of state powers in *Young's Market* and the other early cases. The first step was to harmonize Twenty-first Amendment and Commerce Clause principles where possible by asking "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[12] Because "[t]he central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition," the "central tenet" of the Commerce Clause will control to invalidate "mere economic protectionism," at least where the state cannot justify its tax or regulation as "designed to promote temperance or to carry out any other purpose of the . . . Amendment."[13] But the Court eventually came to view the Twenty-first Amendment as not creating an exception to the commerce power. "[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," the Court stated in 2005. Discrimination in favor of local products can be upheld only if the state "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alterna-

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[9] 384 U.S. at 35. *See*, *e.g.*, Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964) and State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

[10] 384 U.S. at 35. The Court added that it was not deciding then whether the mode of liquor regulation chosen by a state in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. Id. at 42–43.

[11] 384 U.S. at 47.

[12] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984). "[T]he central power reserved by § 2 of the Twenty-first Amendment [is] that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" 467 U.S. at 715 (quoting California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980)).

[13] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984). *See also* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) (attempt to regulate prices of out-of-state sales); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (state's limited interest in banning wine commercials carried on cable TV while permitting various other forms of liquor advertisement is outweighed by federal interest in promoting access to cable TV); and 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (retail price maintenance in violation of Sherman Act).

tives." [14] This interpretation stemmed from the Court's conclusion that the Twenty-first Amendment restored to states the powers that they had possessed prior to Prohibition "to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use" in a manner that did not discriminate against out-of-state goods.[15]

Regulation of Transportation and "Through" Shipments.— When passing upon the constitutionality of legislation regulating the carriage of liquor interstate, a majority of the Justices seemed disposed to bypass the Twenty-first Amendment and to resolve the issue exclusively in terms of the Commerce Clause and state power. This trend toward devaluation of the Twenty-first Amendment was set in motion by *Ziffrin, Inc. v. Reeves* [16] in which a Kentucky statute that prohibited the transportation of intoxicating liquors by carriers other than licensed common carriers was enforced as to an Indiana corporation, engaged in delivering liquor obtained from Kentucky distillers to consignees in Illinois but licensed only as a contract carrier under the Federal Motor Carriers Act. After acknowledging that "the Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause," [17] the Court proceeded to found its ruling largely upon decisions antedating the Amendment that sustained similar state regulations as a legitimate exercise of the police power not unduly burdening interstate commerce. In light of the contemporaneous cases enumerated in the preceding topic construing the Twenty-first Amendment as according a plenary power to the states, such extended emphasis on the police power and the Commerce Clause would seem to have been unnecessary. Thereafter, a total eclipse of the Twenty-first Amendment was recorded in *Duckworth v. Arkansas* [18] and *Carter v. Virginia*,[19] in which, with-

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[14] Granholm v. Heald, 544 U.S. 460, 487, 489 (2005) (invalidating Michigan and New York laws allowing in-state but not out-of-state wineries to make direct sales to consumers). This is the same test the Court applies outside the context of alcoholic beverages. See Maine v. Taylor, 477 U.S. 131, 138 (1986) (once discrimination against interstate commerce is established, "the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means") (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).

[15] 460 U.S. at 484. According to Justice Kennedy's opinion for the Court, these pre-Prohibition state powers were framed by the Wilson and Webb-Kenyon Acts, and the Twenty-first Amendment evidenced a "clear intention of constitutionalizing the Commerce Clause framework established under those statutes." Id.

[16] 308 U.S. 132 (1939).

[17] 308 U.S. at 138.

[18] 314 U.S. 390 (1941).

[19] 321 U.S. 131 (1944). *See also* Cartlidge v. Raincey, 168 F.2d 841 (5th Cir. 1948), *cert. denied*, 335 U.S. 885 (1948).

out even considering that Amendment, a majority of the Court upheld, as not contravening the Commerce Clause, statutes regulating the transport through the state of liquor cargoes originating and ending outside the regulating state's boundaries.[20]

Regulation of Imports Destined for a Federal Area.—Importation of alcoholic beverages into a state for ultimate delivery at a National Park located in the state but over which the United States retained exclusive jurisdiction has been construed as not constituting "transportation . . . into [a] State for delivery and use therein" within the meaning of § 2 of the Amendment. The importation having had as its objective delivery and use in a federal area over which the state retained no jurisdiction, the increased powers that the state acquired from the Twenty-first Amendment were declared to be inapplicable. California therefore could not extend the importation license and other regulatory requirements of its Alcoholic Beverage Control Act to a retail liquor dealer doing business in the Park.[21] On the other hand, a state may apply nondiscriminatory liquor regulations to sales at federal enclaves under concurrent federal and state jurisdiction, and may require that liquor sold at such federal enclaves be labeled as being restricted for use only within the enclave.[22]

Foreign Imports, Exports; Taxation, Regulation.—The Twenty-first Amendment did not repeal the Export-Import Clause, Art. I, § 10, cl. 2, nor obliterate the Commerce Clause, Art. I, § 8, cl. 3. Accordingly, a state cannot tax imported liquor while it remains "in unbroken packages in the hands of the original importer and prior

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[20] Arkansas required a permit for the transportation of liquor across its territory, but granted the same upon application and payment of a nominal fee. Virginia required carriers engaged in similar through-shipments to use the most direct route, carry a bill of lading describing that route, and post a $1,000 bond conditioned on lawful transportation; and also stipulated that the true consignee be named in the bill of lading and be one having the legal right to receive the shipment at destination.

[21] Collins v. Yosemite Park Co., 304 U.S. 518, 537–38 (1938). The principle was reaffirmed in United States v. Mississippi Tax Comm'n, 412 U.S. 363 (1973), holding that Mississippi could not apply its tax regulations to liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within the State and over which the United States had obtained exclusive jurisdiction. "[A]bsent an appropriate express reservation . . . the Twenty-first Amendment confers no power on a State to regulate –whether by licensing, taxation, or otherwise—the importation of distilled spirits into territory over which the United States exercises exclusive jurisdiction." Id. at 375. Nor may states tax importation of liquor for sale at bases over which the United States exercises concurrent jurisdiction only. United States v. Mississippi Tax Comm'n, 421 U.S. 599 (1975).

[22] North Dakota v. United States, 495 U.S. 423 (1990) (also upholding application to federal enclaves of a uniform requirement that shipments into the state be reported to state officials).

to [his] resale or use" thereof.[23] Likewise, New York is precluded from terminating the business of an airport dealer who, under sanction of federal customs laws, acquired "tax-free liquors for export" from out-of-state sources for resale exclusively to airline passengers, with delivery deferred until the latter arrive at foreign destinations.[24] Similarly, a state "affirmation law" prohibiting wholesalers from charging lower prices on out-of-state sales than those already approved for in-state sales is invalid as a direct regulation of interstate commerce. "The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country . . . or another State."[25]

Effect of Section 2 upon Other Constitutional Provisions.—Notwithstanding the 1936 assertion that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth,"[26] the Court has now in a series of cases acknowledged that § 2 of the Twenty-first Amendment did not repeal provisions of the Constitution adopted before ratification of the Twenty-first, save for the severe cabining of Commerce Clause application to the liquor traffic, but it has formulated no consistent rationale for a determination of the effect of the later provision upon earlier ones. In *Craig v. Boren*,[27] the Court invalidated a state law that prescribed different minimum drinking ages for men and women as violating the Equal Protection Clause. To the state's Twenty-first Amendment argument, the Court replied that the Amendment "primarily created an exception to the normal operation of the Commerce Clause" and that its "relevance . . . to other constitutional provisions" is doubtful. "'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where

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[23] Department of Revenue v. Beam Distillers, 377 U.S. 341 (1964). The Court distinguished Gordon v. Texas, 355 U.S. 369 (1958) and De Bary v. Louisiana, 227 U.S. 108 (1913).

[24] Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964).

[25] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 585 (1986) (citation omitted). *Accord*, Healy v. Beer Institute, 491 U.S. 324 (1989).

[26] State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 64 (1936). In Craig v. Boren, 429 U.S. 190, 206–07 (1976), this case and others like it are distinguished as involving the importation of intoxicants into a state, an area of increased state regulatory power, and as involving purely economic regulation traditionally meriting only restrained review. Neither distinguishing element, of course, addresses the precise language quoted. For consideration of equal protection analysis in an analogous situation, the statutory exemption of state insurance regulations from Commerce Clause purview, *see* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 655–74 (1981).

[27] 429 U.S. 190 (1976).

the sale or use of liquor is concerned.'"[28] The holding on this point is "that the operation of the Twenty-first Amendment does not alter the application of the equal protection standards that would otherwise govern this case."[29] Other decisions reach the same result but without discussing the application of the Amendment.[30] Similarly, a state "may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment."[31]

The Court departed from this line of reasoning in *California v. LaRue*,[32] in which it sustained the facial constitutionality of regulations barring a lengthy list of actual or simulated sexual activities and motion picture portrayals of these activities in establishments licensed to sell liquor by the drink. In an action attacking the validity of the regulations as applied to ban nude dancing in bars, the Court considered at some length the material adduced at the public hearings which resulted in the rules demonstrating the antisocial consequences of the activities in the bars. It conceded that the regulations reached expression that would not be deemed legally obscene under prevailing standards and reached expressive conduct that would not be prohibitable under prevailing standards,[33] but the Court thought that the constitutional protection of conduct that partakes "more of gross sexuality than of communication" was outweighed by the state's interest in maintaining order and decency. Moreover, the Court continued, the second section of the Twenty-first Amendment gave an "added presumption in favor of the validity" of the regulations as applied to prohibit questioned activities in places serving liquor by the drink.[34]

A much broader ruling resulted when the Court considered the constitutionality of a state regulation banning topless dancing in

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[28] 429 U.S. at 206 (quoting P. Brest, Processes of Constitutional Decisionmaking—Cases and Materials 258 (1975).

[29] 429 U.S. at 209–210.

[30] *E.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–97 (1972) (invalidating a state liquor regulation as an equal protection denial in a racial context); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (invalidating a state law authorizing the posting of someone as an "excessive drinker" and thus barring him from buying liquor, as reconstrued in Paul v. Davis, 424 U.S. 693, 707–09 (1976)).

[31] Larkin v. Grendel's Den, 459 U.S. 116, 122 n.5 (1982).

[32] 409 U.S. 109 (1972).

[33] *Cf.* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (ban on live nude dancing in Borough); Doran v. Salem Inn, 422 U.S. 922 (1975) (ban on nude dancing in "any public place" applied to topless dancing in bars).

[34] 409 U.S. at 114–19. In Doran v. Salem Inn, 422 U.S. 922, 932–33 (1975), the Court described its holding in *LaRue* more broadly, saying that "we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a State could therefore ban such dancing as part of its liquor license control program."

bars. "Pursuant to its power to regulate the sale of liquor within its boundaries, it has banned topless dancing in establishments granted a license to serve liquor. The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs."[35] This recurrence to the greater-includes-the-lesser-power argument, relatively rare in recent years,[36] would if it were broadly applied give the states in the area of regulation of alcoholic beverages a review-free discretion of unknown scope.

In *44 Liquormart, Inc. v. Rhode Island*,[37] the Court disavowed *LaRue* and *Bellanca*, and reaffirmed that, "although the Twenty-first Amendment limits the effect of the dormant Commerce Clause on a state's regulatory power over the delivery or use of intoxicating beverages within its borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution,'"[38] and therefore does not afford a basis for state legislation infringing freedom of expression protected by the First Amendment. There is no reason, the Court asserted, for distinguishing between freedom of expression and the other constitutional guarantees (*e.g.*, those protected by the Establishment and Equal Protection Clauses) held to be insulated from state impairment pursuant to powers conferred by the Twenty-first Amendment. The Court hastened to add by way of dictum that states retain adequate police powers to regulate "grossly sexual exhibitions in premises licensed to serve alcoholic beverages." "Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations."[39]

Effect on Federal Regulation

The Twenty-first Amendment does not oust all federal regulatory power affecting transportation or sale of alcoholic beverages.

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[35] New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 717 (1981).

[36] For a rejection of the argument in another context, contemporaneously with *Bellanca*, *see* Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 657–68 (1981). For use of the argument in the commercial speech context, *see* Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345–46 (1986); this use of the argument in *Posadas* was disavowed in 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). *See also* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), not addressing the commercial speech issue but holding state regulation of liquor advertisements on cable TV to be preempted, in spite of the Twenty-first Amendment, by federal policies promoting access to cable TV).

[37] 517 U.S. 484 (1996) (statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages is not shielded from constitutional scrutiny by the Twenty-first Amendment).

[38] 517 U.S. at 516 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712 (1984)).

[39] 517 U.S. at 515.

Thus, the Court held, the Amendment does not bar a prosecution under the Sherman Antitrust Act of producers, wholesalers, and retailers charged with conspiring to fix and maintain retail prices of alcoholic beverages in Colorado.[40] In a concurring opinion, supported by Justice Roberts, Justice Frankfurter took the position that if the State of Colorado had in fact "authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. . . . [Because] the Sherman Law . . . can have no greater potency than the Commerce Clause itself, it must equally yield to state power drawn from the Twenty-first Amendment."[41]

Following a review of the cases in this area, the Court has observed "that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'"[42] Invalidating under the Sherman Act a state fair trade scheme imposing a resale price maintenance policy for wine, the Court balanced the federal interest in free enterprise expressed through the antitrust laws against the asserted state interests in promoting temperance and orderly marketing conditions. Because the state courts had found that the policy under attack promoted neither interest significantly, the Supreme Court experienced no difficulty in concluding that the federal interest prevailed. Whether more substantial state interests or means more suited to promoting the state interests would survive attack under federal legislation must await further litigation.

Congress may condition receipt of federal highway funds on a state's agreeing to raise the minimum drinking age to 21, the Twenty-first Amendment not constituting an "independent constitutional bar" to this sort of spending power exercise even though Congress may lack the power to achieve its purpose directly.[43]

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[40] United States v. Frankfort Distilleries, 324 U.S. 293, 297–99 (1945).

[41] 324 U.S. at 301–02. For application of federal laws, *see* William Jameson & Co. v. Morgenthau, 307 U.S. 171 (1939); Kiefer-Stewart Co. v. Jos. E. Seagram & Sons, 340 U.S. 211 (1951); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951); Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966); Burke v. Ford, 389 U.S. 320 (1967).

[42] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 110 (1980).

[43] South Dakota v. Dole, 483 U.S. 203, 210 (1987).

PRESIDENTIAL TENURE

TWENTY-SECOND AMENDMENT

SECTIONS 1 AND 2. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

LIMITATION OF PRESIDENTIAL TERMS

"By reason of the lack of a positive expression upon the subject of the tenure of the office of President, and by reason of a well-defined custom which has risen in the past that no President should have more than two terms in that office, much discussion has resulted upon this subject. Hence it is the purpose of this . . . [proposal] . . . to submit this question to the people so they, by and through the recognized processes, may express their views upon this question, and if they shall so elect, they may . . . thereby set at rest this problem."[1] This characterization of the issue, of course, followed soon after the people had expressed their views by electing Franklin D. Roosevelt to unprecedented third and fourth terms of office, in 1940 and 1944, respectively.

[1] H.R. REP. NO. 17, 80th Cong., 1st Sess. at 2 (1947).

The Twenty-Second Amendment has yet to be tested or applied. Commentary suggests, however, that a number of issues could be raised as to the Amendment's meaning and application, especially in relation to the Twelfth Amendment. By its terms, the Twenty-Second Amendment bars only the election of two-term Presidents, and this prohibition would not prevent someone who had twice been elected President from succeeding to the office after having been elected or appointed Vice President. Broader language providing that no such person "shall be chosen or serve as President . . . or be eligible to hold the office" was rejected in favor of the Amendment's ban merely on election.[2] Whether a two-term President could be elected or appointed Vice President depends upon the meaning of the Twelfth Amendment, which provides that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President." Is someone prohibited by the Twenty-Second Amendment from being "elected" to the office of President thereby "constitutionally ineligible to the office"? Note also that neither Amendment addresses the eligibility of a former two-term President to serve as Speaker of the House or as one of the other officers who could serve as President through operation of the Succession Act.[3]

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[2] H.J. Res. 27, 80th Cong., 1st Sess. (1947) (as introduced). As the House Judiciary Committee reported the measure, it would have made the covered category of former presidents "ineligible to hold the office of President." H.R. REP. NO. 17, 80th Cong., 1st Sess. at 1 (1947).

[3] 3 U.S.C. § 19. For analysis of the Twenty-Second Amendment and its applicability to the various scenarios under which a person can succeed to the office, see Bruce G. Peabody and Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565 (1999)..

PRESIDENTIAL ELECTORS FOR D. C.

TWENTY-THIRD AMENDMENT

SECTIONS 1 AND 2. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

The Congress shall have power to enforce this article by appropriate legislation.

ENFRANCHISEMENT OF RESIDENTS OF THE DISTRICT OF COLUMBIA

"The purpose of this . . . constitutional amendment is to provide the citizens of the District of Columbia with appropriate rights of voting in national elections for President and Vice President of the United States. It would permit District citizens to elect Presidential electors who would be in addition to the electors from the States and who would participate in electing the President and Vice President."

"The District of Columbia, with more than 800,000 people, has a greater number of persons than the population of each of 13 of our States. District citizens have all the obligations of citizenship, including the payment of Federal taxes, of local taxes, and service in our Armed Forces. They have fought and died in every U.S. war since the District was founded. Yet, they cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States. The resultant constitutional

anomaly of imposing all the obligations of citizenship without the most fundamental of its privileges will be removed by the proposed constitutional amendment. . . .”

“[This] . . . amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not make the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its form of government. . . . It would, however, perpetuate recognition of the unique status of the District as the seat of Federal Government under the exclusive legislative control of Congress.” [1]

[1] H.R. REP. NO. 1698, 86th Cong. 2d Sess. 1, 2 (1960).

ABOLITION OF THE POLL TAX

TWENTY-FOURTH AMENDMENT

SECTIONS 1 AND 2. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

The Congress shall have power to enforce this article by appropriate legislation.

EXPANSION OF THE RIGHT TO VOTE

Ratification of the Twenty-fourth Amendment in 1964 marked the culmination of an endeavor begun in Congress in 1939 to eliminate the poll tax as a qualification for voting in federal elections. Property qualifications extend back to colonial days, but the poll tax itself as a qualification was instituted in eleven states of the South following the end of Reconstruction, although at the time of the ratification of this Amendment only five states still retained it.[1] Congress viewed the qualification as "an obstacle to the proper exercise of a citizen's franchise" and expected its removal to "provide a more direct approach to participation by more of the people in their government." Congress similarly thought that a constitutional amendment was necessary,[2] because the qualifications had previously survived constitutional challenges on several grounds.[3]

Not long after ratification of the Amendment—applicable only to federal elections—Congress by statute authorized the Attorney General to seek injunctive relief against use of the poll tax as a means of racial discrimination in state elections,[4] and the Supreme

[1] Harman v. Forssenius, 380 U.S. 528, 538–40, 543–44 (1965); United States v. Texas, 252 F. Supp. 234, 238–45 (W.D. Tex.) (three-judge court), *aff'd on other grounds*, 384 U.S. 155 (1966).

[2] H.R. REP. NO. 1821, 87th Cong., 2d Sess. 3, 5 (1962).

[3] Breedlove v. Suttles, 302 U.S. 277 (1937); Saunders v. Wilkins, 152 F.2d 235 (4th Cir. 1945), *cert. denied*, 328 U.S. 870 (1946); Butler v. Thompson, 97 F. Supp. 17 (E.D. Va), *aff'd*, 341 U.S. 937 (1951).

[4] Voting Rights Act of 1965, § 10, 79 Stat. 442, 42 U.S.C. § 1973h. For the results of actions instituted by the Attorney General under direction of this section,

Court held that the poll tax discriminated on the basis of wealth in violation of the Equal Protection Clause.[5]

In *Harman v. Forssenius*,[6] the Court struck down a Virginia statute that eliminated the poll tax as an absolute qualification for voting in federal elections and gave federal voters the choice either of paying the tax or of filing a certificate of residence six months before the election. Viewing the latter requirement as imposing upon voters in federal elections an onerous requirement that was not imposed on those who continued to pay the tax, the Court unanimously held the law to conflict with the new Amendment by penalizing those who chose to exercise a right guaranteed them by the Amendment.

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see United States v. Texas, 252 F. Supp. 234 (W.D. Tex.) (three-judge court). *aff'd on other grounds*, 384 U.S. 155 (1966); United States v. Alabama, 252 F. Supp. 95 (M.D. Ala. 1966) (three-judge court).

[5] Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (invalid discrimination based on wealth).

[6] 380 U.S. 528 (1965).

PRESIDENTIAL VACANCY AND DISABILITY

TWENTY-FIFTH AMENDMENT

SECTIONS 1–4. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principle officers of the

executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

PRESIDENTIAL SUCCESSION

The Twenty-fifth Amendment was an effort to resolve some of the continuing issues revolving about the office of the President; that is, what happens upon the death, removal, or resignation of the President and what is the course to follow if for some reason the President becomes disabled to such a degree that he cannot fulfill his responsibilities. The practice had been well established that the Vice President became President upon the death of the President, as had happened eight times in our history. Presumably, the Vice President would become President upon the removal of the President from office. Whether the Vice President would become acting President when the President became unable to carry on and whether the President could resume his office upon his recovering his ability were two questions that had divided scholars and experts. Also, seven Vice Presidents had died in office and one had resigned, so that for some twenty per cent of United States history there had been no Vice President to step up. But the seemingly most insoluble problem was that of presidential inability—Garfield's lying in a coma for eighty days before succumbing to the effects of an assassin's bullet, Wilson an invalid for the last eighteen months of his term, the result of a stroke—with its unanswered questions: who was to determine the existence of an inability, how was the matter to be handled if the President sought to continue, in what manner should the Vice

President act, would he be acting President or President, what was to happen if the President recovered. Congress finally proposed this Amendment to the states in the aftermath of President Kennedy's assassination, with the Vice Presidency vacant and a President who had previously had a heart attack.

The Amendment saw multiple use during the 1970s and resulted for the first time in our history in the accession to the Presidency and Vice-Presidency of two men who had not faced the voters in a national election. First, Vice President Spiro Agnew resigned on October 10, 1973, and President Nixon nominated Gerald R. Ford to succeed him, following the procedures of § 2 of the Amendment for the first time. Hearings were held upon the nomination by the Senate Rules Committee and the House Judiciary Committee, both Houses thereafter confirmed the nomination, and the new Vice President took the oath of office December 6, 1973. Second, President Richard M. Nixon resigned his office August 9, 1974, and Vice President Ford immediately succeeded to the office and took the presidential oath of office at noon of the same day. Third, again following § 2 of the Amendment, President Ford nominated Nelson A. Rockefeller to be Vice President; on August 20, 1974, hearings were held in both Houses, confirmation voted, and Mr. Rockefeller took the oath of office December 19, 1974.[1]

[1] For the legislative history, *see* S. REP. NO. 66, 89th Cong., 1st Sess. (1965); H.R. REP. NO. 203, 89th Cong., 1st Sess. (1965); H.R. REP. NO. 564, 89th Cong., 1st Sess. (1965). For an account of the history of the succession problem, *see* R. SILVA, PRESIDENTIAL SUCCESSION (1951).

REDUCTION OF VOTING AGE

TWENTY-SIXTH AMENDMENT

SECTIONS 1 AND 2. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

The Congress shall have power to enforce this article by appropriate legislation.

THE EIGHTEEN-YEAR-OLD VOTE

In extending the Voting Rights Act of 1965 in 1970,[1] Congress included a provision lowering the age qualification to vote in all elections, federal, state, and local, to 18.[2] In a divided decision, the Supreme Court held that Congress was empowered to lower the age qualification in federal elections, but voided the application of the provision in all other elections as beyond congressional power.[3] Confronted thus with the possibility that they might have to maintain two sets of registration books and go to the expense of running separate election systems for federal elections and for all other elections, the states were receptive to the proposing of an Amendment by Congress to establish a minimum age qualification at 18 for all elections, and ratified it promptly.[4]

[1] 79 Stat. 437, as extended and amended by 84 Stat. 314, 42 U.S.C. §§ 1971 *et seq*.

[2] Title 3, 84 Stat. 318, 42 U.S.C. § 1973bb.

[3] Oregon v. Mitchell, 400 U.S. 112 (1970).

[4] S. REP. NO. 26, 92d Cong., 1st Sess. (1971); H.R. REP. NO. 37, 92d Cong., 1st Sess. (1971).

CONGRESSIONAL PAY LIMITATION

TWENTY-SEVENTH AMENDMENT

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

REGULATING CONGRESSIONAL PAY

Referred to the state legislatures at the same time as those proposals that eventually became the Bill of Rights, the congressional pay amendment had long been assumed to be dead.[1] This provision had its genesis, as did several others of the first amendments, in the petitions of the states ratifying the Constitution.[2] It was ratified, however, by only six states (of the eleven needed), and it was rejected by five states. Aside from the idiosyncratic action of the Ohio legislature in 1873, which ratified the proposal in protest of a controversial pay increase adopted by Congress, the pay limitation provision lay dormant until the 1980s. Then, an aide to a Texas legislator discovered the proposal and began a crusade that culminated some ten years later in its ratification.[3]

Now that the provision is a part of the Constitution,[4] it will likely play a minor role. What it commands was already statutorily prescribed, and, at most, it may have implications for automatic cost-of-living increases in pay for Members of Congress.[5]

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[1] Indeed, in Dillon v. Gloss, 256 U.S. 368, 375 (1921), the Court, albeit in dictum, observed that, unless the inference was drawn that ratification must occur within some reasonable time of proposal, "four amendments proposed long ago—two in 1789, one in 1810 and one in 1861—are still pending and in a situation where their ratification in some of the States many years since by representatives of generations now largely forgotten may be effectively supplemented in enough more States to make three-fourths by representatives of the present or some future generation. To that view few would be able to subscribe, *and in our opinion it is quite untenable*." (Emphasis supplied).

[2] A comprehensive, scholarly treatment of the background, development, failure, and subsequent success of this amendment is Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORD. L. REV. 497 (1992). A briefer account is *The Congressional Pay Amendment*, 16 Ops. of the Office of Legal Counsel, U.S. Dept. of Justice 102, App. at 127–136 (1992) (prelim. pr.).

[3] The ratification issues are considered in the discussion of Article V, *supra*.

[4] In the only case to date brought under the Amendment, the parties did not raise the question of the validity of its ratification; the court refused to consider the issue raised by an *amicus*. Boehner v. Anderson, 809 F.Supp. 138, 139 (D.D.C. 1992). It is not at all clear the issue is justiciable.

[5] *See* discussion of "Congressional Pay," *supra*.

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

1. Act of September 24, 1789 (1 Stat. 81, § 13, in part).

Provision that "[the Supreme Court] shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any . . . persons holding office, under authority of the United States" as applied to the issue of mandamus to the Secretary of State requiring him to deliver to plaintiff a commission (duly signed by the President) as justice of the peace in the District of Columbia held an attempt to enlarge the original jurisdiction of the Supreme Court, fixed by Article III, § 2.

Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

2. Act of February 20, 1812 (2 Stat. 677).

Provisions establishing board of revision to annul titles conferred many years previously by governors of the Northwest Territory were held violative of the due process clause of the Fifth Amendment.

Reichart v. Felps, 73 U.S. (6 Wall.) 160 (1868).

3. Act of March 6, 1820 (3 Stat. 548, § 8, proviso).

The Missouri Compromise, prohibiting slavery within the Louisiana Territory north of 36°30' except Missouri, held not warranted as a regulation of Territory belonging to the United States under Article IV, § 3, clause 2 (and see Fifth Amendment).

Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
Concurring: Taney, C.J.
Concurring specially: Wayne, Nelson, Grier, Daniel, Campbell, Catron
Dissenting: McLean, Curtis

4. Act of February 25, 1862 (12 Stat. 345, § 1); July 11, 1862 (12 Stat. 532, § 1); March 3, 1863 (12 Stat. 711, § 3), each in part only.

"Legal tender clauses," making noninterest-bearing United States notes legal tender in payment of "all debts, public and private," so far as applied to debts contracted before passage of the act, held not within express or implied powers of Congress under Article I, § 8, and inconsistent with Article I, § 10, and Fifth Amendment.

Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870); overruled in *Knox v. Lee (Legal Tender Cases)*, 79 U.S. (12 Wall.) 457 (1871).
Concurring: Chase, C.J., Nelson, Clifford, Grier, Field
Dissenting: Miller, Swayne, Davis

5. Act of May 20, 1862 (§ 35, 12 Stat. 394); Act of May 21, 1862 (12 Stat. 407); Act of June 25, 1864 (13 Stat. 187); Act of July 23, 1866 (14 Stat. 216); Revised Statutes Relating to the District of Columbia, Act of June 22, 1874, (§§ 281, 282, 294, 304, 18 Stat. pt. 2).

Provisions of law requiring, or construed to require, racial separation in the schools of the District of Columbia, held to violate the equal protection component of the due process clause of the Fifth Amendment.

Bolling v. Sharpe, 347 U.S. 497 (1954).

6. Act of March 3, 1863 (12 Stat. 756, § 5)

"So much of the fifth section . . . as provides for the removal of a judgment in a State court, and in which the cause was tried by a jury to the circuit court of the United States for a retrial on the facts and law, is not in pursuance of the Constitution, and is void" under the Seventh Amendment.

The Justices v. Murray, 76 U.S. (9 Wall.) 274 (1870).

7. Act of March 3, 1863 (12 Stat. 766, § 5)

Provision for an appeal from the Court of Claims to the Supreme Court—there being, at the time, a further provision (§ 14) requiring an estimate by the Secretary of the Treasury before payment of final judgment, held to contravene the judicial finality intended by the Constitution, Article III.

Gordon v. United States, , 69 U.S. (2 Wall.) 561 (1864).(Case was dismissed without opinion; the grounds upon which this decision was made were stated in a posthumous opinion by Chief Justice Taney printed in the appendix to volume 117 U.S. 697.)

8. Act of June 30, 1864 (13 Stat. 311, § 13)

Provision that "any prize cause now pending in any circuit court shall, on the application of all parties in interest . . . be transferred by that court to the Supreme Court . . . ," as applied in a case where no action had been taken in the Circuit Court on the appeal from the district court, held to propose an appeal procedure not within Article III, § 2.

The Alicia, 74 U.S. (7 Wall.) 571 (1869).

9. Act of January 24, 1865 (13 Stat. 424)

Requirement of a test oath (disavowing actions in hostility to the United States) before admission to appear as attorney in a federal court by virtue of any previous admission, held invalid as applied to an attorney who had been pardoned by the President for all offenses dur-

ing the Rebellion—as ex post facto (Article I, § 9, clause 3) and an interference with the pardoning power (Article II, § 2, clause 1).

Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867).
Concurring: Field, Wayne, Grier, Nelson, Clifford
Dissenting: Miller, Swayne, Davis, Chase, C.J.

10. Act of March 2, 1867 (14 Stat. 484, § 29)

General prohibition on sale of naphtha, etc., for illuminating purposes, if inflammable at less temperature than 110° F., held invalid "except so far as the section named operates within the United States, but without the limits of any State," as being a mere police regulation.

United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870).

11. Act of May 31, 1870 (16 Stat. 140, §§ 3, 4)

Provisions penalizing (1) refusal of local election official to permit voting by persons offering to qualify under State laws, applicable to any citizens; and (2) hindering of any person from qualifying or voting, held invalid under Fifteenth Amendment.

United States v. Reese, 92 U.S. 214 (1876).
Concurring: Waite, C.J., Miller, Field, Bradley, Swayne, Davis, Strong
Dissenting: Clifford, Hunt

12. Act of July 12, 1870 (16 Stat. 235)

Provision making Presidential pardons inadmissible in evidence in Court of Claims, prohibiting their use by that court in deciding claims or appeals, and requiring dismissal of appeals by the Supreme Court in cases where proof of loyalty had been made otherwise than as prescribed by law, held an interference with judicial power under Article III, § 1, and with the pardoning power under Article II, § 2, clause 1.

United States v. Klein, 80 U.S. (13 Wall.) 128 (1872).
Concurring: Chase, C.J., Nelson, Swayne, Davis, Strong, Clifford, Field
Dissenting: Miller, Bradley

13. Act of March 3, 1873 (ch. 258, § 2, 17 Stat. 599, recodified in 39 U.S.C. § 3001(e)(2))

Comstock Act provision barring from the mails any unsolicited advertisement for contraceptives, as applied to circulars and flyers promoting prophylactics or containing information discussing the desirability and availability of prophylactics, violates the free speech clause of the First Amendment.

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983).
Justices concurring: Marshall, White, Blackmun, Powell, Burger, C.J.
Justices concurring specially: Rehnquist, O'Connor, Stevens

14. Act of June 22, 1874 (18 Stat. 1878, § 4)

Provision authorizing federal courts, in suits for forfeitures under revenue and custom laws, to require production of documents, with allegations expected to be proved therein to be taken as proved on failure to produce such documents, was held to violate of the Search and Seizure Clause of the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment.

Boyd v. United States, 116 U.S. 616 (1886).
Concurring: Bradley, Field, Harlan, Woods, Matthews, Gray, Blatchford
Concurring specially: Miller, Waite, C.J.

15. Revised Statutes 1977 (Act of May 31, 1870, § 16, 16 Stat. 144)

Provision that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ," held invalid under the Thirteenth Amendment.

Hodges v. United States, 203 U.S. 1 (1906), overruled in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441–43 (1968).
Concurring: Brewer, Brown, Fuller, Peckham, McKenna, Holmes, Moody, White, C.J.
Dissenting: Harlan, Day

16. Revised Statutes 4937–4947 (Act of July 8, 1870, 16 Stat. 210), and Act of August 14, 1876 (19 Stat. 141)

Original trademark law, applying to marks "for exclusive use within the United States," and a penal act designed solely for the protection of rights defined in the earlier measure, held not supportable by Article I, § 8, clause 8 (Copyright Clause), nor Article I, § 8, clause 3, because of its application to intrastate as well as interstate commerce.

Trade-Mark Cases, 100 U.S. 82 (1879).

17. Revised Statutes 5132, subdivision 9 (Act of March 2, 1867, 14 Stat. 539)

Provision penalizing "any person respecting whom bankruptcy proceedings are commenced . . . who, within 3 months before the commencement of proceedings in bankruptcy, under the false color and pretense of carrying on business and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud . . . ," held a police regulation not within the bankruptcy power (Article I, § 4, clause 4).

United States v. Fox, 95 U.S. 670 (1878).

18. Revised Statutes 5507 (Act of May 31, 1870, § 5, 16 Stat. 141)

Provision penalizing "[e]very person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right

of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats . . . ," held not authorized by the Fifteenth Amendment.

James v. Bowman, 190 U.S. 127 (1903).
Concurring: Brewer, Fuller, Peckham, Holmes, Day, White, C.J.
Dissenting: Harlan, Brown

19. Revised Statutes 5519 (Act of April 20, 1871, 17 Stat. 13, § 2)

Section providing punishment in case "two or more persons in any State . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws . . . or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws . . . ," held invalid as not being directed at state action proscribed by the Fourteenth Amendment.

United States v. Harris, 106 U.S. 629 (1883).
Concurring: Woods, Miller, Bradley, Gray, Field, Matthews, Blatchford, White, C.J.
Dissenting: Harlan

20. Revised Statutes of the District of Columbia, § 1064 (Act of June 17, 1870, 16 Stat. 154,§ 3)

Provision that "prosecutions in the police court [of the District of Columbia] shall be by information under oath, without indictment by grand jury or trial by petit jury," as applied to punishment for conspiracy, held to contravene Article III, § 2, clause 3, requiring jury trial of all crimes.

Callan v. Wilson, 127 U.S. 540 (1888).

21. Act of March 1, 1875 (18 Stat. 336, §§ 1, 2)

Provision "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations . . . of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude"—subject to penalty, held not to be supported by the Thirteenth or Fourteenth Amendments.

Civil Rights Cases, 109 U.S. 3 (1883), as to operation within states.
Concurring: Bradley, Miller, Field, Woods, Matthews, Gray, Blatchford, Waite, C.J.
Dissenting: Harlan

22. Act of March 3, 1875 (18 Stat. 479, § 2)

Provision that "if the party [i.e., a person stealing property from the United States] has been convicted, then the judgment against him

shall be conclusive evidence in the prosecution against [the] receiver that the property of the United States therein described has been embezzled, stolen, or purloined," held to contravene the Sixth Amendment.

Kirby v. United States, 174 U.S. 47 (1899).
Concurring: Harlan, Gray, Shiras, White, Peckham, Fuller, C.J.
Dissenting: Brown, McKenna

23. Act of July 12, 1876 (19 Stat. 80, § 6, in part)

Provision that "postmasters of the first, second, and third classes . . . may be removed by the President by and with the advice and consent of the Senate," held to infringe the executive power under Article II, § 1, clause 1.

Myers v. United States, 272 U.S. 52 (1926).
Concurring: Taft, C.J., Van Devanter, Sutherland, Butler, Sanford, Stone
Dissenting: Holmes, McReynolds, Brandeis

24. Act of August 11, 1888 (25 Stat. 411)

Directive, in a provision for the purchase or condemnation of a certain lock and dam in the Monongahela River, that ". . . in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated . . . ," held to contravene the Fifth Amendment.

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

25. Act of May 5, 1892 (27 Stat. 25, § 4)

Provision of a Chinese exclusion act, that Chinese persons "convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period not exceeding 1 year and thereafter removed from the United States . . . " (such conviction and judgment being had before a justice, judge, or commissioner upon a summary hearing), held to contravene the Fifth and Sixth Amendments.

Wong Wing v. United States, 163 U.S. 228 (1896).
Concurring: Shiras, Harlan, Gray, Brown, White, Peckham, Fuller, C.J.
Concurring in part and dissenting in part: Field

26. Joint Resolution of August 4, 1894 (28 Stat. 1018, No. 41)

Provision authorizing the Secretary of the Interior to approve a second lease of certain land by an Indian chief in Minnesota (granted to lessor's ancestor by art. 9 of a treaty with the Chippewa Indians), held an interference with judicial interpretation of treaties under Article III, § 2, clause 1 (and repugnant to the Fifth Amendment).

Jones v. Meehan, 175 U.S. 1 (1899).

27. Act of August 27, 1894 (28 Stat. 553–60, §§ 27–37)

Income tax provisions of the tariff act of 1894. "The tax imposed by §§ 27 and 37, inclusive . . . so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation [Article I, § 2, clause 3], all those sections, constituting one entire scheme of taxation, are necessarily invalid" (158 U.S. 601, 637).

Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), and rehearing, 158 U.S. 601 (1895).
Concurring: Fuller, C.J., Gray, Brewer, Brown, Shiras, Jackson
Concurring specially: Field
Dissenting: White, Harlan

28. Act of January 30, 1897 (29 Stat. 506)

Prohibition on sale of liquor "to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government . . . ," held a police regulation infringing state powers, and not warranted by the Commerce Clause, Article I, § 8, clause 3.

Matter of Heff, 197 U.S. 488 (1905), overruled in *United States v. Nice*, 241 U.S. 591 (1916).
Concurring: Brewer, Brown, White, Peckham, McKenna, Holmes, Day, Fuller, C.J.
Dissenting: Harlan

29. Act of June 1, 1898 (30 Stat. 428)

Section 10, penalizing "any employer subject to the provisions of this act" who should "threaten any employee with loss of employment . . . because of his membership in . . . a labor corporation, association, or organization" (the act being applicable "to any common carrier . . . engaged in the transportation of passengers or property . . . from one State . . . to another State . . . ," etc.), held an infringement of the Fifth Amendment and not supported by the Commerce Clause.

Adair v. United States, 208 U.S. 161 (1908).
Concurring: Harlan, Brewer, White, Peckham, Day, Fuller, C.J.
Dissenting: McKenna, Holmes

30. Act of June 13, 1898 (30 Stat. 448, 459)

Stamp tax on foreign bills of lading, held a tax on exports in violation of Article I, § 9.

Fairbank v. United States, 181 U.S. 283 (1901).
Concurring: Brewer, Brown, Shiras, Peckham, Fuller, C.J.
Dissenting: Harlan, Gray, White, McKenna

31. Same (30 Stat. 448, 460)

Tax on charter parties, as applied to shipments exclusively from ports in United States to foreign ports, held a tax on exports in violation of Article I, § 9.

United States v. Hvoslef, 237 U.S. 1 (1915).

32. Same (30 Stat. 448, 461)

Stamp tax on policies of marine insurance on exports, held a tax on exports in violation of Article I, § 9.

Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19 (1915).

33. Act of June 6, 1900 (31 Stat. 359, § 171)

Section of the Alaska Code providing for a six-person jury in trials for misdemeanors, held repugnant to the Sixth Amendment, requiring "jury" trial of crimes.

Rassmussen v. United States, 197 U.S. 516 (1905).
Concurring: White, Brewer, Peckham, McKenna, Holmes, Day, Fuller, C.J.
Concurring specially: Harlan, Brown

34. Act of March 3, 1901 (31 Stat. 1341, § 935)

Section of the District of Columbia Code granting the same right of appeal, in criminal cases, to the United States or the District of Columbia as to the defendant, but providing that a verdict was not to be set aside for error found in rulings during trial, held an attempt to take an advisory opinion, contrary to Article III, § 2.

United States v. Evans, 213 U.S. 297 (1909).

35. Act of June 11, 1906 (34 Stat. 232)

Act providing that "every common carrier engaged in trade or commerce in the District of Columbia . . . or between the several States . . . shall be liable to any of its employees . . . for all damages which may result from the negligence of any of its officers . . . or by reason of any defect . . . due to its negligence in its cars, engines . . . roadbed," etc., held not supportable under Article I, § 8, clause 3 because it extended to intrastate as well as interstate commercial activities.

The Employers' Liability Cases, 207 U.S. 463 (1908). The act was upheld as to the District of Columbia in *Hyde v. Southern Ry.*, 31 App. D.C. 466 (1908), and, as to the territories, in *El Paso & N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909).
Concurring: White, Day
Concurring specially: Peckham, Brewer, Fuller, C.J.
Dissenting: Moody, Harlan, McKenna, Holmes

36. Act of June 16, 1906 (34 Stat. 269, § 2)

Provision of Oklahoma Enabling Act restricting relocation of the state capital prior to 1913, held not supportable by Article IV, § 3, authorizing admission of new states.

Coyle v. Smith, 221 U.S. 559 (1911).
Concurring: Lurton, White, Harlan, Day, Hughes, Van Devanter, Lamar
Dissenting: McKenna, Holmes

37. Act of February 20, 1907 (34 Stat. 889, § 3)

Provision in the Immigration Act of 1907 penalizing "whoever . . . shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution . . . any alien woman or girl, within 3 years after she shall have entered the United States," held an exercise of police power not within the control of Congress over immigration (whether drawn from the Commerce Clause or based on inherent sovereignty).

Keller v. United States, 213 U.S. 138 (1909).
Concurring: Brewer, White, Peckham, McKenna, Day, Fuller, C.J.
Dissenting: Holmes, Harlan, Moody

38. Act of March 1, 1907 (34 Stat. 1028)

Provisions authorizing certain Indians "to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since . . . 1902, insofar as said acts . . . attempt to increase or extend the restrictions upon alienation . . . of allotments of lands of Cherokee citizens . . . ," and giving a right of appeal to the Supreme Court, held an attempt to enlarge the judicial power restricted by Article III, § 2, to cases and controversies.

Muskrat v. United States, 219 U.S. 346 (1911).

39. Act of May 27, 1908 (35 Stat. 313, § 4)

Provision making locally taxable "all land [of Indians of the Five Civilized Tribes] from which restrictions have been or shall be removed," held a violation of the Fifth Amendment, in view of the Atoka Agreement, embodied in the Curtis Act of June 28, 1898, providing tax-exemption for allotted lands while title in original allottee, not exceeding 21 years.

Choate v. Trapp, 224 U.S. 665 (1912).

40. Act of February 9, 1909, § 2 (35 Stat. 614, as amended)

Provision of Narcotic Drugs Import and Export Act creating a presumption that possessor of cocaine knew of its illegal importation into the United States held, in light of the fact that more cocaine is produced domestically than is brought into the country and in absence of

any showing that defendant could have known his cocaine was imported, if it was, inapplicable to support conviction from mere possession of cocaine.

Turner v. United States, 396 U.S. 398 (1970).
Concurring specially: Black, Douglas

41. Act of August 19, 1911 (37 Stat. 28)

A proviso in § 8 of the Federal Corrupt Practices Act fixing a maximum authorized expenditure by a candidate for Senator "in any campaign for his nomination and election," as applied to a primary election, held not supported by Article I, § 4, giving Congress power to regulate the manner of holding elections for Senators and Representatives.

Newberry v. United States, 256 U.S. 232 (1921), overruled in *United States v. Classic*, 313 U.S. 299 (1941).
Concurring: McReynolds, McKenna, Holmes, Day, Van Devanter
Concurring specially: Pitney, Brandeis, Clarke
Dissenting: White, C.J. (concurring in part)

42. Act of June 18, 1912 (37 Stat. 136, § 8)

Part of § 8 giving Juvenile Court of the District of Columbia (proceeding upon information) concurrent jurisdiction of desertion cases (which were, by law, punishable by fine or imprisonment in the workhouse at hard labor for 1 year), held invalid under the Fifth Amendment, which gives right to presentment by a grand jury in case of infamous crimes.

United States v. Moreland, 258 U.S. 433 (1922).
Concurring: McKenna, Day, Van Devanter, Pitney, McReynolds
Dissenting: Brandeis, Holmes, Taft, C.J.

43. Act of March 4, 1913 (37 Stat. 988, part of par. 64)

Provision of the District of Columbia Public Utility Commission Act authorizing appeal to the United States Supreme Court from decrees of the District of Columbia Court Appeals modifying valuation decisions of the Utilities Commission, held an attempt to extend the appellate jurisdiction of the Supreme Court to cases not strictly judicial within the meaning of Article III, § 2.

Keller v. Potomac Elec. Co., 261 U.S. 428 (1923).

44. Act of September 1, 1916 (39 Stat. 675)

The original Child Labor Law, providing "that no producer . . . shall ship . . . in interstate commerce . . . any article or commodity the product of any mill . . . in which within 30 days prior to the removal of such product therefrom children under the age of 14 years have been employed or permitted to work more than 8 hours in any day or more

than 6 days in any week . . . ," held not within the commerce power of Congress.

Hammer v. Dagenhart, 247 U.S. 251 (1918).
Concurring: Day, Van Devanter, Pitney, McReynolds, White, C.J.
Dissenting: Holmes, McKenna, Brandeis, Clarke

45. Act of September 8, 1916 (39 Stat. 757, § 2(a), in part)

Provision of the income tax law of 1916, that a "stock dividend shall be considered income, to the amount of its cash value," held invalid (in spite of the Sixteenth Amendment) as an attempt to tax something not actually income, without regard to apportionment under Article I, § 2, clause 3.

Eisner v. Macomber, , 252 U.S. 189 (1920)
Concurring: Pitney, McKenna, Van Devanter, McReynolds, White, C.J.
Dissenting: Holmes, Day, Brandeis, Clarke

46. Act of October 6, 1917 (40 Stat. 395)

The amendment of §§ 24 and 256 of the Judicial Code (which prescribe jurisdiction of district courts) "saving . . . to claimants the rights and remedies under the workmen's compensation law of any State," held an attempt to transfer federal legislative powers to the states—the Constitution, by Article III, § 2, and Article I, § 8, having adopted rules of general maritime law.

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920).
Concurring: McReynolds, McKenna, Day, Van Devanter, White, C.J.
Dissenting: Holmes, Pitney, Brandeis, Clarke

47. Act of September 19, 1918 (40 Stat. 960)

That part of the Minimum Wage Law of the District of Columbia which authorized the Wage Board "to ascertain and declare . . . (a) Standards of minimum wages for women in any occupation within the District of Columbia, and what wages are inadequate to supply the necessary cost of living to any such women workers to maintain them in good health and to protect their morals . . . ," held to interfere with freedom of contract under the Fifth Amendment.

Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
Concurring: Sutherland, McKenna, Van Devanter, McReynolds, Butler
Dissenting: Taft, C.J., Sanford, Holmes

48. Act of February 24, 1919 (40 Stat. 1065, § 213, in part)

That part of § 213 of the of Revenue Act of 1919 which provided that ". . . for the purposes of the title . . . the term 'gross income' . . . includes gains, profits, and income derived from salaries, wages, or com-

pensation for personal service (including in the case of . . . judges of the Supreme and inferior courts of the United States . . . the compensation received as such) . . . " as applied to a judge in office when the act was passed, held a violation of the guaranty of judges' salaries, in Article III, § 1.

Evans v. Gore, 253 U.S. 245 (1920).*Miles v. Graham*, 268 U.S. 501 (1925), held it invalid as applied to a judge taking office subsequent to the date of the act. Both cases were overruled by *O'Malley v. Woodrough*, 307 U.S. 277 (1939).
Concurring: Van Devanter, McKenna, Day, Pitney, McReynolds, Clarke, White, C.J.
Dissenting: Holmes, Brandeis

49. Act of February 24, 1919 (40 Stat. 1097, § 402(c))

That part of the estate tax law providing that the "gross estate" of a decedent should include value of all property "to the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he had at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this act), except in case of a *bona fide* sale . . . " as applied to a transfer of property made prior to the act and intended to take effect in possession or enjoyment at death of grantor, but not in fact testamentary or designed to evade taxation, held confiscatory, contrary to Fifth Amendment.

Nichols v. Coolidge, 274 U.S. 531 (1927).
Concurring: McReynolds, Van Devanter, Sutherland, Butler, Taft, C.J.
Concurring specially (only in the result): Holmes, Brandeis, Sanford, Stone

50. Act of February 24, 1919, title XII (40 Stat. 1138, entire title)

The Child Labor Tax Act, providing that "every person . . . operating . . . any . . . factory . . . in which children under the age of 14 years have been employed or permitted to work . . . shall pay . . . in addition to all other taxes imposed by law, an excise tax equivalent to 10 percent of the entire net profits received . . . for such year from the sale . . . of the product of such . . . factory . . . ," held beyond the taxing power under Article I, § 8, clause 1, and an infringement of state authority.

Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20 (1922).
Concurring: Taft, C.J., McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis
Dissenting: Clarke

51. Act of October 22, 1919 (41 Stat. 298, § 2), amending Act of August 10, 1917 (40 Stat. 277, § 4)

(a) § 4 of the Lever Act, providing in part "that it is hereby made unlawful for any person willfully . . . to make any unjust or unreason-

able rate or charge in handling or dealing in or with any necessaries . . . " and fixing a penalty, held invalid to support an indictment for charging an unreasonable price on sale—as not setting up an ascertainable standard of guilt within the requirement of the Sixth Amendment.

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).
Concurring: White, C.J., McKenna, Holmes, Van Devanter, McReynolds, Clarke
Concurring specially: Pitney, Brandeis

(b) That provision of § 4 making it unlawful "to conspire, combine, agree, or arrange with any other person to . . . exact excessive prices for any necessaries" and fixing a penalty, held invalid to support an indictment, on the reasoning of the *Cohen Grocery* case.

Weeds, Inc. v. United States, 255 U.S. 109 (1921).
Concurring: White, C.J., McKenna, Holmes, Van Devanter, McReynolds, Clarke
Concurring specially: Pitney, Brandeis

52. Act of August 24, 1921 (42 Stat. 187, Future Trading Act)

(a) § 4 (and interwoven regulations) providing a "tax of 20 cents a bushel on every bushel involved therein, upon each contract of sale of grain for future delivery, except . . . where such contracts are made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market' . . . ," held not within the taxing power under Article I, § 8.

Hill v. Wallace, 259 U.S. 44 (1922).

(b) § 3, providing "That in addition to the taxes now imposed by law there is hereby levied a tax amounting to 20 cents per bushel on each bushel involved therein, whether the actual commodity is intended to be delivered or only nominally referred to, upon each . . . option for a contract either of purchase or sale of grain . . . ," held invalid on the same reasoning.

Trusler v. Crooks, 269 U.S. 475 (1926).

53. Act of November 23, 1921 (42 Stat. 261, 245, in part)

Provision of Revenue Act of 1921 abating the deduction (4 percent of mean reserves) allowed from taxable income of life insurance companies in general by the amount of interest on their tax-exempts, and so according no relative advantage to the owners of the tax-exempt securities, held to destroy a guaranteed exemption.

National Life Ins. Co. v. United States, 277 U.S. 508 (1928).
Concurring: McReynolds, Van Devanter, Sutherland, Butler, Sanford, Taft, C.J.
Dissenting: Brandeis, Holmes, Stone

54. Act of June 10, 1922 (42 Stat. 634)

A second attempt to amend §§ 24 and 256 of the Judicial Code, relating to jurisdiction of district courts, by saving "to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State . . . " held invalid on authority of *Knickerbocker Ice Co. v. Stewart*.

Washington v. Dawson & Co., 264 U.S. 219 (1924).
Concurring: McReynolds, McKenna, Holmes, Van Devanter, Sutherland, Butler, Sanford, Taft, C.J.
Dissenting: Brandeis

55. Act of June 2, 1924 (43 Stat. 313)

The gift tax provisions of the Revenue Act of 1924, applicable to gifts made during the calendar year, were held invalid under the Fifth Amendment insofar as they applied to gifts made before passage of the act.

Untermyer v. Anderson, 276 U.S. 440 (1928).
Concurring: McReynolds, Sanford, Van Devanter, Sutherland, Butler, Taft, C.J.
Dissenting: Holmes, Brandeis, Stone

56. Act of February 26, 1926 (44 Stat. 70, § 302, in part)

Stipulation creating a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death of donor and requiring the value thereof to be included in computing the death transfer tax on decedent's estate was held to effect an invalid deprivation of property without due process.

Heiner v. Donnan, 285 U.S. 312 (1932).
Concurring: Sutherland, Van Devanter, McReynolds, Butler, Roberts, Hughes, C.J.
Dissenting: Stone, Brandeis

57. Act of February 26, 1926 (44 Stat. 95, § 701)

Provision imposing a special excise tax of $1,000 on liquor dealers operating in States where such business is illegal, was held a penalty, without constitutional support following repeal of the Eighteenth Amendment.

United States v. Constantine, 296 U.S. 287 (1935).
Concurring: Roberts, Van Devanter, McReynolds, Sutherland, Butler, Hughes, C.J.
Dissenting: Cardozo, Brandeis, Stone

58. Act of March 20, 1933 (48 Stat. 11, § 17, in part)

Clause in the Economy Act of 1933 providing ". . . all laws granting or pertaining to yearly renewable term war risk insurance are hereby repealed," held invalid to abrogate an outstanding contract of insurance, which is a vested right protected by the Fifth Amendment.

Lynch v. United States, 292 U.S. 571 (1934).

59. Act of May 12, 1933 (48 Stat. 31)

Agricultural Adjustment Act providing for processing taxes on agricultural commodities and benefit payments therefore to farmers, held not within the taxing power under Article I, § 8, clause 1.

United States v. Butler, 297 U.S. 1 (1936).
Concurring: Roberts, Van Devanter, McReynolds, Sutherland, Butler, Hughes, C.J.
Dissenting: Stone, Brandeis, Cardozo

60. Joint Resolution of June 5, 1933 (48 Stat. 113, § 1)

Abrogation of gold clause in government obligations, held a repudiation of the pledge implicit in the power to borrow money (Article I, § 8, clause 2), and within the prohibition of the Fourteenth Amendment, against questioning the validity of the public debt. (The majority of the Court, however, held plaintiff not entitled to recover under the circumstances.)

Perry v. United States, 294 U.S. 330 (1935).
Concurring: Hughes, C.J., Brandeis, Roberts, Cardozo
Concurring specially: Stone
Dissenting: McReynolds, Van Devanter, Sutherland, Butler

61. Act of June 16, 1933 (48 Stat. 195, the National Industrial Recovery Act)

(a) Title I, except § 9. Provisions relating to codes of fair competition, authorized to be approved by the President in his discretion "to effectuate the policy" of the act, held invalid as a delegation of legislative power (Article I, § 1) and not within the commerce power (Article I, § 8, clause 3).

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
Concurring: Hughes, C.J., Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Roberts
Concurring specially: Cardozo, Stone

(b) § 9(c). Clause of the oil regulation section authorizing the President "to prohibit the transportation in interstate . . . commerce of petroleum . . . produced or withdrawn from storage in excess of the amount permitted . . . by any State law . . . " and prescribing a penalty for violation of orders issued thereunder, held invalid as a delegation of legislative power.

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
Concurring: Hughes, C.J., Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts
Dissenting: Cardozo

62. Act of June 16, 1933 (48 Stat. 307, § 13)

Temporary reduction of 15 percent in retired pay of judges, retired from service but subject to performance of judicial duties under the Act of March 1, 1929 (45 Stat. 1422), was held a violation of the guaranty of judges' salaries in Article III, § 1.

Booth v. United States, 291 U.S. 339 (1934).

63. Act of April 27, 1934 (48 Stat. 646 § 6), amending § 5(i) of Home Owners' Loan Act of 1933)

Provision for conversion of state building and loan associations into federal associations, upon vote of 51 percent of the votes cast at a meeting of stockholders called to consider such action, held an encroachment on reserved powers of state.

Hopkins Savings Ass'n v. Cleary, 296 U.S. 315 (1935).

64. Act of May 24, 1934 (48 Stat. 798)

Provision for readjustment of municipal indebtedness, though "adequately related" to the bankruptcy power, was held invalid as an interference with state sovereignty.

Ashton v. Cameron County Dist., 298 U.S. 513 (1936).
Concurring: McReynolds, Van Devanter, Sutherland, Butler, Roberts
Dissenting: Cardozo, Brandeis, Stone, Hughes, C.J.

65. Act of June 19, 1934, ch. 652 (48 Stat. 1088, § 316, 18 U.S.C. § 1304)

Section 316 of the Communications Act of 1934, which prohibits radio and television broadcasters from carrying advertisements for privately operated casino gambling regardless of the station's or casino's location, violates the First Amendment's protections for commercial speech as applied to prohibit advertising of private casino gambling broadcast by stations located within a state where such gambling is illegal.

Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999).
Justices concurring: Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer, Rehnquist, C.J.
Justices concurring specially: Thomas

66. Act of June 27, 1934 (48 Stat. 1283)

The Railroad Retirement Act, establishing a detailed compulsory retirement system for employees of carriers subject to the Interstate Commerce Act, held to be not a regulation of commerce within the meaning of Article I, § 8, clause 3, and to violate of the Due Process Clause (Fifth Amendment).

Railroad Retirement Bd. v. Alton R.R., , 295 U.S. 330 (1935)
Concurring: Roberts, Van Devanter, McReynolds, Sutherland, Butler
Dissenting: Hughes, C.J., Brandeis, Stone, Cardozo

67. Act of June 28, 1934 (48 Stat. 1289, ch. 869)

The Frazier-Lemke Act, adding subsection (s) to § 75 of the Bankruptcy Act, designed to preserve to mortgagors the ownership and enjoyment of their farm property and providing specifically, in paragraph 7, that a bankrupt left in possession has the option at any time within 5 years of buying at the appraised value—subject meanwhile to no monetary obligation other than payment of reasonable rental, held a violation of property rights, under the Fifth Amendment.

Louisville Bank v. Radford, 295 U.S. 555 (1935).

68. Act of August 24, 1935 (48 Stat. 750).

Amendments of Agricultural Adjustment Act held not within the taxing power, the amendments not having cured the defects of the original act held unconstitutional in *United States v. Butler*, 297 U.S. 1 (1936).

Rickert Rice Mills v. Fontenot, 297 U.S. 110 (1936).

69. Act of August 29, 1935, ch. 814 § 5(e) (49 Stat. 982, 27 U.S.C. § 205(e))

The prohibition in section 5(e)(2) of the Federal Alcohol Administration Act of 1935 on the display of alcohol content on beer labels is inconsistent with the protections afforded to commercial speech by the First Amendment. The government's interest in curbing strength wars among brewers is substantial, but, given the "overall irrationality" of the regulatory scheme, the labeling prohibition does not directly and materially advance that interest.

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
Justices concurring: Thomas, O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer, Rehnquist, C.J.
Justice concurring specially: Stevens

70. Act of August 30, 1935 (49 Stat. 991)

Bituminous Coal Conservation Act of 1935, held to impose, not a tax within Article I, § 8, but a penalty not sustained by the Commerce Clause (Article I, § 8, clause 3).

Carter v. Carter Coal Co., 298 U.S. 238 (1936).
Concurring: Sutherland, Van Devanter, McReynolds, Butler, Roberts
Concurring specially: Hughes, C.J.
Concurring in part and dissenting in part: Cardozo, Brandeis, Stone

71. Act of February 15, 1938, ch. 29 (52 Stat. 30)

District of Columbia Code § 22–1115, prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute," violates the First Amendment.

Boos v. Barry, 485 U.S. 312 (1988).
Justices concurring: O'Connor, Brennan, Marshall, Stevens, Scalia
Justices dissenting: Rehnquist, C.J., White, Blackmun

72. Act of June 25, 1938 (52 Stat. 1040)

Federal Food, Drug, and Cosmetic Act of 1938, § 301(f), prohibiting the refusal to permit entry or inspection of premises by federal officers held void for vagueness and to violate the Due Process Clause of the Fifth Amendment.

United States v. Cardiff, 344 U.S. 174 (1952).
Concurring: Douglas, Black, Reed, Frankfurter, Jackson, Clark, Minton, Vinson, C.J.
Dissenting: Burton

73. Act of June 30, 1938 (52 Stat. 1251)

Federal Firearms Act, § 2(f), establishing a presumption of guilt based on a prior conviction and present possession of a firearm, held to violate the test of due process under the Fifth Amendment.

Tot v. United States, 319 U.S. 463 (1943).
Concurring: Roberts, Reed, Frankfurter, Jackson, Rutledge, Stone, C.J.
Concurring specially: Black, Douglas

74. Act of August 10, 1939 (§ 201(d), 53 Stat. 1362, as amended, 42 U.S.C. § 402(g))

Provision of Social Security Act that grants survivors' benefits based on the earnings of a deceased husband and father covered by the Act to his widow and to the couple's children in her care but that grants benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower held violative of the right to equal protection secured by the Fifth Amendment's Due Process Clause, because it unjustifiably discriminates against female wage earners required to pay social security taxes by affording them less protection for their survivors than is provided for male wage earners.

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

75. Act of October 14, 1940 (54 Stat. 1169 § 401(g)); as amended by Act of January 20, 1944 (58 Stat. 4, § 1)

Provision of Aliens and Nationality Code (8 U.S.C. § 1481(a)(8)), derived from the Nationality Act of 1940, as amended, that citizenship shall be lost upon conviction by court martial and dishonorable discharge for deserting the armed services in time of war, held invalid as imposing a cruel and unusual punishment barred by the Eighth Amendment and not authorized by the war powers conferred by Article I, § 8, clauses 11 to 14.

Trop v. Dulles, 356 U.S. 86 (1958).
Concurring: Warren, C.J., Whittaker
Concurring specially: Black, Douglas, Brennan
Dissenting: Frankfurter, Burton, Clark, Harlan

76. Act of November 15, 1943 (57 Stat. 450)

Urgent Deficiency Appropriation Act of 1943, § 304, providing that no salary should be paid to certain named federal employees out of moneys appropriated, held to violate Article I, § 9, clause 3, forbidding enactment of bill of attainder or ex post facto law.

United States v. Lovett, 328 U.S. 303 (1946).
Concurring: Black, Douglas, Murphy, Rutledge, Burton, Stone, C.J.
Concurring specially: Frankfurter, Reed

77. Act of September 27, 1944 (58 Stat. 746, § 401(J), and Act of June 27, 1952 (66 Stat. 163, 267–268, § 349(a)(10))

§ 401(J) of Immigration and Nationality Act of 1940, added in 1944, and § 49(a)(10) of the Immigration and Nationality Act of 1952 depriving one of citizenship, without the procedural safeguards guaranteed by the Fifth and Sixth Amendments, for the offense of leaving or remaining outside the country, in time of war or national emergency, to evade military service held invalid.

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).
Concurring: Goldberg, Black, Douglas, Warren, C.J.
Concurring specially: Brennan
Dissenting: Harlan, Clark, Stewart, White

78. Act of July 31, 1946 (ch. 707, § 7, 60 Stat. 719)

District court decision holding invalid under First and Fifth Amendments statute prohibiting parades or assemblages on United States Capitol grounds is summarily affirmed.

Chief of Capitol Police v. Jeanette Rankin Brigade, 409 U.S. 972 (1972).

79. Act of June 25, 1948 (62 Stat. 760)

Provision of Lindberg Kidnaping Act that imposed for the death penalty only if recommended by the jury held unconstitutional because it penalized the assertion of a defendant's Sixth Amendment right to jury trial.

United States v. Jackson, 390 U.S. 570 (1968).
Concurring: Stewart, Douglas, Harlan, Brennan, Fortas, Warren, C.J.
Dissenting: White, Black

80. Act of August 18, 1949 (63 Stat. 617, 40 U.S.C. § 13k)

Provision, insofar as it applies to the public sidewalks surrounding the Supreme Court building, which bars the display of any flag,

banner, or device designed to bring into public notice any party, organization, or movement, held to violate the free speech clause of the First Amendment.

United States v. Grace, 461 U.S. 171 (1983).
Concurring: White, Brennan, Blackmun, Powell, Rehnquist, O'Connor, Burger, C.J.
Concurring in part and dissenting in part: Marshall, Stevens

81. Act of May 5, 1950 (64 Stat. 107)

Article 3(a) of the Uniform Code of Military Justice, subjecting civilian ex-servicemen to court martial for crime committed while in military service, held to violate Article III, § 2, and the Fifth and Sixth Amendments.

Toth v. Quarles, 350 U.S. 11 (1955).
Concurring: Black, Frankfurter, Douglas, Clark, Harlan, Warren, C.J.
Dissenting: Reed, Burton, Minton

82. Act of May 5, 1950 (64 Stat. 107)

Insofar as Article 2(11) of the Uniform Code of Military Justice subjects civilian dependents accompanying members of the armed forces overseas in time of peace to trial, in capital cases, by court martial, it violates Article III, § 2, and the Fifth and Sixth Amendments.

Reid v. Covert, 354 U.S. 1 (1957).
Concurring: Black, Douglas, Warren, C.J.
Concurring specifically: Frankfurter, Harlan
Dissenting: Clark, Burton

Insofar as the aforementioned provision is invoked in time of peace for the trial of noncapital offenses committed on land bases overseas by employees of the armed forces who have not been inducted or who have not voluntarily enlisted therein, it violates the Sixth Amendment.

McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).
Concurring: Clark, Black, Douglas, Brennan, Warren, C.J.
Dissenting: Harlan, Frankfurter
Concurring in Part and dissenting in Part: Whittaker, Stewart

Insofar as the aforementioned provision is invoked in time of peace for the trial of noncapital offenses committed by civilian dependents accompanying members of the armed forces overseas, it violates Article III, § 2, and the Fifth and Sixth Amendments.

Kinsella v. United States, 361 U.S. 234 (1960).
Concurring: Clark, Black, Douglas, Brennan, Warren, C.J.
Dissenting: Harlan, Frankfurter
Concurring in part and dissenting in part: Whittaker, Stewart

Insofar as the aforementioned provision is invoked in time of peace for the trial of a capital offense committed by a civilian employee of

the armed forces overseas, it violates Article III, § 2, and the Fifth and Sixth Amendments.

Grisham v. Hagan, 361 U.S. 278 (1960).
Concurring: Clark, Black, Douglas, Brennan, Warren, C.J.
Dissenting: Harlan, Frankfurter
Concurring in part and dissenting in part: Whittaker, Stewart

83. Act of August 16, 1950 (64 Stat. 451, as amended)

Statutory scheme authorizing the Postmaster General to close the mails to distributors of obscene materials held unconstitutional in the absence of procedural provisions to assure prompt judicial determination that protected materials were not being restrained.

Blount v. Rizzi, 400 U.S. 410 (1971).

84. Act of August 28, 1950 (§ 202(c)(1)(D), 64 Stat. 483, 42 U.S.C. § 402(c)(1)(C))

District court decision holding invalid as a violation of the equal protection component of the Fifth Amendment's due process clause a Social Security provision entitling a husband to insurance benefits through his wife's benefits, provided he received at least one-half of his support from her at the time she became entitled, but requiring no such showing of support for the wife to qualify for benefits through her husband, is summarily affirmed.

Califano v. Silbowitz, 430 U.S. 934 (1977).

85. Act of August 28, 1950 (§ 202(f)(1)(E), 64 Stat. 485, 42 U.S.C. § 402(f)(1)(D))

Social Security Act provision awarding survivor's benefits based on earnings of a deceased wife to widower only if he was receiving at least half of his support from her at the time of her death, whereas widow receives benefits regardless of dependency, held violative of equal protection element of Fifth Amendment's Due Process Clause because of its impermissible sex classification.

Califano v. Goldfarb, 430 U.S. 199 (1977).
Concurring: Brennan, White, Marshall, Powell
Concurring specially: Stevens
Dissenting: Rehnquist, Stewart, Blackmun, Burger, C.J.

86. Act of September 23, 1950 (Title I, § 5, 64 Stat. 992)

Provision of Subversive Activities Control Act making it unlawful for member of Communist front organization to work in a defense plant held to be an overbroad infringement of the right of association protected by the First Amendment.

United States v. Robel, 389 U.S. 258 (1967).
Concurring: Warren, C.J., Black, Douglas, Stewart, Fortas
Concurring specially: Brennan

Dissenting: White, Harlan

87. Act of September 23, 1950 (64 Stat. 993, § 6)

Subversive Activities Control Act of 1950, § 6, providing that any member of a Communist organization, which has registered or has been ordered to register, commits a crime if he attempts to obtain or use a passport, held to violate of due process under the Fifth Amendment.

Aptheker v. Secretary of State, 378 U.S. 500 (1964).
Concurring: Goldberg, Brennan, Stewart, Warren, C.J.
Concurring specially: Black, Douglas
Dissenting: Clark, Harlan, White

88. Act of September 28, 1950 (Title I, §§ 7, 8, 64 Stat. 993)

Provisions of Subversive Activities Control Act of 1950 requiring in lieu of registration by the Communist Party registration by Party members may not be applied to compel registration by, or to prosecute for refusal to register, alleged members who have asserted their privilege against self-incrimination, inasmuch as registration would expose such persons to criminal prosecution under other laws.

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965).

89. Act of October 30, 1951 (§ 5(f)(ii), 65 Stat. 683, 45 U.S.C. § 231a(c)(3)(ii))

Provision of Railroad Retirement Act similar to section voided in *Califano v. Goldfarb* (no. 85, *supra*).

Railroad Retirement Bd. v. Kalina, 431 U.S. 909 (1977).

90. Act of June 27, 1952 (Title III, 349, 66 Stat. 267)

Provision of Immigration and Nationality Act of 1952 providing for revocation of United States citizenship of one who votes in a foreign election held unconstitutional under § 1 of the Fourteenth Amendment.

Afroyim v. Rusk, 387 U.S. 253 (1967).
Concurring: Black, Douglas, Brennan, Fortas, Warren, C.J.
Dissenting: Harlan, Clark, Stewart, White

91. Act of June 27, 1952 (66 Stat. 163, 269, § 352(a)(1))

§ 352(a)(1) of the Immigration and Nationality Act of 1952, depriving a naturalized person of citizenship for "having a continuous residence for three years" in state of his birth or prior nationality, held violative of the Due Process Clause of the Fifth Amendment.

Schneider v. Rusk, 377 U.S. 163 (1964).
Concurring: Douglas, Black, Stewart, Goldberg, Warren, C.J.
Dissenting: Clark, Harlan, White

92. Act of June 27, 1952 (ch. 477, § 244(e)(2), 66 Stat. 214, 8 U.S.C. § 1254 (c)(2))

Provision of the immigration law that permits either house of Congress to veto the decision of the Attorney General to suspend the deportation of certain aliens violates the bicameralism and presentation requirements of lawmaking imposed upon Congress by Article I, §§ 1 and 7.

INS v. Chadha, 462 U.S. 919 (1983).
Justices concurring: Burger, C.J., Brennan, Marshall, Blackmun, Stevens
Justice concurring specially: Powell
Justices dissenting: Rehnquist, White

93. Act of August 16, 1954 (68A Stat. 525, Int. Rev. Code of 1954, §§ 4401–4423)

Provisions of tax laws requiring gamblers to pay occupational and excise taxes may not be used over an assertion of one's privilege against self-incrimination either to compel extensive reporting of activities, leaving the registrant subject to prosecution under the laws of all the states with the possible exception of Nevada, or to prosecute for failure to register and report, because the scheme abridged the Fifth Amendment privilege.

Marchetti v. United States, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968).
Concurring: Harlan, Black, Douglas, White, Fortas
Concurring specially: Brennan, Stewart
Dissenting: Warren, C.J.

94. Act of August 16, 1954 (68A Stat. 560, Marijuana Tax Act, §§ 4741, 4744, 4751, 4753)

Provisions of tax laws requiring possessors of marijuana to register and to pay a transfer tax may not be used over an assertion of the privilege against self-incrimination to compel registration or to prosecute for failure to register.

Leary v. United States, 395 U.S. 6 (1969).
Concurring specially: Warren, C.J., Stewart

95. Act of August 16, 1954 (68A Stat. 728, Int. Rev. Code of 1954, §§ 5841, 5851)

Provisions of tax laws requiring the possessor of certain firearms, which it is made illegal to receive or to possess, to register with the Treasury Department may not be used over an assertion of the privilege against self-incrimination to prosecute one for failure to register or for possession of an unregistered firearm, as the statutory scheme abridges the Fifth Amendment privilege.

Haynes v. United States, 390 U.S. 85 (1968).
Concurring: Harlan, Black, Douglas, Brennan, Stewart, White, Fortas
Dissenting: Warren, C.J.

96. Act of August 16, 1954 (68A Stat. 867, Int. Rev. Code of 1954, § 7302)

Provision of tax laws providing for forfeiture of property used in violating internal revenue laws may not be constitutionally used in face of invocation of privilege against self-incrimination to condemn money in possession of gambler who had failed to comply with the registration and reporting scheme held void in *Marchetti v. United States*, 390 U.S. 39 (1968).

United States v. United States Coin & Currency, 401 U.S. 715 (1971).
Concurring: Harlan, Black, Douglas, Brennan, Marshall
Dissenting: White, Stewart, Blackmun, Burger, C.J.

97. Act of August 16, 1954 (ch. 736, 68A Stat. 521, 26 U.S.C. § 4371(1))

A federal tax on insurance premiums paid to foreign insurers not subject to the federal income tax violates the Export Clause, Art. I, § 9, cl. 5, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad.

United States v. IBM Corp., 517 U.S. 843 (1996).
Justices concurring: Thomas, O'Connor, Scalia, Souter, Breyer, and, Rehnquist, C.J.
Justices dissenting: Kennedy, Ginsburg

98. Act of July 18, 1956 (§ 106, Stat. 570)

Provision of Narcotic Drugs Import and Export Act creating a presumption that possessor of marijuana knew of its illegal importation into the United States held, in absence of showing that all marijuana in United States was of foreign origin and that domestic users could know that their marijuana was more likely than not of foreign origin, unconstitutional under the Due Process Clause of the Fifth Amendment.

Leary v. United States, 395 U.S. 6 (1969).
Concurring specially: Black

99. Act of August 10, 1956 (70A Stat. 65, Uniform Code of Military Justice, Articles 80, 130, 134)

Servicemen may not be charged under the Act and tried in military courts because of the commission of non-service connected crimes committed off-post and off-duty which are subject to civilian court jurisdiction where the guarantees of the Bill of Rights are applicable.

O'Callahan v. Parker, 395 U.S. 258 (1969), overruled in *Solorio v. United States*, 483 U.S. 435 (1987).
Concurring: Douglas, Black, Brennan, Fortas, Marshall, Warren, C.J.
Dissenting: Harlan, Stewart, White

100. Act of August 10, 1956 (70A Stat. 35, § 772(f))

Proviso of statute permitting the wearing of United States military apparel in theatrical productions only if the portrayal does not tend to discredit the armed forces imposes an unconstitutional restraint upon First Amendment freedoms and precludes a prosecution under 18 U.S.C. § 702 for unauthorized wearing of uniform in a street skit disrespectful of the military.

Schacht v. United States, 398 U.S. 58 (1970).

101. Act of September 2, 1958 (§ 5601(b)(1), 72 Stat. 1399)

Provision of Internal Revenue Code creating a presumption that one's presence at the site of an unregistered still shall be sufficient for conviction under a statute punishing possession, custody, or control of an unregistered still unless defendant otherwise explained his presence at the site to the jury held unconstitutional because the presumption is not a legitimate, rational, or reasonable inference that defendant was engaged in one of the specialized functions proscribed by the statute.

United States v. Romano, 382 U.S. 136 (1965).

102. Act of September 2, 1958 (Pub. L. 85–921, § 1, 72 Stat. 1771, 18 U.S.C. § 504(1))

Exemptions from ban on photographic reproduction of currency "for philatelic, numismatic, educational, historical, or newsworthy purposes" violates the First Amendment because it discriminates on the basis of the content of a publication.

Regan v. Time, Inc., 468 U.S. 641 (1984).
Justices concurring: White, Brennan, Blackmun, Marshall, Powell, Rehnquist, O'Connor, Burger, C.J.
Justice dissenting: Stevens

103. Act of September 2, 1958 (§ 1(25)(B), 72 Stat. 1446), and Act of September 7, 1962 (§ 401, 76 Stat. 469)

Federal statutes providing that spouses of female members of the Armed Forces must be dependent in fact in order to qualify for certain dependent's benefits, whereas spouses of male members are statutorily deemed dependent and automatically qualified for allowances, whatever their actual status, held an invalid sex classification under the equal protection principles of the Fifth Amendment's Due Process Clause.

Frontiero v. Richardson, 411 U.S. 677 (1973).
Concurring: Brennan, Douglas, White, Marshall
Concurring specially: Powell, Blackmun, Burger, C.J., Stewart
Dissenting: Rehnquist

104. Act of September 14, 1959 (§ 504, 73 Stat. 536)

Provision of Labor-Management Reporting and Disclosure Act of 1959 making it a crime for a member of the Communist Party to serve as an officer or, with the exception of clerical or custodial positions, as an employee of a labor union held to be a bill of attainder and unconstitutional.

United States v. Brown, 381 U.S. 437 (1965).
Concurring: Warren, C.J., Black, Douglas, Brennan, Goldberg
Dissenting: White, Clark, Harlan, Stewart

105. Act of October 11, 1962 (§ 305, 76 Stat. 840)

Provision of Postal Services and Federal Employees Salary Act of 1962 authorizing Post Office Department to detain material determined to be "communist political propaganda" and to forward it to the addressee only if he requested it after notification by the Department, the material to be destroyed otherwise, held to impose on the addressee an affirmative obligation that abridged First Amendment rights.

Lamont v. Postmaster General, 381 U.S. 301 (1965).

106. Act of October 15, 1962 (76 Stat. 914).

Provision of District of Columbia laws requiring that a person to be eligible to receive welfare assistance must have resided in the District for at least one year impermissibly classified persons on the basis of an assertion of the right to travel interstate and therefore held to violate the Due Process Clause of the Fifth Amendment.

Shapiro v. Thompson, 394 U.S. 618 (1969).
Concurring: Brennan, Douglas, Stewart, White, Fortas, Marshall
Dissenting: Warren, C.J., Black, Harlan

107. Act of December 16, 1963 (77 Stat. 378, 20 U.S.C. § 754)

Provision of Higher Education Facilities Act of 1963 which in effect removed restriction against religious use of facilities constructed with federal funds after 20 years held to violate the establishment clause of the First Amendment inasmuch as the property will still be of considerable value at the end of the period and removal of the restriction would constitute a substantial governmental contribution to religion.

Tilton v. Richardson, 403 U.S. 672 (1971).

108. Act of July 30, 1965 (Pub. L. 89–97, § 121, 79 Stat. 351, 42 U.S.C. § 1396c)

Spending Clause does not support authority in the Medicaid Act for the Secretary of Health and Human Services to terminate all future Medicaid payments to a state whose Medicaid plan does not comply with new coverage mandated by the Affordable Care Act.. Though Congress may use its power under the Clause to secure state compli-

ance with federal objectives, Spending Clause legislation is much in the nature of a contract, and authority to withhold a significant source of a state's budget (over 10% for some states) for failure to provide services to signicantly broadened classes of recipients under an independent regulatory regime is improperly coercive. Medicaid coverage mandated under the Affordable Care Act cannot fairly be characterized as a "modification" to the program the states signed on to, but rather amounts to a fundamental shift in Medicaid's purpose from caring for the neediest to being a key element of a comprehensive, universal health plan.

National Federation of Independent Business v. Sebelius, 567 U.S. ___, No. 11–393, slip op. (2012).
Concurring: Roberts, C.J., Breyer, Kagan
Concurring (by implication): Scalia, Kennedy, Thomas, Alito
Dissenting in part: Ginsburg, Sotomayor

109. Act of July 30, 1965 (§ 339, 79 Stat. 409)

Section of Social Security Act qualifying certain illegitimate children for disability insurance benefits by presuming dependence but disqualifying other illegitimate children, regardless of dependency, if the disabled wage earner parent did not contribute to the child's support before the onset of the disability or if the child did not live with the parent before the onset of disability, held to deny latter class of children equal protection as guaranteed by the Due Process Clause of the Fifth Amendment.

Jiminez v. Weinberger, 417 U.S. 628 (1974).
Concurring: Burger, C.J., Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell
Dissenting: Rehnquist

110. Act of August 6, 1965 (Pub. L. 89–110, § 4(b), 79 Stat. 438, 42 U.S.C. § 1973(b))

Section 4 of the Voting Rights Act of 1965, which provides the formula for determining the states or electoral districts that are required to submit electoral changes to the Department of Justice or a federal court for preclearance approval under Section 5 of the Act, exceeds Congress's enforcement power under the Fifteenth Amendment by violating the "fundamental principle of equal sovereignty" among states without sufficient justification.

Shelby Cty. v. Holder, 570 U.S. ___, No. 12–96, slip op. (2013).
Justices concurring: Roberts, C.J., Scalia, Kennedy, Thomas, Alito
Justices dissenting: Ginsburg, Breyer, Sotomayor, Kagan

111. Act of September 3, 1966 (§ 102(b), 80 Stat. 831), and Act of April 8, 1974 (§§ 6(a)(1) amending § 3(d) of Act, 6(a)(2) amending 3 (e)(2)(C), 6(a)(5) amending § 3(s)(5), and 6(a)(6) amending § 3(x))

Those sections of the Fair Labor Standards Act extending wage and hour coverage to the employees of state and local governments held invalid because Congress lacks the authority under the Commerce Clause to regulate employee activities in areas of traditional governmental functions of the states.

National League of Cities v. Usery, 426 U.S. 833 (1976) (subsequently overruled).
Concurring: Rehnquist, Stewart, Blackmun, Powell, Burger, C.J.
Dissenting: Brennan, White, Marshall, Stevens

112. Act of November 7, 1967 (Pub. L. 90–129, § 201(8), 81 Stat. 368), as amended by Act of August 13, 1981 (Pub. L. 97–35, § 1229, 95 Stat. 730, 47 U.S.C. § 399)

Communications Act provision banning noncommercial educational stations receiving grants from the Corporation for Public Broadcasting from engaging in editorializing violates the First Amendment.

FCC v. League of Women Voters, 468 U.S. 364 (1984).
Justices concurring: Brennan, Marshall, Blackmun, Powell, O'Connor
Justices dissenting: White, Rehnquist, Stevens, Burger, C.J.

113. Act of January 2, 1968 (§ 163(a)(2), 81 Stat. 872)

District court decisions holding unconstitutional, under Fifth Amendment's Due Process Clause, a section of Social Security Act that reduced, perhaps to zero, benefits coming to illegitimate children upon death of parent in order to satisfy the maximum payment due the wife and legitimate children, are summarily affirmed.

Richardson v. Davis, 409 U.S. 1069 (1972).

114. Act of January 2, 1968 (§ 203, 81 Stat. 882)

Provision of Social Security Act extending benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father but not giving benefits when the mother becomes unemployed held to impermissibly classify on the basis of sex and violate the Fifth Amendment's Due Process Clause.

Califano v. Westcott, 443 U.S. 76 (1979).

115. Act of June 19, 1968 (Pub. L. 90–351, § 701(a), 82 Stat. 210, 18 U.S.C. § 3501)

A section of the Omnibus Crime Control and Safe Streets Act of 1968 purporting to reinstate the voluntariness principle that had governed the constitutionality of custodial interrogations prior to the Court's

decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), is an invalid attempt by Congress to redefine a constitutional protection defined by the Court. The warnings to suspects required by *Miranda* are Constitution-based rules. Although the *Miranda* Court invited a legislative rule that would be "at least as effective" in protecting a suspect's right to remain silent, section 3501 is not an adequate substitute.

Dickerson v. United States, , 530 U.S. 428 (2000).
Justices concurring: Rehnquist, C.J., Stevens, O'Connor, Kennedy, Souter, Ginsburg
Justices dissenting: Scalia, Thomas

116. Act of June 19, 1968 (Pub. L. No. 90–351, § 802, 82 Stat. 213, 18 U.S.C. § 2511(c), as amended by the Act of October 21, 1986 (Pub. L. No. 99–508, § 101(c)(1)(A)), 100 Stat. 1851))

A federal prohibition on disclosure of the contents of an illegally intercepted electronic communication violates the First Amendment as applied to a talk show host and a community activist who had played no part in the illegal interception, and who had lawfully obtained tapes of the illegally intercepted cellular phone conversation. The subject matter of the disclosed conversation, involving a threat of violence in a labor dispute, was "a matter of public concern." Although the disclosure prohibition well serves the government's "important" interest in protecting private communication, in this case "privacy concerns give way when balanced against the interest in publishing matters of public importance."

Bartnicki v. Vopper, 532 U.S. 514 (2001).
Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer
Justices dissenting: Rehnquist, C.J., Scalia, Thomas

117. Act of June 22, 1970 (ch. III, 84 Stat. 318)

Provision of Voting Rights Act Amendments of 1970 that set a minimum voting age qualification of 18 in state and local elections held to be unconstitutional because beyond the powers of Congress to legislate.

Oregon v. Mitchell, 400 U.S. 112 (1970).
Concurring: Harlan, Stewart, Blackmun, Burger, C.J.
Concurring specially: Black
Dissenting: Douglas, Brennan, White, Marshall

118. Act of December 29, 1970 (§ 8(a), 84 Stat. 1598, 29 U.S.C. § 637(a))

Provision of Occupational Safety and Health Act authorizing inspections of covered work places in industry without warrants held to violate Fourth Amendment.

Marshall v. Barlow's, Inc., , 436 U.S. 307 (1978).
Concurring: White, Stewart, Marshall, Powell, Burger, C.J.
Dissenting: Stevens, Blackmun, Rehnquist

119. Act of January 11, 1971, (§ 2, 84 Stat. 2048)

Provision of Food Stamp Act disqualifying from participation in program any household containing an individual unrelated by birth, marriage, or adoption to any other member of the household violates the Due Process Clause of the Fifth Amendment.

Department of Agriculture v. Moreno, 413 U.S. 528 (1973).
Concurring: Brennan, Douglas, Stewart, White, Marshall, Blackmun, Powell
Dissenting: Rehnquist, Burger, C.J.

120. Act of January 11, 1971 (§ 4, 84 Stat. 2049)

Provision of Food Stamp Act disqualifying from participation in program any household containing a person 18 years or older who had been claimed as a dependent child for income tax purposes in the present or preceding tax year by a taxpayer not a member of the household violates the Due Process Clause of the Fifth Amendment.

Department of Agriculture v. Murry, 413 U.S. 508 (1973).
Concurring: Douglas, Brennan, Stewart, White, Marshall
Dissenting: Blackmun, Rehnquist, Powell, Burger, C.J.

121. Act of December 10, 1971 (Pub. L. 92–178, § 801, 85 Stat. 570, 26 U.S.C § 9012(f))

Provision of Presidential Election Campaign Fund Act limiting to $1,000 the amount that independent committees may expend to further the election of a presidential candidate financing his campaign with public funds is an impermissible limitation of freedom of speech and association protected by the First Amendment.

FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985).
Justices concurring: Rehnquist, Brennan, Blackmun, Powell, O'Connor, Stevens, Burger, C.J.
Justices dissenting: White, Marshall

122. Federal Election Campaign Act of February 7, 1972 (86 Stat. 3, as amended by the Federal Campaign Act Amendments of 1974 (88 Stat. 1263), adding or amending 18 U.S.C. §§ 608(a), 608(e), and 2 U.S.C. § 437c)

Provisions of election law that forbid a candidate or the members of his immediate family from expending personal funds in excess of specified amounts, that limit to $1,000 the independent expenditures of any person relative to an identified candidate, and that forbid expenditures by candidates for federal office in excess of specified amounts violate the First Amendment speech guarantees; provisions of the law creating a commission to oversee enforcement of the Act are an in-

valid infringement of constitutional separation of powers in that they devolve responsibilities upon a commission four of whose six members are appointed by Congress and all six of whom are confirmed by the House of Representatives as well as by the Senate, not in compliance with the appointments clause.

Buckley v. Valeo, 424 U.S. 1 (1976).
Concurring: Brennan, Stewart, Blackmun, Powell, Rehnquist, Burger, C.J.
Dissenting (expenditure provisions only): White
Dissenting (candidate's personal funds only): Marshall

123. Act of February 7, 1972, Federal Election Campaign Act, (Pub. L. 92–225, Title III, § 316, as added Pub. L. 94–283, Title I, § 112(2), 90 Stat. 490, 2 U.S.C. § 441b)

Federal law prohibiting corporations from using their general treasury funds to make independent expenditures for an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate is invalidated. Disclaimers indicating who is responsible for political advertising and requiring the disclosure of campaign information to the FEC are upheld.

Citizens United v. FEC, 558 U.S. ___, No. 08–205, slip op. (2010)
Justices concurring: Kennedy, Roberts, C.J., Scalia, Alito, Thomas
Justices dissenting: Stevens, Ginsburg, Breyer, Sotomayor

124. Act of April 8, 1974 (Pub. L. 93–259, §§ 6(a)(6), 6(d)(1), 29 U.S.C. §§ 203(x), 216(b))

Fair Labor Standards Amendments of 1974 subjecting nonconsenting states to suits for damages brought by employees in state courts violates the principle of sovereign immunity implicit in the constitutional scheme. Congress lacks power under Article I to subject nonconsenting states to suits for damages in state courts.

Alden v. Maine, 527 U.S. 706 (1999).
Justices concurring: Kennedy, O'Connor, Scalia, Thomas, Rehnquist, C.J.
Justices dissenting: Souter, Stevens, Ginsburg, Breyer

125. Act of April 8, 1974 (Pub. L. No. 93–259, §§ 6(d)(1), 28(a)(2), 88 Stat. 61, 74; 29 U.S.C. §§ 216(b), 630(b))

The Fair Labor Standards Act Amendments of 1974, amending the Age Discrimination in Employment Act to subject states to damages actions in federal courts, exceeds congressional power under section 5 of the Fourteenth Amendment. Age is not a suspect classification under the Equal Protection Clause, and the ADEA is "so out of proportion to a remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).
Justices concurring: O'Connor, Scalia, Kennedy, Thomas, Rehnquist, C.J.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer

126. Act of May 11, 1976 (Pub. L. 94–283, § 112(2), 90 Stat. 489; 2 U.S.C. § 441a(d)(3))

The Party Expenditure Provision of the Federal Election Campaign Act, which limits expenditures by a political party "in connection with the general election campaign of a [congressional] candidate," violates the First Amendment when applied to expenditures that a political party makes independently, without coordination with the candidate.

Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996).
Justices concurring: Breyer, O'Connor, Souter
Justices concurring in part and dissenting in part: Kennedy, Scalia, Thomas, Rehnquist, C.J.
Justices dissenting: Stevens, Ginsburg

127. Act of May 11, 1976 (Pub. L. 92–225, § 316, 90 Stat. 490, 2 U.S.C. § 441b)

Provision of Federal Election Campaign Act requiring that independent corporate campaign expenditures be financed by voluntary contributions to a separate segregated fund violates the First Amendment as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a business corporation or union.

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).
Justices concurring: Brennan, Marshall, Powell, Scalia
Justice concurring specially: O'Connor
Justices dissenting: Rehnquist, C.J., White, Blackmun, Stevens

128. Act of October 1, 1976 (title II, 90 Stat. 1446); Act of October 12, 1979 (101(c), 93 Stat. 657))

Provisions of appropriations laws rolling back automatic pay increases for federal officers and employees is unconstitutional as to Article III judges because, the increases having gone into effect, they violate the Security of Compensation Clause of Article III, § 1.

United States v. Will, 449 U.S. 200 (1980).

129. Act of October 19, 1976 (Pub. L. 94–553, § 101(c), 17 U.S.C. § 504(c))

Section 504(c) of the Copyright Act, which authorizes a copyright owner to recover statutory damages, in lieu of actual damages, "in a sum of not less than $500 or more than $20,000 as the court considers just," does not grant the right to a jury trial on the amount of statutory damages. The Seventh Amendment, however, requires a jury determination of the amount of statutory damages.

Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998).

130. Act of November 6, 1978 (§ 241(a), 92 Stat. 2668, 28 U.S.C. § 1471)

Assignment to judges who do not have tenure and guarantee of compensation protections afforded Article III judges of jurisdiction over all proceedings arising under or in the bankruptcy act and over all cases relating to proceedings under the bankruptcy act is invalid, inasmuch as judges without Article III protection may not receive at least some of this jurisdiction.

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
Concurring: Brennan, Marshall, Blackmun, Stevens
Concurring specially: Rehnquist, O'Connor
Dissenting: White, Powell, Burger, C.J.

131. Act of November 9, 1978 (Pub. L. 95–621, § 202(c)(1), 92 Stat. 3372, 15 U.S.C. § 3342(c)(1))

Decision of Court of Appeals holding unconstitutional provision giving either House of Congress power to veto rules of Federal Energy Regulatory Commission on certain natural gas pricing matters is summarily affirmed on the authority of *INS v. Chadha* .

Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983).

132. Act of May 28, 1980 (Pub. L. 96–252, § 21(a), 94 Stat. 393, 15 U.S.C. § 57a–1(a))

Decision of Court of Appeals holding unconstitutional provision of FTC Improvements Act giving Congress power by concurrent resolution to veto final rules of the FTC is summarily affirmed on the basis of *INS v. Chadha*.

United States Senate v. FTC, 463 U.S. 1216 (1983).

133. Act of May 30, 1980 (94 Stat. 399, 45 U.S.C. §§ 1001 et seq.) as amended by the Act of October 14, 1980 (94 Stat. 1959))

Acts of Congress applying to bankruptcy reorganization of one railroad and guaranteeing employee benefits is repugnant to the requirement of Article I, § 8, cl. 4, that bankruptcy legislation be "uniform."

Railroad Labor Executives Ass'n v. Gibbons, 455 U.S. 457 (1982).

134. Act of January 12, 1983 (Pub. L. 97–459, § 207, 96 Stat. 2519, 25 U.S.C. § 2206)

Section of Indian Land Consolidation Act providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract's total acreage violates the Fifth Amendment's Takings Clause by completely abrogating rights of intestacy and devise.

Hodel v. Irving, 481 U.S. 704 (1987).
Justices concurring: O'Connor, Brennan, Marshall, Blackmun, Powell, Scalia, Rehnquist, C.J.
Justices concurring specially: Stevens, White

135. Act of April 20, 1983, 97 Stat. 69 (Pub. L. No. 98–21 § 101(b)(1) (amending 26 U.S.C. § 3121(b)(5))

The 1983 extension of the Social Security tax to then-sitting judges violates the Compensation Clause of Article III, § 1. The Clause "does not prevent Congress from imposing a non-discriminatory tax laid generally upon judges and other citizens . . . , but it does prohibit taxation that singles out judges for specially unfavorable treatment." The 1983 Social Security law gave 96% of federal employees "total freedom" of choice about whether to participate in the system, and structured the system in such a way that "virtually all" of the remaining 4% of employees—except the judges—could opt to retain existing coverage. By requiring then-sitting judges to join the Social Security System and pay Social Security taxes, the 1983 law discriminated against judges in violation of the Compensation Clause.

United States v. Hatter, 532 U.S. 557 (2001).
Justices concurring: Breyer, Kennedy, Souter, Ginsburg, Scalia, Thomas, Rehnquist, C.J.

136. Act of July 10, 1984 (Pub. L. 98–353, Title I, § 104(a), 98 Stat. 340; 28 U.S.C. § 157(b)(2)(C)

Because bankruptcy courts are Article I entities, Congress established a division between "core proceedings," which could be heard and determined by bankruptcy courts, subject to lenient review, and other proceedings, which, though initially heard and decided by bankruptcy courts, could be reviewed *de novo* in the district court at the behest of any party, unless the parties had consented to bankruptcy-court jurisdiction in the same manner as core proceedings. Among these "core proceedings" were counterclaims by the estate against persons filing claims against the estate. The Court held that a counterclaim of tortious interference with a gift, although made during a bankruptcy proceeding, was a state common law claim that did not fall under any of the public rights exceptions allowing for exercise of Article III jurisdiction.

Stern v. Marshall, 564 U.S. ___, No. 10–179, slip op. (2011).
Justices concurring: Roberts, C. J.,, Scalia, Kennedy, Thomas, Alito
Justices dissenting: Breyer, Ginsburg, Sotomayor, Kagan

137. Act of October 30, 1984, (Pub. L. 98–608, § 1(4), 98 Stat. 3173, 25 U.S.C. § 2206)

Section 207 of the Indian Land Consolidation Act, as amended in 1984, effects an unconstitutional taking of property without compensa-

tion by restricting a property owner's right to pass on property to his heirs. The amended section, like an earlier version held unconstitutional in *Hodel v. Irving* (1987), provides that certain small interests in Indian land will escheat to the tribe upon death of the owner. None of the changes made in 1984 cures the constitutional defect.

Babbitt v. Youpee, 519 U.S. 234 (1997).
Justices concurring: Ginsburg, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer, Rehnquist, C.J.
Justices dissenting: Stevens

138. Act of January 15, 1985, (Pub. L. 99–240, § 5(d)(2)(C), 99 Stat. 1842, 42 U.S.C. § 2021e(d)(2)(C))

"Take-title" incentives contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, designed to encourage states to cooperate in the federal regulatory scheme, offend principles of federalism embodied in the Tenth Amendment. These incentives, which require that non-participating states take title to waste or become liable for generators' damages, cross the line distinguishing encouragement from coercion. Congress may not simply commandeer the legislative and regulatory processes of the states, nor may it force a transfer from generators to state governments. A required choice between two unconstitutionally coercive regulatory techniques is also impermissible.

New York v. United States, 505 U.S. 144 (1992).
Justices concurring: O'Connor, Scalia, Kennedy, Souter, Thomas, Rehnquist, C.J.
Justices dissenting: White, Blackmun, Stevens

139. Act of December 12, 1985 (Pub. L. 99–177, § 251), 99 Stat. 1063, 2 U.S.C. § 901)

That portion of the Balanced Budget and Emergency Deficit Control Act that authorizes the Comptroller General to determine the amount of spending reductions that must be accomplished each year to reach congressional targets and that authorizes him to report a figure to the President that the President must implement violates the constitutional separation of powers because the Comptroller General is subject to congressional control (removal) and cannot be given a role in the execution of the laws.

Bowsher v. Synar, 478 U.S. 714 (1986).
Justices concurring: Burger, C.J., Brennan, Powell, Rehnquist, O'Connor
Justices concurring specially: Stevens, Marshall
Justices dissenting: White, Blackmun

140. Act of October 27, 1986 (Pub. L. 99–570, § 1366, 100 Stat. 3207–35, 18 U.S.C. § 981(a)(1))

Statute requiring full civil forfeiture of money transported out of the United States without amounts in excess of $10,000 being re-

ported violates the Excessive Fines Clause of the Eighth Amendment when $357,144 was required to be forfeited.

United States v. Bajakajian, , 524 U.S. 321 (1998).
Justices concurring: Thomas, Stevens, Souter, Ginsburg, Breyer
Justices dissenting: Kennedy, Rehnquist, C.J., O'Connor, Scalia

141. Act of October 27, 1986 (Pub. L. No. 99–570, § 1401, 100 Stat. 3207, 3207–40, 18 U.S.C. § 924(e)(2)(B)(ii))

Imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Due Process Clause of the Fifth Amendment as being void for vagueness.

Johnson v. United States, , 576 U.S. ___, No. 13–7120, slip op. (2015).
Justices concurring: Roberts, C.J., Scalia, Ginsburg, Breyer, Sotomayor, Kagan
Justices concurring in judgment only: Kennedy, Thomas
Justice dissenting: Alito

142. Act of October 30, 1986 (Pub. L. 99–591, title VI, § 6007(f)), 100 Stat. 3341, 49 U.S.C. App. § 2456(f))

The Metropolitan Washington Airports Act of 1986, which transferred operating control of two Washington, D.C., area airports from the Federal Government to a regional airports authority, violates separation of powers principles by conditioning that transfer on the establishment of a Board of Review, composed of Members of Congress and having veto authority over actions of the airports authority's board of directors.

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991)
Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, Souter
Justices dissenting: White, Marshall, Rehnquist, C.J.

143. Act of November 17, 1986 (Pub. L. 99–662, title IV, § 1402(a), 26 U.S.C. §§ 4461, 4462)

The Harbor Maintenance Tax (HMT) violates the Export Clause of the Constitution, Art. I, § 9, cl. 5, to the extent that the tax applies to goods loaded for export at United States ports. The HMT, which requires shippers to pay a uniform charge of 0.125% of cargo value on commercial cargo shipped through the Nation's ports, is an impermissible tax rather than a permissible user fee. The value of export cargo does not correspond reliably with federal harbor services used by exporters, and the tax does not, therefore, represent compensation for services rendered.

United States v. United States Shoe Corp., 523 U.S. 360 (1998).

144. Act of April 28, 1988 (Pub. L. 100–297 § 6101, 102 Stat. 424, 47 U.S.C. § 223(b)(1))

Amendment to Communications Act of 1934 imposing an outright ban on "indecent" but not obscene commercial telephone messages ("dial-a-porn") violates the First Amendment, because it has not been shown to be narrowly tailored to further the governmental interest in protecting minors from hearing such messages.

Sable Communications v. FCC, 492 U.S. 115 (1989).

145. Act of October 17, 1988 (Pub. L. 100–497, § 11(d)(7), 102 Stat. 2472, 25 U.S.C. § 2710(d)(7))

A provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact violates the Eleventh Amendment. In exercise of its powers under Article I, Congress may not abrogate States' Eleventh Amendment immunity from suit in federal court. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), is overruled.

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas
Justices dissenting: Stevens, Souter, Ginsburg, Breyer

146. Act of October 28, 1989 (Pub. L. 101–131, 103 Stat. 777, 18 U.S.C. § 700)

The Flag Protection Act of 1989, criminalizing burning and certain other forms of destruction of the United States flag, violates the First Amendment. Most of the prohibited acts involve disrespectful treatment of the flag, and evidence a purpose to suppress expression out of concern for its likely communicative impact.

United States v. Eichman, 496 U.S. 310 (1990).
Justices concurring: Brennan, Marshall, Blackmun, Scalia, Kennedy
Justices dissenting: Stevens, White, O'Connor, Rehnquist, C.J.

147. Act of November 30, 1989 (Pub. L. 101–194, § 601, 103 Stat. 1760, 5 U.S.C. app. § 501)

Section 501(b) of the Ethics in Government Act, as amended in 1989 to prohibit Members of Congress and federal employees from accepting honoraria, violates the First Amendment as applied to Executive Branch employees below grade GS–16. The ban is limited to expressive activity and does not include other outside income, and the "speculative benefits" of the ban do not justify its "crudely crafted burden" on expression.

United States v. National Treasury Employees Union, 513 U.S. 454 (1995).
Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer
Justice concurring in part and dissenting in part: O'Connor
Justices dissenting: Rehnquist, C.J., Scalia, Thomas

148. Act of July 26, 1990 (Pub. L. No. 101–336, Title I, 104 Stat. 327, 42 U.S.C. §§ 12112–12117)

Title I of the Americans with Disabilities Act of 1990 (ADA), exceeds congressional power to enforce the Fourteenth Amendment, and violates the Eleventh Amendment, by subjecting states to suits brought by state employees in federal courts to collect money damages for the state's failure to make reasonable accommodations for qualified individuals with disabilities. Rational basis review applies, and consequently states "are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational." The legislative record of the ADA fails to show that Congress identified a pattern of irrational state employment discrimination against the disabled. Moreover, even if a pattern of discrimination by states had been found, the ADA's remedies would run afoul of the "congruence and proportionality" limitation on Congress's exercise of enforcement power.

Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).
Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas
Justices dissenting: Breyer, Stevens, Souter, Ginsburg

149. Act of July 26, 1990 (Pub. L. No. 101–336, Title I, 104 Stat. 327, 42 U.S.C. §§ 12111, 12203)

Title I of the Americans with Disabilities Act of 1990 (ADA) may not be applied against a religious organization for the discharge of a "called" teacher at a parochial school. The Establishment and Free Exercise Clauses bar ADA actions by or on behalf of ministers against their churches, and an ordained teacher may fall within the "ministerial exception" even though she teaches many secular subjects and her discharge may not have been doctrinally based.

Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission, 565 U.S. ___, No. 10–553, slip op. (2012).

150. Act of November 28, 1990 (Pub. L. No. 101–624, Title XIX, Subtitle B, 104 Stat. 3854, 7 U.S.C. §§ 6101 et seq.)

The Mushroom Promotion, Research, and Consumer Information Act violates the First Amendment by imposing mandatory assessments on mushroom handlers for the purpose of funding generic advertising to promote mushroom sales. The mushroom program differs "in a most fundamental respect" from the compelled assessment on fruit growers upheld in *Glickman v. Wileman Bros. & Elliott, Inc.* (1997).

There the mandated assessments were "ancillary to a more comprehensive program restricting marketing autonomy," while here there is "no broader regulatory system in place." The mushroom program contains no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing else that forces mushroom producers to associate as a group to make cooperative decisions. But for the assessment for advertising, the mushroom growing business is unregulated.

United States v. United Foods, Inc., 533 U.S. 405 (2001).
Justices concurring: Kennedy, Stevens, Scalia, Souter, Thomas, Rehnquist, C.J.
Justices dissenting: Breyer, Ginsburg, O'Connor

151. Act of November 29, 1990 (Pub. L. 101–647, § 1702, 104 Stat. 4844, 18 U.S.C. § 922q)

The Gun Free School Zones Act of 1990, which makes it a criminal offense to knowingly possess a firearm within a school zone, exceeds congressional power under the Commerce Clause. It is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." Possession of a gun at or near a school "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."

United States v. Lopez, 514 U.S. 549 (1995).
Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas
Justices dissenting: Stevens, Souter, Breyer, Ginsburg

152. Act of November 29, 1990 (Pub. L. 101–647, § 2521, 104 Stat. 4844, 18 U.S.C. § 1345(a)(2))

Allowing a pretrial freeze of legitimate, untainted assets violates a criminal defendant's Sixth Amendment right to counsel of choice.

Luis v. United States, 578 U.S. ___, No. 14–419, slip op. (2016).
Justices concurring: Roberts, C.J., Ginsburg, Breyer, Sotomayor
Justice concurring in judgment only: Thomas
Justices dissenting: Kennedy, Alito, Kagan

153. Act of December 19, 1991 (Pub. L. 102–242 § 476, 105 Stat. 2387, 15 U.S.C. § 78aa–1)

Section 27A(b) of the Securities Exchange Act of 1934, as added in 1991, requiring reinstatement of any section 10(b) actions that were dismissed as time barred subsequent to a 1991 Supreme Court decision, violates the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments in private civil actions. The provision violates a fundamental principle of Article III that the federal judicial power comprehends the power to render dispositive judgments.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).
Justices concurring: Scalia, O'Connor, Kennedy, Souter, Thomas, Rehnquist, C.J.
Justice concurring specially: Breyer
Justices dissenting: Stevens, Ginsburg

154. Act of October 5, 1992 (Pub. L. 102–385, §§ 10(b) and 10(c), 106 Stat. 1487, 1503; 47 U.S.C. § 532(j) and § 531 note, respectively)

Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, which requires cable operators to segregate and block indecent programming on leased access channels if they do not prohibit it, violates the First Amendment. Section 10(c) of the Act, which permits a cable operator to prevent transmission of "sexually explicit" programming on public access channels, also violates the First Amendment.

Denver Area Educ. Tel. Consortium v. FCC, 518 U.S. 727 (1996).
Justices concurring: Breyer, Stevens, O'Connor (§ 10(b) only), Kennedy, Souter, Ginsburg
Justices dissenting: Thomas, Scalia, O'Connor (§ 10(c) only), Rehnquist, C.J.

155. Act of October 24, 1992, Title XIX, 106 Stat. 3037 (Pub. L. 102–486, 26 U.S.C. §§ 9701–9722)

The Coal Industry Retiree Health Benefit Act of 1992 is unconstitutional as applied to the petitioner Eastern Enterprises. Pursuant to the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal industry who had worked for Eastern prior to 1966. Eastern had transferred its coal-related business to a subsidiary in 1965. Four Justices viewed the imposition of liability on Eastern as a violation of the Takings Clause, and one Justice viewed it as a violation of substantive due process.

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).
Justices concurring: O'Connor, Scalia, Thomas, Rehnquist, C.J.
Justices concurring specially: Kennedy
Justices dissenting: Stevens, Souter, Ginsburg, Breyer

156. Act of October 27, 1992 (Pub. L. 102–542, 15 U.S.C. § 1122)

The Trademark Remedy Clarification Act, which provided that states shall not be immune from suit under the Trademark Act of 1946 (Lanham Act) "under the eleventh amendment . . . or under any other doctrine of sovereign immunity," did not validly abrogate state sovereign immunity. Congress lacks power to do so in exercise of Article I powers, and the TRCA cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. The right to be free from a business competitor's false advertising is not a "property right" protected by the Due Process Clause.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).
Justices concurring: Scalia, O'Connor, Kennedy, Thomas, Rehnquist, C.J.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer

157. Act of October 28, 1992 (Pub. L. 102–560, 106 Stat. 4230, 29 U.S.C. § 296)

The Patent and Plant Variety Remedy Clarification Act, which amended the patent laws to expressly abrogate states' sovereign immunity from patent infringement suits is invalid. Congress lacks power to abrogate state immunity in exercise of Article I powers, and the Patent Remedy Clarification Act cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. Section 5 power is remedial, yet the legislative record reveals no identified pattern of patent infringement by states and the Act's provisions are "out of proportion to a supposed remedial or preventive object."

Florida Prepaid Postsecondary Edu. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999).
Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas
Justices dissenting: Stevens, Souter, Ginsburg, Breyer

158. Act of February 5, 1993 (Pub. L. 103–3, 107 Stat. 9, 29 U.S.C. § 2612)

Congress may not require a state employer to grant a state employee unpaid self-care leave under the Family and Medical Leave Act. Congress cannot abrogate state immunity under section 5 of the Fourteenth Amendment to enforce self-care leave requirements because those requirements are intended primarily to ameliorate discrimination based on personal illness and are not a congruent and proportional remedy for gender discrimination.

Coleman v. Court of Appeals of Maryland, 566 U.S. ___, No. 10–1016, slip op. (2012).
Justices concurring: Kennedy, Roberts, C.J., Thomas, Alito
Justices concurring specially: Scalia
Justices dissenting: Ginsburg, Breyer, Sotomayor, Kagan

159. Act of November 16, 1993 (Pub. L. 103–141, 107 Stat. 1488, 42 U.S.C. §§ 2000bb to 2000bb–4)

The Religious Freedom Restoration Act, which directed use of the compelling interest test to determine the validity of laws of general applicability that substantially burden the free exercise of religion, exceeds congressional power under section 5 of the Fourteenth Amendment. Congress's power under Section 5 to "enforce" the Fourteenth Amendment by "appropriate legislation" does not extend to defining the substance of the Amendment's restrictions. This RFRA appears to do. RFRA "is so far out of proportion to a supposed remedial or preven-

tive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."

City of Boerne v. Flores, 521 U.S. 507 (1997).
Justices concurring: Kennedy, Stevens, Thomas, Ginsburg, Rehnquist, C.J.
Justices dissenting: O'Connor, Breyer, Souter

160. Act of November 30, 1993 (Pub. L. 103–159, 107 Stat. 1536)

Interim provisions of the Brady Handgun Violence Prevention Act that require state and local law enforcement officers to conduct background checks on prospective handgun purchasers are inconsistent with the Constitution's allocation of power between Federal and state governments. In *New York v. United States*, 505 U.S. 144 (1992), the Court held that Congress may not compel states to enact or enforce a federal regulatory program, and "Congress cannot circumvent that prohibition by conscripting the State's officers directly."

Printz v. United States, 521 U.S. 898 (1997).
Justices concurring: Scalia, O'Connor, Kennedy, Thomas, Rehnquist, C.J.
Justices dissenting: Stevens, Souter, Ginsburg, Breyer

161. Act of September 13, 1994 (Pub. L. 103–322, § 40302, 108 Stat. 1941, 42 U.S.C. § 13981)

A provision of the Violence Against Women Act that creates a federal civil remedy for victims of gender-motivated violence exceeds congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment. The commerce power does not authorize Congress to regulate "noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." The Fourteenth Amendment prohibits only state action, and affords no protection against purely private conduct. Section 13981, however, is not aimed at the conduct of state officials, but is aimed at private conduct.

United States v. Morrison, 529 U.S. 598 (2000).
Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas
Justices dissenting: Souter, Breyer, Stevens, Ginsburg

162. Act of February 8, 1996, 110 Stat. 56, 133–34 (Pub. L. 104–104, title V, § 502, 47 U.S.C. §§ 223(a), 223(d))

Two provisions of the Communications Decency Act of 1996—one that prohibits knowing transmission on the Internet of obscene or indecent messages to any recipient under 18 years of age, and the other that prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to anyone under 18 years of age—violate the First Amendment.

Reno v. ACLU, 521 U.S. 844 (1997).
Justices concurring: Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
Justices concurring in part and dissenting in part: O'Connor, Rehnquist, C.J.

163. Act of February 8, 1996 (Pub. L. 104–104, § 505, 110 Stat. 136, 47 U.S.C. § 561)

Section 505 of the Telecommunications Act of 1996, which required cable TV operators that offer channels primarily devoted to sexually oriented programming to prevent signal bleed either by fully scrambling those channels or by limiting their transmission to designated hours when children are less likely to be watching, violates the First Amendment. The provision is content-based, and therefore can only be upheld if narrowly tailored to promote a compelling governmental interest. The measure is not narrowly tailored, as the government did not establish that the less restrictive alternative found in section 504 of the Act—that of scrambling a channel at a subscriber's request—would be ineffective.

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).
Justices concurring: Kennedy, Stevens, Souter, Thomas, Ginsburg
Justices dissenting: Scalia, Breyer, O'Connor, Scalia, Rehnquist, C.J.

164. Act of April 9, 1996, 110 Stat. 1200 (Pub. L. 104–130, 2 U.S.C. §§ 691 et seq.)

The Line Item Veto Act, which gives the President the authority to "cancel in whole" three types of provisions that have been signed into law, violates the Presentment Clause of Article I, section 7. In effect, the law grants to the President "the unilateral power to change the text of duly enacted statutes." This Line Item Veto Act authority differs in important respects from the President's constitutional authority to "return" (veto) legislation: the statutory cancellation occurs after rather than before a bill becomes law, and can apply to a part of a bill as well as the entire bill.

Clinton v. City of New York, 524 U.S. 417 (1998).
Justices concurring: Stevens, Kennedy, Souter, Thomas, Ginsburg, Rehnquist, C.J.
Justices dissenting: Scalia, O'Connor, Breyer

165. Act of April 26, 1996 (Pub. L. No. 104–134 § 504(a)(16), 110 Stat. 1321–55)

A restriction in the appropriations act for the Legal Services Corporation that prohibits funding for any organization that participates in litigation that challenges a federal or state welfare law constitutes viewpoint discrimination in violation of the First Amendment. Moreover, the restrictions on LSC advocacy "distort [the] usual functioning" of the judiciary, and are "inconsistent with accepted separation-of-powers principles." "An informed, independent judiciary presumes an informed, independent bar," yet the restriction "prohibits speech and expression on which courts must depend for the proper exercise of judicial power."

Legal Services Corp. v. Valazquez, 531 U.S. 533 (2001).
Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer
Justices dissenting: Scalia, O'Connor, Thomas, Rehnquist, C.J.

166. Act of September 21, 1996 (Pub. L. No. 104–199, § 2(a), 110 Stat. 2419, 1 U.S.C. § 7)

Section 3 of the Defense of Marriage Act (DOMA), which provides that—for purposes of any federal act, ruling, regulation, or interpretation by an administrative agency—the word "spouse" is defined as a person of the opposite sex who is a husband or a wife, was "motivated by improper animus or purpose" to disparage and injure those whom a state, by its marriage laws, "sought to protect in personhood and dignity," amounting to a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.

United States v. Windsor, 570 U.S. ___, No. 12–307, slip op. (2013).
Justices concurring: Kennedy, Ginsburg, Breyer, Sotomayor, Kagan
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito

167. Act of September 30, 1996 (Pub. L. No. 104–208, § 121, 110 Stat. 3009–26, 18 U.S.C. §§ 2252, 2256)

Two sections of the Child Pornography Prevention Act of 1996 that extend the federal prohibition against child pornography to sexually explicit images that appear to depict minors but that were produced without using any real child violate the First Amendment. These provisions cover any visual image that "appears to be" of a minor engaging in sexually explicit conduct, and any image promoted or presented in a way that "conveys the impression" that it depicts a minor engaging in sexually explicit conduct. The rationale for excepting child pornography from First Amendment coverage is to protect children who are abused and exploited in the production process, yet the Act's prohibitions extend to "virtual" pornography that does not involve a child in the production process.

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).
Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer
Justice concurring specially: Thomas
Justices dissenting: Chief Justice Rehnquist, Scalia

168. Act of November 21, 1997 (Pub. L. 105–115, § 127, 111 Stat. 2328, 21 U.S.C. § 353a)

Section 127 of the Food and Drug Administration Modernization Act of 1997, which adds section 503A of the Federal Food, Drug, and Cosmetic Act to exempt "compounded drugs" from the regular FDA approval process if providers comply with several restrictions, including that they refrain from advertising or promoting the compounded drugs, violates the First Amendment. The advertising restriction does not meet

the *Central Hudson* test for acceptable governmental regulation of commercial speech. The government failed to demonstrate that the advertising restriction is "not more extensive than is necessary" to serve its interest in preventing the drug compounding exemption from becoming a loophole by which large-scale drug manufacturing can avoid the FDA drug approval process. There are several non-speech means by which the government might achieve its objective.

Thompson v. Western States Medical Center, 535 U.S. 357 (2002).
Justices concurring: O'Connor, Scalia, Kennedy, Souter, Breyer
Justices dissenting: Breyer, Stevens, Ginsburg, Rehnquist, C.J.

169. Act of December 9, 1999 (Pub. L. 106–152, § 1(a), 113 Stat. 1732, 18 U.S.C. § 48)

Federal law which criminalized the commercial creation, sale, or possession of depictions of animal cruelty struck down. Despite an exemption for depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value," the law was found to reach protected First Amendment speech.

United States v. Stevens, 559 U.S. ___, No. 08–769, slip op (2010)
Justices concurring: Roberts, C.J., Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor
Justices dissenting: Alito

170. Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107–155, §§ 213, 318; 2 U.S.C. §§ 315(d)(4), 441k)

Section 213 of the Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Federal Election Campaign Act of 1971 (FECA) to require political parties to choose between coordinated and independent expenditures during the post-nomination, pre-election period, is unconstitutional because it burdens parties' right to make unlimited independent expenditures. Section 318 of BCRA, which amended the FECA to prohibit persons "17 years old or younger" from contributing to candidates or political parties, is invalid as violating the First Amendment rights of minors.

McConnell v. FEC, 540 U.S. 93 (2003).

171. Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107–155, § 203; 2 U.S.C. § 441b(b)(2))

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court held that § 203 was not facially overbroad, and, in *Wisconsin Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410 (2006), it held that it had not purported to resolve future as-applied challenges. Now it holds that § 203 is unconstitutional as applied to issue ads that mention a candidate

for federal office, when such ads are not the "functional equivalent" of express advocacy for or against the candidate.

Federal Election Commission v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007).
Justices concurring: Roberts, C.J., Alito, Scalia, Kennedy, Thomas
Justices dissenting: Souter, Stevens, Ginsberg, Breyer

172. Act of March 27, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107–155, §§ 319(a) and (b); 2 U.S.C. § 441a–1(a) and (b))

A subsection of BCRA providing that, if a "self-financing" candidate for the House of Representatives spends more than a specified amount, then his opponent may accept more contributions than otherwise permitted, violates the First Amendment. A subsection with disclosure requirements designed to implement the asymmetrical contribution limits also violates the First Amendment.

Davis v. Federal Election Commission, 128 S. Ct. 2759 (2008).
Justices concurring: Alito, Roberts, C.J., Scalia, Kennedy, Thomas
Justices dissenting (except as to standing and mootness): Stevens, Souter, Ginsberg, Breyer

173. Act of March 27, 2002 (Pub. L. 107–155, § 307(b), 116 Stat. 102, 2 U.S.C. § 441a(a)(3))

Aggregate limits on the amount of money individuals are allowed to contribute to candidates, political action committees, national party committees, and state or local party committees violate the First Amendment by restricting participation in the political process without furthering the government's interest in preventing quid pro quo corruption or the appearance thereof.

McCutcheon v. FEC, 572 U.S. ___, No. 12–536, slip op. (2014).
Justices concurring: Roberts, C.J., Scalia, Kennedy, Alito
Justice concurring in judgment only: Thomas
Justices dissenting: Ginsburg, Breyer, Sotomayor, Kagan

174. Act of July 30, 2002 (Pub. L. 107–204, Title I, §§ 101(e)(6), 107(d)(3), 116 Stat. 750; 15 U.S.C.S. §§ 7211(e)(6) and 7217(d)(3))

Two provisions of the Sarbanes-Oxley Act, providing that members of the Public Company Accounting Oversight Board could only be removed by the Commissioners of the Securities and Exchange Commission "for good cause shown" and "in accordance with" specified procedures, violated the Constitution's separation of powers. Because the removal decision was vested in Commissioners who themselves were protected from removal by the President absent a showing of "inefficiency, neglect of duty, or malfeasance in office," the Court held that the dual for-cause limitations on the removal of Board members withdrew from the President any decision on whether that good cause existed.

Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. ___, No. 08–861, slip op. (2010).
Justices concurring: Roberts, C.J., Scalia, Thomas, Kennedy, Alito
Justices dissenting: Stevens, Breyer, Ginsburg, Sotomayor

175. Act of September 30, 2002 (Pub. L. No. 107–228, § 214(d), 116 Stat. 1350)

Section 214(d) of the Foreign Relations Authorization Act, FY2003—which states that, "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary [of State] shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel"—is unconstitutional because it forces the Executive to contradict a prior recognition decision made pursuant to the President's exclusive power under Article II, Section 3, to recognize foreign sovereigns.

Zivotofsky v. Kerry, 576 U.S. ___, No. 13–628, slip op. (2014).
Justices concurring: Kennedy, Ginsburg, Breyer, Sotomayor, Kagan
Justice concurring in part, and dissenting in part: Thomas
Justices dissenting: Roberts, C.J., Scalia, Alito

176. Act of April 30, 2003 (Pub. L. 108–21, §§ 401(a)(1), 401(d)(2), 117 Stat. 667, 670; 18 U.S.C. §§ 3553(b)(1), 3742(e))

Two provisions of the Sentencing Reform Act, one that makes the Guidelines mandatory and one that sets forth standards governing appeals of departures from the mandatory Guidelines, are invalidated. The Sixth Amendment right to a jury trial limits sentence enhancements that courts may impose pursuant to the Guidelines.

United States v. Booker, 543 U.S. 220 (2005).
Justices concurring: Breyer, O'Connor, Kennedy, Ginsburg, Rehnquist, C.J.
Justices dissenting: Stevens, Souter, Scalia, Thomas

177. Act of April 30, 2003 (Pub. L. 108–21, § 401(e), 117 Stat. 671; 18 U.S.C. § 3742(g)(2))

In evaluating whether Congress has authorized a District Court to consider post-conviction behavior as part of resentencing (after a sentence has been appealed, vacated, and remanded), the Court holds that a statutory limitation on the use of such information during resentencing to depart from the Sentencing Guidelines is no longer valid after *United States v. Booker*.

Pepper v. United States, 562 U.S. ___, .No. 09–6822, slip op. (2011).
Justices concurring: Sotomayor, Roberts, C.J., Scalia, Kennedy, Ginsburg
Justices concurring in part and dissenting in part: Breyer, Alito
Justice dissenting: Thomas

178. Act of May 27, 2003 (Pub. L. 108–25, Title III, § 301(f), 117 Stat. 711, 734, 22 U.S.C. § 7631(f))

A condition on the provision of federal funds intended to combat HIV/AIDS requiring a recipient to have a policy "explicitly opposing prostitution and sex trafficking" violates First Amendment free speech rights by improperly interfering with the recipient's protected conduct outside of the federal program.

Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 570 U.S. ___, No. 12–10, slip op. (2013).
Justices concurring: Roberts, C.J., Kennedy, Ginsburg, Breyer, Alito, Sotomayor
Justices dissenting: Scalia, Thomas

179. Act of December 30, 2005 (Pub. L. 109–148, § 1005(e)(1), 119 Stat. 2742; 28 U.S.C. § 2241(e)(1))

A provision of the Detainee Treatment Act eliminating federal habeas jurisdiction over alien detainees held at Guantanamo Bay, Cuba is invalidated as a violation of the Suspension Clause [Art. I, § 9, clause 2]. As the detainees disputed their enemy status, their ability to dispute their status had been limited, and they were held in a location under the *de facto* jurisdiction of the United States, the Suspension Clause was in full effect regarding their detention.

Boumediene v. Bush, 553 U.S. 723 (2008).
Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito

180. Act of December 20, 2006 (Pub. L. 109–437, § 3, 120 Stat. 3266, 18 U.S.C. § 704)

Stolen Valor Act, which penalizes any false claim of having been awarded a military decoration or medal, is invalidated on First Amendment grounds by four Justices for failure to be shown to be actually necessary to meet compelling governmental interests (strict scrutiny), and by two additional Justices for failure to achieve legitimate objectives through less restrictive ways (intermediate scrutiny).

United States v. Alvarez, 567 U.S. ___, No. 11–210, slip op. (2012).
Justices concurring: Kennedy, Roberts, C.J., Ginsburg, Sotomayor
Justices concurring specially: Breyer, Kagan
Justice dissenting: Alito, Scalia, Thomas

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS AND MUNICIPAL ORDINANCES HELD UNCONSTITUTIONAL OR HELD TO BE PREEMPTED BY FEDERAL LAW

Three separate lists of Supreme Court decisions appear below: part I lists cases holding state constitutional or statutory provisions unconstitutional, part II lists cases holding local laws unconstitutional, and part III lists cases holding that state or local laws are preempted by federal law. As Congress acted as the legislature for the District of Columbia until passage of the Home Rule Act on December 24, 1973, District of Columbia statutes that were enacted by Congress are treated as federal statutes (and included in a prior appendix), and District of Columbia statutes enacted by the District of Columbia government are treated as state statutes.

Each case is briefly summarized, and the votes of Justices are indicated unless the Court's decision was unanimous. Justices who write or join the majority or plurality opinion are listed under "Justices concurring", whether or not they write separate concurring opinions, and Justices who do not join the majority or plurality opinion, but write separate opinions concurring in the result, are listed under "Justices specially concurring."

Previous editions contained only two lists, one for cases holding state laws unconstitutional or preempted by federal law, and one for unconstitutional or preempted local laws. The 2002 edition added the third category because of the different nature of preemption cases. State or local laws held to be preempted by federal law are void not because they contravene any provision of the Constitution, but rather because they conflict with a federal statute or treaty, and through operation of the Supremacy Clause. Preemption cases formerly listed in one of the first two categories have been moved to the third. A few cases with multiple holdings are listed in more than one category.

I. STATE LAWS HELD UNCONSTITUTIONAL

1. *United States v. Peters*, 9 U.S. (5 Cr.) 115 (1809).

> A Pennsylvania statute prohibiting the execution of any process issued to enforce a certain sentence of a federal court, on the ground that the federal court lacked jurisdiction in the cause, could not oust the federal court of jurisdiction. A state statute purporting to annul the judgment of a court of the United States and to destroy rights acquired thereunder is without legal foundation.

2. *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810).

A Georgia statute annulling conveyance of public lands authorized by a prior enactment violated the Contracts Clause (Art. I, § 10) of the Constitution.

Justices concurring: Marshall, C.J., Washington, Livingston, Todd
Justice dissenting: Johnson (in part)

3. *New Jersey v. Wilson*, 11 U.S. (7 Cr.) 164 (1812).

A New Jersey law purporting to repeal an exemption from taxation contained in a prior enactment conveying certain lands violated the Contracts Clause (Art. I, § 10).

4. *Terrett v. Taylor*, 13 U.S. (9 Cr.) 43 (1815).

Although subsequently cited as a Contract Clause case (*Piqua Branch Bank v. Knoop,* 57 U.S. (16 How.) 369, 389 (1853)), the Court in the instant decision, without referring to the Contracts Clause (Art. I, § 10), voided, as contrary to the principles of natural justice, two Virginia acts that purported to divest the Episcopal Church of title to property "acquired under the faith of previous laws."

5. *Sturges v. Crowninshield,*17 U.S. (4 Wheat.) 122 (1819).

Retroactive operation of a New York insolvency law to discharge the obligation of a debtor on a promissory note negotiated prior to its adoption violated the Contracts Clause (Art. I, § 10).

6. *McMillan v. McNeil*, 17 U.S. (4 Wheat.) 209 (1819).

A Louisiana insolvency law had no extraterritorial operation, and, although adopted in 1808, its invocation to relieve a debtor of an obligation contracted by him in 1811, while a resident of South Carolina, offended the Contracts Clause (Art. I, § 10).

7. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

Under the principle of national supremacy (Art. VI), which immunizes instrumentalities of the Federal Government from state taxation, a Maryland law imposing a tax on notes issued by a branch of the Bank of United States was held unconstitutional.

8. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

A New Hampshire law that altered a charter granted to a private eleemosynary corporation by the British Crown prior to the Revolution violated the Contracts Clause (Art. I, § 10).

Justices concurring: Marshall, C.J., Washington, Johnson, Livingston, Story
Justice dissenting: Duvall

9. *Farmers' and Mechanics' Bank v. Smith*, 19 U.S. (6 Wheat.) 131 (1821).

A Pennsylvania insolvency law, insofar as it purported to discharge a debtor from obligations contracted prior to its passage, violated the Contracts Clause (Art. I, § 10).

10. *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823).

Because the compact between Virginia and Kentucky negotiated on the occasion of the separation of the latter from the former stipulated that rights in lands within the ceded area should remain valid and secure under the laws of Kentucky, and should be determined by Virginia law as of the time of separation, a subsequent Kentucky law that diminished the rights of a lawful owner by reducing the scope of his remedies against an adverse possessor violated the Contracts Clause (Art. I, § 10).

Justice concurring: Johnson (separately)

11. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

An Ohio statute levying a tax on the Bank of the United States, a federal instrumentality, was unenforceable (Art VI).

Justices concurring: Marshall, C.J., Washington, Todd, Duvall, Story, Thompson
Justice dissenting: Johnson

12. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

Although a New York insolvency law may be applied to discharge a debt contracted subsequently to the passage of such law, the statute could not be accorded extraterritorial enforcement to the extent of discharging a claim sought to be collected by a citizen of another state either in a federal court or in the courts of other states.

Justices concurring: Johnson, Marshall, C.J., Duvall, Story
Justices dissenting: Washington, Thompson, Trimble

13. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

A Maryland statute that required an importer to obtain a license before reselling in the original package articles imported from abroad was in conflict with the federal power to regulate foreign commerce (Art. I, § 8, cl. 3) and with the constitutional provision (Art. I, § 10, cl. 2) prohibiting states from levying import duties.

Justices concurring: Marshall, C.J., Washington, Johnson, Duvall, Story, Trimble
Justice dissenting: Thompson

14. *Craig v. Missouri*, 29 U.S. (4 Pet.) 410 (1830).

A Missouri act, under the authority of which certificates in denominations of 50 cents to $10 were issued, payable in discharge of taxes

or debts owned to the state and of salaries due public officers, violated the constitutional prohibition (Art. I, § 10, cl. 10) against emission of "bills of credit" by states.

Justices concurring: Marshall, C.J., Duvall, Story, Baldwin
Justices dissenting: Johnson, Thompson, McLean

15. *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 635 (1832).

Consistently with the principle of *Ogden v. Saunders,* a Maryland insolvency law could not be invoked to effect discharge of an obligation contracted in Louisiana subsequently to its passage.

16. *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842).

A Pennsylvania law that diminished the compensation of a federal officer by subjecting him to county taxes imposed an invalid burden on a federal instrumentality (Art. VI).

17. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

A Pennsylvania statute (1826) that penalized an owner's recovery of a runaway slave violated Art. IV, § 2, cl. 3, as well as federal implementing legislation.

Justices concurring: Story, Catron, McKinley, Taney (separately), C.J., Thompson (separately), Baldwin (separately), Wayne (separately), Daniel (separately), McLean (separately)

18. *Bronson v. Kinzie*, 42 U.S. (1 How.) 311 (1843).

An Illinois mortgage moratorium statute that, when applied to a mortgage negotiated prior to its passage, reduced the remedies of the mortgage lender by conferring a new right of redemption upon a defaulting borrower, impaired an obligation of contract contrary to Art. I, § 10.

Justices concurring: Taney, C.J., Baldwin, Wayne, Catron, Daniel
Justice dissenting: McLean

19. *McCracken v. Hayward*, 43 U.S. (2 How.) 608 (1844).

An Illinois mortgage moratorium statute that, when applied to a mortgage executed prior to its passage, diminished remedies of the mortgage lender by prohibiting consummation of a foreclosure unless the foreclosure price equaled two-thirds of the value of the mortgaged property, impaired the lender's obligation of contract contrary to Art. I, § 10.

20. *Gordon v. Appeal Tax Court*, 44 U.S. (3 How.) 133 (1845).

As to stockholders of Maryland state banks afforded an exemption under prior act of 1821, Maryland statute of 1841 taxing these stockholders impaired the obligation of contract.

21. *Planters' Bank v. Sharp*, 47 U.S. (6 How.) 301 (1848).

A Mississippi statute that nullified the power of a bank under a previously issued charter to discount bills of exchange and promissory notes and to institute actions for collection of the same was void because it impaired an obligation of contract, in violation of Art. I, § 10.

Justices concurring: McLean, Wayne, Catron, Nelson, Woodbury, Grier
Justices dissenting: Taney, C.J., Daniel

22. *Passenger Cases (Smith v. Turner)*, 48 U.S. (7 How.) 283 (1849).

Collection by New York and Massachusetts of per capita taxes on alien and domestic passengers arriving in the ports of these states violated Congress's power to regulate foreign and interstate commerce pursuant to Art. I, § 8, cl. 3.

Justices concurring: McLean (separately), Wayne (separately), Catron (separately), McKinley (separately), Grier (separately)
Justices dissenting: Taney (separately), C.J., Daniel (separately), Woodbury (separately), Nelson

23. *Woodruff v. Trapnall*, 51 U.S. (10 How.) 190 (1851).

A judgment debtor of the State of Arkansas tendered, in satisfaction of the judgment, banknotes in circulation at the time of the repeal by the state of that section of the said bank's charter providing that such notes should be received in discharge of public debts. Because of the Contract Clause, the legislative repeal could neither affect such notes nor abrogate the pledge of the state to receive them in payment of debts.

Justices concurring: Taney, C.J., McLean, Wayne, McKinley, Woodbury
Justices dissenting: Catron, Daniel, Nelson, Grier

24. *Achison v. Huddleson*, 53 U.S. (12 How.) 293 (1852).

Because a Maryland statute, assented to by Congress, prohibited tolls from being levied by that state on passenger coaches carrying mails over the Cumberland Road, later Maryland law imposing tolls on passengers in such coaches was void because it conflicted with an earlier compact between Maryland and the Federal Government and also because it imposed a burden on federal carriage of the mails under Art. VI.

25. *Trustees for Vincennes University v. Indiana*, 55 U.S. (14 How.) 268 (1853).

Because the incorporation by the territorial legislature of the university in 1806 operated to vest in the latter certain federal lands reserved for educational purposes, a subsequent enactment by Indiana ordering the sale of such lands and use of the proceeds for other purposes was invalid because of impairment of the contractual rights of the university.

Justices concurring: McLean, Wayne, Nelson, Grier, Curtis
Justices dissenting: Taney, C.J., Catron, Daniel

26. *Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1854).

Retroactive Arkansas laws that vested all property of the state bank in Arkansas and thereby prevented the bank from honoring its outstanding bills payable on demand to the holders thereof impaired the bank's contractual rights and were void.

Justices concurring: Taney, C.J., McLean, Wayne, Grier, Curtis, Campbell
Justices dissenting: Catron, Daniel, Nelson

27. *State Bank of Ohio v. Knoop*, 57 U.S. (16 How.) 369 (1854).

Because state banks, on acceptance of a charter under the Ohio banking law of 1845, were directed, in lieu of all taxes, to pay six percent of annual dividends to the states, a later statute that exposed these banks to higher taxes effected an invalid impairment of the obligation of contract.

Justices concurring: Taney, C.J., McLean, Wayne, Nelson, Grier, Curtis
Justices dissenting: Catron, Daniel, Campbell

28. *Hays v. The Pacific Mail Steamship Co.*, 58 U.S. (17 How.) 596 (1855).

California lacked jurisdiction to impose property taxes on vessels that were owned by a New York company and registered in New York, as the vessels' calls at California ports were too brief to establish a tax situs.

Justices concurring: Taney, C.J., McLean, Wayne, Catron, Nelson, Grier, Curtis, Campbell
Justice dissenting: Daniel

29. *Dodge v. Woolsey*, 59 U.S. (18 How.) 331 (1856).

A levy under an 1851 Ohio law of a bank tax at a higher rate than that specified in the bank's charter in 1845 was invalid because it impaired the obligation of contract.

Justices concurring: Taney, C.J., McLean, Wayne, Nelson, Grier, Curtis
Justices dissenting: Catron, Daniel, Campbell

30. *Almy v. California*, 65 U.S. (24 How.) 169 (1861).

A California stamp tax imposed on bills of lading for gold or silver transported from California to any place outside the state was void as a tax on exports forbidden by Art. I, § 10, cl. 2.

31. *Howard v. Bugbee*, 65 U.S. (24 How.) 461 (1861).

An Alabama statute authorizing redemption of mortgaged property in two years after sale under a foreclosure decree, by bona fide creditors of the mortgagor could not be applied to sales under mort-

gages executed prior to the enactment without an unconstitutional impairment of the obligation of contracts under Art. I, § 10.

32. *Bank of Commerce v. New York City*, 67 U.S. (2 Black) 620 (1863).

Securities of the United States being exempt from state taxation, inclusion of their value in the capital of a bank subjected to taxation by the terms of a New York law rendered the latter void.

33. *Bank Tax Case*, 69 U.S. (2 Wall.) 200 (1865).

An 1863 New York law, enacted after the *Bank of Commerce* decision, was held invalid as, in effect, a tax on the securities of the United States.

34. *Hawthorne v. Calef*, 69 U.S. (2 Wall.) 10 (1865).

A Maine statute terminating the liability of corporate stock for the debts of the corporation impaired the obligation of contracts with respect to claims of creditors outstanding at the time of such termination.

35. *The Binghamton Bridge*, 70 U.S. (3 Wall.) 51 (1866).

An obligation of contract was impaired when the New York legislature, after having issued a charter to a bridge company containing assurances that erection of other bridges within two miles of said bridge would not be authorized, subsequently chartered a second company to construct a bridge within a few rods of the first.

36. *McGee v. Mathis*, 71 U.S. (4 Wall.) 143 (1867).

An 1855 Arkansas statute that repealed an 1851 grant of a tax exemption applicable to swamp lands, paid for either before or after repeal with scrip issued before the repeal, impaired a contract of the state with holders of such scrip (Art. I, § 10).

37. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

Missouri constitutional provisions that required clergymen, as a prerequisite to the practice of their profession, to take an oath that they had never been guilty of hostility to the United States, or of certain other acts that were lawful when committed, was void as a bill of attainder and as an *ex post facto* law.

Justices concurring: Wayne, Grier, Nelson, Clifford, Field
Justices dissenting: Swayne, Davis, Miller

38. *Von Hoffman v. Quincy*, 71 U.S. (4 Wall.) 535 (1867).

An Illinois law limiting taxing powers granted to a municipality under a prior law authorizing it to issue bonds and amortize the same by levy of taxes impaired the obligation of contract under Art. I, § 10.

39. *Christmas v. Russell,*72 U.S. (5 Wall.) 290 (1866).

A Mississippi statute that prohibited enforcement of a judgment of a sister state against a resident of Mississippi whenever barred by the Mississippi statute of limitations violated the Full Faith and Credit Clause of Art. IV.

40. *Steamship Co. v. Portwardens,*73 U.S. (6 Wall.) 31 (1867).

A Louisiana statute that provided that port wardens might collect, in addition to other fees, a tax of five dollars from every ship entering the port of New Orleans, whether any service was performed or not, violated the Commerce Clause (Art. I, § 8, cl. 3).

41. *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868).

A Nevada tax collected from every person leaving the state by rail or stage coach abridged the privileges of United States citizens to move freely across state lines in fulfillment of their relations with the National Government.

42. *Northern Central Ry. v. Jackson*, 74 U.S. (7 Wall.) 262 (1869).

Pennsylvania was without jurisdiction to enforce its law taxing interest on railway bonds secured by a mortgage applicable to railway property part of which was located in another state.

Justices concurring: Chase, C.J., Nelson, Davis, Field, Miller, Grier
Justices dissenting: Clifford, Swayne

43. *Furman v. Nichol*, 75 U.S. (8 Wall.) 44 (1869).

A Tennessee statute repealing prior law making notes of the Banks of Tennessee receivable in payment of taxes impaired the obligation of contract as to the notes already in circulation (Art. I, § 10).

44. *Home of the Friendless v. Rouse*, 75 U.S. (8 Wall.) 430 (1869); *The Washington University v. Rouse*, 75 U.S. (8 Wall.) 439 (1869).

A Missouri statute taxing corporations afforded tax exemption by their charter impaired the obligation of contract (Art. I, § 10).

Justices concurring: Nelson, Clifford, Grier, Swayne, Davis
Justices dissenting: Chase, C.J., Miller, Field

45. *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204 (1871).

Alabama taxes levied on vessels owned by its citizens and employed in intrastate commerce "at so much per ton of the registered tonnage" violated the constitutional prohibition against the levy of tonnage duties by states.

46. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871).

A Maryland law that exacted a traders' license from nonresidents at a higher rate than was collected from residents violated the Privileges and Immunities Clause of Art. IV, § 2.

47. *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92 (1872).

State legislation cannot interfere with the disposition of the public domain by Congress, and therefore a Missouri statute of limitations, which was inapplicable to the United States, could not be applied so as to accord title to an adverse possessor as against a grantee from the United States, notwithstanding that the adverse possession preceded the federal conveyance.

Justices concurring: Field, Nelson, Swayne, Clifford, Miller, Bradley, Chase, C.J.
Justices dissenting: Davis, Strong

48. *Wilmington R.R. v. Reid*, 80 U.S. (13 Wall.) 264 (1872).

A North Carolina statute that levied a tax on the franchise and property of a railroad that had been accorded a tax exemption by the terms of its charter impaired the obligation of contract.

49. *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872).

The Contracts Clause (Art. I, § 10) precluded reliance on a Georgia constitutional provision of 1868, prohibiting enforcement of any contract, the consideration for which was a slave, to defeat enforcement of a note based on such consideration and negotiated prior to adoption of said provision.

Justices concurring: Swayne, Nelson, Davis, Strong, Clifford, Miller, Field, Bradley
Justice dissenting: Chase, C.J.

50. *Accord: Osborne v. Nicholson*, 80 U.S. (13 Wall.) 654 (1872), invalidating a similar Arkansas constitutional provision adopted in 1868.

Justices concurring: Swayne, Nelson, Davis, Strong, Clifford, Miller, Field, Bradley
Justice dissenting: Chase, C.J.

51. *Delmas v. Insurance Company*, 81 U.S. (14 Wall.) 661 (1872).

A Louisiana constitutional provision rendering unenforceable contracts, the consideration for which was Confederate money, was, because of the Contracts Clause (Art. I, § 10), inapplicable to contracts consummated before adoption of the former provision.

52. *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873).

A Pennsylvania law that imposed a tax on freight transported interstate, into and out of Pennsylvania, was an invalid regulation of interstate commerce.

Justices concurring: Story, Chase, C.J., Clifford, Miller, Field, Bradley, Hunt
Justices dissenting: Swayne, Davis

53. *State Tax on Foreign-Held Bonds*, 82 U.S. (15 Wall.) 300 (1873).

A Pennsylvania law, insofar as it directed domestic corporations to withhold on behalf of the state a portion of interest due on bonds owned by nonresidents, impaired the obligation of contract and denied due process by taxing property beyond its jurisdiction.

Justices concurring: Field, Chase, C.J., Bradley, Swayne, Strong
Justices dissenting: Davis, Clifford, Miller, Hunt

54. *Gunn v. Barry*, 82 U.S. (15 Wall.) 610 (1873).

A Georgia constitutional provision that increased the amount of a homestead exemption impaired the obligation of contract, insofar as it applied to a judgment obtained under a less liberal exemption provision.

55. *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1873).

A West Virginia Act of 1865, depriving defendants of right to rehearing on a judgment obtained under an earlier law unless they made oath that they had not committed certain offenses, constituted an invalid bill of attainder and *ex post facto* law.

Justices concurring: Field, Chase, C.J., Clifford, Miller, Swayne, Davis, Strong, Hunt
Justice dissenting: Bradley

56. *Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244 (1873).

South Carolina taxing laws, as applied to a railroad whose charter exempted it from taxation, impaired the obligation of contract.

57. *Walker v. Whitehead*, 83 U.S. (16 Wall.) 314 (1873).

A Georgia law restricting remedies for obtaining a judgment, so far as it affected prior contracts, impaired the obligation of contract.

58. *Barings v. Dabney*, 86 U.S. (19 Wall.) 1 (1873).

A South Carolina act appropriating for payment of state debts the assets of an insolvent bank, in which the state owned all the stock, disadvantaged private creditors of the bank and thereby impaired the obligation of contract.

59. *Peete v. Morgan*, 86 U.S. (19 Wall.) 581 (1874).

A Texas act of 1870 imposing a tonnage tax on foreign vessels to defray quarantine expenses held to violate of Art I, § 10, prohibiting levy without consent of Congress.

60. *Pacific R.R. v. Maguire*, 87 U.S. (20 Wall.) 36 (1874).

A Missouri law that levied a tax on a railroad prior to expiration of a grant of exemption impaired the obligation of contract.

Justices concurring: Waite, C.J., Field, Bradley, Swayne, Davis, Hunt
Justices dissenting: Clifford, Miller

61. *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874).

A Wisconsin act admitting foreign insurance companies to transact business within the state, upon their agreement not to remove suits to federal courts, exacted an unconstitutional condition.

Justices concurring: Clifford, Miller, Field, Bradley, Swayne, Strong, Hunt
Justices dissenting: Waite, C.J., Davis

62. *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1875).

A Kansas act of 1872, authorizing municipalities to issue bonds repayable out of tax revenues in support of private enterprise, amounted to collection of money in aid of a private, rather than public purpose, and violated due process.

Justices concurring: Strong, Swayne, Davis, Waite, C.J., Miller, Field, Bradley
Justice dissenting: Clifford

63. *Wilmington & Weldon R.R. v. King*, 91 U.S. 3 (1875).

A North Carolina statute, insofar as it authorized a jury, in suits on contracts negotiated during the Civil War, to place their own estimates upon the value of such contracts instead of taking the value stipulated by the parties, impaired the obligation of such contracts.

Justices concurring: Waite, C.J., Clifford, Miller, Field, Swayne, Davis, Strong, Hunt
Justice dissenting: Bradley

64. *Welton v. Missouri*, 91 U.S. 275 (1875).

A Missouri act that required payment of a license fee by peddlers of merchandise produced outside the state, but exempted peddlers of merchandise produced in the state, imposed an unconstitutional burden on interstate commerce.

65. *Morrill v. Wisconsin*, 154 U.S. 626 (1877).

A Wisconsin statute was held void on the basis of *Welton v. Missouri*.

66. *Henderson v. Mayor of New York*, 92 U.S. 259 (1876).

A New York act of 1849 that required the owner of an ocean-going passenger vessel to post a bond of $300 for each passenger as surety against their becoming public charges, or, in lieu thereof, to pay a tax

of $1.50 for each, contravened Congress's exclusive power to regulate foreign commerce.

67. *Chy Lung v. Freeman*, 92 U.S. 275 (1876).

A California law that required the master of a vessel to post a $500 bond for each alien "lewd and debauched female" passenger arriving from a foreign country contravened the federal power to regulate foreign commerce.

68. *Inman Steamship Co. v. Tinker*, 94 U.S. 238 (1877).

A New York act of 1865, that provided for collection from docking vessels of a fee measured by tonnage, imposed a tonnage duty in violation of Art. I, § 10.

69. *Foster v. Masters of New Orleans*, 94 U.S. 246 (1877).

A Louisiana statute, that required a survey of hatches of every sea-going vessel arriving at New Orleans, contravened the federal power to regulate foreign and interstate commerce.

70. *New Jersey v. Yard*, 95 U.S. 104 (1877).

A statute increasing a tax above the rate stipulated in the state's contract with railroad corporations impaired the obligation of contract.

71. *Railroad Co. v. Husen*, 95 U.S. 465 (1878).

A Missouri act prohibiting the bringing of cattle into the state between March and November contravened the power of Congress over interstate commerce.

72. *Hall v. DeCuir*, 95 U.S. 485 (1878).

A Louisiana Reconstruction Act that prohibited interstate common carriers of passengers from discriminating on the basis of race or color was held invalid as a regulation of interstate commerce.

73. *Farrington v. Tennessee*, 95 U.S. 679 (1878).

A Tennessee law increasing the tax on a bank above the rate specified in its charter was held to impair the obligation of that contract.

Justices concurring: Swayne, Miller, Hunt, Bradley, Harlan, Waite, C.J.
Justices dissenting: Strong, Clifford, Field

74. *Edwards v. Kearzey*, 96 U.S. 595 (1878).

A North Carolina constitutional provision increasing amount of debtor's property exempt from sale under execution of a judgment impaired the obligation of contracts negotiated prior to its adoption.

Justices concurring: Waite, C.J., Swayne, Bradley, Strong, Miller

Justices concurring specially: Field, Hunt
Justice dissenting: Harlan

75. *Keith v. Clark*, 97 U.S. 454 (1878).

A provision of the Tennessee Constitution of 1865 that forbade the receipt for taxes of the bills of the Bank of Tennessee and declared the issues of the bank during the insurrectionary period void was held to impair the obligation of contract.

Justices concurring: Miller, Clifford, Strong, Hunt, Swayne, Field
Justices dissenting: Waite, C.J., Bradley, Harlan

76. *Cook v. Pennsylvania*, 97 U.S. 566 (1878).

A Pennsylvania act taxing auction sales, when applied to sales of imported goods in the original packages, was void as a duty on imports and a regulation of foreign commerce.

77. *Northwestern University v. Illinois ex rel. Miller*, 99 U.S. 309 (1878).

A revenue law of Illinois, insofar as it modified tax exemptions granted to Northwestern University by an earlier statute, impaired the obligation of contract.

78. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

A West Virginia law barring Negroes from jury service violated the Equal Protection Clause.

Justices concurring: Strong, Miller, Hunt, Swayne, Bradley, Harlan, Waite, C.J.
Justices dissenting: Field, Clifford

79. *Guy v. City of Baltimore,*100 U.S. 434 (1879).

A Maryland statute and a Baltimore ordinance, levying tax solely on products of other states, was held to impose an invalid burden upon foreign and interstate commerce.

Justices concurring: Harlan, Hunt, Clifford, Strong, Miller, Swayne, Field, Bradley
Justice dissenting: Waite, C.J.

80. *Tiernan v. Rinker*, 102 U.S. 123 (1880).

A Texas statute, insofar as it levied an occupational tax only upon the sale of out-of-state beer and wine, violated Congress's power to regulate foreign and interstate commerce.

81. *Hartman v. Greenhow*, 102 U.S. 672 (1880).

A Virginia act, adopted subsequently to a law providing for the issuance of bonds and the acceptance of interest coupons thereon in full payment of taxes, that levied a new property tax collectible by

way of deduction from such interest coupons, impaired the obligation of contract.

Justices concurring: Field, Clifford, Harlan, Strong, Hunt, Swayne, Bradley, Waite, C.J.
Justice dissenting: Miller

82. *Hall v. Wisconsin*, 103 U.S. 5 (1880).

A Wisconsin act that repealed a prior statute authorizing payment of fixed sum for performance of a contract to complete a geological survey, impaired the obligation of contract, notwithstanding that the second act was enacted prior to total fulfillment of the contract.

83. *Webber v. Virginia*, 103 U.S. 344 (1881).

Virginia license acts, requiring a license for sale of goods made outside the state but not within the state, were held to conflict with the Commerce Clause.

84. *United States ex rel. Wolff v. City of New Orleans*, 103 U.S. 358 (1881).

A Louisiana act withdrawing from New Orleans the power to levy taxes adequate to amortize previously issued bonds impaired the obligation of contract.

Accord: Louisiana v. Pilsbury, 105 U.S. 278 (1881).

85. *Asylum v. City of New Orleans*, 105 U.S. 362 (1881).

The general taxing laws for New Orleans when applied to the property of an asylum, whose charter exempted it from taxation, impaired the obligation of contract.

Justices concurring: Bradley, Waite, C.J., Woods, Gray, Harlan, Matthews, Blatchford
Justices dissenting: Miller, Field

86. *Western Union Telegraph Co. v. Texas*, 105 U.S. 460 (1882).

A Texas tax collected on private telegraph messages sent out of the state imposed an invalid burden on foreign and interstate commerce, and, insofar as it was imposed on official messages sent by federal officers, it constituted an unconstitutional burden on a federal instrumentality.

87. *Ralls County Court v. United States*, 105 U.S. 733 (1881).

A Missouri law that deprived a county of the taxing power requisite to meet interest payments on previously issued bonds impaired the obligation of contract.

88. *City of Parkersburg v. Brown*, 106 U.S. 487 (1882).

A West Virginia law authorizing a city to issue its bonds in aid of manufacturers was void because it sanctioned an expenditure of public funds for a private purpose contrary to due process.

89. *New York v. Compagnie Gen. Transatlantique*, 107 U.S. 59 (1882).

A New York law imposing a tax on every alien arriving from a foreign country, and holding the vessel liable for payment of the tax, was an invalid regulation of foreign commerce.

90. *Kring v. Missouri*, 107 U.S. 221 (1883).

A Missouri law that abolished a rule existing at the time the crime was committed, under which subsequent prosecution for first degree murder was precluded after a conviction for second degree murder has been set aside on appeal, was void as an *ex post facto* law.

Justices concurring: Miller, Harlan, Field, Blatchford, Woods
Justices dissenting: Matthews, Bradley, Gray, Waite, C.J.

91. *Nelson v. St. Martin's Parish*, 111 U.S. 716 (1884).

A Louisiana act that repealed the taxing authority of a municipality to pay judgments previously rendered against it impaired the obligation of contract.

92. *Cole v. La Grange*, 113 U.S. 1 (1885).

A Missouri act that authorized a city to issue bonds in aid of manufacturing corporations was void because it sanctioned defrayment of public moneys for other than public purpose and deprived taxpayers of property without due process.

93. *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885).

Pennsylvania taxing laws, when applied to the capital stock of a New Jersey ferry corporation carrying on no business in the state except the landing and receiving of passengers and freight, was void as a tax on interstate commerce.

94. *Virginia Coupon Cases (Poindexter v. Greenhow)*, 114 U.S. 270 (1885).

A Virginia act that terminated a privilege accorded bondholders under prior law of tendering coupons from said bonds in payment of taxes impaired the obligation of contract (Art. I, § 10).

Justices concurring: Matthews, Field, Harlan, Woods, Blatchford
Justices dissenting: Bradley, Miller, Gray, Waite, C.J.

95. *Effinger v. Kenney*, 115 U.S. 566 (1885).

Virginia Act of 1867, which provided that in suits to enforce contracts for the sale of property negotiated during the Civil War and pay-

able in Confederate notes, the measure of recovery was to be the value of the land at the time of sale rather than the value of such notes at that time, impaired the obligation of contracts (Art. I, § 10).

96. *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U.S. 683 (1885).

A Kentucky act of 1872 that chartered a corporation and authorized it to supply gas in Louisville, Kentucky, impaired the obligation of contract resulting from the grant of an exclusive privilege to an older company in 1869.

97. *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885).

When a public officer has completed services (1871–1874), for which the compensation was fixed by law, an implied obligation to pay him at such rate arises, and such contract was impaired by a Louisiana constitutional provision of 1880 that reduced the taxing power of a parish to such extent as to deprive the officer of any effective means of collecting the sum due him.

98. *City of Mobile v. Watson*, 116 U.S. 289 (1886).

An Alabama law that deprived Mobile and its successor of the power to levy taxes sufficient to amortize previously issued bonds impaired the obligation of contracts.

99. *Walling v. Michigan*, 116 U.S. 446 (1886).

A Michigan law taxing nonresidents soliciting sale of foreign liquors to be shipped into the state imposed an invalid restraint on interstate commerce.

100. *Royall v. Virginia*, 116 U.S. 572 (1886).

When a Virginia law provided that coupons on state bonds were acceptable in payment of state fees, a subsequent law requiring legal tender in payment of a professional license fee impaired the obligation of contract between the coupon holder and the state. A law that imposed a penalty for practice without a license was void when applied where the license had been denied for failure to pay in legal tender.

101. *Pickard v. Pullman Southern Car Co.*, 117 U.S. 34 (1886).

A Tennessee privilege tax on railway sleeping cars was void insofar as it applied to cars moving in interstate commerce.

102. *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886).

A state cannot validly sell for taxes lands that the United States owned at the time the taxes were levied, but in which it ceased to have an interest at the time of sale (Art. VI).

103. *Wabash, St. L. & P. Ry. Co. v. Illinois,* 118 U.S. 557 (1886).

An Illinois law that prohibited long-short haul rate discrimination, when applied to interstate transportation, encroached upon the federal commerce power.

Justices concurring: Miller, Field, Harlan, Woods, Matthews, Blatchford
Justices dissenting: Bradley, Gray, Waite, C.J.

104. *Robbins v. Shelby County Taxing Dist.,* 120 U.S. 489 (1887).

A Tennessee law taxing drummers not operating from a domestic licensed place of business, insofar as it applied to drummers soliciting sales of goods on behalf of out-of-state business firms, was an invalid regulation of interstate commerce.

Justices concurring: Bradley, Miller, Harlan, Woods, Matthews, Blatchford
Justices dissenting: Waite, C.J., Gray, Field

105. *Corson v. Maryland*, 120 U.S. 502 (1887).

A Maryland law licensing salesmen, insofar as it was applied to a New York resident soliciting orders on behalf of a New York firm, was an invalid regulation of interstate commerce.

106. *Barron v. Burnside*, 121 U.S. 186 (1887).

An Iowa law that conditioned admission of a foreign corporation to do local business on the surrender of its right to invoke the diversity of citizenship jurisdiction of federal courts exacted an invalid forfeiture of a constitutional right.

107. *Fargo v. Michigan*, 121 U.S. 230 (1887).

A Michigan act, insofar as it taxed the gross receipts of companies and corporations engaged in interstate commerce, was held to be in conflict with the commerce powers of Congress.

108. *Seibert v. Lewis*, 122 U.S. 284 (1887).

A Missouri law requiring certain petitions, not exacted when county bonds were issued, before taxes could be levied to amortize said bonds, impaired the obligation of contracts.

109. *Philadelphia Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887).

A Pennsylvania gross receipts tax on public utilities, insofar as it was applied to the gross receipts of a domestic corporation derived from transportation of persons and property on the high seas, was in conflict with the exclusive federal power to regulate foreign and interstate commerce.

110. *Western Union Tel. Co. v. Pendleton*, 122 U.S. 347 (1887).

An Indiana statute concerning the delivery of telegrams, insofar as it applied to deliveries sent from Indiana to other states, was an invalid regulation of commerce.

111. *Bowman v. Chicago & Northwestern Ry. Co.,*125 U.S. 465 (1888).

An Iowa liquor statute that required interstate carriers to procure a certificate from the auditor of the county of destination before bringing liquor into the state violated of the Commerce Clause.

Justices concurring: Matthews, Field (separately), Miller, Bradley, Blatchford
Justices dissenting: Harlan, Gray, Waite, C.J.

112. *California v. Pacific R.R.*, 127 U.S. 1 (1888).

A California tax levied on the franchise of interstate railway corporations chartered by Congress pursuant to its commerce power is void, Congress not having consented to it.

113. *Ratterman v. Western Union Tel. Co.*, 127 U.S. 411 (1888).

An Ohio law that levied a tax on the receipts of a telegraph company was invalid to the extent that part of such receipts levied on were derived from interstate commerce.

114. *Asher v. Texas*, 128 U.S. 129 (1888).

A Texas law that imposed a license tax on drummers violates the Commerce Clause as enforced against one who solicited orders for the purchase of merchandise from out-of-state sellers.

115. *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889).

A clause of a District of Columbia act that required commercial agents selling by sample to pay a license tax was held a regulation of interstate commerce when applied to agents soliciting purchases on behalf of principals outside the District of Columbia.

Justices concurring: Fuller, C.J., Field, Bradley, Harlan, Matthews, Gray, Blatchford, Lamar
Justice dissenting: Miller

116. *Western Union Tel. Co. v. Alabama*, 132 U.S. 472 (1889).

An Alabama tax law, as applied to revenue of telegraph company made by sending messages outside the state, was held to be an invalid regulation of commerce.

117. *Medley, Petitioner*, 134 U.S. 160 (1890).

A Colorado law, when applied to a person convicted of a murder committed prior to the enactment and that increased the penalty to be imposed, was void as an *ex post facto* law.

Justices concurring: Miller, Field, Harlan, Gray, Blatchford, Lamar, Fuller, C.J.
Justices dissenting: Brewer, Bradley

118. *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890).

A state rate-regulatory law that empowered a commission to establish rate schedules that were final and not subject to judicial review as to their reasonableness violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Justices concurring: Blatchford, Miller, Field, Harlan, Brewer, Fuller, C.J.
Justices dissenting: Bradley, Gray, Lamar

119. *Leisy v. Hardin*, 135 U.S. 100 (1890).

An Iowa Prohibition law, enforced as to an interstate shipment of liquor in the original packages or kegs, violated Congress's power to regulate interstate commerce.

Justices concurring: Fuller, C.J., Miller, Field, Bradley, Blatchford, Lamar
Justices dissenting: Gray, Harlan, Brewer

120. *Lyng v. Michigan*, 135 U.S. 161 (1890).

A Michigan statute that taxed the sale of imported liquor in original package was held an invalid regulation of interstate commerce.

Justices concurring: Fuller, C.J., Miller, Field, Bradley, Blatchford, Lamar
Justices dissenting: Gray, Harlan, Brewer

121. *McGahey v. Virginia*, 135 U.S. 662 (1890).

Virginia acts that stipulated that, if the genuineness of coupons tendered in payment of taxes was in issue, the bond from which the coupon was cut must be produced, that precluded use of expert testimony to establish the genuineness of the coupons, and that, in suits for payment of taxes, imposed on the defendant tendering coupons as payment the burden of establishing the validity of said coupons, were deemed to abridge the remedies available to the bondholders so materially as to impair the obligation of contract.

122. *Norfolk & Western R.R. v. Pennsylvania*, 136 U.S. 114 (1890).

A Pennsylvania act that imposed a license tax on foreign corporation common carriers doing business in the state was held to be invalid as a tax on interstate commerce.

Justices concurring: Lamar, Miller, Field, Bradley, Harlan, Blatchford
Justices dissenting: Fuller, C.J., Gray, Brewer

123. *Minnesota v. Barber*, 136 U.S. 313 (1890).

A Minnesota statute that made it illegal to offer for sale any meat other than that taken from animals passed by state inspectors was

held to discriminate against meat producers from other states and to place an undue burden upon interstate commerce.

124. *Brimmer v. Rebman*, 138 U.S. 78 (1891).

A Virginia statute prohibiting sale of meat killed 100 miles or more from place of sale, unless it was first inspected in Virginia, held void as interference with interstate commerce and imposing a discriminatory tax.

125. *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891).

An Oregon act of 1887 that voided all certificates for the sale of public land unless 20% of the purchase price had been paid prior to 1879, altered the terms of purchase provided under preexisting law and therefore impaired the obligations of the contract.

126. *Crutcher v. Kentucky*, 141 U.S. 47 (1891).

A Kentucky law that required a license from foreign express corporation agents before doing business in the state was held invalid under the Commerce Clause.

Justices concurring: Bradley, Field, Harlan, Blatchford, Lamar, Brewer
Justices dissenting: Fuller, C.J., Gray

127. *Voight v. Wright*, 141 U.S. 62 (1891).

A Virginia statute that required state inspection of all but domestic flour held invalid under Commerce Clause.

128. *Mobile & Ohio R.R. v. Tennessee*, 153 U.S. 486 (1894).

Tennessee statutes that levied taxes on a railroad company enjoying tax exemption under an earlier charter impaired the obligation of contract.

Justices concurring: Jackson, Field, Harlan, Brown, White
Justices dissenting: Fuller, C.J., Gray, Brewer, Shiras

129. *New York, L. E. & W. R.R. v. Pennsylvania*, 153 U.S. 628 (1894).

A Pennsylvania act of 1885 that required a New York corporation, when paying interest in New York City on its outstanding securities, to withhold a Pennsylvania tax levied on resident owners of such securities, violated due process because of its application to property beyond the jurisdiction of Pennsylvania. The act also impaired the obligation of contracts by increasing the conditions originally exacted of the railroad in return for permission to construct and operate over trackage in Pennsylvania.

130. *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204 (1894).

A Kentucky act regulating toll rates on bridge across the Ohio River was an unconstitutional regulation of interstate commerce.

Justices concurring: Brown, Harlan, Brewer, Shiras, Jackson
Justices dissenting: Fuller, C.J., Field, Gray, White

131. *Bank of Commerce v. Tennessee*, 161 U.S. 134 (1896).

Tennessee revenue laws that imposed a tax on stock beyond that stipulated under the provision of a state charter impaired the obligation of contracts.

132. *Barnitz v. Beverly*, 163 U.S. 118 (1896).

A Kansas law granting to mortgagor a right to redeem foreclosed property, which right did not exist when the mortgage was negotiated, impaired the obligation of contracts.

133. *Illinois Central R.R. v. Illinois*, 163 U.S. 142 (1896).

An Illinois statute that required a railroad to run its New Orleans train into Cairo and back to mail line, although there was already adequate service to Cairo, was held to be an unconstitutional obstruction of interstate commerce and of passage of United States mails.

134. *Missouri Pacific Ry. v. Nebraska*, 164 U.S. 403 (1896).

A Nebraska statute that compelled a railroad to permit a third party to erect a grain elevator on its right of way deprived of property violated due process.

135. *Scott v. Donald*, 165 U.S. 58 (1897).

A South Carolina act regulating the sale of alcoholic beverages exclusively at state dispensaries, when enforced against a resident importing out-of-state liquor, unconstitutionally discriminated against interstate commerce.

Justices concurring: Shiras, Field, Harlan, Gray, White, Peckham, Fuller
Justice dissenting: Brown

136. *Gulf, C. & S. F. Ry. v. Ellis*, 165 U.S. 150 (1897).

A Texas law that required railroads to pay court costs and attorneys' fees to litigants successfully prosecuting claims against them deprived the railroads of due process and equal protection of the law.

Justices concurring: Brewer, Field, Harlan, Brown, Shiras, Peckham
Justices dissenting: Gray, White, Fuller, C.J.

137. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

A Louisiana law imposing a penalty for soliciting contracts of insurance on behalf of insurers who had not complied with Louisi-

ana law effected a denial of liberty of contract contrary to due process when applied to an insurance contract negotiated in New York with a New York company and with premiums and losses to be paid in New York.

138. *Smyth v. Ames*, 169 U.S. 466 (1898).

A Nebraska statute setting intrastate freight rates was held to impose rates so low as to be unreasonable and to amount to a deprivation of property without due process of law.

139. *Houston & Texas Cent. Ry. v. Texas*, 170 U.S. 243 (1898).

A Texas constitutional provision, as enforced to recover certain sections of land held by a railroad company under a previous legislative grant, impaired the obligation of contract.

140. *Thompson v. Utah*, 170 U.S. 343 (1898).

A provision in Utah's constitution, providing for the trial of noncapital criminal cases in courts of general jurisdiction by a jury of eight persons, was held an *ex post facto* law as applied to felonies committed before the territory became a state.

Justices concurring: Harlan, Gray, Brown, Shiras, White, McKenna, Fuller, C.J.
Justices dissenting: Brewer, Peckham

141. *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898).

A Pennsylvania law that prohibited the manufacture and sale of oleomargarine was invalid to the extent that it prohibited interstate importation and resale of oleomargarine in original packages.

Justices concurring: Fuller, C.J., Brewer, Brown, Shiras, White, Peckham, McKenna
Justices dissenting: Gray, Harlan

142. *Collins v. New Hampshire*, 171 U.S. 30 (1898).

A New Hampshire law that prohibited the sale of oleomargarine unless it was pink in color, was invalid as an arbitrary means of rendering the product unmarketable and also could not be enforced to prevent the interstate transportation and resale of oleomargarine produced in another state and not pink in color.

Justices concurring: Fuller, C.J., Brewer, Brown, Shiras, White, Peckham, McKenna
Justices dissenting: Harlan, Gray

143. *Blake v. McClung*, 172 U.S. 239 (1898).

Tennessee acts that granted Tennessee creditors priority over nonresident creditors having claims against foreign corporations admitted to do local business infringed the Privileges and Immunities Clause of Art. IV, § 2.

Justices concurring: Harlan, Gray, Brown, Shiras, White, McKenna, Peckham
Justices dissenting: Brewer, Fuller, C.J.

144. *Norwood v. Baker*, 172 U.S. 269 (1898).

The exaction, as authorized by Ohio law, from the owner of property, via special assessment, of the cost of a public improvement in substantial excess of the benefits accruing to him amounted to a taking of property for public use without compensation, and violated due process.

Justices concurring: Harlan, Brown, White, Peckham, McKenna, Fuller, C.J.
Justices dissenting: Brewer, Gray, Shiras

145. *Dewey v. City of Des Moines*, 173 U.S. 193 (1899).

An Iowa statute deprived a nonresident owner of property in Iowa of due process by subjecting him to personal liability to pay a special assessment when the state did not acquire personal jurisdiction via service of process.

146. *Lake Shore & Mich. So. Ry. v. Smith*, 173 U.S. 684 (1899).

A Michigan act that required railroads to sell 1,000-mile tickets at a fixed price in favor of the purchaser, his wife, and children, with provisions for forfeiture if presented by any other person in payment of fare, and for expiration within two years, subject to redemption of unused portion and collection of 3 cents per mile already traveled, effected a taking of property without due process and a denial of equal protection.

Justices concurring: Peckham, Harlan, Brewer, Brown, Shiras, White
Justices dissenting: Fuller, C.J., Gray, McKenna

147. *Houston & Texas Cent. R.R. v. Texas*, 177 U.S. 66 (1900).

Subsequent repeal of a Texas statute that permitted treasury warrants to be given to the state for payment of interest on bonds issued by a railroad and held by the state, with accompanying endeavor to hold the railroad liable for back interest paid on the warrants, impaired the obligation of contract.

148. *Cleveland, C.C. & St. L. Ry. v. Illinois*, 177 U.S. 514 (1900).

An Illinois law that required all regular passenger trains to stop at county seats for receipt and discharge of passengers imposed an invalid burden on interstate commerce when applied to an express train serving only through passengers between New York and St. Louis.

149. *Stearns v. Minnesota*, 179 U.S. 223 (1900).

A Minnesota statute repealing all former tax exemption laws and providing for the taxation of lands granted to railroads impaired the obligation of contracts.

Duluth & I. R.R. v. St. Louis County, 179 U.S. 302 (1900).

150. *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79 (1901).

A Kansas statute that regulated public stock yards violated the Equal Protection Clause because it applied to only one stockyard company in the state.

151. *Louisville & Nashville R.R. v. Eubank*, 184 U.S. 27 (1902).

A Kentucky constitutional provision on long and short haul railroad rates was held invalid where interstate shipments were involved.

Justices concurring: Peckham, Harlan, Brown, Shiras, White, McKenna, Fuller, C.J.
Justices dissenting: Brewer, Gray

152. *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902).

An Illinois statute that regulated monopolies, but exempted agricultural products and livestock in the hands of the producer from the operation of the law, was held to deny the equal protection of the laws.

Justices concurring: Harlan, Brewer, Brown, Shiras, White, Peckham, Fuller, C.J.
Justice dissenting: McKenna

153. *Stockard v. Morgan*, 185 U.S. 27 (1902).

A Tennessee license tax on agents soliciting and selling by sample for a company in another state was held an invalid regulation of commerce.

154. *Louisville & J. Ferry Co. v. Kentucky,*188 U.S. 385 (1903).

An Indiana franchise granted to a Kentucky corporation for operating a ferry from the Indiana to the Kentucky shore had its tax situs in Indiana; accordingly, Kentucky lacked jurisdiction with the result that its law that authorized a levy on the Indiana franchise deprived it of property without due process of law.

Justices concurring: Harlan, Brewer, Brown, White, Peckham, McKenna, Holmes
Justices dissenting: Shiras, Fuller, C.J.

155. *The Roanoke*, 189 U.S. 185 (1903).

A Washington law that accorded a contractor or subcontractor a lien on a foreign vessel for work done and that made no provision for protection of owner in event contractor was fully paid before notice of subcontractor's lien was received deprived the owner of normal defenses and constituted an invalid interference with admiralty jurisdiction exclusively vested in federal courts by Article III.

156. *The Robert W. Parsons*, 191 U.S. 17 (1903).

New York statutes giving a lien for repairs upon vessels, and providing for the enforcement of such liens by proceedings *in rem*, were held void as in conflict with the exclusive admiralty and maritime jurisdiction of the federal courts.

Justices concurring: Brown, White, McKenna, Holmes, Day
Justices dissenting: Brewer, Peckham, Harlan, Fuller, C.J.

157. *Allen v. Pullman Company*, 191 U.S. 171 (1903).

A Tennessee tax of $500 per year per Pullman car, when applied to cars moving in interstate as well as intrastate commerce, imposed an invalid burden on interstate commerce.

158. *Bradley v. Lightcap*, 195 U.S. 1 (1904).

An Illinois law, passed after a mortgage was executed, that provided that, if a mortgagee did not obtain a deed within five years after the period of redemption had lapsed, he lost the estate (whereas under the law existing when the mortgage was executed, failure by the mortgagee to take out a deed had no effect on the title of the mortgagee against the mortgagor), was held void as impairing the obligation of contract and depriving the mortgagee of property rights without due process.

159. *Central of Georgia Ry. v. Murphey*, 196 U.S. 194 (1905).

Georgia statutes that imposed the duty on common carriers of reporting on the shipment of freight to the shipper were held void when applied to interstate shipments.

160. *Lochner v. New York*, 198 U.S. 45 (1905).

A New York statute establishing a 10-hour day in bakeries violated due process because it interfered with the employees' freedom to contract in relation to their labor.

Justices concurring: Peckham, Brewer, Brown, McKenna, Fuller
Justices dissenting: Harlan, White, Day, Holmes (separately)

161. *Union Transit Co. v. Kentucky*, 199 U.S. 194 (1905).

Because tangible personal property acquires a tax situs in the state where it is permanently located, an attempt by Kentucky, in which the owner was domiciled, to tax railway cars located in Indiana, was void and amounted to a deprivation of property without due process.

Justices concurring: Brown, Harlan, Brewer, Peckham, McKenna, Day
Justices dissenting: Holmes, White, Fuller, C.J.

162. *Houston & Texas Central R.R. v. Mayes*, 201 U.S. 321 (1906).

A Texas statute exacting of an interstate railroad an absolute requirement that it furnish a certain number of cars on a given day to transport merchandise to another state imposed an invalid, unreasonable burden on interstate commerce.

Justices concurring: Brewer, Brown, Peckham, Holmes, Day
Justices dissenting: Harlan, McKenna, Fuller, C.J.

163. *Powers v. Detroit & Grand Haven Ry.*, 201 U.S. 543 (1906).

When a railroad is reorganized under a special act but no new corporation is chartered, a tax concession granted by such act amounted to a contract that could not be impaired by a subsequent Michigan enactment that purported to alter the rate of the tax.

Justices concurring: Brewer, Harlan, Brown, Peckham, McKenna, Holmes, Day, Fuller, C.J.
Justice dissenting: White

164. *Mayor of Vicksburg v. Vicksburg Waterworks Co.*, 202 U.S. 453 (1906).

A water company owning an exclusive franchise to supply a city with water was entitled to an injunction restraining impairment of such contract by attempted erection by city of its own water system pursuant to Mississippi statutory authorization.

Justices concurring: Day, Brewer, Brown, White, Peckham, McKenna, Holmes, Fuller, C.J.
Justice dissenting: Harlan

165. *American Smelting Co. v. Colorado*, 204 U.S. 103 (1907).

A Colorado statute stipulating that foreign corporations, as a condition for admission to do business, pay a fee based on their capital stock whereupon they would be subjected to all the liabilities and restrictions imposed upon domestic corporations amounted to a contract, the obligation of which was invalidly impaired by a later statute that imposed higher annual license fees on foreign corporations admitted under the preceding terms than were levied on domestic corporations, whose corporate existence had not expired.

Justices concurring: Peckham, Brewer, White, McKenna, Day
Justices dissenting: Harlan, Holmes, Moody, Fuller, C.J.

166. *Adams Express Co. v. Kentucky*, 206 U.S. 129 (1907).

A Kentucky law proscribing C.O.D. shipments of liquor, providing that the place where the money is paid or the goods delivered shall be deemed to be the place of sale, and making the carrier jointly liable with the vendor was, as applied to interstate shipments, an invalid regulation of interstate commerce.

Justices concurring: Brewer, Holmes, Peckham, Moody, White, Day, McKenna, Fuller, C.J.
Justice dissenting: Harlan

Accord: American Express Co. v. Kentucky, 206 U.S. 139 (1907).

167. *Central of Georgia Ry. v. Wright*, 207 U.S. 127 (1907).

A Georgia statutory assessment procedure that afforded taxpayer no opportunity to be heard as to valuation of property not returned by him under honest belief that it was not taxable, and that permitted him to challenge the assessment only for fraud and corruption, violated due process.

168. *Darnell & Son Co. v. City of Memphis,*208 U.S. 113 (1908).

A Tennessee tax law that exempted domestic crops and manufactured products, but applied the levy to like products of out-of-state origin, imposed an invalid burden on interstate commerce.

169. *Ex parte Young*, 209 U.S. 123 (1908).

A Minnesota railroad rate statute that imposed such excessive penalties that parties affected were deterred from testing its validity in the courts denied a railroad the equal protection of the laws.

170. *Galveston, H. & S.A. Ry. v. Texas*, 210 U.S. 217 (1908).

A Texas gross receipts tax insofar as it was levied on railroad receipts that included income derived from interstate commerce unconstitutionally burdened interstate commerce.

Justices concurring: Holmes, Brewer, Peckham, Day, Moody
Justices dissenting: Harlan, White, McKenna, Fuller, C.J.

171. *Willcox v. Consolidated Gas Co.*, 212 U.S. 19 (1909).

A New York law that required a public utility to perform its service in such a manner that its entire plant would have to be rebuilt at a cost on which no return could be obtained under the rates fixed unconstitutionally deprived the utility of its property without due process.

172. *Louisville & Nashville R.R. v. Stock Yards Co.*, 212 U.S. 132 (1909).

A Kentucky constitutional provision that required a carrier to deliver its cars to connecting carriers without providing adequate protection for their return or compensation for their use effected an invalid taking of property without due process of law.

Justices concurring: Holmes, Brewer, White, Peckham, Day, Fuller, C.J.
Justices dissenting: McKenna, Harlan, Moody

173. *Nielson v. Oregon*, 212 U.S. 315 (1909).

For want of jurisdiction, Oregon could not validly prosecute as a violator of its law prohibiting the use of purse nets one who, pursuant to a license from Washington, used such a net on the Washington side of the Columbia River.

174. *Adams Express Co. v. Kentucky*, 214 U.S. 218 (1909).

A Kentucky law proscribing the sale of liquor to an inebriate, as applied to a carrier delivering liquor to such person from another state, violated the Commerce Clause.

Justices concurring: Brewer, Holmes, Peckham, Moody, White, Day, McKenna, Fuller, C.J.
Justice dissenting: Harlan

175. *Louisiana ex rel. Hubert v. Mayor of New Orleans*, 215 U.S. 170 (1909).

A Louisiana act of 1870 providing for registration and collection of judgments against New Orleans, so far as it delayed payment, or collection of taxes for payment, of contract claims existing before its passage, impaired the obligation of such contracts.

176. *North Dakota ex rel. Flaherty v. Hanson*, 215 U.S. 515 (1910).

A North Dakota statute that required the recipient of a federal retail liquor license, solely because of payment therefor and without reference to the doing of any act within North Dakota, to publish official notices of the terms of such license and of the place where it is posted, to display on his premises an affidavit confirming such publication, and to file an authenticated copy of such federal license together with a $10 fee, was void for imposing a burden on the federal taxing power.

Justices concurring: White, Harlan, Brewer, Day
Justices dissenting: Fuller, C.J., McKenna, Holmes

177. *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910).

A Kansas statute imposing a charter fee, computed as a percentage of authorized capital stock, on corporations for the privilege of doing business in Kansas, could not validly be collected from a foreign corporation engaged in interstate commerce, and also violated due process insofar as it was imposed on property, part of which was located beyond the limits of that state.

Justices concurring: Harlan, Brewer, White (separately), Day, Moody
Justices dissenting: Holmes, McKenna, Peckham, Fuller, C.J.

178. *Ludwig v. Western Union Tel. Co.*, 216 U.S. 146 (1910).

An Arkansas law that required a foreign corporation engaged in interstate commerce to pay, as a license fee for doing an intrastate

business, a given amount of its entire capital stock, whether employed in Arkansas or elsewhere, was void by reason of imposing a burden on interstate commerce and embracing property outside the jurisdiction of the state.

Justices concurring: Harlan, Moody, Lurton, White, Day, Brewer
Justices dissenting: Fuller, C.J., McKenna, Holmes

179. *Southern Ry. v. Greene*, 216 U.S. 400 (1910).

An Alabama law that imposed on foreign corporations already admitted to do business an additional franchise or privilege tax not levied on domestic corporations denied the foreign corporations equal protection of the laws.

Justices concurring: Day, Harlan, Brewer, White
Justices dissenting: Fuller, C.J., McKenna, Holmes

180. *International Textbook Co. v. Pigg*, 217 U.S. 91 (1910).

A Kansas law that imposed upon foreign corporations engaged in interstate commerce, as a condition for admission and retention of the right to do business in that state, procurement of a license and submission of an annual financial statement, and that prohibited such foreign corporations from filing actions in Kansas courts unless such conditions were met, imposed an unconstitutional burden on interstate commerce.

Justices concurring: Harlan, White, Holmes, Day, Lurton
Justices dissenting: Fuller, C.J., McKenna

181. *St. Louis S.W. Ry. v. Arkansas*, 217 U.S. 136 (1910).

An Arkansas law, and a commission order issued under it, that required an interstate carrier, upon application of a local shipper, to deliver promptly the number of freight cars requested for loading purposes and that, without regard to the effect of such demand on its interstate traffic, exposed it to severe penalties for noncompliance, imposed an invalid, unreasonable burden on interstate commerce. The rules of the American Railway Association as to availability of a member carrier's cars for interstate shipments being a matter of federal regulation, it was beyond the power of a state court to pass on their sufficiency.

Justices concurring: White, Harlan, McKenna, Holmes, Day, Lurton
Justices dissenting: Fuller, C.J.

182. *Missouri Pacific Ry. v. Nebraska*, 217 U.S. 196 (1910).

A Nebraska law compelling railroad, at its own expense, and upon request of grain elevator operators, to install switches connecting such elevators with its right of way, deprived the carrier of property without due process of law.

Justices concurring: Holmes, White, Day, Lurton, Fuller, C.J.
Justices dissenting: Harlan, McKenna

183. *Dozier v. Alabama*, 218 U.S. 124 (1910).

An Alabama law that imposed a license tax on agents not having a permanent place of business in that state and soliciting orders for the purchase and delivery of pictures and frames manufactured in, and delivered from, another state, with the title remaining in the vendor until the agent collected the purchase price, imposed an invalid burden on interstate commercial transactions.

184. *Herndon v. Chicago, R.I. & P. Ry.*, 218 U.S. 135 (1910).

When a railroad already has provided adequate accommodations at any point, a Missouri regulation that required interstate trains to stop at such point imposed an invalid, unreasonable burden on interstate commerce. Also, a Missouri law that forfeited the right of an admitted foreign carrier to do a local business upon its instituting a right of action in a federal court imposed an unconstitutional condition.

185. *Bailey v. Alabama*, 219 U.S. 219 (1911).

An Alabama law that made a refusal to perform labor contracted for, without return of money or property advanced under the contract, *prima facie* evidence of fraud and that was enforced under local rules of evidence that precluded one accused of such fraud from testifying as to uncommunicated motives, was an invalid peonage law proscribed by the Thirteenth Amendment.

Justices concurring: Hughes, Lamar, Harlan, Day, Van Devanter, McKenna, White, C.J.
Justices dissenting: Holmes, Lurton

186. *Oklahoma v. Kansas Natural Gas Co.,*221 U.S. 229 (1911).

An Oklahoma law that withheld from foreign corporations engaged in interstate commerce a privilege afforded domestic corporations engaged in local commerce, namely, of building pipe lines across its highways and transporting to points outside its boundaries natural gas extracted and reduced to possession therein, was invalid as a restraint on interstate commerce and as a deprivation of property without due process of law.

Justices concurring: McKenna, Harlan, Day, Van Devanter, Lamar, White, C.J.
Justices dissenting: Holmes, Lurton, Hughes

187. *Berryman v. Whitman College*, 222 U.S. 334 (1912).

A Washington statute of 1905, as interpreted to authorize taxation of Whitman College, impaired the obligation of contract by nullifying the College's exemption from taxation conferred by its charter.

188. *Louisville & Nashville R.R. v. Cook Brewing Co.*, 223 U.S. 70 (1912).

A Kentucky statute prohibiting common carriers from transporting intoxicating liquors to "dry" points in Kentucky was constitutionally inapplicable to interstate shipments of such liquor to consignees in Kentucky.

189. *Atchison, T. & S.F. Ry. v. O'Connor*, 223 U.S. 280 (1912).

A Colorado law levying tax of 2 cents on each $1,000 of a corporation's capital stock could not constitutionally be collected from a Kansas corporation engaged in interstate commerce, the greater part of whose property and business was located and conducted outside Colorado.

190. *Oklahoma v. Wells, Fargo & Co.*, 223 U.S. 298 (1912).

An Oklahoma law that purported to be an *ad valorem* tax on the property of corporations, levied in the form of a three-percent gross receipts tax, and computed, in the case of express companies doing an interstate business, as a percentage of gross receipts from all sources, interstate as well as intrastate, which is equal to the proportion that its business in Oklahoma bears to its total business, was void as applied to such express companies. The tax burdened interstate commerce and was levied, contrary to due process, on property in the form of income from investments and bonds located outside the state.

191. *Haskell v. Kansas Natural Gas Co.*, 224 U.S. 217 (1912).

An Oklahoma conservation law, insofar as it withheld from foreign corporations the right to lay pipe lines across highways for purposes of transporting natural gas in interstate commerce, imposed an invalid burden on interstate commerce.

192. *St. Louis, I. Mt. & So. Ry. v. Wynne,*224 U.S. 354 (1912).

An Arkansas law compelling railroads to pay claimants within 30 days after notice of injury to livestock caused by their trains, and, upon default thereof, authorizing claimants to recover double the damages awarded by a jury plus an attorney's fee, notwithstanding that the amount sued for was less than the amount originally claimed, in effect penalized the railroads for their refusal to pay excessive claims, and accordingly effected an arbitrary deprivation of property without due process of law.

193. *Bucks Stove Co. v. Vickers*, 226 U.S. 205 (1912).

A Kansas law that imposed certain requirements, such as obtaining permission of the State Charter Board, paying filing and license fees, and submitting annual statements listing all stockholders, as a

condition prerequisite to doing business in Kansas and suing in its courts could not constitutionally be applied to foreign corporations engaged in interstate commerce. A state cannot exact a franchise for the privilege of engaging in such commerce.

194. *Crenshaw v. Arkansas*, 227 U.S. 389 (1913).

An Arkansas statute, exacting a license and fee from peddlers of lightning rods and other articles, as applied to representatives of a Missouri corporation soliciting orders for the sale and subsequent delivery of stoves by said corporation, imposed an invalid burden on interstate commerce.

Accord: Rogers v. Arkansas, 227 U.S. 401 (1913).

195. *Accord: Stewart v. Michigan*, 232 U.S. 665 (1914), voiding application of a similar Michigan law.

196. *Ettor v. City of Tacoma*, 228 U.S. 148 (1913).

A Washington statute of 1907 repealing a prior act of 1893, with the result that rights to consequential damages for a change of street grade that had already accrued under the earlier act were destroyed, amounted to a deprivation of property without due process of law.

197. *Missouri Pacific Ry. v. Tucker*, 230 U.S. 340 (1913).

A Kansas statute that did not permit a carrier to have the sufficiency of rates established under it determined by judicial review and that exposed the carrier, when sued for charging rates in excess thereof, to a liability for liquidated damages in the sum of $500, which was unrelated to actual damages, deprived carrier of property without due process of law.

198. *Chicago, M. & St. P. Ry. v. Polt*, 232 U.S. 165 (1914).

A South Dakota law that made railroads liable for double damages in case of failure to pay a claim, within 60 days after notice, or to offer to pay a sum equal to what a jury found the claimant entitled to, was arbitrary and deprived the carriers of property without due process of law.

Accord: Chicago, M. & St. P. Ry. v. Kennedy, 232 U.S. 626 (1914).

199. *Harrison v. St. Louis, S. F. & T. R.R.*, 232 U.S. 318 (1914).

An Oklahoma law that prohibited foreign corporations, upon penalty of forfeiting their license to do business in that state, from invoking the diversity of citizenship jurisdiction of federal courts, imposed an unconstitutional condition.

200. *Foote v. Maryland*, 232 U.S. 495 (1914).

The Maryland oyster inspection tax of 1910, levied on oysters coming from other states, the proceeds from which were used partly for inspection and partly for other purposes, such as the policing of state waters, was void as imposing a burden on interstate commerce in excess of the expenses absolutely necessary for inspection.

201. *Farmers Bank v. Minnesota*, 232 U.S. 516 (1914).

Minnesota tax on bonds issued by a municipality of the Territory of Oklahoma and held by Minnesota corporations was void as a tax on a federal instrumentality (Art. VI).

202. *Russell v. Sebastian*, 233 U.S. 195 (1914).

Amendment in 1911 of California constitution of 1879, and municipal ordinances of Los Angeles adopted in pursuance of the amendment were ineffectual by reason of the prohibition against impairment of contracts contained in Art. I, § 10, of the Federal Constitution, to deprive a utility of rights acquired before said amendment, which embraced the privilege of laying gas pipes under the streets of Los Angeles.

203. *Singer Sewing Machine Co. v. Brickell*, 233 U.S. 304 (1914).

Alabama sewing machine license tax could not be collected from those agencies of a foreign corporation engaged wholly in an interstate business, that is, in soliciting orders for machines to be accepted and fulfilled at the Georgia office of the seller.

204. *Tennessee Coal Co. v. George*, 233 U.S. 354 (1914).

Because venue is not part of a transitory cause of action, an Alabama law that created such a cause of action by making the employer liable to the employee for injuries attributable to defective machinery was inoperative insofar as it sought to withhold from such employee the right to sue on such action in courts of any state other than Alabama; the Full Faith and Credit Clause of Art. IV does not preclude a court in another state that acquired jurisdiction from enforcing such right of action.

205. *Carondelet Canal Co. v. Louisiana*, 233 U.S. 362 (1914).

Louisiana act of 1906 repealing prior act of 1858 and sequestering with compensation certain property acquired by a canal company under the repealed enactment impaired an obligation of contact.

206. *Smith v. Texas*, 233 U.S. 630 (1914).

Texas act of 1914 stipulating that only those who have previously served two years as freight train conductors or brakemen shall be eli-

gible to serve as railroad train conductors was arbitrary and effected a denial of the equal protection of the laws.

207. *International Harvester Co. v. Kentucky*, 234 U.S. 216 (1914).

Kentucky criminal and antitrust provisions, both constitutional and statutory, were void for vagueness and hence violated due process because a prohibition of combinations that establish prices that are greater or lower than the "real market value" of an article as established by "fair competition" and "under normal market conditions" afforded no standard that was possible to know in advance and to obey.

Justices concurring: Holmes, Hughes, Lamar, Day, Lurton, Van Devanter, White, C.J.
Justices dissenting: McKenna, Pitney

Accord: International Harvester Co. v. Kentucky, 234 U.S. 579 (1914); *Collins v. Kentucky*, 234 U.S. 634 (1914); *American Machine Co. v. Kentucky*, 236 U.S. 660 (1915).

208. *Missouri Pacific Ry. v. Larabee*, 234 U.S. 459 (1914).

Kansas statute empowering a Kansas court to award against a litigant attorney's fees attributable to the presentation before the United States Supreme Court of an appeal in a mandamus proceeding was inoperative consistently with the principle of national supremacy, for a state court cannot be empowered by state law to assess fees for services rendered in a federal court when such assessment is sanctioned neither by federal law nor by the rules of the Supreme Court.

209. *Western Union Tel. Co. v. Brown*, 234 U.S. 542 (1914).

South Carolina law making mental anguish resulting from negligent non-delivery of a telegram a cause of action could not be invoked to support an action for negligent non-delivery in the District of Columbia, an area beyond the jurisdiction of South Carolina and, consistent with due process, removed from the scope of its legislative power. The statute, as applied to messages sent from South Carolina to another jurisdiction, also was an invalid regulation of interstate commerce.

210. *United States v. Reynolds*, 235 U.S. 133 (1914).

An Alabama law that permitted a person convicted of an offense to contract with another whereby, in consideration of the latter's becoming surety for the convicted person's fine, the convicted person agreed to perform certain services, and that further stipulated that, if such contract were breached, the convicted person would become subject to a fine equal to the damages sustained by the other contracting party and payment of which would be remitted to that contracting party, imposed a form of peonage proscribed by the Thirteenth Amendment.

Justices concurring: Holmes (separately)

211. *McCabe v. Atchison, T. & S.F. Ry.,*235 U.S. 151 (1914).

Oklahoma Separate Coach Law violated the Equal Protection Clause by permitting carriers to provide sleeping, dining, and chair cars for whites but not for Negroes.

Justices concurring: White (separately), C.J., Holmes (separately), Lamar (separately), McReynolds (separately)

212. *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914).

A South Dakota law that required a foreign corporation to appoint a local agent to accept service of process as a condition precedent to suing in state courts to collect a claim arising out of interstate commerce imposed an invalid burden on said commerce.

213. *Choctaw & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914).

An Oklahoma privilege tax, insofar as it was levied on sale of coal extracted from lands owned by Indian tribes and leased on their behalf by the Federal Government, was invalid as a tax on federal instrumentality.

214. *Coppage v. Kansas*, 236 U.S. 1 (1915).

Kansas law proscribing "yellow dog" contracts whereby the employer exacted of employees an agreement not to join or remain a member of a union as a condition of acquiring and retaining employment deprived employees of liberty of contract contrary to due process.

Justices concurring: Pitney, McKenna, Van Devanter, Lamar, McReynolds, White, C.J.
Justices dissenting: Day, Hughes, Holmes (separately)

215. *Heyman v. Hays*, 236 U.S. 178 (1915).

Tennessee county privilege tax law, insofar as it was enforced as to a liquor dealer doing a strictly mail-order business confined to shipments to out-of-state destinations was void as a burden on interstate commerce.

Accord: Southern Operating Co. v. Hayes, 236 U.S. 188 (1915).

216. *Northern Pacific Ry. v. North Dakota ex rel. McCue*, 236 U.S. 585 (1915).

North Dakota law compelling carriers to haul certain commodities at less than compensatory rates deprived them of property without due process.

Justices concurring: Hughes, McKenna, Holmes, Day, Van Devanter, Lamar, McReynolds, White, C.J.
Justice dissenting: Pitney

217. *Norfolk & Western Ry. v. Conley*, 236 U.S. 605 (1915).

A West Virginia law that compelled carriers to haul passengers at noncompensatory rates deprived them of property without due process.

Justices concurring: Hughes, McKenna, Holmes, Day, Van Devanter, Lamar, McReynolds, White, C.J.
Justice dissenting: Pitney

218. *Wright v. Central of Georgia Ry.*, 236 U.S. 674 (1915).

Since the lessee of two railroads, built under special charters containing irreparable contracts exempting the railway property from taxation in excess of a given rate was to be viewed as in the same position as the owners, Georgia's levy of an ad valorem tax on the lessee in excess of the charter rate impaired the obligation of contract (Art. I, § 10).

Justices concurring: Holmes, McKenna, Day, Van Devanter, White, C.J.
Justices dissenting: Hughes, Pitney, McReynolds

Accord: Wright v. Louisville & Nashville R.R., 236 U.S. 687 (1915).

Justices concurring: Holmes, McKenna, Day, Van Devanter, White, C.J.
Justices dissenting: Hughes, Pitney, McReynolds

219. *Davis v. Virginia*, 236 U.S. 697 (1915).

Solicitation by a peddler in Virginia of orders for portraits made in another State, with an option to the purchaser to select frames upon delivery of the portrait by the peddler, amounted to a single transaction in interstate commerce, and Virginia therefore could not validly impose a peddler's license tax on the solicitor of such orders.

220. *Chicago, B. & Q. Ry. v. Wisconsin R.R. Comm'n*, 237 U.S. 220 (1915).

Wisconsin statute requiring interstate trains to stop at villages of a specified number of inhabitants, without regard to the volume of business done there, was void as imposing an unreasonable burden on interstate commerce.

221. *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915).

Florida statute denied due process insofar as it provided, after execution against a corporation had been returned "no property," a second execution to issue against a stockholder for the same debt to be enforced against his property to the extent of any unpaid subscription owing on his stock and without notice to such stockholder.

222. *Charleston & W. Car. Ry. v. Varnville Co.*, 237 U.S. 597 (1915).

A South Carolina law that imposed a penalty on carriers for their failure to adjust claims within 40 days imposed an invalid burden on

interstate commerce and also was in conflict with the federal Carmack Amendment.

223. *Atchison, T. & S. F. Ry. v. Vosburg*, 238 U.S. 56 (1915).

The Kansas Reciprocal Demurrage Law of 1905, which allowed recovery of an attorney's fee by the shipper in case of delinquency by the carrier, but accorded the carrier no like privilege in case of delinquency on the part of the shipper, denied the carrier equal protection of the law.

224. *Guinn v. United States*, 238 U.S. 347 (1915).

An Oklahoma grandfather clause, in its 1910 constitution, exempting from a literacy requirement and automatically enfranchising all entitled to vote as of January 1, 1866, or who were descendants of those entitled to vote on the latter date, violated the Fifteenth Amendment's protection of Negroes from discriminatory denial of the right to vote based on race.

225. *Accord: Mayers v. Anderson*, 238 U.S. 368 (1915), voiding a similar Maryland grandfather clause.

226. *Southwestern Tel. Co. v. Danaher*, 238 U.S. 482 (1915).

An Arkansas statute was held to be unreasonable and to violate due process because, as enforced, it subjected a telephone company to a $6,300 penalty for discriminatory refusal to serve when, pursuant to company regulations known to the state and uniformly enforced for economical collection of its approved rates, it suspended services to a delinquent and refused to resume services, while the delinquency remained unpaid, at the reduced rate afforded to those who paid the monthly service charge in advance.

227. *Chicago, M. & St. P. R.R. v. Wisconsin*, 238 U.S. 491 (1915).

A Wisconsin statute that compelled sleeping car companies, if an upper berth was not sold, to accord use of the space to the purchaser of a lower berth, took salable property from the owner without compensation and therefore deprived the owner of property without due process of law.

Justices concurring: Lamar, Day, Hughes, Van Devanter, Pitney, McReynolds, White, C.J.
Justices dissenting: McKenna, Holmes

228. *Truax v. Raich*, 239 U.S. 33 (1915).

An Arizona statute that compelled establishments hiring five or more workers to reserve 80 percent of the employment opportunities to U.S. citizens denied aliens equal protection of the laws.

Justices concurring: Hughes, Holmes, Pitney, Lamar, Day, Van Devanter, McKenna, White, C.J.
Justice dissenting: McReynolds

229. *Provident Savings Ass'n v. Kentucky*, 239 U.S. 103 (1915).

Kentucky statute levying tax, in the nature of a license tax for the doing of local business, on premiums collected in New York by a foreign insurance company after it had ceased to do business in that state violated due process because it affected activities beyond the jurisdiction of the state.

230. *Indian Oil Co. v. Oklahoma*, 240 U.S. 522 (1916).

Oklahoma tax on lessee's interest in Indian lands, acquired pursuant to federal statutory authorization, was void as a tax on a federal instrumentality.

231. *Rosenberger v. Pacific Express Co.*, 241 U.S. 48 (1916).

Texas statute imposing special licenses on express companies maintaining offices for C.O.D. delivery of interstate shipments of alcoholic beverages imposed an invalid burden on interstate commerce under the terms of the Wilson Act of 1890 (26 Stat. 313).

232. *McFarland v. American Sugar Co.*, 241 U.S. 79 (1916).

A Louisiana law that established a rebuttable presumption that any person systematically purchasing sugar in Louisiana at a price below that which he paid in any other state was a party to a monopoly or conspiracy in restraint of trade violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it declared an individual presumptively guilty of a crime and exempted countless others paying the same price.

233. *Wisconsin v. Philadelphia & Reading Coal Co.*, 241 U.S. 329 (1916).

A Wisconsin law that revoked the license of any foreign corporation that removed to a federal court a suit instituted against it by a Wisconsin citizen imposed an unconstitutional condition.

234. *Detroit United Ry. v. Michigan*, 242 U.S. 238 (1916).

Construction of acts of 1905 and 1907 as compelling a Detroit City Railway to extend its lines to suburban areas annexed by Detroit only on the same terms as were contained in its initial franchise as authorized by the Detroit ordinance of 1889, wherein its fare was fixed, operated to impair the obligation of contract.

Justices concurring: Pitney, Holmes, Day, Van Devanter, McReynolds, White, C.J.
Justices dissenting: Clarke, Brandeis

235. *Rowland v. Boyle*, 244 U.S. 106 (1917).

The two-cent passenger rate fixed by act of the Arkansas legislature was confiscatory and accordingly deprived the railroad of its property without due process.

236. *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917).

Georgia "Blow-Post" law imposed an unconstitutional burden on interstate commerce insofar as compliance with it would have required an interstate train to come practically to a stop at each of 124 ordinary grade crossings within a distance of 123 miles in Georgia and would have added more than six hours to the running time of the train.

Justices concurring: McKenna, Holmes, McReynolds, Day, Clarke, Van Devanter
Justices dissenting: White, C.J., Pitney, Brandeis

237. *Western Oil Ref. Co. v. Lipscomb*, 244 U.S. 346 (1917).

A Tennessee privilege tax could not validly be imposed on interstate sales consummated at either destination in Tennessee by an Indiana corporation that, for the purpose of filling orders taken by its salesmen in Tennessee, shipped thereto a tank car of oil and a carload of barrels and filled the orders through an agent who drew the oil from the tank car into the barrels, or into barrels furnished by customers, and then made delivery and collected the agreed price, and thereafter moved the two cars to another point in Tennessee for effecting like deliveries.

Justices concurring: Van Devanter, Holmes, Brandeis, Pitney, McReynolds, Day, Clarke, McKenna
Justice dissenting: White, C.J.

238. *Adams v. Tanner*, 244 U.S. 590 (1917).

A Washington law that proscribed private employment agencies by prohibiting them from collecting fees for their services deprived individuals of the liberty to pursue a lawful calling contrary to due process of law.

Justices concurring: McReynolds, Pitney, Van Devanter, White, C.J.
Justices dissenting: McKenna, Brandeis, Holmes, Clarke

239. *Hendrickson v. Apperson*, 245 U.S. 105 (1917).

Kentucky act of 1906, amending act of 1894 and construed in such manner as to enable a county to avoid collection of taxes to repay judgment on unpaid bonds impaired the obligation of contract.

Accord: Hendrickson v. Creager, 245 U.S. 115 (1917).

240. *Looney v. Crane Co.*, 245 U.S. 178 (1917).

A Texas law that, under the guise of taxing the privilege of doing an intrastate business, imposed on an Illinois corporation a license tax

based on its authorized capital stock, was void not only as imposing a burden on interstate commerce, but also as contravening the Due Process Clause by affecting property outside the jurisdiction of Texas.

241. *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917).

Pennsylvania gross receipts tax on wholesalers, as applied to a merchant who sold part of his merchandise to customers in foreign countries either as the result of orders received directly from them or as the result of orders solicited by agents abroad was void as a regulation of foreign commerce and as a duty on exports.

242. *International Paper Co. v. Massachusetts*, 246 U.S. 135 (1918).

License fee or excise of a given per cent of the par value of the entire authorized capital stock of a foreign corporation doing both a local and interstate business and owning property in several States was a tax on the entire business and property of the corporation and was void both as an illegal burden on interstate commerce and as a violation of due process by reason of affecting property beyond the borders of the taxing State.

Accord: Locomobile Co. v. Massachusetts, 246 U.S. 146 (1918).

243. *Cheney Brothers Co. v. Massachusetts*, 246 U.S. 147 (1918).

When a Connecticut corporation maintains and employs a Massachusetts office with a stock of samples and an office force and traveling salesmen merely to obtain local orders subject to confirmation at the Connecticut office and with deliveries to be made directly from the latter, its business was interstate commerce and a Massachusetts annual excise could not be validly applied thereto.

244. *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918).

Liberty of contract, as protected by the due process clause of the Fourteenth Amendment, precluded enforcement of the Missouri nonforfeiture statute, prescribing how net value of a life insurance policy is to be applied to avert a forfeiture in the event the annual premium is not paid, so as to prevent a Missouri resident from executing in the New York office of the insurer a different agreement sanctioned by New York law whereby the policy was pledged as security for a loan and later canceled in satisfaction of the indebtedness.

Justices concurring: McReynolds, McKenna, Holmes, Van Devanter, White, C.J.
Justices dissenting: Brandeis, Day, Pitney, Clarke

245. *Georgia v. Cincinnati So. Ry.*, 248 U.S. 26 (1918).

Georgia act of 1916 revoking a grant in 1879 of a perpetual right of way to a railroad impaired the obligation of contract (Art. I, § 10).

246. *Union Pac. R.R. v. Public Service Comm'n*, 248 U.S. 67 (1918).

Missouri act, insofar as it authorized the Missouri Public Service Commission to exact a fee of $10,000 for a certificate of authority for issuance by an interstate railroad, doing no intrastate business in Missouri, of a $30,000,000 mortgage bond issue to meet expenditures incurred but in small part in that State, imposed an invalid burden on interstate commerce.

247. *Flexner v. Farson*, 248 U.S. 289 (1919).

Kentucky law, insofar as it authorized a judgment against nonresident individuals based on service against their Kentucky agent after his appointment had expired, violated due process.

248. *Central of Georgia Ry. v. Wright*, 248 U.S. 525 (1919).

Tax exemptions in charters granted to certain railroads inured to their lessee, and, accordingly, a Georgia tax authorized by a constitutional provision postdating such charters and imposed on the leasehold interest of the lessee impaired the obligation of contract.

249. *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919).

A Georgia law under which a New Jersey company's tank cars operating in and out of that state were assessed upon a track-mileage basis, i.e., in an amount bearing the same ratio to the value of all its cars and other personal property as the ratio of the miles of railroad over which the cars were run in Georgia to the total miles over which they were run in all states, was invalid because the rule bore no necessary relation to the real value in Georgia and hence conflicted with due process.

Justices concurring: McReynolds, McKenna, Holmes, Day, Van Devanter, White, C.J.
Justices dissenting: Pitney, Brandeis, Clarke

250. *Standard Oil Co. v. Graves*, 249 U.S. 389 (1919).

A Washington law under which, in a ten-year period, inspection fees collected on oil products brought into the state for use or consumption amounted to $335,000, of which only $80,000 was disbursed for expenses, was deemed to impose an excessive charge and accordingly an invalid burden on interstate commerce.

251. *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522 (1919).

Tennessee act that made the annual tax for the privilege of doing railway construction work dependent on whether the person taxed had his chief office in Tennessee, i.e. $25 if he had and $100 if he did not, violated the Privilege and Immunities Clause of Art. IV, § 2.

252. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920).

New York income tax law that allowed exemptions to residents, with increases for married persons and dependents but that allowed no equivalent exemptions to nonresidents abridged the Privileges and Immunities Clause of Art. IV, § 2.

253. *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920).

The Oklahoma constitution and laws, under which an order of the State Corporation Commission declaring a laundry a monopoly and limiting its rates was not judicially reviewable, and that compelled litigant, for purposes of obtaining a judicial test of rates, to disobey the order and invite serious penalty for each day of refusal pending completion of judicial appeal, violated due process insofar as rates were enforced by penalties.

254. *Accord: Oklahoma Gin Co. v. Oklahoma*, 252 U.S. 339 (1920).

An Illinois law denying Illinois courts jurisdiction in actions for wrongful death occurring in another state, which was construed to bar jurisdiction of actions on a sister state judgment founded upon a like cause, was as so applied, in violation of the Full Faith and Credit Clause.

255. *Askren v. Continental Oil Co.*, 252 U.S. 444 (1920).

New Mexico law levying annual license on distributors of gasoline plus 2 cents per gallon on all gasoline sold was a privilege tax, and, as applied to parties who bring gasoline from without and sell it in New Mexico, imposed an invalid burden on interstate commerce insofar as it related to their business of selling in tank car lots and in barrels or packages as originally imported.

256. *Wallace v. Hines*, 253 U.S. 66 (1920).

North Dakota act, as administered, imposed invalid burden on interstate commerce and took property without due process by reason of taxing an interstate railroad by assessing the value of its property in the state at that proportion of the total value of its stock and bonds that the main track mileage within the state bore to the main track mileage of the entire line; this formula was indefensible inasmuch as the cost of construction per mile was within than without the taxing state, and the large and valuable terminals of the railroad were located elsewhere.

257. *Hawke v. Smith (No. 1)*, 253 U.S. 221 (1920).

Action of Ohio legislature ratifying proposed Eighteenth Amendment could not be referred to the voters, and the provisions of the Ohio

constitution requiring such referendum were inconsistent with Article V of the Federal Constitution.

Accord: Hawke v. Smith (No. 2), 253 U.S. 231 (1920), applicable to proposed Nineteenth Amendment.

258. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

Since Pennsylvania Public Service Commission Law failed to provide opportunity by way of appeal to the courts or by injunctive proceedings to test issue as to whether rates fixed by Commission are confiscatory, order of Commission establishing maximum future rates violated due process of law.

Justices concurring: McReynolds, Day, Van Devanter, Pitney, McKenna, White, C.J.
Justices dissenting: Brandeis, Holmes, Clarke

259. *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

A Virginia law that taxed all income of local corporation derived from business within and without Virginia, while exempting entirely income derived outside of Virginia by local corporations that did no local business, violated the Equal Protection Clause.

Justices concurring: Pitney, McReynolds, McKenna, Day, Van Devanter, Clarke, White, C.J.
Justices dissenting: Brandeis, Holmes

260. *Johnson v. Maryland*, 254 U.S. 51 (1920).

A Maryland law requiring an operator's license of drivers of motor trucks could not constitutionally be applied to a Postal Department employee operating a federal mail truck in the performance of official duty.

Justices concurring: Holmes, McKenna, Day, Van Devanter, Brandeis, Clarke, White, C.J.
Justices dissenting: Pitney, McReynolds

261. *Turner v. Wade*, 254 U.S. 64 (1920).

The Georgia Tax Equalization Act denied due process insofar as it authorized an increase in the assessed valuation of the taxpayer's property without notice and hearing and accorded him an abortive remedy of arbitration which was nullified by the inability of the arbitrators to agree on a lower assessment before the expiration of the time when the assessment became final and binding.

262. *Bank of Minden v. Clement*, 256 U.S. 126 (1921).

A Louisiana law that exempted proceeds of an insurance policy, payable upon death of insured to his executor, from the claims of insured's creditors impaired the obligation of contract as enforced against

a debt on a promissory note antedating such laws and also as enforced against policies that antedated the law.

Justices concurring: McReynolds, McKenna, Holmes, Day, Van Devanter, Pitney, Brandeis, White, C.J.
Justice dissenting: Clarke

263. *Bethlehem Motors Corp. v. Flynt*, 256 U.S. 421 (1921).

North Carolina statute that exacted a $500 license fee of every automobile manufacturer as a condition precedent to selling cars in the state, and which imposed a like requirement on any firm selling cars of a manufacturer who had not paid the tax, but that reduced the fee to $100 in the event that the manufacturer had invested three-fourths of his assets in North Carolina state and municipal securities or properties, violated the Commerce Clause and the Equal Protection Clause when enforced against nonresident manufacturers selling cars in North Carolina directly or through local dealers.

Justices concurring: McKenna, Holmes, Day, Van Devanter, McReynolds, Clarke
Justices dissenting: Pitney, Brandeis

264. *Bowman v. Continental Oil Co.*, 256 U.S. 642 (1921).

New Mexico statute that imposed a tax of 2 cents per gallon sold on distributors of gasoline was void insofar as it embraced interstate transactions, but the annual license fee of $50 imposed thereby on each gasoline station was totally void insofar as interstate sales could not be separated from the intrastate sales.

265. *Kansas City So. Ry. v. Road Improv. Dist. No. 6*, 256 U.S. 658 (1921).

Arkansas statute that authorized local assessments for road improvements denied equal protection of the laws insofar as railroad property was burdened for local improvement on a basis totally different from that used for measuring the contribution demanded of individual owners.

266. *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265 (1921).

West Virginia statute that forbade engaging in the business of transporting petroleum in pipe lines without the payment of a tax of 2¢ for each barrel of oil transported imposed an invalid burden on interstate commerce as applied to company's volume of oil produced in, but moving out of, West Virginia to extra-state destinations.

Justices concurring: Holmes, McKenna, Day, Van Devanter, McReynolds, Taft, C.J.
Justices dissenting: Clarke, Pitney, Brandeis

Accord: United Fuel Gas Co. v. Hallanan, 257 U.S. 277 (1921), voiding like application of the West Virginia tax to the interstate movement of natural gas.

Justices concurring: Holmes, Pitney, McReynolds, Day, Van Devanter, McKenna, Taft, C.J.
Justices dissenting: Brandeis, Clarke

267. *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282 (1921).

A Kentucky law prescribing conditions under which foreign corporations could do business in that state, and that precluded enforcement in Kentucky courts of contracts made by foreign corporations not complying with such conditions, could not be enforced against Tennessee corporation that sued in a Kentucky court for breach of a contract consummated in that state for the purchase of grain to be delivered to and used in Tennessee; such transaction was in interstate commerce, notwithstanding that the Tennessee purchaser might change its mind after delivery to a carrier in Kentucky and sell the grain in Kentucky or consign it to some other place in Kentucky.

Justices concurring: Van Devanter, Holmes, Pitney, Day, McKenna, McReynolds, Taft, C.J.
Justices dissenting: Brandeis, Clarke

268. *Truax v. Corrigan*, 257 U.S. 312 (1921).

An Arizona statute that regulated injunctions in labor disputes, but exempted ex-employees, when committing tortious injury to the business of their former employer in the form of mass picketing, libelous utterances, and inducement of customers to withhold patronage, while leaving subject to injunctive restraint all other tortfeasors engaged in like wrongdoing, deprived the employer of property without due process and denied him equal protection of the law.

Justices concurring: Van Devanter, Day, McKenna, McReynolds, Taft, C.J.
Justices dissenting: Holmes, Pitney, Clarke, Brandeis

269. *Gillespie v. Oklahoma*, 257 U.S. 501 (1922).

An Oklahoma income tax law could not validly be enforced as to net income of lessee derived from the sales of his share of oil and gas received under leases of restricted Indian lands which constituted him in effect an instrumentality used by the United States in fulfilling its duties to the Indians.

Justices concurring: Holmes, Day, Van Devanter, McKenna, McReynolds, Taft, C.J.
Justices dissenting: Pitney, Brandeis, Clarke

270. *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922).

An Arkansas law that revoked the license of a foreign corporation to do business in that state whenever it resorted to the federal courts sitting in that state exacted an unconstitutional condition.

271. *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922).

A North Dakota statute that required purchasers of grain to obtain a license to act under a defined system of grading, inspection, and weighing, and to abide by regulations as to prices and profits imposed an invalid burden on interstate commerce insofar as it was applied to a North Dakota association which bought grain in the state and loaded it promptly on cars for shipment to other states for sale, notwithstanding occasional diversion of the grain for local sales.

Justices concurring: Day, McKenna, McReynolds, Van Devanter, Pitney, Taft, C.J.
Justices dissenting: Brandeis, Holmes, Clarke

Accord: Lemke v. Homer Farmers Elevator Co., 258 U.S. 65 (1922).

Justices concurring: Day, McKenna, McReynolds, Pitney, Van Devanter, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Clarke

272. *Newton v. Consolidated Gas Co.,*258 U.S. 165 (1922).

Rates fixed for the sale of gas by New York statute were confiscatory and deprived the utility of its property without due process of law.

Accord: Newton v. New York Gas Co., 258 U.S. 178 (1922); *Newton v. Kings County Lighting Co.*, 258 U.S. 180 (1922); *Newton v. Brooklyn Union Gas Co.*, 258 U.S. 604 (1922); *Newton v. Consolidated Gas Co.*, 259 U.S. 101 (1922).

273. *Forbes Pioneer Boat Line v. Everglades Drainage Dist.*, 258 U.S. 338 (1922).

A Florida law retroactively validating collection of fee for passage through a canal, the use of which was then free by law, was ineffective; a legislature could not retroactively approve what it could not lawfully do.

274. *Texas Co. v. Brown*, 258 U.S. 466 (1922).

A Georgia law levying inspection fees and providing for inspection of oil and gasoline was unconstitutional as applied to gasoline and oil in interstate commerce; for the fees clearly exceeded the cost of inspection and amounted to a tariff levied without the consent of Congress.

275. *Chicago & N.W. Ry. v. Nye Schneider Fowler Co.*, 260 U.S. 35 (1922).

A Nebraska law, as construed, that authorized imposition against carrier, in favor of claimant, of an additional attorney's fee of $100, upon the basis of the service rendered, time and labor bestowed, and recovery secured by claimant's attorney in resisting appeal by which the carrier obtained a large reduction of an excessive judgment was unreasonable in that it deterred the carrier from vindicating its rights by appeal and therefore violated due process.

276. *St. Louis Compress Co. v. Arkansas*, 260 U.S. 346 (1922).

An Arkansas law exacting of persons insuring property in Arkansas a five-percent tax on amounts paid on premiums to insurers not authorized to do business in Arkansas violated due process insofar as it was applied to insurance contracted and paid for outside Arkansas by a foreign corporation doing a local business.

277. *Champlain Co. v. Brattleboro*, 260 U.S. 366 (1922).

A Vermont levy of a property tax on logs under control of the owner which, in the course of their interstate journey, were being temporarily detained by a boom to await subsidence of high waters and for the sole purpose of saving them from loss, was void as a burden on interstate commerce.

278. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

A Pennsylvania law that forbade mining in such a way as to cause subsidence of any human habitation or public street or building and which thereby made commercially impracticable the removal of valuable coal deposits was deemed arbitrary and amounted to a deprivation of property without due process. As applied to an owner of land who, prior to this enactment, had validly deeded the surface with express reservation of right to remove coal underneath and subject to waiver by grantee of damage claims resulting from such mining, said law also impaired the obligation of contract.

Justices concurring: Holmes, McKenna, Day, Van Devanter, Pitney, McReynolds, Sutherland, Taft, C.J.
Justice dissenting: Brandeis

279. *Columbia G. & E. Ry. v. South Carolina*, 261 U.S. 236 (1923).

A South Carolina statute, as construed, that sought to convert a covenant in a prior legislative contract into a condition subsequent, and to impose as a penalty for its violation the forfeiture of valuable property, impaired the obligation of contract.

280. *Federal Land Bank v. Crosland*, 261 U.S. 374 (1923).

A first mortgage executed to a Federal Land Bank is a federal instrumentality and cannot be subjected to an Alabama recording tax.

281. *Phipps v. Cleveland Refg. Co.*, 261 U.S. 449 (1923).

An Ohio law that applied to interstate and intrastate commerce, and that exacted fees for inspection of petroleum products in excess of the legitimate cost of inspection, imposed an invalid import tax to the extent that the excess could not be separated and assigned solely to intrastate commerce.

282. *Thomas v. Kansas City So. Ry.*, 261 U.S. 481 (1923).

Insofar as drainage district tax authorized under an Arkansas law imposed upon a railroad a levy disproportionate to the value of the benefits derived from an improvement, the tax violated the Equal Protection Clause.

283. *Davis v. Farmers Co-operative Co.,*262 U.S. 312 (1923).

A Minnesota law that provided that interstate railroads that had an agent in Minnesota to solicit traffic over lines outside Minnesota may be served with summons by delivery of copy of it to the agent imposed an invalid burden on interstate commerce as applied to a carrier that owned and operated no facilities in Minnesota and that was sued by a plaintiff who did not reside in Minnesota on a cause of action arising outside the state.

284. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

A Nebraska law that forbade the teaching of any language other than English in any school, private, denominational, or public, maintaining classes for the first eight grades denied liberty without due process of law.

Justices concurring: McReynolds, Brandeis, Butler, Sanford, Van Devanter, McKenna, Taft, C.J.
Justices dissenting: Holmes, Sutherland

285. *Accord: Bartels v. Iowa*, 262 U.S. 404 (1923). A similar Iowa law violates due process. Same division of Justices as in Meyer v. Nebraska.

286. *Accord: Bohning v. Ohio*, 262 U.S. 404 (1923), as to an Ohio law.

287. *Georgia Ry. v. Town of Decatur,*262 U.S. 432 (1923).

A Georgia law that extended corporate limits of a town and that, as judicially construed, had the effect of rendering applicable to the added territory street railway rates fixed by an earlier contract between the town and the railway impaired the obligation of that contract by adding to its burden.

Accord: Georgia Ry. v. College Park, 262 U.S. 441 (1923).

288. *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522 (1923).

A Kansas law that compelled a business engaged in the manufacturing and processing of food to continue operation in the event of a labor dispute, to submit the controversy to an arbitration board, and to abide by the latter's recommendations pertaining to the payment of minimum wages, subjected both employers and employees to a denial of liberty without due process of law.

Accord: Dorchy v. Kansas, 264 U.S. 286 (1924), same Kansas law voided when applied to labor disputes affecting coal mines; *Wolff Packing Co. v. Industrial Court*, 262 U.S. 522 (1923), voiding other provisions of this Kansas law that authorized an arbitration tribunal in the course of compulsory arbitration, to fix the hours of labor to be observed by an employer involved in a labor dispute.

289. *Kentucky Co. v. Paramount Exch.*, 262 U.S. 544 (1923).

A Wisconsin law that required a foreign corporation not doing business in Wisconsin, or having property there, other than that sought to be recovered in a suit, to send, as a condition precedent to maintaining such action, its officer with corporate records pertinent to the matter in controversy, and to submit to an adversary examination before answer, but which did not subject nonresident individuals to such examination, except when served with notice and subpoena within Wisconsin, and then only in the court where the service was had, and which limited such examinations, in the case of residents of Wisconsin, individual or corporate, to the county of their residence violated the Equal Protection Clause.

Justices concurring: Van Devanter, Sanford, Butler, McKenna, McReynolds, Sutherland, Taft, C.J.
Justices dissenting: Brandeis, Holmes

290. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

A West Virginia law that required pipe line companies to fill all local needs before endeavoring to export any natural gas extracted in West Virginia was void as a prohibited interference with interstate commerce.

Justices concurring: Van Devanter, Sutherland, Butler, McKenna, Taft, C.J.
Justices dissenting: Holmes, McReynolds, Brandeis, Sanford

291. *Clallam County v. United States*, 263 U.S. 341 (1923).

Washington state and county property taxes cannot be levied on the property of a corporation that, though formed under Washington law, was a federal instrumentality created and operated by the United States as an instrument of war.

292. *Tampa Interocean Steamship Co. v. Louisiana*, 266 U.S. 594 (1925).

A Louisiana license tax law could not validly be enforced as to the business of companies employed as agents by owners of vessels engaged exclusively in interstate and foreign commerce when the services performed by the agents consisted of the soliciting and engaging of cargo, and the nomination of vessels to carry it, etc. (*See Texas Transp. Co. v. New Orleans,* 264 U.S. 150 (1924), voiding like application of a similar New Orleans ordinance.)

293. *Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924).

A Nebraska law that prescribed the minimum weights of loaves of bread to be made and sold and that, in order to prevent the palming off of smaller for larger sizes, fixed a maximum for each class and allowed a "tolerance" of only two ounces per pound in excess of the minimum was found to be unreasonable, to be unnecessary to protect purchasers against the imposition of fraud by short weights, and therefore to deprive bakers and sellers of bread of their liberty without due process of law.

Justices concurring: Butler, Sanford, McReynolds, Sutherland, McKenna, Van Devanter, Taft, C.J.
Justices dissenting: Brandeis, Holmes

294. *Atchison, T. & S.F. Ry. v. Wells*, 265 U.S. 101 (1924).

A Texas law that permitted a nonresident to prosecute a case which arose outside of Texas against a railroad corporation of another state, which was engaged in interstate commerce and neither owned nor operated facilities in Texas, was inoperative because it burdened interstate commerce.

295. *Air-Way Corp. v. Day*, 266 U.S. 71 (1924).

An Ohio law that levied an annual fee on foreign corporations for the privilege of exercising their franchise in the state, which was computed at the rate of 5¢ per share upon the proportion of the number of shares of authorized common stock represented by property owned and used and business transacted in Ohio, was void as imposing a burden on interstate commerce when applied to a foreign corporation all of whose business, intrastate and interstate, and all of whose property were represented by the shares outstanding; application of the rate to all shares authorized, or even to a greater number than the total outstanding, amounted to a burden on all property and business including interstate commerce. As imposed, the tax also violated the Equal Protection Clause.

296. *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924).

An insurance policy originally issued to insurer in Tennessee and converted by him in Texas from term insurance to 20 year payment life was deemed to be a mere continuation of the original policy, and upon suit on the policy in Texas, a Texas law imposing a penalty and allowing an attorney's fee could not constitutionally be applied against the insurer for the reason that Texas could not regulate contracts consummated outside its limits in conformity with the laws of the place where the contract was made without violating Full Faith and Credit Clause.

297. *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555 (1925).

A Missouri law that required foreign corporations doing business In Missouri to pay an annual franchise tax of 1/10 of 1% of the par value of capital stock and surplus employed in business in the state could not constitutionally be exacted of a pipe line company for the privilege of doing in Missouri what was exclusively an interstate business.

Justices concurring: Sutherland, Holmes, Van Devanter, McReynolds, Butler, Sanford, McKenna, Taft, C.J.
Justice dissenting: Brandeis

298. *Michigan Comm'n v. Duke*, 266 U.S. 570 (1925).

A Michigan law that converted an interstate contract motor carrier into a public utility by legislative fiat in effect took property for public use without compensation in violation of the due process clause, and also imposed unreasonable conditions on the right to carry on interstate commerce.

299. *Flanagan v. Federal Coal Co.*, 267 U.S. 222 (1925).

In a suit for breach of contract, a plaintiff's right to sue could not be barred by his failure to pay a Tennessee license tax, because the state law levying the tax could not be applied to a contract for the purchase of coal to be delivered to customers in other states; that is, in interstate commerce.

300. *Buck v. Kuykendall*, 267 U.S. 307 (1925).

A Washington law that prohibited motor vehicle common carriers for hire from using its highways without obtaining a certificate of convenience could not validly be exacted of an interstate motor carrier; the law was not a regulation designed to promote public safety but a prohibition of competition and, accordingly, burdened interstate commerce.

Justices concurring: Brandeis, Sanford, Sutherland, Van Devanter, Butler, Holmes, Taft, C.J.
Justice dissenting: McReynolds

301. *Accord: Bush Co. v. Maloy*, 267 U.S. 317 (1925), voiding like application of a similar Maryland law.

Justices concurring: Brandeis, Sutherland, Van Devanter, Holmes, Sanford, Butler, Taft, C.J.
Justice dissenting: McReynolds

302. *Accord: Allen v. Galveston Truck Line Corp.*, 289 U.S. 708 (1933), voiding like application of a Texas law.

303. *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925).

The North Dakota Grain Grading Act, which required locally grown wheat, 90% of which was for interstate shipment, to be graded by licensed inspectors, and imposed various requirements, such as the keeping of records of quantity purchased and price paid and the exaction of bonds from purchasers maintaining grain elevators, was not supportable as an inspection law and imposed undue burdens on interstate commerce.

Justices concurring: Van Devanter, Holmes, Butler, McReynolds, Sutherland, Sanford, Stone, Taft, C.J.
Justice dissenting: Brandeis

304. *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203 (1925).

A Massachusetts law that imposed excise tax on foreign corporations doing business in the state, measured by a combination of the total value of capital shares attributable to transactions therein and the proportion of net income attributable to such transactions, could not validly be applied to a foreign corporation which transacted only as interstate business therein. The tax as here imposed also violated due process by affecting property beyond Massachusetts borders.

Justices concurring: McReynolds, Holmes, Van Devanter, Butler, Sutherland, Stone, Sanford, Taft, C.J.
Justice dissenting: Brandeis

305. *Frick v. Pennsylvania*, 268 U.S. 473 (1925).

Pennsylvania estate tax law, insofar as it measured the tax on the transfer of that part of the decedent's estate located within Pennsylvania by taking the whole of the decedent's estate which included tangible personal property located outside Pennsylvania, violated due process.

306. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Oregon Compulsory Education Law that required every parent to send his child to a public school was an unconstitutional interference with the liberty of parents and guardians to direct the upbringing of children and violated due process.

307. *Lee v. Osceola Imp. Dist.*, 268 U.S. 643 (1925).

An Arkansas statute that imposed special assessment on lands acquired by private owners from the United States on account of benefits resulting from road improvements completed before the United

States parted with title effected a taking of property without due process of law.

308. *Connally v. General Const. Co.*, 269 U.S. 385 (1926).

An Iowa law that imposed severe, cumulative punishments upon contractors with the state who paid their workers less than "the current rate of per diem wages in the locality where the work is performed" was void for vagueness and violated due process.

Justices concurring: Brandeis, Holmes

309. *Browning v. Hooper*, 269 U.S. 396 (1926).

A Texas statute that permitted property taxpaying voters to originate an election approving creation of a road improvement district with power to float bond issue and to levy taxes to amortize the same, with provision for establishment of the district if approved by two-thirds of those voting in the election, was procedurally defective in that each taxpayer to be assessed for the improvement was not accorded a notice and opportunity to be heard on the question of the benefits and hence denied due process.

310. *Rhode Island Trust Co. v. Doughton*, 270 U.S. 69 (1926).

A North Carolina law purporting to tax inheritance of shares owned by nonresident in a foreign corporation having 50% or more of its property in North Carolina violated due process because the property of a corporation is not owned by a shareholder and presence of corporate property in the state did not give it jurisdiction over his shares for tax purposes.

311. *Schlesinger v. Wisconsin*, 270 U.S. 230 (1926).

A Wisconsin law that established a conclusive presumption that all gifts of a material part of a decedent's estate made by him within six years of his death were made in contemplation of death and therefore subject to the graduated inheritance tax created an arbitrary classification that violated the Due Process and Equal Protection Clauses.

Justices concurring: McReynolds, Butler, Sutherland, Sanford, Van Devanter, Taft, C.J.

Justices dissenting: Holmes, Brandeis, Stone

Accord: Uihlein v. Wisconsin, 273 U.S. 642 (1926).

312. *Weaver v. Palmer Bros.*, 270 U.S. 402 (1926).

A Pennsylvania law that prohibited the use of shoddy, even when sterilized, in the manufacture of bedding materials, was so arbitrary and unreasonable as to violate due process.

Justices concurring: Butler, Van Devanter, Sutherland, Sanford, McReynolds, Taft, C.J.

Justices dissenting: Holmes, Brandeis, Stone

313. *Fidelity & Deposit Co. v. Tafoya*, 270 U.S. 426 (1926).

A New Mexico law that forbade insurance companies authorized to do business in that state to pay any nonresident any fee for the obtaining or placing of any policies covering risks in New Mexico violated due process because it attempted to control conduct beyond the jurisdiction of New Mexico.

Justices concurring: Holmes, Van Devanter, Sutherland, Stone, Butler, Taft, C.J.
Justices dissenting: McReynolds, Brandeis, Sanford

314. *Childers v. Beaver*, 270 U.S. 555 (1926).

An Oklahoma inheritance tax law, applied to inheritance by Indians of Indian lands as determined by federal law, was void as a tax on a federal instrumentality.

315. *Appleby v. City of New York*, 271 U.S. 365 (1926).

Acts of New York of 1857 and 1871 authorizing New York City to erect piers over submerged lots impaired the obligation of contract as embraced in deeds to such submerged lots conveyed to private owners for valuable consideration through deeds executed by New York City in 1852.

316. *Appleby v. Delaney*, 271 U.S. 403 (1926).

Act of New York of 1871 that authorized New York City to construct certain harbor improvements impaired the obligation of contract embraced in prior deeds to grantees whereunder the latter were accorded the privilege of filling in their underwater lots and constructing piers thereover.

317. *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926).

A California law that provided that private carriers by automobile for hire could not operate over California highways between fixed points in the state without obtaining a certificate of convenience and submitting to regulation as common carriers exacted an unconstitutional condition and effected a denial of due process.

Justices concurring: Sutherland, McReynolds (separately), Taft, C.J., Sanford, Stone, Butler, Van Devanter
Justices dissenting: Holmes, Brandeis

318. *Jaybird Mining Co. v. Wier*, 271 U.S. 609 (1926).

An Oklahoma law that levied an *ad valorem* tax on ores mined and in bins on the land was void as a tax on federal instrumentality when applied to a lessee of Indian land leased with the approval of the Secretary of the Interior.

Justices concurring: Butler, Stone, Holmes, Sanford, Sutherland, Van Devanter, Taft, C.J.
Justices dissenting: McReynolds, Brandeis

319. *Hughes Bros. v. Minnesota*, 272 U.S. 469 (1926).

A Minnesota law levying personal property tax could not be collected on logs cut in Minnesota pursuant to a contract of sale for delivery in Michigan while they were in transit in interstate commerce by a route from Minnesota to Michigan.

320. *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926).

When an Illinois tax law originally is construed as a personal property tax whereby the local net receipts of foreign insurance companies were subjected to assessment at only 30% of full value, but at a later date is construed as a privilege tax with the result that all the local net income of such foreign companies was taxed at the rate applicable to personal property while domestic companies continued to pay the tax on their personal property assessed at the reduced valuation, the resulting discrimination denied the foreign companies the equal protection of the laws.

321. *Wachovia Bank & Trust Co. v. Doughton,*272 U.S. 567 (1926).

A North Carolina inheritance tax law could not validly be applied to property constituting a trust fund in Massachusetts established under the will of a Massachusetts resident and bestowing a power of appointment upon a North Carolina resident who exercised that power through a will made in North Carolina; the levy by a state of the tax on property beyond its jurisdiction violated due process.

Justices concurring: Holmes, Brandeis, Stone

322. *Ottinger v. Consolidated Gas Co.*, 272 U.S. 576 (1926).

Act of New York prescribing a gas rate of $1 per thousand feet was confiscatory and deprived the utility of its property without due process of law.

Accord: Ottinger v. Brooklyn Union Co., 272 U.S. 579 (1926).

323. *Miller v. City of Milwaukee*, 272 U.S. 713 (1927).

A Wisconsin law that exempted income of corporation derived from interest received from tax exempt federal bonds owned by said corporation, but which attempted to tax such income indirectly by taxing only so much of the stockholder's dividends as corresponded to the corporate income not assessed, was invalid.

Justices concurring: Brandeis, Stone

324. *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927).

A Pennsylvania law exacting a license from persons engaged in the state in the sale of steamship tickets and orders for transportation to or from foreign countries was void as imposing an undue burden on foreign commerce.

Justices concurring: Butler, McReynolds, Van Devanter, Sutherland, Sanford, Taft, C.J.
Justices dissenting: Brandeis, Holmes, Stone

325. *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927).

A New York law that prohibited ticket agencies from selling theater tickets at prices in excess of 50¢ over the price printed on the ticket was void because it regulated a business not affected with the public interest and deprived such business of due process.

Justices concurring: Sutherland, Van Devanter, Butler, McReynolds, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Stone, Sanford

326. *Tumey v. Ohio*, 273 U.S. 510 (1927).

An Ohio law that compensated mayors serving as judges in minor prohibition offenses solely out of the fees and costs collected from defendants who were convicted violated due process.

327. *Nixon v. Herndon*, 273 U.S. 536 (1927).

Texas White Primary Law that barred Negroes from participation in Democratic party primary elections denied them the equal protection of the laws.

328. *Fairmont Co. v. Minnesota*, 274 U.S. 1 (1927).

A Minnesota law that punished anyone who discriminated between different localities of that state by buying dairy products in one locality at a higher price than was paid for the same commodities in another locality infringed liberty of contract as protected by the Due Process Clause.

Justices concurring: McReynolds, Butler, Van Devanter, Sanford, Sutherland, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Stone

329. *Ohio Pub. Serv. Co. v. Ohio ex rel. Fritz*, 274 U.S. 12 (1927).

An Ohio law that destroyed assignability of a franchise previously granted to an electric company by a municipal ordinance impaired the obligation of contract.

Justices concurring: McReynolds, Sutherland, Stone, Sanford, Butler, Van Devanter, Taft, C.J.
Justices dissenting: Holmes, Brandeis

330. *Southern Ry. v. Kentucky*, 274 U.S. 76 (1927).

A Kentucky law that imposed a franchise tax on railroad corporations was constitutionally defective and violated due process insofar as it was computed by including mileage outside the state that did not in any plain and intelligible way add to the value of the road and the rights exercised in Kentucky.

Justices concurring: Butler, Holmes, Sutherland, Stone, McReynolds, Van Devanter, Sanford, Taft, C.J.
Justice dissenting: Brandeis

331. *Road Improv. Dist. v. Missouri Pacific R.R.*, 274 U.S. 188 (1927).

Special assessments levied against a railroad by a road district pursuant to an Arkansas statute and based on real property and rolling stock and other personalty were unreasonably discriminatory and excessive and deprived the railroad of property without due process because other assessments for the same improvement were based solely on real property.

332. *Fiske v. Kansas*, 274 U.S. 380 (1927).

As construed and applied to an organization not shown to have advocated any crime, violence, or other unlawful acts, the Kansas criminal syndicalism law violated due process.

333. *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927).

Because of the exception it contained, under which its prohibitions were not to apply to conduct engaged in by participants whenever necessary to obtain a reasonable profit from products traded in, the Colorado Antitrust Law was void for want of a fixed standard for determining guilt and a violation of due process.

334. *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927).

As applied to a foreign corporation having a fixed place of business and an agent in one county, but no property, debts or anything also in the county in which it was sued, Arkansas law that authorized actions to be brought against a foreign corporation in any county in the state, while restricting actions against domestic corporations to the county where it had a place of business or where its chief officer resided, deprived the foreign corporation of equal protection of the laws.

Justices concurring: Van Devanter, McReynolds, Sutherland, Stone, Sanford, Butler, Taft, C.J.
Justices dissenting: Holmes, Brandeis

335. *Northwestern Ins. Co. v. Wisconsin*, 275 U.S. 136 (1927).

A Wisconsin law levying a tax on the gross income of domestic insurance companies was void where the income was derived in part as interest on United States bonds.

336. *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

A New Jersey statute that provided that in suits by residents against nonresidents for injuries resulting from operation of motor vehicles by the latter, service might be made on the Secretary of State as their agent, but that failed to provide any assurance that notice of such service would be communicated to the nonresidents, violated due process.

Justices concurring: Taft, C.J., Van Devanter, Butler, Sutherland, Sanford, McReynolds
Justices dissenting: Brandeis, Holmes, Stone

337. *Accord: Consolidated Flour Mills Co. v. Muegge*, 278 U.S. 559 (1928), voiding similar service as authorized by an Oklahoma law.

338. *Missouri ex rel. Robertson v. Miller*, 276 U.S. 174 (1928).

A Mississippi statute that terminated the right of a retired revenue agent to prosecute suits for unpaid taxes in the name of his successor by requiring that the successor approve and join in such suits, and that stipulated that the successor share equally in the commissions that had accrued solely to the retired agent, was held to impair the latter's rights under the Contract Clause insofar as it was enforced retroactively to accord a share to the successor in suits instituted by the retired agent before this legislative alteration.

339. *New Brunswick v. United States*, 276 U.S. 547 (1928).

Property taxes assessed under New Jersey law on land acquired from the United States Housing Corporation by private purchasers subject to retention of mortgage by the federal agency could not be collected by sale of the land unless the federal liens were excluded and preserved as prior liens.

Justices concurring: Sanford, Stone, Sutherland, Butler, Brandeis, Holmes, Van Devanter, Taft, C.J.
Justice dissenting: McReynolds

340. *Brooke v. City of Norfolk*, 277 U.S. 27 (1928).

State and city taxes authorized under laws of Virginia may not be levied on the corpus of a trust located in Maryland, the income from which accrued to a beneficiary resident in Virginia; the corpus was beyond the jurisdiction of Virginia and accordingly the assessments violated due process.

341. *Louisville Gas Co. v. Coleman*, 277 U.S. 32 (1928).

A Kentucky law that conditioned the recording of mortgages not maturing within five years upon the payment of a tax of 20 cents for each $100 of value secured, but that exempted mortgages maturing within that period, was void as denying equal protection of the laws.

Justices concurring: Sutherland, Butler, Van Devanter, McReynolds, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Sanford, Stone

342. *Long v. Rockwood*, 277 U.S. 142 (1928).

A Massachusetts income tax law could not validly be imposed on income received by a citizen as royalties for the use of patents issued by the United States.

Justices concurring: McReynolds, Butler, Van Devanter, Sanford, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Sutherland, Stone

343. *Standard Pipe Line v. Highway Dist.*, 277 U.S. 160 (1928).

An Arkansas law that purported to validate assessments by the district was ineffective to sustain an arbitrary assessment against the pipe line at the rate of $5,000 per mile in view of the fact that the pipe line originally was constructed in 1909–1915 at a cost under $9,000 per mile, and the benefit, if any, that accrued to the pipe line was small.

344. *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928).

A Mississippi law imposing tax on the sale of gasoline was void as applied to sales to federal instrumentalities such as the Coast Guard or a Veterans' Hospital.

Justices concurring: Butler, Sutherland, Van Devanter, Sanford, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Stone, McReynolds

345. *Accord: Graysburg Oil Co. v. Texas*, 278 U.S. 582 (1929), voiding application of Texas gasoline tax statute to gasoline sold to the United States.

346. *Ribnik v. McBride*, 277 U.S. 350 (1928).

A New Jersey law empowering the Secretary of Labor to fix the fees charged by employment agencies violated due process because the regulation was not imposed on a business affected with a public interest.

Justices concurring: Sutherland, Taft, C.J., Sanford, Butler, McReynolds, Van Devanter
Justices dissenting: Stone, Holmes, Brandeis

347. *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389 (1928).

A Pennsylvania law that taxed gross receipts of foreign and domestic corporations derived from intrastate operation of taxicabs, but exempted like receipts derived by individuals and partnerships, denied equal protection of the laws.

Justices concurring: Butler, Sutherland, Sanford, Van Devanter, McReynolds, Taft, C.J.
Justices dissenting: Holmes, Brandeis, Stone

348. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

The Louisiana Shrimp Act, which permitted shipment of shrimp taken in Louisiana tidal waters only if the heads and hulls had previously been removed, and which was designed to favor the canning in Louisiana of shrimp destined for the interstate market, was unconstitutional; those taking the shrimp immediately became entitled to ship them in interstate commerce.

Justices concurring: Butler, Sutherland, Sanford, Stone, Van Devanter, Holmes, Brandeis, Taft, C.J.
Justice dissenting: McReynolds

349. *Accord: Johnson v. Haydel*, 278 U.S. 16 (1928), voiding the Louisiana Oyster Act for like reasons.

350. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105 (1928).

A Pennsylvania law that prohibited corporate ownership of a drug store unless all of the stockholders were licensed pharmacists had no reasonable relationship to public health and therefore violated due process.

Justices concurring: Sutherland, Butler, Van Devanter, Stone, Sanford, McReynolds, Taft, C.J.
Justices dissenting: Holmes, Brandeis

351. *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929).

A Tennessee law that fixed the prices at which gasoline may be sold violated due process because the business sought to be regulated was not affected with a public interest.

Justices concurring: Sutherland, Stone (separately), Sanford, McReynolds, Butler, Brandeis (separately), Van Devanter, Taft, C.J.
Justice dissenting: Holmes

352. *Cudahy Co. v. Hinkle*, 278 U.S. 460 (1929).

Where the local property of a foreign corporation and the part of its business transacted in the state, less than half of which was intrastate, were but small fractions of its entire property and its nationwide business, Washington law that taxed the corporation in the form

of a filing fee and a license tax, both reckoned upon its authorized capital stock, was inoperative because it burdened interstate commerce and reached property beyond the state contrary to due process.

Justices concurring: McReynolds, Sutherland, Stone, Sanford, Butler, Van Devanter, Taft, C.J.
Justices dissenting: Brandeis, Holmes

353. *Frost v. Corporation Comm'n*, 278 U.S. 515 (1929).

An Oklahoma law that permitted an individual to engage in the business of ginning cotton only upon a showing of public necessity, but allowed a corporation to engage in that business in the same locality without such a showing, denied the individual equal protection of the law.

Justices concurring: Sutherland, Butler, Van Devanter, McReynolds, Sanford, Taft, C.J.
Justices dissenting: Brandeis, Holmes, Stone

354. *Manley v. Georgia*, 279 U.S. 1 (1929).

A Georgia banking law that declared that every insolvency of a bank shall be deemed to have been fraudulent, with provision for rebutting that presumption, was arbitrary and unreasonable and violated due process.

355. *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929).

A Louisiana tax law could not be enforced against oil purchased at interior points for export in foreign commerce for the oil did not lose its character as goods in foreign commerce merely because, after shipment to the exporter at a Louisiana port, the oil was temporarily stored there preparatory to loading on vessels of foreign consignees.

Justices concurring: Taft, C.J., Holmes, Brandeis, Stone, Sanford, Van Devanter, Butler
Justices dissenting: McReynolds, Sutherland

356. *London Guarantee & Accident Co. v. Industrial Comm'n*, 279 U.S. 109 (1929).

California workmen's compensation act could not be applied in settlement of a claim for the death of a seaman in a case that was subject to the exclusive maritime jurisdiction of federal courts.

Justices concurring: Taft, C.J., Holmes, Stone, Sanford, Sutherland, McReynolds, Butler, Van Devanter
Justice dissenting: Brandeis

357. *Helson v. Kentucky*, 279 U.S. 245 (1929).

A Kentucky law imposing a tax on the sale of gasoline could not be applied to gasoline purchased outside Kentucky for use in a ferry

engaged as an instrumentality of interstate commerce, that is, in operation on the Ohio River between Kentucky and Illinois.

Justices concurring: Sutherland, Butler, Van Devanter, Sanford, Stone (separately), Brandeis (separately), Holmes (separately), Taft, C.J.
Justice dissenting: McReynolds

358. *Macallen Co. v. Massachusetts*, 279 U.S. 620 (1929).

A Massachusetts law imposing an excise on domestic business corporations was in reality a statute imposing a tax on income rather than a tax on the corporate privilege and, as an income tax law, could not be imposed on income derived from United States bonds nor, because it impaired the obligation of contract, on income from local county and municipal bonds exempt by statutory contract.

Justices concurring: Sutherland, Sanford, Butler, Van Devanter, McReynolds, Taft, C.J.
Justices dissenting: Stone, Holmes, Brandeis

359. *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639 (1929).

A Georgia law that viewed a fatal collision between railroad and motor car at grade crossing as raising a presumption of negligence on the part of the railroad and as the proximate cause of death and that permitted the jury to weigh the presumption as evidence against the testimony of the railroad's witnesses tending to prove due care was unreasonable and violated due process.

360. *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83 (1929).

A Virginia law that levied a property tax on corpus of a trust consisting of securities managed by a Maryland trustee who paid over to children of settlor, all of whom resided in Virginia, the income from the trust, violated due process because it taxed intangibles with a taxable situs in Maryland, where the trustee and owner of the legal title was located.

Justices concurring: McReynolds, Van Devanter, Butler, Sutherland, Sanford, Stone (separately), Brandeis (separately), Holmes (separately), Taft, C.J.

361. *Farmers Loan Co. v. Minnesota*, 280 U.S. 204 (1930).

A Minnesota inheritance tax law, insofar as it was applied to Minnesota securities kept in New York by the decedent who died domiciled in New York, violated due process.

Justices concurring: McReynolds, Van Devanter, Butler, Sutherland, Sanford, Stone (separately), Taft, C.J.

362. *New Jersey Tel. Co. v. Tax Board*, 280 U.S. 338 (1930).

A New Jersey franchise tax law, levied at the rate of 5% of gross receipts of a telephone company engaged in interstate and foreign commerce, was a direct tax on foreign and interstate commerce and void.

Justices concurring: Butler, Sutherland, Sanford, Van Devanter, McReynolds
Justices dissenting: Holmes, Brandeis

363. *Moore v. Mitchell*, 281 U.S. 18 (1930).

Indiana was powerless to give any force or effect beyond her borders to its 1927 law that purported to authorize a county treasurer to sue for unpaid taxes owed by a nonresident; such officer derived no authority in New York from this Indiana law and hence had no legal capacity to sue in a federal court in New York.

364. *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930).

A Missouri law that provided that, in taxing assets of insurance companies, the amounts of their legal reserves and unpaid policy claims should first be deducted, was invalid as applied to a company owning nontaxable United States bonds insofar as the law was construed to require that the deduction should be reduced by the proportion of the value that such bonds bore to total assets; the company thus was saddled with a heavier tax burden than would have been imposed had it not owned such bonds.

Justices concurring: Butler, Van Devanter, McReynolds, Sutherland, Hughes (separately), C.J.
Justices dissenting: Stone, Holmes, Brandeis

365. *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

A Texas law that forbade insurance stipulations limiting the time for suit on a claim to less than two years could not be applied, consistently with due process, to permit recovery contrary to the terms of a fire insurance policy executed in Mexico by a Mexican insurer and covered in part by reinsurance effected in Mexico and New York by New York insurers licensed to do business in Texas who defended against a Texas claimant to whom the policy was assigned while he was a resident of Mexico and where he resided when the loss was sustained.

366. *Baldwin v. Missouri*, 281 U.S. 586 (1930).

Missouri, not having jurisdiction for tax purposes of various intangibles, such as bank accounts and federal securities held in banks in Missouri and owned by a decedent domiciled in Illinois, its transfer tax law could not be applied, consistently with due process, to the transfer of such intangibles, under a will probated in Illinois, to the decedent's son who also was domiciled in Illinois.

Justices concurring: McReynolds, Van Devanter, Sutherland, Butler
Justices dissenting: Holmes, Brandeis, Stone (separately)

367. *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930).

Arkansas personal property tax laws could not be enforced against the purchaser of army blankets situate within an army cantonment in that state, as to which exclusive federal jurisdiction attached under Art. I, § 8, cl. 17.

368. *Beidler v. South Carolina Tax Comm'n*, 282 U.S. 1 (1930).

South Carolina inheritance tax law could not be applied, consistently with due process, to affect the transfer by will of shares in a South Carolina corporation and debts owed by the latter belonging to a decedent who died domiciled in Illinois; such intangibles were not shown to have acquired any taxable business situs in South Carolina.

Justices concurring: Hughes, C.J., Holmes (separately), Brandeis (separately), Van Devanter, McReynolds, Sutherland, Butler, Stone, Roberts

369. *Chicago, St. P., M. & O. Ry. v. Holmberg*, 282 U.S. 162 (1930).

A Nebraska law, as construed, that required a railroad to provide an underground cattle-pass across its right of way partly at its own expense for the purpose, not of advancing safety, but merely for the convenience of a farmer owning land on both sides of the railroad, deprived the latter of property without due process.

370. *Furst v. Brewster*, 282 U.S. 493 (1931).

An Arkansas law that withheld from a foreign corporation the right to sue in state courts unless it had filed a copy of its charter and a financial statement and had designated a local office and an agent to accept service of process could not constitutionally be enforced to prevent suit by a non-complying foreign corporation to collect a debt which arose out of an interstate transaction for the sale of goods.

371. *Coolidge v. Long*, 282 U.S. 582 (1931).

A Massachusetts law that imposed succession taxes on all property in Massachusetts transferred by deed or gift intended to take effect in possession or enjoyment after the death of the grantor, or transferred to any person absolutely or in trust, could not, consistently with due process or the Contract Clause, be enforced with reference to rights of succession or rights effected by gift that vested under trust agreements created prior to passage of the act, notwithstanding that the settlor died after its passage.

Justices concurring: Butler, Van Devanter, McReynolds, Sutherland, Hughes, C.J.
Justices dissenting: Roberts, Holmes, Brandeis, Stone

372. *Hans Rees' Sons v. North Carolina,*283 U.S. 123 (1931).

A North Carolina income tax law, as applied to income of New York corporation that manufactured leather goods in North Carolina

for sale in New York, violated due process because the formula for allocating income to that state, namely, that part of the corporation's net income that bears the same ratio to entire net income as the value of its tangible property in North Carolina bears to the value of all its tangible property, attributed to North Carolina a portion of total income that was out of all appropriate proportion to the business of the corporation conducted in North Carolina.

373. *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (1931).

A Tennessee law that imposed a privilege tax graduated to carrying capacity on motor buses, the proceeds from which were not segregated for application to highway maintenance, was void insofar as the privilege tax was imposed on a bus carrier engaged exclusively in interstate commerce.

Justices concurring: Brandeis, Van Devanter, Butler, Sutherland, Roberts, Stone, Holmes, Hughes, C.J.
Justice dissenting: McReynolds

374. *Stromberg v. California*, 283 U.S. 359 (1931).

A California law that prohibited the display of a red flag in a public or meeting place as a symbol of opposition to organized government or as a stimulus to anarchistic action or as an aid to seditious propaganda was so vague and indefinite as to permit punishment of the fair use of opportunity for free political discussion and therefore, as enforced, denied liberty without due process.

Justices concurring: Hughes, C.J., Holmes, Stone, Brandeis, Roberts, Van Devanter, Sutherland
Justices dissenting: Butler, McReynolds

375. *Smith v. Cahoon*, 283 U.S. 553 (1931).

Florida law that required motor carriers to furnish bond or an insurance policy for the protection of the public against injuries but which exempted vehicles used exclusively in delivering dairy products and carriers engaged exclusively in transporting fish, agricultural, and dairy products between production to shipping points en route to primary market denied the equal protection of the laws; and insofar as it subjected carriers for hire to the same requirements as to procurement of a certificate of convenience and necessity and rate regulation as were exacted of common carriers the law violated due process.

376. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

A Minnesota law that authorized the enjoinder of one engaged regularly in the business of publishing a malicious, scandalous, and defamatory newspaper or magazine, as applied to publications charging neglect of duty and corruption on the part of state law enforcement officers,

effected an unconstitutional infringement of freedom of the press as safeguarded by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Hughes, C.J., Brandeis, Holmes, Stone, Roberts
Justices dissenting: Butler, Van Devanter, McReynolds, Sutherland

377. *State Tax Comm'n v. Interstate Natural Gas Co.*, 284 U.S. 41 (1931).

A Mississippi privilege tax could not be enforced as to an interstate pipe line company that sold gas wholesale to local, independent distributors from a supply which passed into and through the state in interstate commerce; fact that pipe line company, in order to make delivery, used a thermometer and reduced pressure, did not convert the sale into an intrastate transaction.

378. *Hoeper v. Tax Comm'n, ,*284 U.S. 206 (1931).

A Wisconsin income tax law that authorized an assessment against a husband of a tax computed on the combined total of his and his wife's incomes, augmented by surtaxes resulting from the combination, notwithstanding that under the laws of Wisconsin the husband had no interest in, or control over, the property or income of his wife, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Justices concurring: Roberts, Butler, Van Devanter, McReynolds, Sutherland, Hughes, C.J.
Justices dissenting: Holmes, Brandeis, Stone

379. *First Nat'l Bank v. Maine*, 284 U.S. 312 (1932).

A Maine transfer tax law could not be applied, consistently with due process, to the inheritance of shares in a Maine corporation passing under the will of a Massachusetts testator who died a resident of Massachusetts and owning the shares.

Justices concurring: Sutherland, Butler, Van Devanter, Roberts, McReynolds, Hughes, C.J.
Justices dissenting: Stone, Holmes, Brandeis

380. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

An Oklahoma law that prohibited anyone from engaging in the manufacture, sale, or distribution of ice without a state license, to be issued only on proof of public necessity and capacity to meet public demand, constituted an invalid regulation of a business not affected with a public interest and a denial of liberty to pursue a lawful calling contrary to due process.

Justices concurring: Sutherland, Van Devanter, McReynolds, Butler, Roberts, Hughes, C.J.
Justices dissenting: Brandeis, Stone

381. *Coombes v. Getz*, 285 U.S. 434 (1932).

Repeal of a California constitutional provision making directors of corporations liable to creditors for all moneys misappropriated or embezzled impaired the obligation of contract as to creditors who dealt with corporations during the period when the constitutional provision was in force, and inclusion in the state constitution of another provision under which the state reserved the power to alter or repeal all existing or future laws concerning corporations could not be invoked to destroy vested rights contrary to due process.

Justices concurring: Sutherland, Roberts, Butler, McReynolds, Van Devanter, Hughes, C.J.
Justices dissenting: Cardozo, Brandeis, Stone

382. *Nixon v. Condon*, 286 U.S. 73 (1932).

Texas White Primary Law that empowered the state executive committee of a political party to prescribe the qualifications of members of the party and thereby to exclude Negroes from voting in primaries conducted by the party amounted to state action in violation of the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: Cardozo, Brandeis, Stone, Roberts, Hughes, C.J.
Justices dissenting: McReynolds, Van Devanter, Butler, Sutherland

383. *Champlin Rfg. Co. v. Corporation Comm'n*, 286 U.S. 210 (1932).

An Oklahoma statute that provided that any person violating it shall be subject to having his oil-producing property placed in the hands of a receiver by a court upon the state attorney general's filing suit, but that restricted such receivership to the operation of producing wells and the marketing of the production of such wells in conformity with this law, was a penal provision and as such violated due process clause because it punished violations of regulatory provisions of the statute that were too vague to afford a standard of conduct.

384. *Anglo-Chilean Corp. v. Alabama*, 288 U.S. 218 (1933).

An Alabama law that subjected foreign corporations to an annual franchise tax for doing business, levied at the rate of $2 for each $1,000 of capital employed in the state, violated both Art. I, § 10, cl. 2, prohibiting state import duties, and the Commerce Clause, when enforced against a foreign corporation, whose sole business in Alabama consisted of the landing, storing, and selling in original packages of goods imported from abroad.

Justices concurring: Butler, McReynolds, Van Devanter, Roberts, Sutherland, Hughes, C.J.
Justices dissenting: Cardozo, Brandeis, Stone

385. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933).

The Florida Chain Store Tax Law, which levied a heavier privilege tax per store on the owner whose stores were in different counties than on the owner whose stores were all in the same county, denied equal protection of the laws.

Justices concurring: Roberts, McReynolds, Sutherland, Butler, Van Devanter, Hughes, C.J.
Justices dissenting: Brandeis, Cardozo, Stone

386. *Consolidated Textile Co. v. Gregory*, 289 U.S. 85 (1933).

A Wisconsin law, insofar as it authorized service of process on a foreign corporation that sold goods in Wisconsin through a controlled subsidiary and hence was not carrying on any business in the state at the time of the attempted service, violated due process, notwithstanding that the summons was served on an officer of the corporation temporarily in Wisconsin for the purpose of negotiating a controversy with a local attorney.

387. *Johnson Oil Co. v. Oklahoma,*290 U.S. 158 (1933).

An Oklahoma property tax law could not be enforced, consistently with due process, against the entire fleet of tank cars of an Illinois corporation that were used in transporting oil from its refinery in Oklahoma to other states; instead, the state may base its tax on the number of cars that on the average were physically present within its boundaries.

388. *Southern Ry. v. Virginia*, 290 U.S. 190 (1933).

A Virginia law that authorized an administrative officer to require railroads to eliminate grade crossing whenever, in his opinion, such alterations were necessary to promote public safety and convenience and afforded the railroads no notice or hearing on the existence of such necessity and no means of reviewing the officer's decision violated due process.

Justices concurring: McReynolds, Roberts, Butler, Van Devanter, Sutherland, Brandeis
Justices dissenting: Hughes, C.J., Stone, Cardozo

389. *Morrison v. California*, 291 U.S. 82 (1934).

A section of the California Alien Land Law that provided that, when the state, in a prosecution for violating such law, proved use or occupancy by an alien lessee, alleged in the indictment to be an alien ineligible for naturalization, the onus of proving citizenship shall devolve upon the defense, was arbitrary and violated due process as applied to the lessee because a lease of land conveys no hint of criminality

and there is no practical necessity for relieving the prosecution of the obligation of proving Japanese race.

390. *Standard Oil Co. v. California*, 291 U.S. 242 (1934).

A California law that levied a license tax upon every distributor for each gallon of motor vehicle fuel sold and delivered by him in the state could not constitutionally be applied to the sale and delivery of gasoline to a military reservation as to which the United States had acquired exclusive jurisdiction.

391. *Hartford Accident & Ins. Co. v. Delta Pine Land Co.*, 292 U.S. 143 (1934).

Mississippi statutes, as judicially construed, that deemed all contracts of insurance and surety covering its citizens to have been made in Mississippi and that were enforced to facilitate recovery under an indemnity contract consummated in Tennessee in conformity with the law of Tennessee, where the insured, a Mississippi corporation, also conducted its business, and to nullify as contrary to Mississippi law nonobservance of a contractual stipulation as to the time for filing claims, violated due process because the Mississippi laws were accorded effect beyond the territorial limits of Mississippi.

392. *McKnett v. St. Louis & S.F. Ry.,*292 U.S. 230 (1934).

An Alabama law, as judicially construed, that precluded Alabama courts from entertaining actions against foreign corporations arising in other states under federal law, while permitting entertainment of such actions arising in other states under state law, violated the Constitution.

393. *W. B. Worthen Co. v. Thomas*, 292 U.S. 426 (1934).

An Arkansas law that exempted life insurance proceeds from judicial process, when applied to prevent recovery by a creditor of the insured who had garnished the insurer prior to passage of the law, impaired the obligation of contract.

Justices concurring: Hughes, C.J., Cardozo, Brandeis, Roberts, Stone, Sutherland (separately), Van Devanter (separately), McReynolds (separately), Butler (separately)

394. *Concordia Ins. Co. v. Illinois*, 292 U.S. 535 (1934).

Illinois tax laws violated the Equal Protection Clause because they (1) subjected foreign insurance companies selling fire, marine, inland marine, and casualty insurance to two property taxes, one on tangible property and a second, on net receipts, including net receipts from their casualty business, while subjecting competing foreign insurance companies selling only casualty insurance to the single tax on tangible prop-

erty; and (2) insofar as the net receipts were assessed at full value while other personal property in general was assessed at only 60% of value.

Justices concurring: Van Devanter, Sutherland, Butler, McReynolds, Roberts
Justices dissenting: Cardozo, Brandeis, Stone

395. *Cooney v. Mountain States Tel. Co.*, 294 U.S. 384 (1935).

Montana laws that imposed an occupation tax on every telephone company providing service in the state imposed an invalid burden on interstate commerce when applied to a company that used the same facilities to furnish both interstate as well as intrastate services.

396. *Baldwin v. G.A.F. Seelig, Inc.,*294 U.S. 511 (1935).

The New York Milk Control Act, insofar as it prohibited the sale of milk imported from another state unless the price paid to the producer in the other state equaled the minimum prescribed for purchases from local producers, imposed an unconstitutional burden on interstate commerce irrespective of resale of such milk in the original or other containers.

397. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935).

A Kentucky law that taxed the sales of retailers at the rate of ½0 of 1% on the first $400,000 of gross sales, and that imposed increasing rates on each additional $100,000 of gross sales up to $1,000,000, with a maximum rate of 1% on sales over $1,000,000, was arbitrary and violated the Equal Protection Clause because there was no reasonable relation between the amount of the tax and the value of the privilege of merchandising or between gross sales, the measure of the tax, and net profits.

Justices concurring: Roberts, Sutherland, Van Devanter, Butler, McReynolds, Hughes, C.J.
Justices dissenting: Cardozo, Brandeis, Stone

398. *Accord: Valentine v. A. & P. Tea Co.*, 299 U.S. 32 (1936), voiding a similar Iowa Chain Store Tax Act.

Justices concurring: Roberts, Sutherland, Butler, McReynolds, Van Devanter, Hughes, C.J.
Justices dissenting: Brandeis, Cardozo

399. *Panhandle Co. v. Highway Comm'n*, 294 U.S. 613 (1935).

A Kansas law that, as judicially construed, empowered the state highway commission to order a pipe line company, at its own expense, to relocate its pipe and telephone lines, then located on a private right of way, in order to conform to plans adopted for new highways across

the right of way, deprived the company of property without due process of law.

Justices concurring: McReynolds, Butler, Van Devanter, Sutherland, Brandeis, Roberts, Stone (separately), Cardozo (separately), Hughes, C.J.

400. *Broderick v. Rosner*, 294 U.S. 629 (1935).

A New Jersey law that prohibited suits in New Jersey courts to enforce a stockholder's statutory personal liability arising under the laws of another state, and that was invoked to bar a suit by the New York Superintendent of Banks to recover assessments levied on New Jersey residents holding stock in a New York bank, violated the Full Faith and Credit Clause.

Justices concurring: Brandeis, Sutherland, Butler, Van Devanter, Stone, Roberts, McReynolds, Hughes, C.J.
Justices dissenting: Cardozo

401. *Worthen Co. v. Kavanaugh*, 295 U.S. 56 (1935).

An Arkansas law that reduced the remedies available to mortgagees in the event of a default on mortgage bonds issued by an improvement district, with the result that they were deprived of effective means of recovery for 6½ years, impaired the obligation of contract.

402. *Georgia Ry. & Electric Co. v. City of Decatur,*295 U.S. 165 (1935).

Insofar as a Georgia statute that authorized a municipality to effect certain street improvements and to assess railways having tracks on such streets with the cost of such improvements, included an irrebuttable presumption that a benefit accrued to the railway from such improvements, the statute denied the railway a hearing essential to due process of law.

Justices concurring: Sutherland, Butler, Van Devanter, McReynolds, Roberts, Hughes, C.J.
Justices dissenting: Stone, Brandeis, Cardozo

403. *Senior v. Braden*, 295 U.S. 422 (1935).

Insofar as trust certificates held by a resident represented interests in various parcels of land located in, and outside of, Ohio, and afforded the holder no voice in the management of such property but only a right to share in the net income from it and in the proceeds from the sale of it, such interests could be taxed only by a uniform rule according to value, and an Ohio law that levied an intangible property tax on such interests, which was measured by income, violated the Equal Protection and Due Process Clauses.

Justices concurring: McReynolds, Butler, Van Devanter, Sutherland, Roberts, Hughes, C.J.
Justices dissenting: Stone, Brandeis, Cardozo

404. *Colgate v. Harvey*, 296 U.S. 404 (1935).

A Vermont law that levied a 4% tax on income derived from loans made outside the state, but that exempted entirely like income derived from money loaned within Vermont at interest not exceeding 5% per year, constituted arbitrary discrimination in violation of the privileges and immunities of United States citizens under the Fourteenth Amendment.

Justices concurring: Sutherland, Van Devanter, Butler, McReynolds, Roberts, Hughes, C.J.
Justices dissenting: Stone, Brandeis, Cardozo

405. *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189 (1936).

A Louisiana law that abolished a requirement that building and loan associations, when income was insufficient to pay all demands of withdrawing stockholders within 60 days, set apart 50% of receipts to pay such withdrawals and provided, instead, that the directors be vested with sole discretion as to the amount to be allocated for such withdrawals, impaired the obligation of contract as to a stockholder who, prior to the amendment, gave notice of withdrawal and whose demand had not been paid.

406. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

A Louisiana law that imposed a tax on the gross receipts derived from the sale of advertisements by newspapers enjoying a circulation of more than 20,000 copies per week unconstitutionally restricted freedom of the press contrary to the Due Process Clause of the Fourteenth Amendment.

407. *Mayflower Farms v. Ten Eyck*, 297 U.S. 266 (1936).

The New York Milk Control Act, which permitted milk dealers without well-advertised trade names who were in business before April 10, 1933, to sell milk in New York City at a price one cent below the minimum that was binding on competitors with well-advertised trade names, denied equal protection to dealers without well-advertised names who established their business after that date.

Justices concurring: Roberts, Hughes, C.J., Van Devanter, Sutherland, Butler, McReynolds
Justices dissenting: Cardozo, Brandeis, Stone

408. *Bingaman v. Golden Eagle Lines*, 297 U.S. 626 (1936).

A New Mexico law that imposed an excise tax on the sale and use of gasoline and motor fuel and collected a license tax of $25 from users who import for use in New Mexico gasoline purchased in another state could not validly be imposed on a motor vehicle carrier, engaged exclusively in interstate commerce, that imported out-of-state gasoline

for use in New Mexico. This was because the tax was levied, not as compensation for the use of that state's highways, but on the use of an instrumentality of interstate commerce.

409. *Fisher's Blend Station v. State Tax Comm'n*, 297 U.S. 650 (1936).

A Washington statute that levied an occupation tax measured by gross receipts of radio broadcasting stations within that state whose programs were received by listeners in other states imposed an unconstitutional burden on interstate commerce.

410. *International Steel & I. Co. v. National Surety Co.*, 297 U.S. 657 (1936).

A Tennessee law concerning the settlement of public construction contracts, which retroactively released the surety on a bond given by a contractor as required by prior law for the security of claims of materialmen and substituted, without the latter's consent, the obligation of another bond, impaired the obligation of contract.

411. *Graves v. Texas Co.*, 298 U.S. 393 (1936).

An Alabama law that imposed an excise tax on the sale of gasoline could not be enforced as to sales of gasoline to the United States.

Justices concurring: Butler, Sutherland, Van Devanter, Roberts, Hughes, C.J., McReynolds
Justices dissenting: Cardozo, Brandeis

412. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

A New York law that required employers to pay women minimum wages that would be not only equal to the fair and reasonable value of the services rendered but also sufficient to meet the minimum cost of living necessary for health deprived employers and employees of their freedom of contract without due process of law.

Justices concurring: Butler, Van Devanter, McReynolds, Sutherland, Roberts
Justices dissenting: Hughes, C.J., Brandeis, Stone, Cardozo

413. *Binney v. Long*, 299 U.S. 280 (1936).

A Massachusetts succession tax law under which succession to property through failure of an intestate to exercise a power of appointment under a non-testamentary conveyance of the property by deed or trust made after September 1, 1907, was not taxed, whereas if the conveyance were made before that date, the succession was not only taxable but the rate might be substantially increased by aggregating the value of that succession with other interests derived by the transferee by inheritance from the donee of the power, violated the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: Roberts, Hughes, C.J., Van Devanter, Butler, Sutherland, McReynolds

Justices dissenting: Cardozo, Brandeis

414. *DeJonge v. Oregon*, 299 U.S. 353 (1937).

The Oregon Criminal Syndicalism Law, invoked to punish participation in the conduct of a public meeting devoted to a lawful purpose merely because the meeting had been held under the auspices of an organization that taught or advocated the forcible overthrow of government but did not engage in such advocacy during the meeting, violated freedom of assembly and freedom of speech guaranteed by the Due Process Clause of the Fourteenth Amendment.

415. *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937).

A New York income tax law could not be extended to salaries of employees of the Panama Railroad Company because the company together with its employees was a federal instrumentality (Art. VI).

416. *Ingels v. Morf*, 300 U.S. 290 (1937).

The California Caravan Act, which imposed a $15 fee on each motor vehicle transported from another state into California for the purposes of sale, imposed an unconstitutional burden on interstate commerce; the proceeds from such fees were not used to meet the cost of highway construction or maintenance, but instead to reimburse the state for the added expense of policing caravan traffic, and for that purpose the fee was excessive.

417. *Herndon v. Lowry*, 301 U.S. 242 (1937).

A Georgia insurrection statute, which punished as a crime the acts of soliciting members for a political party and conducting meetings of a local unit of that party, where one of the doctrines of the party, established by reference to a document not shown to have been exhibited by anyone, may be said to embrace ultimate resort in the indefinite future to violence against government, invaded freedom of speech as guaranteed by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Roberts, Brandeis, Stone, Hughes, C.J., Cardozo
Justices dissenting: Van Devanter, McReynolds, Butler, Sutherland

418. *Lindsey v. Washington*, 301 U.S. 397 (1937).

A Washington statute that increased the severity of a penalty for a specific offense by mandating a sentence of 15 years, thereby removing the discretion of the judge to sentence for less than the maximum of 15 years, when applied retroactively to a crime committed before its enactment, was invalid as an *ex post facto* law.

419. *Hartford Ins. Co. v. Harrison*, 301 U.S. 459 (1937).

A Georgia law that prohibited stock insurance companies writing fire and casualty insurance from acting through agents who were their salaried employees, but that permitted mutual companies writing such insurance to do so, violated the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: McReynolds, Sutherland, Van Devanter, Butler, Hughes, C.J.
Justices dissenting: Roberts, Brandeis, Stone, Cardozo

420. *Puget Sound Stevedoring Co. v. State Tax Comm'n*, 302 U.S. 90 (1937).

A Washington gross receipts tax law could not validly be enforced as to receipts accruing to a stevedoring corporation acting as an independent contractor in loading and unloading cargoes of vessels engaged in interstate or foreign commerce by longshoremen subject to its own direction and control; such business was a form of interstate and foreign commerce.

421. *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937).

A West Virginia gross receipts tax law could not validly be enforced to sustain a levy on that part of gross receipts of a federal contractor working on a federal installation in West Virginia that was derived from the fabrication of equipment at its Pennsylvania plant for which the contractor received payment prior to installation of such equipment on the West Virginia site owned by the Federal Government; for such compensable activities were completed beyond the jurisdiction of West Virginia.

422. *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938).

A California law that levied a privilege tax on admitted foreign insurers, measured by gross premiums received, violated due process insofar as it affected premiums received in Connecticut on contracts of reinsurance consummated in the latter state and covering policies of life insurance issued by other insurers to residents of California; California was without power to tax activities conducted beyond its borders.

Justices concurring: Stone, Hughes, C.J., McReynolds, Brandeis, Butler, Roberts
Justice dissenting: Black

423. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938).

An Indiana law of 1933 that repealed tenure rights of certain teachers accorded under a Tenure Act of 1927 impaired the obligation of contract.

Justices concurring: Roberts, Hughes, C.J., McReynolds, Brandeis, Butler, Stone

Justice dissenting: Black

Accord: Indiana ex rel. Valentine v. Marker, 303 U.S. 628 (1938).

424. *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938).

An Indiana gross receipts tax law could not constitutionally be applied to gross receipts derived by an Indiana corporation from sales in other states of goods manufactured in Indiana; as thus applied the law burdened interstate commerce.

Justices concurring: Roberts, Hughes, C.J., Brandeis, Butler, Stone, Reed
Justices dissenting: Black (in part), McReynolds (in part)

425. *Freeman v. Hewit*, 329 U.S. 249 (1946).

Indiana's gross income tax imposed an unconstitutional burden on interstate commerce when applied to the receipt by one domiciled in the state of the proceeds of a sale of securities sent out of the state to be sold.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson , Rutledge , Burton
Justices dissenting: Black, Douglas, Murphy

426. *Indiana Dep't of Revenue v. Nebeker*, 348 U.S. 933 (1955).

Indiana's gross receipts tax also could not be levied on receipts from the purchase and sale on margin of securities by resident owners through a nonresident broker engaged in interstate commerce.

Justices concurring: Warren, C.J., Reed, Frankfurter, Burton, Clark, Minton
Justices dissenting: Black, Douglas

427. *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938).

The provisions of the California Alcoholic Beverages Control Act that imposed a fee for a license to import alcoholic beverages and controlled the importation of such beverages, could not be enforced, consistently with the Twenty-first Amendment, against a retail dealer doing business in a National Park as to which California retained no jurisdiction.

428. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

A Missouri statute that accorded Negro residents financial aid to enable them to obtain instruction at out-of-state universities equivalent to that afforded exclusively to white students at the University of Missouri denies such Negroes the equal protection of the laws. The obligation of a state to give equal protection of the laws can be performed only where its laws operate; that is, within its own jurisdiction.

Justices concurring: Hughes, C.J., Brandeis, Stone, Roberts, Black, Reed
Justices dissenting: McReynolds, Butler

429. *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939).

A Washington gross receipts tax levied on the privilege of engaging in business in the state cannot constitutionally be imposed on the gross receipts of a marketing agent for a federation of fruit growers whose business consists of the marketing of fruit shipped from Washington to places of sale in other states and foreign countries. Such a tax burdens interstate and foreign commerce contrary to Art. I, § 8, cl. 3.

Justices concurring: Butler, McReynolds, Hughes, C.J., Brandeis, Stone, Roberts, Reed
Justice dissenting: Black

430. *Hale v. Bimco Trading Co.*, 306 U.S. 375 (1939).

A Florida statute imposing an inspection fee of 15 cents per cwt. (60 times the cost of the inspection) on cement imported from abroad is invalid under the Commerce Clause (Art. I, § 8, cl. 3).

431. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

A New Jersey statute that provides, "Any person not engaged in a lawful occupation, known to be a member of any gang consisting of two or more persons, who had been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State, is declared to be a gangster . . . " and punishable upon conviction, violates the Due Process Clause of the Fourteenth Amendment because of vagueness and uncertainty.

432. *Lane v. Wilson*, 307 U.S. 268 (1939).

An Oklahoma statute that provided that all persons, other than those who voted in 1914, who were qualified to vote in 1916 but failed to register between April 30 and May 11, 1916, should be perpetually disenfranchised, was found to violate the Fifteenth Amendment.

Justices concurring: Hughes, C.J., Roberts, Black, Reed, Frankfurter
Justices dissenting: McReynolds, Butler

433. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

An Alabama statute that forbids the publicizing of facts concerning a labor dispute, whether by printed sign, pamphlet, word of mouth, or otherwise, in the vicinity of the business involved, and without regard to the number of persons engaged in such activity, the peaceful character of their conduct, the nature of the dispute, or the accuracy or restraint of the language used in imparting information, violates freedom of speech and press as guaranteed by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Hughes, C.J., Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy

Justice dissenting: McReynolds

434. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

A Connecticut statute that forbids any person to solicit money or valuables for any alleged religious cause, unless he has first procured a license from an official who is required to determine whether the cause is a religious one and who may deny issuance if he determines that the cause is not, imposes a prior restraint of the free exercise of religion in violation of due process.

435. *McCarroll v. Dixie Lines*, 309 U.S. 176 (1940).

Gasoline carried by interstate motor busses through Arkansas for use as fuel in interstate transportation beyond the Arkansas line cannot be subject to an Arkansas tax imposed for maintenance of state highways and collected on every gallon of gasoline above 20 brought into the state in any motor vehicle for use in operating the same. The statute levying this tax unconstitutionally burdens interstate commerce.

Justices concurring: McReynolds, Stone, Hughes, C.J., Roberts, Reed (separately)
Justices dissenting: Black, Frankfurter, Douglas

436. *Best v. Maxwell*, 311 U.S. 454 (1940).

A North Carolina statute that levies an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the state, who displays samples in any hotel room or house rented for the purpose of securing retail orders, cannot be applied to a nonresident merchant who took orders in the state and shipped interstate directly to customers. In view of the imposition of a one dollar per year license tax collected from regular retail merchants, the enforcement of the statute as to nonresidents unconstitutionally discriminates in favor of intrastate commerce contrary to Art. I, § 8, cl. 3.

437. *Wood v. Lovett*, 313 U.S. 362 (1941).

When Arkansas, with the help of a statute curing irregularities in a tax proceeding, sold land under a tax title that was valid, subsequent repeal of the curative statute impaired the obligation of contract (Art. I, § 10, cl. 1).

Justices concurring: Hughes, C.J., Stone, Roberts, Reed, Frankfurter
Justices dissenting: Black, Douglas, Murphy

438. *Edwards v. California*, 314 U.S. 160 (1941).

A California statute making it a misdemeanor for anyone knowingly to bring, or assist in bringing, into the state a nonresident, indigent person imposes an unconstitutional burden on interstate commerce.

Justices concurring: Stone, C.J., Roberts, Reed, Frankfurter, Byrnes, Douglas, Black, Murphy, Jackson would have rested the invalidity on § 1 of the Fourteenth Amendment.

439. *Taylor v. Georgia*, 315 U.S. 25 (1942).

A Georgia statute that makes it a crime for any person to contract with another to perform services of any kind, and under such contract to obtain in advance money or other thing of value, with intent not to perform such service, and providing further that failure to perform the service or to return the money, without good and sufficient cause, shall amount to presumptive evidence of intent, at the time of making the contract, not to perform such service, violates the Thirteenth Amendment.

440. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

As applied to one convicted once of stealing chickens, and twice of robbery, an Oklahoma statute providing for the sterilization of habitual criminals, other than those convicted of embezzlement, or violation of prohibition and revenue laws, violates the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring specially: Stone, C.J., Jackson

441. *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943).

A provision of the California Agricultural Code provided that the selling and delivery of milk "at less than the minimum wholesale, retail prices effective in a marketing area" was an unfair practice warranting revocation of license or prosecution. Sales and deliveries of milk to the War Department on a federal enclave within a state over which the United States has acquired exclusive jurisdiction are not subject to regulation under a state milk stabilization law.

Justices concurring: Stone, C.J., Roberts, Black, Reed, Douglas, Jackson
Justices dissenting: Frankfurter, Murphy

442. *Mayo v. United States*, 319 U.S. 441 (1943).

The Florida Commercial Fertilizer Law, a comprehensive regulation of the sale or distribution of commercial fertilizer that required a label or stamp on each bag evidencing the payment of an inspection fee, could not constitutionally be applied to fertilizer that the United States owned and was distributing within the state pursuant to a provision of the Soil Conservation and Domestic Allotment Act. Federal instrumentalities are immune from state taxation and regulation unless Congress provides otherwise, and Congress had not done so.

443. *Taylor v. Mississippi*, 319 U.S. 583 (1943).

The General Laws of Mississippi, 1943, ch. 178, provided, in part, that the teaching and dissemination of printed matter designed to en-

courage disloyalty to the national and state governments, and the distribution of printed matter reasonably tending "to create an attitude of stubborn refusal to salute, honor, or respect the flag or Government of the United States, or of the State of Mississippi" was a felony. The Fourteenth Amendment of the Constitution prohibits the imposition of punishment for: (1) urging and advising on religious grounds that citizens refrain from saluting the flag; and (2) the communication of beliefs and opinion concerning domestic measures and trends in national and world affairs, when this is without sinister purpose and not in advocacy of, or incitement to, subversive action against the nation or state and does not involve any clear and present danger to our institutions or our government. Conviction under the statute for disseminating literature reasonably tending to create an attitude of stubborn refusal to salute, honor or respect the national and state flags and governments denies the liberty guaranteed by the Fourteenth Amendment.

444. *Pollock v. Williams*, 322 U.S. 4 (1944).

Florida Statute of 1941, sec. 817.09 and sec. 817.10, made it a misdemeanor to induce advances with intent to defraud by a promise to perform labor, and further made failure to perform labor for which money had been obtained *prima facie* evidence of intent to defraud. The statute violates the Thirteenth Amendment and the Federal Antipeonage Act for it cannot be said that a plea of guilty is uninfluenced by the statute's threat to convict by its prima facie evidence section.

Justices concurring: Roberts, Black, Frankfurter, Douglas, Murphy, Jackson, Rutledge
Justices dissenting: Stone, C.J., Reed

445. *United States v. Allegheny County*, 322 U.S. 174 (1944).

Pennsylvania law provided in part that "The following subjects and property shall be valued and assessed, and subject to taxation," and that taxes are declared "to be a first lien on said property." The effect of an *ad valorem* property tax is to increase the valuation of the land and buildings of a manufacturer by the value of machinery leased to him by the United States and is therefore a tax on property owned by the United States and violates the Constitution.

Justices concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Jackson, Rutledge
Justices dissenting: Roberts, Frankfurter

446. *McLeod v. J. E. Dilworth Co.,*322 U.S. 327 (1944).

The Commerce Clause prohibits the imposition of an Arkansas sales tax on sales to residents of the state that are consummated by acceptance of orders in, and the shipments of goods from, another state, in which title passes upon delivery to the carrier.

Justices concurring: Stone, C.J., Roberts, Reed, Frankfurter, Jackson
Justices dissenting: Black, Douglas, Murphy, Rutledge

447. *Thomas v. Collins*, 323 U.S. 516 (1945).

A Texas statute required union organizers, before soliciting members, to obtain an organizer's card from the Secretary of State. As applied in this case, the statute violates the First and Fourteenth Amendments because it imposes a prior restraint on free speech and free assembly. The First Amendment's safeguards apply to business and economic activity, and restrictions of these activities can be justified only by clear and present danger to the public welfare.

Justices concurring: Black, Douglas, Murphy, Jackson, Rutledge
Justices dissenting: Stone, C.J., Roberts, Reed, Frankfurter

448. *Hooven & Allison Co. v. Evatt*, 324 U.S. 652 (1945).

An Ohio *ad valorem* tax on Philippine importations violated the constitutional prohibition of state taxation of imports because the place from which the imported articles were brought is not a part of the United States in the constitutional sense.

Justices concurring: Stone, C.J., Roberts, Reed (dissenting in part), Frankfurter, Douglas (concurring in part), Murphy (concurring in part), Jackson, Rutledge (concurring in part)
Justice dissenting: Black

449. *Southern Pacific Co. v. Arizona ex rel. Sullivan,*325 U.S. 761 (1945).

The Arizona Train Limit Law makes it unlawful to operate a train of more than fourteen passenger or seventy freight cars. As applied to interstate trains, this law contravenes the Commerce Clause. The state regulation passes beyond what is plainly essential for safety, as it does not appear that it will lessen, rather than increase, the danger of accident.

Justices concurring: Stone, C.J., Roberts, Reed, Frankfurter, Murphy, Jackson, Rutledge
Justices dissenting: Black, Douglas

450. *Marsh v. Alabama*, 326 U.S. 501 (1946).

Alabama law makes it a crime to enter or remain on the premises of another after having been warned not to do so. A state, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, cannot impose criminal punishment on a person for distributing religious literature on the sidewalk of a company-owned town contrary to regulations of the town's management, where the town and its shopping district are freely accessible to and freely used by the public in general.

Justices concurring: Black, Frankfurter, Douglas, Murphy, Rutledge

Justices dissenting: Stone, C.J., Reed, Burton

451. *Tucker v. Texas*, 326 U.S. 517 (1946).

The Texas Penal Code makes it an offense for any "peddler or hawker of goods or merchandise" willfully to refuse to leave premises after having been notified to do so by the owner or possessor thereof. A state, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, cannot impose criminal punishment upon a person engaged in religious activities and distributing religious literature in a village owned by the United States under a congressional program designed to provide housing for workers engaged in national defense activities, where the village is freely accessible and open to the public.

Justices concurring: Black, Frankfurter, Douglas, Murphy, Rutledge
Justices dissenting: Stone, C.J., Reed, Burton

452. *Republic Pictures Corp. v. Kappler*, 327 U.S. 757 (1946).

An Iowa statute, insofar as it required actions on claims arising under a federal statute not containing any period of limitations to be commenced within six months, denied equal protection of law when enforced as to one seeking to recover under the Federal Fair Labor Standards Act; a state may not discriminate against rights accruing under federal laws by imposing as to them a special period of limitations not applicable to other claims.

453. *Morgan v. Virginia*, 328 U.S. 373 (1946).

Virginia law required motor carriers, both interstate and intrastate, to separate without discrimination white and colored passengers in their motor buses so that contiguous seats would not be occupied by persons of different races at the same time. Even though Congress has enacted no legislation on the subject, the state provisions are invalid as applied to passengers in vehicles moving interstate because they burden interstate commerce.

Justices concurring: Black (separately), Reed, Frankfurter (separately), Douglas, Murphy, Rutledge
Justice dissenting: Burton

454. *Richfield Oil Corp. v. State Bd. of Equalization,*329 U.S. 69 (1946).

The California Retail Sales Tax, measured by gross receipts, cannot constitutionally be collected on exports in the form of oil delivered from appellant's dockside tanks to a New Zealand vessel in a California port for transportation to Auckland pursuant to a contract of sale with the New Zealand Government.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Douglas, Jackson, Rutledge, Burton

Justice dissenting: Black

455. *Order of Travelers v. Wolfe*, 331 U.S. 586 (1947).

A South Dakota Law setting a six-year statute of limitations for commencing actions on contract and declaring void every stipulation in a contract that reduces the time during which a party may sue to enforce his rights cannot be applied to an action brought in South Dakota for benefits arising under the constitution of a fraternal benefit society incorporated in Ohio and licensed to do business in South Dakota. The claimant is bound by the limitation prescribed in the society's constitution barring actions on claims six months after disallowance by the society, and South Dakota is required under the Federal Constitution to give full faith and credit to the public acts of Ohio.

Justices concurring: Vinson, C.J., Frankfurter, Reed, Jackson, Burton
Justices dissenting: Black, Douglas, Murphy, Rutledge

456. *United States v. California*, 332 U.S. 19 (1947).

California statutes granting permits to California residents to prospect for oil and gas offshore, both within and outside a three-mile marginal belt, are void. California is not the owner of the three-mile marginal belt along its coast; the Federal Government rather than the State has paramount rights in and power over that belt, and full dominion over the resources of the soil under that water area. The United States is therefore entitled to a decree enjoining California and all persons claiming under it from continuing to trespass upon the area in violation of the rights of the United States.

Justices concurring: Vinson, C.J., Black, Douglas, Murphy, Rutledge, Burton
Justices dissenting: Reed, Frankfurter

457. *Sipuel v. Board of Regents*, 332 U.S. 631 (1948).

Oklahoma constitutional and statutory provisions barring Negroes from the University of Oklahoma Law School violate the Equal Protection Clause of the Fourteenth Amendment because the University Law School is the only institution for legal education maintained by the state.

458. *Oyama v. California, 332 U.S. 633 (1948).*

The California Alien Land Law, forbidding aliens ineligible for American citizenship to acquire, own, occupy, lease or transfer agricultural land, and providing for escheat of any property acquired in violation of the statutes, cannot constitutionally by applied to effect an escheat of agricultural lands acquired in the name of a minor American citizen with funds contributed by his father, a Japanese alien ineligible for naturalization. The statute deprived the son of the equal protec-

tion of the laws and of his privileges as an American citizen, in violation of the Fourteenth Amendment.

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge
Justices dissenting: Reed, Jackson, Burton

459. *Winters v. New York*, 333 U.S. 507 (1948).

A New York law creating a misdemeanor offense for publishing, selling, or otherwise distributing "any book, pamphlet, magazine, newspaper or other printed matter devoted to the publication, and principally made up of criminal laws, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime . . . ," as construed by the state Court of Appeals to prohibit distribution of a magazine principally made up of news or stories of criminal deeds of bloodshed or lust so massed as to become a vehicle for inciting violent and depraved crimes against the person, is so vague and indefinite as to violate the Fourteenth Amendment by prohibiting acts within the protection of the guaranty of free speech and press.

Justices concurring: Vinson, Black, Reed, Douglas, Murphy, Rutledge
Justices dissenting: Frankfurter, Jackson, Burton

460. *Toomer v. Witsell*, 334 U.S. 385 (1948).

A South Carolina law requiring a license of shrimp boat owners, the fee for which was $25 per boat for residents and $2,500 per boat for nonresidents, plainly discriminated against nonresidents and violated the privileges and immunities clause of Art. IV, § 2. The same law unconstitutionally burdened interstate commerce by requiring all boats licensed to trawl for shrimp in South Carolina waters to dock in the state and to unload their catch, pack, and properly stamp the catch before shipping or transporting it to another state.

Justices concurring: Vinson, C.J., Reed, Douglas, Murphy, Rutledge, Burton, Black (dissenting in part), Frankfurter (dissenting in part), Jackson (dissenting in part)

461. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

California's requirement that every person bringing fish ashore in the state for sale obtain a commercial fishing license, but denying such a license to any person ineligible for citizenship, precluded a resident Japanese alien from earning his living as a commercial fisherman in the ocean waters off the state and was invalid both under the Equal Protection Clause and a federal statute (42 U.S.C. § 1981).

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge, Burton
Justices dissenting: Reed, Jackson

462. *Greyhound Lines v. Mealey*, 334 U.S. 653 (1948).

New York constitutionally may tax gross receipts of a common carrier derived from transportation apportioned as to mileage within the state, but collection of the tax on gross receipts from that portion of the mileage outside the state unduly burdens interstate commerce in violation of the Commerce Clause.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Rutledge, Burton
Justices dissenting: Black, Douglas, Murphy

463. *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949).

Denial of a license under the New York Agricultural and Market Law violated the Commerce Clause and the Federal Agricultural Marketing Act where the denial was on the ground that the expanded facilities would reduce the supply of milk for local markets and result in destructive competition in a market already adequately served.

Justices concurring: Vinson, C.J., Reed, Douglas, Jackson, Burton
Justices dissenting: Black, Frankfurter, Murphy, Rutledge

464. *Schnell v. Davis*, 336 U.S. 933 (1949).

The Boswell Amendment to the Alabama Constitution, which vested unlimited authority in electoral officials to determine whether prospective voters satisfied the literacy requirement, violated the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

465. *Union Nat'l Bank v. Lamb*, 337 U.S. 38 (1949).

Missouri law, providing that a judgment could not be revived after ten years from its rendition, could not be invoked, consistently with the Full Faith and Credit Clause, to prevent enforcement in a Missouri court of a Colorado judgment obtained in 1927 and revived in Colorado in 1946.

Justices concurring: Vinson, C.J., Reed, Douglas, Murphy, Jackson, Burton
Justices dissenting: Black, Frankfurter, Rutledge

466. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949).

The Ohio *ad valorem* tax levied on accounts receivable of foreign corporations derived from sales of goods manufactured within the state, but exempting receivables owned by residents and domestic corporations, denied foreign corporations equal protection of the laws in violation of the Fourteenth Amendment. The tax was not saved from invalidity by the "reciprocity" provision of the statute imposing it, because this plan was not one that, by credit or otherwise, protected the nonresident or foreign corporation against discrimination.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Murphy, Jackson, Rutledge, Burton
Justices dissenting: Black, Douglas

467. *Treichler v. Wisconsin*, 338 U.S. 251 (1949).

Insofar as the Wisconsin emergency tax on inheritances is measured by tangible property located outside the state, the tax violates the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Douglas, Burton, Clark, Minton
Justice dissenting: Black

468. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Notice by publication, as authorized by the New York Banking Law for purposes of enabling banks managing common trust funds to obtain a judicial settlement of accounts binding on all having an interest in such funds, is not sufficient under the Due Process Clause of the Fourteenth Amendment for determining property rights of persons whose whereabouts are known.

Justices concurring: Vinson, C.J., Black, Reed, Jackson, Clark, Minton, Frankfurter
Justice dissenting: Burton

469. *Sweatt v. Painter*, 339 U.S. 629 (1950).

Texas constitutional and statutory provisions restricting admission to the University of Texas Law School to white students violate the Equal Protection Clause of the Fourteenth Amendment because Negro students denied admission are afforded educational facilities inferior to those available at the University.

470. *United States v. Louisiana*, 339 U.S. 699 (1950).

The Louisiana Constitution provides that the Louisiana boundary includes all islands within three leagues of the coast, and Louisiana statutes provide that the state's southern boundary is 27 marine miles from the shore line. Because the three-mile belt off the shore is in the domain of the Nation rather than that of the states, it follows that the area claimed by Louisiana extending 24 miles seaward beyond the three-mile belt is also in the domain of the Nation rather than of Louisiana. The marginal sea is a national, not a state, concern and national rights are paramount in that area. The United States, therefore, is entitled to a decree upholding such paramount rights and enjoining Louisiana and all persons claiming under it from trespassing upon the area in violation of the rights of the United States, and requiring Louisiana to account for the money derived by it from the area after June 23, 1947.

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Burton
Justices dissenting: Reed, Minton

471. *United States v. Texas*, 339 U.S. 707 (1950).

Notwithstanding provisions in Texas laws under which Texas extended its boundary to a line in the Gulf of Mexico 24 marine miles beyond the three-mile limit and asserted ownership of the bed within that area and to the outer edge of the continental shelf, the United States is entitled to a decree sustaining its paramount rights to dominion of natural resources in the area, beyond the low-water mark on the coast of Texas and outside inland waters. Any claim that Texas may have asserted over the marginal belt when it existed as an independent Republic was relinquished upon its admission into the Union on an equal footing with the other states.

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Burton
Justices dissenting: Reed, Minton

472. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

Oklahoma law required segregation in educational facilities at institutions of higher learning. As applied to assign an African American student to a special row in the classroom, to a special table in the library, and to a special table in the cafeteria, the law impaired and inhibited the student's ability to study, engage in discussion, exchange views with other students, and in general to learn his profession. The conditions under which the student was required to receive his education deprived him of his right to equal protection guaranteed by the Fourteenth Amendment.

473. *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951).

The Illinois occupation tax, levied on gross receipts from sales of tangible personal property, cannot be collected on orders sent directly by the customer to the head officer of a corporation in Massachusetts and shipped directly to the customers from that office. These sales are interstate in nature and are immune from state taxation by virtue of the Commerce Clause.

Justices concurring: Vinson, C.J., Black (dissenting in part), Reed (dissenting in part), Frankfurter, Douglas (dissenting in part), Jackson, Burton, Clark (dissenting in part), Minton

474. *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951).

A Connecticut franchise tax for the privilege of doing business in the state, computed at a nondiscriminatory rate on that part of a foreign corporation's net income that is reasonably attributed to its business activities within the state and not levied as compensation for the use of highways, or collected in lieu of an *ad valorem* property tax, or

imposed as a fee for inspection, or as a tax on sales or use, cannot constitutionally be applied to a foreign motor carrier engaged exclusively in interstate trucking. A state cannot exact a franchise tax for the privilege of engaging in interstate commerce.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Minton
Justices dissenting: Black, Douglas, Clark

475. *Hughes v. Fetter*, 341 U.S. 609 (1951).

The Wisconsin Wrongful Death Act, authorizing recovery "only for a death caused in this State," and thereby blocking recovery under statutes of other states, must give way to the strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states.

Justices concurring: Vinson, C.J., Black, Douglas, Burton, Clark
Justices dissenting: Reed, Frankfurter, Jackson, Minton

476. *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952).

When boats and barges of an Ohio corporation used in transporting oil along the Mississippi River do not pick up or discharge oil in Ohio, and, apart from stopping therein occasionally for fuel and repairs, are almost continuously outside Ohio and are subject, on an apportionment basis, to taxation by other states, an Ohio tax on their full value violates the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Vinson, C.J., Reed, Clark, Frankfurter, Douglas, Jackson, Burton
Justices dissenting: Black, Minton

477. *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952).

A Mississippi privilege tax, levied on the privilege of soliciting business for a laundry not licensed in the state and collected at the rate of $50 on each vehicle used in the business cannot validly be imposed on a foreign corporation operating an establishment in Tennessee and doing no business in Mississippi other than sending trucks thereto to solicit business, and pick up, deliver, and collect for laundry. A tax so administered burdens interstate commerce.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
Justice dissenting: Black

478. *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952).

Illinois law provided that "no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the

laws of the place where such death occurred and services of process in such suit may be had upon the defendant in such place." In a suit brought in a federal district court in Illinois on grounds of diversity of citizenship to recover under the Utah death statute for a death occurring in Utah, the Illinois statute was held to violate the Full Faith and Credit clause.

Justices concurring: Vinson, C.J., Black, Douglas, Jackson, Burton, Clark, Minton
Justices dissenting: Reed, Frankfurter

479. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

Insofar as the New York Education Law forbids the commercial showing of any motion picture without a license and authorizes denial of a license on a censor's conclusion that a film is "sacrilegious," it is void as a prior restraint on freedom of speech and of the press under the First Amendment, made applicable to the states by the Due Process Clause of the Fourteenth Amendment. The statute authorized designated officers to refuse to license the showing of any film that is obscene, indecent, immoral, inhuman, sacrilegious, or the exhibition of which would tend to corrupt morals or incite to crime.

480. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

As construed and applied, Art. 5–C of the New York Religious Corporations Laws, which authorized transfer of administrative control of the Russian Orthodox churches of North America from the Supreme Church Authority in Moscow to the authorities selected by a convention of the North American churches, is invalid. Legislation that determines, in a hierarchical church, ecclesiastical administration or the appointment of the clergy, or transfers control of churches from one group to another, interferes with the free exercise of religion in violation of the First Amendment.

Justices concurring: Black, Douglas, Frankfurter, Vinson, C.J., Reed, Burton, Clark, Minton
Justice dissenting: Jackson

481. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

Oklahoma law requires each state officer and employee, as a condition of his employment, to take a "loyalty oath," that he is not, and has not been for the preceding five years, a member of any organization listed by the Attorney General of the United States as "communist front" or "subversive." As construed, this statute excludes persons from state employment on the basis of membership in an organization, regardless of their knowledge concerning the activities and purposes of the organization, and therefore violates the Due Process Clause of the Fourteenth Amendment.

482. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954).

The Arkansas Gross Receipts Tax, levied on the gross receipts of sales within the state, cannot be applied to transactions under which private contractors procured in Arkansas two tractors for use in constructing a naval ammunition depot for the United States under a cost-plus-fixed-fee contract. Applicable federal laws provide that in procuring articles required for accomplishment of the agreement, the contractor shall act as purchasing agent for the Government and that the government not only acquires title but shall be directly liable to the vendor for the purchase price. The tax is void as a levy on the Federal Government.

Justices concurring: Reed, Frankfurter, Jackson, Burton, Clark, Minton
Justices dissenting: Warren, C.J., Black, Douglas

483. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

A Texas tax on the occupation of "gathering gas" measured by the entire volume of gas "taken," as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the state for the purpose of immediate interstate transmission, violates the Commerce Clause. As here applied, the state delayed the incidence of the tax beyond the step where production and processing have ceased and transmission in interstate commerce has begun, so that the tax is not levied on the capture or production of the gas, but on its introduction into interstate commerce after production, gathering and processing.

484. *Miller Bros., Co. v. Maryland*, 347 U.S. 340 (1954).

Where residents of nearby Maryland make purchase from appellant in Delaware, some deliveries being made in Maryland by common carrier and some by appellant's truck, seizure of the appellant's truck in Maryland and holding it liable for the Maryland use tax on all goods sold in Delaware to Maryland customers is a denial of due process. The Delaware corporation has not subjected itself to the taxing power of Maryland and has not afforded Maryland a jurisdiction or power to impose upon it a liability for collections of the Maryland use tax.

Justices concurring: Reed, Frankfurter, Jackson, Burton, Minton
Justices dissenting: Warren, C.J., Black, Douglas, Clark

485. *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954).

In addition to "taxes on property of express companies," Virginia provided that "for the privilege of doing business in the State," express companies shall pay an "annual license tax" upon gross receipts earned in the state "on business passing through, into, or out of, this

State." The gross-receipts tax is in fact and effect a privilege tax, and its application to a foreign corporation doing an exclusively interstate business violated the Commerce Clause.

Justices concurring: Reed, Frankfurter, Jackson, Burton, Minton
Justices dissenting: Warren, C.J., Black, Douglas, Clark

486. *Brown v. Board of Education*, 347 U.S. 483 (1954).

A Kansas law that authorized segregation of white and Negro children in "separate but equal" public schools denies Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment.

487. *Accord: Briggs v. Elliott*, 347 U.S. 483 (1954).

South Carolina constitutional and statutory provisions requiring segregation of white and Negro students in public schools violate the Fourteenth Amendment.

488. *Accord: Davis v. County School Bd.*, 347 U.S. 483 (1954).

Virginia constitutional and statutory provisions requiring segregation of white and Negro students in public schools violate the Fourteenth Amendment.

489. *Accord: Gebhart v. Belton*, 347 U.S. 483 (1954).

Delaware constitutional and statutory provisions requiring segregation of white and Negro students in public schools violate the Fourteenth Amendment.

490. *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954).

An Illinois law providing for a 90-day suspension of a motor carrier upon a finding of 10 or more violations of regulations calling for a balanced distribution of freight loads in relation to the truck's axles cannot be applied to an interstate motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act. A state may not suspend the carrier's rights to use the state's highways in its interstate operations. The Illinois law, as applied to such carrier, also violates the Commerce Clause.

491. *Society for Savings v. Bowers*, 349 U.S. 143 (1955).

Levy of Ohio's property tax against a mutual saving bank and a federal savings and loan association in their own names, measured by the amount of each bank's capital, surplus, or reserve and undivided profits, without deduction of the value of federal securities owned by each or provision for reimbursement of each bank by its depositors for

the tax, is void as a tax upon obligations of the Federal Government (Art. VI, cl. 2).

492. *Griffin v. Illinois*, 351 U.S. 12 (1956).

Illinois statutes provide that a writ of error may be prosecuted on a "mandatory record" kept by the court clerk and consisting of the indictment, arraignment, plea, verdict, and sentence. The "mandatory record" can be obtained free of charge by an indigent defendant. In such instances review is limited to errors on the face of the mandatory record, and there is no review of trial errors such as an erroneous ruling on admission of evidence. No provision was made whereby a convicted person in a non-capital case can obtain a bill of exceptions or report of the trial proceedings, which by statute is furnished free only to indigent defendants sentenced to death. Griffin, an indigent defendant convicted of robbery, accordingly was refused a free certified copy of the entire record, including a stenographic transcript of the proceedings, and therefore was unable to perfect his appeal founded upon nonconstitutional errors of the trial court. Petitioner was held to have been denied due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment.

Justices concurring: Warren, C.J., Black, Frankfurter, Douglas, Clark
Justices dissenting: Reed, Burton, Minton, Harlan

493. *Covey v. Town of Somers*, 351 U.S. 141 (1956).

A New York statutory procedure that sanctioned notice by mail together with the posting of a copy of said notice at a local post office and the publication thereof in two local newspapers of proceedings to foreclose a lien for delinquent real estate taxes, was constitutionally inadequate and effected a taking of property without due process when employed in the foreclosure of the property of a mentally incompetent woman resident in the taxing jurisdiction and known by the officials thereof to be financially responsible but incapable of handling her affairs.

Justice concurring: Frankfurter (separately)

494. *Walker v. Hutchinson City*, 352 U.S. 112 (1956).

Kansas statutes permitted condemnation proceedings to be instituted by notice either in writing or by publication in an official city paper. Where the commissioners, appointed to determine compensation in condemnation of appellant's land, gave no notice of a hearing except by publication in the official city newspaper, though appellant was a resident of Kansas and his name was known to the city and on its official records, and there was no reason why direct notice could not be given, the newspaper publication alone did not measure up to

the quality of notice the Due Process Clause of the Fourteenth Amendment requires as a prerequisite to this type of proceeding.

Justices concurring: Warren, C.J., Black, Reed, Douglas, Clark, Harlan
Justices dissenting: Frankfurter, Burton

495. *Butler v. Michigan*, 352 U.S. 380 (1957).

The Michigan Penal Code proscribed the sale to the general reading public of any book containing obscene language "tending to the corruption of the morals of youth." When invoked to convict a proprietor who sold a book having such a potential effect on youth to an adult police officer, the statute violated the due process clause of the Fourteenth Amendment. Thus enforced, the statute would permit the adult population of Michigan to read only what is fit for children.

496. *Gayle v. Browder*, 352 U.S. 903 (1956).

Alabama statutes and Montgomery City ordinances that required segregation of "white" and "colored" races on motor buses in the city violated the Equal Protection Clause of the Fourteenth Amendment.

497. *Morey v. Doud*, 354 U.S. 457 (1957).

A provision of the Illinois Community Currency Exchange Act exempting money orders of a named company, the American Express Company, from the requirement that any firm selling or issuing money orders in the state must secure a license and submit to state regulation, denies equal protection of the laws to those entities that are not exempted. Although the Equal Protection Clause does not require that every state regulation apply to all in the same business, a statutory discrimination must be based on differences that are reasonably related to the purposes of the statute.

Justices concurring: Warren, C.J., Douglas, Burton, Clark, Brennan, Whittaker
Justices dissenting: Black, Frankfurter, Harlan

498. *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958).

Denial of a free trial transcript to an indigent criminal defendant pursuant to a Washington statute that authorized a trial judge to furnish a transcript to an indigent defendant if in the judge's opinion "justice will thereby be promoted" denied equal protection and due process because the indigent defendant did not have the same opportunity that was available to those who could afford the transcripts to have his case reviewed by an appellate court.

Justices concurring: Warren, C.J., Douglas, Clark, Black, Burton, Brennan
Justices dissenting: Harlan, Whittaker

499. *Speiser v. Randall*, 357 U.S. 513 (1958).

The California statutory provisions exacting as a prerequisite for property tax exemption that applicants therefor swear that they do not advocate the forcible overthrow of federal or state governments or the support of a foreign government against the United States during hostilities are unconstitutional insofar as they are enforced by procedures placing upon the taxpayer the burden of proving that he is not guilty of advocating that which is forbidden. Such procedures deprive the taxpayer of freedom of speech without the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Black, Frankfurter, Douglas, Burton, Harlan, Brennan, Whittaker
Justice dissenting: Clark

First Unitarian Church v. City of Los Angeles, 357 U.S. 545 (1958). *Enforcement of the same oath requirement through statutory procedures that place upon taxpayers the burden of proving nonadvocacy violates the Due Process Clause of the Fourteenth Amendment.* Same division of Justices as in Speiser v. Randall.

500. *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

An Illinois statute that requires trucks and trailers operating on state highways to be equipped with specified type of rear fender mudguard, which is different from those permitted in at least 45 other states, and which would seriously interfere with "interline operations" of motor carriers, cannot validly be applied to interstate motor carriers certified by the Interstate Commerce Commission because to do so unreasonably burdens interstate commerce.

Justices concurring: Harlan (separately), Stewart (separately)

501. *State Athletic Comm'n v. Dorsey*, 359 U.S. 533 (1959).

A Louisiana statute prohibiting athletic contests between Negroes and white persons violated the Equal Protection Clause of the Fourteenth Amendment.

502. *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684 (1959).

As construed and applied, the New York Education Law, which requires denial of a license to show a motion picture "presenting adultery as being right and desirable for certain people under certain circumstances," is unconstitutional. Refusal of a license to show a motion picture found to portray adultery alluringly as proper behavior violates the freedom to advocate ideas guaranteed by the First Amendment and protected by the Fourteenth Amendment from infringement by the states.

Justices concurring: Black (separately), Frankfurter (separately), Douglas (separately), Clark (separately), Harlan (separately)

503. *Faubus v. Aaron*, 361 U.S. 197 (1959).

Arkansas statutes that empowered the Governor to close the public schools and to hold an election as to whether the schools were to be integrated, as well as to withhold public moneys allocated to such schools on the occasion of their closing and to make such funds available to other public schools or nonprofit private schools to which pupils from a closed school might transfer, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

504. *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376 (1960).

Texas statutes discriminated against the United States in violation of Article VI, clause 2, by levying a tax on federally owned land and improvements used and occupied by a private concern that was more burdensome than the tax imposed on similarly situated lessees of property owned by Texas and its subdivisions.

Justices concurring: Brennan, Clark, Black, Douglas, Stewart, Warren, C.J., Whittaker, Harlan, Frankfurter (separately)

505. *Rohr Aircraft Corp. v. San Diego County*, 362 U.S. 628 (1960).

Property taxes assessed under California law could not be levied on real estate owned by the Reconstruction Finance Corporation after the latter had declared the property to be surplus and surrendered it to the War Assets Administration for disposal; this exemption arose even before execution of a quitclaim deed transferring title from the RFC to the United States and even though a property had been leased to a private lessee in the name of both the RFC and the United States.

Justices concurring: Clark, Warren, C.J., Harlan, Stewart, Frankfurter, Brennan, Whittaker
Justices dissenting: Douglas, Black

506. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

An Alabama statute that altered the boundaries of the City of Tuskegee in such manner as to eliminate all but four or five of its 400 African American voters without eliminating any white voter violated the Fifteenth Amendment.

Justice concurring: Whittaker (separately)

507. *Shelton v. Tucker*, 364 U.S. 479 (1960).

An Arkansas statute that required every school teacher, as a condition of employment in state-supported schools and colleges, to file an affidavit listing every organization to which he had belonged or con-

tributed within the preceding five years deprived teachers of associational freedom guaranteed by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Stewart, Warren, C.J., Brennan, Douglas, Black
Justices dissenting: Frankfurter, Clark, Harlan, Whittaker

508. *Bush v. Orleans Parish School Bd.*, 364 U.S. 500 (1961).

The Louisiana interposition statute that averred that the decision in the school segregation case (*Brown v. Board of Education,* 347 U.S. 483 (1954)) constituted usurpation of state power and that interposed the sovereignty of the state against enforcement of that decision did not assert "a constitutional doctrine," and if taken seriously, is legal defiance of constitutional authority.

509. *Orleans Parish School Bd. v. Bush*, 365 U.S. 569 (1961).

Louisiana statutes that (1) provided for segregation of races in public schools and the withholding of funds from integrated schools; (2) conferred on the Governor the right to close all schools upon the integration of any one of them; and (3) directed the Governor to supersede a school board under a court order to desegregate and take over management of public schools, denied equal protection of the laws.

510. *Ferguson v. Georgia*, 365 U.S. 570 (1961).

When, because a Georgia law that granted a defendant in a criminal trial the right to make an unsworn statement to the jury without subjecting himself to cross-examination, defendant's counsel was denied the right to ask him any question when he took the stand to make his unsworn statement, such application of the Georgia law deprived the defendant of the effective assistance of counsel without due process of law.

Justices concurring: Frankfurter (separately), Clark (separately)

511. *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961).

A Louisiana statute that prohibited any "non-trading" association from doing business in Louisiana if it is affiliated with any "foreign or out-of-state non-trading" association, any of the officers or directors of which are members of subversive organizations as cited by a House committee or by the United States Attorney General, and that required every non-trading association with an out-of-state affiliate to file annually an affidavit that none of the officers of the affiliate is a member of such organizations, was void for vagueness and violated of due process.

Justices concurring: Harlan (separately), Stewart (separately), Frankfurter (separately), Clark (separately)

512. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

A Maryland constitutional provision under which an appointed notary public who would not declare his belief in God was denied his commission imposed an invalid test for public office that violated freedom of belief and religion as guaranteed by the First Amendment, applicable through the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Frankfurter (separately), Harlan (separately)

513. *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

A Missouri statutory procedure that enabled a city police officer, in an ex parte proceeding, to obtain from a trial judge search warrants authorizing seizure of all "obscene" material possessed by wholesale and retail distributors without granting the latter a hearing or even seeing any of the materials in question and without specifying any particular publications, sanctioned search and seizure tactics that violated due process.

Justices concurring: Black (separately), Douglas (separately)

514. *Tugwell v. Bush*, 367 U.S. 907 (1961).

A Louisiana statute that punished the giving to or acceptance by any parent of anything of value as an inducement to sending his child to a school operated in violation of Louisiana law was void for vagueness and was designed to scuttle a desegregation program.

515. *Legislature of Louisiana v. United States*, 367 U.S. 908 (1961).

In an effort to interfere with court-ordered public school desegregation, Louisiana enacted statutes that purported to remove the New Orleans school board and replace it with a new group appointed by the legislature, and that deprived the board of its attorney and substituted the Louisiana Attorney General, and enacted a resolution "addressing out of office" the school superintendent chosen by the board. These enactments violated the Equal Protection Clause of the Fourteenth Amendment.

516. *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961).

A Florida statute that required state and local public employees to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party," and that subjected them to discharge for refusal, was void for vagueness and violated due process.

Justices concurring: Black (separately), Douglas (separately)

517. *St. Helena Parish School Bd. v. Hall*, 368 U.S. 515 (1962).

A Louisiana statute that authorized the school board of a municipally operated school system to close the schools upon a vote of the

electors and that provided that the board might then lease or sell any school building, but that subjected to extensive state control and financial aid the private schools that might acquire such buildings, violated equal protection of the laws because it was intended to continue segregation in schools.

518. *Bailey v. Patterson*, 369 U.S. 31 (1962).

Mississippi statutes that required racial segregation at interstate and intrastate transportation facilities denied equal protection of the law.

519. *Turner v. City of Memphis*, 369 U.S. 350 (1962).

A Tennessee statute, and an administrative regulation issued under it, insofar as they sanctioned racial segregation in a private restaurant operated on premises leased from a city at its municipal airport, denied equal protection of the law.

520. *Central R.R. v. Pennsylvania*, 370 U.S. 607 (1962).

Pennsylvania's capital stock tax, in the nature of a property tax, could not be collected on that portion of a railroad's cars (158 out of 3074) that represented the daily average of its cars located on a New Jersey railroad's lines during a taxable year; as to the latter portion of its cars the tax violated the Commerce Clause and the Due Process Clause.

Justice concurring: Black (separately)

521. *Robinson v. California*, 370 U.S. 660 (1962).

A California statute that, as construed, made the "status" of narcotics addiction a criminal offense, even though the accused had never used narcotics in California and had not been guilty of antisocial behavior in California, was void as inflicting cruel and unjust punishment proscribed by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Stewart, Warren, C.J., Brennan, Douglas (separately), Harlan (separately), Black
Justices dissenting: Clark, White

522. *Lassiter v. United States*, 371 U.S. 10 (1962).

Louisiana laws that segregated passengers in terminal facilities of common carriers were unconstitutional because they conflicted with federal law and the Equal Protection Clause.

523. *NAACP v. Button*, 371 U.S. 415 (1963).

A Virginia law that expanded malpractice by attorneys to include acceptance of employment or compensation from any person or organi-

zation not a party to a judicial proceeding and having no pecuniary right or liability in it, and that made it an offense for such person or organization to solicit business for an attorney violated freedom of expression and association, as guaranteed by the Due Process Clause of the Fourteenth Amendment when enforced against a corporation, including its attorneys and litigants, whose major purpose is the elimination of racial segregation through litigation that it solicits, institutes, and finances.

Justices concurring: Brennan, Warren, C.J., Goldberg, Douglas (separately), Black
Justices dissenting: White (in part), Harlan, Clark, Stewart

524. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

A Florida statute that did not accord indigent defendants court-appointed counsel in noncapital felony offenses deprived such defendants of due process of law.

Justices concurring: Douglas (separately), Clark (separately), Harlan (separately)

525. *Gray v. Sanders*, 372 U.S. 368 (1963).

A Georgia county unit system for nominating candidates in primaries for state-wide offices, including United States Senators, as set forth in statutory provisions, violated the principle of "one-person, one vote" as required by the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: Douglas, Stewart (separately), Clark (separately), Warren, C.J., Brennan, White, Goldberg, Black
Justice dissenting: Harlan

526. *Lane v. Brown*, 372 U.S. 477 (1963).

The Indiana Public Defender Act, insofar as it empowered the Public Defender to refuse to perfect an appeal for an indigent defendant whenever the former believed such an appeal would be unsuccessful and that, independently of such intervention by the Defender, afforded such defendant no alternative means of obtaining a transcript of a *coram nobis* hearing requisite to perfect an appeal from a trial court's denial of a writ of error coram nobis, effected a discriminatory denial of a privilege available as of right to a defendant with the requisite funds and violated the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: Harlan (separately), Clark (separately)

527. *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963).

Louisiana use tax, as enforced, unconstitutionally discriminates against interstate commerce in that the isolated purchase of an

item of used equipment in Louisiana was not subject to its sales tax, whereas an Oklahoma contractor was subjected to the Louisiana use tax on an item of used equipment employed in servicing wells in Louisiana that had been acquired in Oklahoma; and further that the Louisiana sales or use tax was computed on the cost of components purchased in Louisiana or purchased out of state for assembly and use in Louisiana whereas here the contractor paid a use tax on equipment assembled in Oklahoma that reflected not only the purchase price of the components but also the cost of labor and shop overhead incurred in assembling the components into a usable item of equipment.

Justices concurring: Warren, C.J., Douglas, Goldberg, Stewart, White, Harlan, Brennan (separately)
Justices dissenting: Clark, Black

528. *Willner v. Committee on Character*, 373 U.S. 96 (1963).

New York's statutory procedure governing admission to practice law, insofar as it failed to provide, in cases of denial of admission, for a hearing on the grounds for rejection to be accorded the applicant, either before the Committee on Character Fitness established by the Appellate Division of its Supreme Court, or before the Appellate Division itself, was defective and amounted to a denial of due process.

Justices concurring: Douglas, Black, White, Warren, C.J., Goldberg, Brennan, Stewart (separately)
Justices dissenting: Harlan, Clark

529. *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

When a city ordinance required separation of the races in restaurants, a South Carolina trespass statute, when enforced against African Americans who refused to leave a lunch counter in a retail store, amounted to a denial of equal protection of the laws.

Justice concurring: Harlan (separately)

530. *Accord: Gober v. City of Birmingham*, 373 U.S. 374 (1963), as to an Alabama law on trespass.

Justices concurring: Warren, C.J., Black, Douglas, Goldberg, White, Clark, Brennan, Stewart
Justice dissenting: Harlan

531. *Lombard v. Louisiana*, 373 U.S. 267 (1963).

When local community policy, as administered by municipal law enforcement officers, proscribed "sit-in demonstrations" against refusal of store proprietors to serve African Americans at lunch counters reserved for white patrons, invoking the Louisiana Criminal Mischief

Statute to punish African Americans who engaged in such demonstrations violated the Equal Protection Clause.

Justices concurring: Warren, C.J., Douglas (separately), Black, Brennan, White, Stewart, Goldberg, Clark
Justice dissenting: Harlan

532. *Wright v. Georgia*, 373 U.S. 284 (1963).

Georgia's unlawful assemblies act, which rendered persons open to conviction for a breach of the peace upon their refusal to disperse upon command of police officers, was void for vagueness and violated due process because it did not give adequate warning to Negroes that peaceably playing basketball in a municipal park would expose them to prosecution for violation of the statute.

Justice concurring: Harlan (separately)

533. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

A Pennsylvania law that required the reading, without comment, of verses from the Bible at the opening of each public school day violated the prohibition against the enactment of any law respecting an establishment of religion as incorporated by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Clark, Douglas (separately), Brennan (separately), Goldberg (separately), Harlan (concurs with latter), Warren, C.J., White, Black
Justice dissenting: Stewart

534. *Sherbert v. Verner*, 374 U.S. 398 (1963).

The South Carolina Unemployment Compensation Act, which withheld benefits and deemed ineligible for the receipt thereof a person who has failed without good cause to accept available work when offered to him, if construed as barring a Seventh-Day Adventist from relief because of religious scruples against working on Saturday, abridged the latter's right to the free exercise of religion contrary to the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Brennan, Clark, Warren, C.J., Goldberg, Black, Douglas, Stewart (separately)
Justices dissenting: Harlan, White

535. *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964).

A Florida statute and regulations implementing it that required a milk distributor to purchase its total supply of fluid milk from area producers at a fixed price and to take all milk that these producers offered was invalid under the Commerce Clause because they interfered with distributor's purchases of milk from out-of-state producers.

536. *Anderson v. Martin*, 375 U.S. 399 (1964).

A Louisiana statute requiring that in all primary, general, or special elections, the nomination papers and ballots shall designate the race of the candidates violated the Equal Protection Clause.

537. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

A Georgia statute establishing congressional districts of grossly unequal populations violates Article I, § 2, of the Constitution.

Justices concurring: Black, Douglas, Brennan, White, Goldberg, Warren, C.J.
Justices concurring in part and dissenting in part: Clark
Justices dissenting: Harlan, Stewart

538. *Accord: Martin v. Bush*, 376 U.S. 222 (1964). A Texas statute establishing congressional districts of grossly unequal populations is unconstitutional on authority of Wesberry v. Sanders, 376 U.S. 1 (1964). Same division of Justices as in Wesberry v. Sanders.

539. *City of New Orleans v. Barthe*, 376 U.S. 189 (1964).

A district court decision holding unconstitutional a Louisiana statute requiring segregation of races in public facilities is affirmed.

540. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

An Illinois unfair competition law cannot be applied to bar or penalize the copying of a product that does not qualify for a federal patent, because this use of the state law conflicts with the exclusive power of the Federal Government to grant patents only to true inventions and then only for a limited time.

541. *Baggett v. Bullitt*, 377 U.S. 360 (1964).

Washington statutes requiring state employees to swear that they are not subversive persons and requiring teachers to swear to promote by precept and example respect for flag and institutions of United States and Washington, reverence for law and order, and undivided allegiance to Federal Government, are void for vagueness.

Justices concurring: White, Black, Douglas, Brennan, Stewart, Goldberg, Warren, C.J.
Justices dissenting: Clark, Harlan

542. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

A New York law regulating sale of alcoholic beverages could not constitutionally be applied to a dealer who sold bottled wines and liquors to departing international airline travelers at JFK airport in New York.

Justices concurring: Stewart, Douglas, Clark, White, Warren, C.J.
Justices dissenting: Black, Goldberg

543. *Accord: Department of Alcoholic Beverage Control v. Ammex Warehouse Co.*, 378 U.S. 124 (1964). Lower court voiding of California law affirmed on authority of Hostetter. Same division of Justices as Hostetter.

544. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

A Kentucky statute providing for a tax of ten cents per gallon on the importation of whiskey into the state, which was collected while the whiskey was in unbroken packages in an importer's possession, was unconstitutionally applied to the importer of Scotch whiskey from abroad under Art. I, § 10, cl. 2.

Justices concurring: Stewart, Douglas, Clark, White, Warren, C.J.
Justices dissenting: Black, Goldberg

545. *Chamberlin v. Dade County Bd. of Public Instruction*, 377 U.S. 402 (1964).

A Florida statute providing for prayer and devotional reading in public schools is unconstitutional.

546. *Reynolds v. Sims*, 377 U.S. 533 (1964).

Alabama constitutional and statutory provisions that do not apportion seats in both houses of legislature on a population basis violated the Equal Protection Clause.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, Goldberg, White
Justices concurring specially: Clark, Stewart
Justice dissenting: Harlan

547. *Accord: WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964).

New York constitutional and statutory provisions that do not apportion seats in both houses of the legislature on the basis of population is unconstitutional.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, Goldberg, White
Justice concurring specially: Clark
Justices dissenting: Harlan, Stewart

548. *Accord: Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964). Same division of Justices as in Lomenzo.

549. *Accord: Davis v. Mann*, 377 U.S. 678 (1964). Virginia. Same division of Justices as in Lomenzo.

550. *Accord: Roman v. Sincock*, 377 U.S. 695 (1964). Delaware. Same division of Justices as in Lomenzo, except Justice Stewart concurring specially.

551. *Accord: Lucas v. Forty-Fourth General Assembly of Colorado,*377 U.S. 713 (1964).

An apportionment formula for state legislature written into state constitution is invalid under Equal Protection Clause even though the electorate approved it in a referendum.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, Goldberg, White
Justices dissenting: Clark, Harlan, Stewart

552. *Accord: Meyers v. Thigpen*, 378 U.S. 554 (1964). Washington Legislature. Same division of Justices as in Lomenzo, except Justice Stewart favored limited remand.

553. *Accord: Williams v. Moss*, 378 U.S. 558 (1964). Oklahoma Legislature. Same division of Justices as in Reynolds v. Sims.

554. *Accord: Pinney v. Butterworth*, 378 U.S. 564 (1964). Connecticut Legislature. Same division of Justices as in Reynolds v. Sims.

555. *Accord: Hill v. Davis*, 378 U.S. 565 (1964). Iowa Legislature. Same division of Justices as in Reynolds v. Sims.

556. *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964).

A statute authorizing issuance of *ex parte* a warrant for seizure of allegedly obscene materials prior to a hearing on the issue of obscenity is invalid under First and Fourteenth Amendments.

Justices concurring: Brennan, White, Goldberg, Warren, C.J.
Justices concurring specially: Black, Douglas; Stewart
Justices dissenting: Harlan, Clark

557. *Tancil v. Woolls*, 379 U.S. 19 (1964).

District court decisions holding unconstitutional Virginia statutes requiring notation of race in divorce decrees and separation by race of names on registration, poll tax, and residence certificate lists, and on assessment rolls are affirmed.

558. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

Louisiana's Criminal Defamation Statute is unconstitutional as applied to criticism of official conduct of public officials because it incorporates standards of malice and truthfulness at variance with *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

559. *McLaughlin v. Florida*, 379 U.S. 184 (1964).

A criminal statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room in the nighttime violates the Equal Protection Clause.

560. *Stanford v. Texas*, 379 U.S. 476 (1965).

A statute providing for the suppression of the Communist Party and authorizing the issuance of search warrants for subversive books and other materials is constitutionally defective because it does not require a description with particularity of the things to be seized.

561. *Cox v. Louisiana*, 379 U.S. 536 (1965).

A Louisiana breach of the peace statute is unconstitutionally vague.

562. *Freedman v. Maryland*, 380 U.S. 51 (1965).

A Maryland censorship statute requiring prior submission of films for review is invalid because of the absence of procedural safeguards eliminating dangers of censorship.

563. *Carrington v. Rash*, 380 U.S. 89 (1965).

A Texas constitutional provision prohibiting any member of Armed Forces who moves into the state from ever voting in Texas while a member of the Armed Forces violates the Equal Protection Clause.

Justices concurring: Stewart, Black, Douglas, Clark, Brennan, White, Goldberg
Justice dissenting: Harlan

564. *Louisiana v. United States*, 380 U.S. 145 (1965).

Constitutional and statutory provisions requiring prospective voters to satisfy registrars of their ability to understand and give reasonable interpretation of any section of United States or Louisiana Constitutions violate Fourteenth and Fifteenth Amendments.

565. *Reserve Life Ins. Co. v. Bowers*, 380 U.S. 258 (1965).

An Ohio statute imposing a personal property tax upon furniture and fixtures used by foreign insurance company in doing business in Ohio but not imposing a similar tax upon furniture and fixtures used by domestic insurance companies violates the Equal Protection Clause.

566. *American Oil Co. v. Neill*, 380 U.S. 451 (1965).

An Idaho tax statute applied to levy an excise tax on licensed Idaho motor fuel dealer's sale and transfer of gasoline in Utah for importation into Idaho by purchaser violated the Due Process Clause of Fourteenth Amendment.

Justices concurring: Warren, C.J., Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg
Justices dissenting: Black

567. *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

The Louisiana Subversive Activities and Communist Control Law is unconstitutional because of overbreadth of its coverage in violation of the First Amendment, and because of its lack of procedural due process.

Justices concurring: Brennan, Douglas, White, Goldberg, Warren, C.J.
Justices dissenting: Harlan, Clark

568. *Harman v. Forssenius*, 380 U.S. 528 (1965).

A Virginia statute requiring voters in federal election who do not qualify by paying poll tax to file a certificate of residence six months in advance of election is contrary to Twenty-fourth Amendment, which absolutely abolished payment of a poll tax as a qualification for voting in federal elections.

569. *Jordan v. Silver*, 381 U.S. 415 (1965).

District court decision holding unconstitutional California constitutional provisions on apportionment of state senate is affirmed.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, White, Goldberg
Justices dissenting: Harlan, Clark, Stewart

570. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

A Connecticut statute making it a crime for any person to use any drug or article to prevent conception is an unconstitutional invasion of privacy of married couples.

Justices concurring: Douglas, Clark
Justices concurring specially: Goldberg, Brennan, Warren, C.J., Harlan, White
Justices dissenting: Black, Stewart

571. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

A Pennsylvania statute permitting jurors to determine whether an acquitted defendant should pay the costs of the trial was void under the Due Process Clause of the Fourteenth Amendment because of vagueness and the absence of any standard that would prevent arbitrary imposition of costs.

572. *Baxstrom v. Herold*, 383 U.S. 107 (1966).

New York's statutory procedure for civil commitment of persons at the expiration of a prison sentence without the jury review available to all others civilly committed in New York and for commitment to an institution maintained by the Department of Correction beyond the expiration of their terms without a judicial determination of dangerous mental illness such as that afforded to all others violates the Equal Protection Clause.

573. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

Virginia constitutional provisions making payment of poll taxes a qualification of eligibility to vote violate the Equal Protection Clause.

Justices concurring: Douglas, Clark, Brennan, White, Fortas, Warren, C.J.
Justices dissenting: Black, Harlan, Stewart

574. *Accord: Texas v. United States*, 384 U.S. 155 (1966).

A Texas poll tax is unconstitutional.

575. *Elfbrandt v. Russell*, 384 U.S. 11 (1966).

An Arizona loyalty oath is unconstitutionally overbroad and inclusive.

Justices concurring: Douglas, Black, Brennan, Fortas, Warren, C.J.
Justices dissenting: White, Clark, Harlan, Stewart

576. *Mills v. Alabama*, 384 U.S. 214 (1966).

An Alabama statute making it a criminal offense to electioneer or solicit votes on election day as applied to a newspaper editor who published an editorial on election day urging people to vote a certain way on a referendum issue violated First and Fourteenth Amendments.

577. *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

A New Jersey statute requiring an unsuccessful appellant to repay the cost of a transcript used in preparing his appeal out of his institutional earning when he is jailed but that does not apply to unsuccessful appellants given suspended sentences, placed on probation, or fined violates the Equal Protection Clause.

Justices concurring: Stewart, Black, Douglas, Brennan, Clark, White, Fortas, Warren, C.J.
Justice dissenting: Harlan

578. *Alton v. Tawes*, 384 U.S. 315 (1966).

A district court decision holding unconstitutional Maryland congressional districting is affirmed.

579. *Carr v. City of Altus*, 385 U.S. 35 (1966).

A district court decision holding unconstitutional under the Commerce Clause a Texas statute forbidding anyone to withdraw water from any underground sources in state without authorization of legislature is affirmed.

580. *Swann v. Adams*, 385 U.S. 440 (1967).

A Florida statute apportioning legislative seats falls short of required population equality.

Justices concurring: White, Black, Douglas, Clark, Brennan, Fortas, Warren, C.J.
Justices dissenting: Harlan, Stewart

581. *Kirkpatrick v. Preisler*, 385 U.S. 450 (1967).

A district court decision holding unconstitutional Missouri's 1965 congressional districting law is summarily affirmed.

582. *Short v. Ness Produce Co.*, 385 U.S. 537 (1967).

A district court decision holding to violate the Commerce Clause an Oregon statute requiring sellers of imported meat to label it with country of origin, post notices in their establishment that it is being sold, and keep record of transactions involving it, is affirmed.

583. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

A New York statute requiring removal of teachers for "treasonable or seditious" utterances or acts is unconstitutionally vague because it apparently bans mere advocacy of abstract doctrine, and a statute that makes Communist Party membership prima facie evidence of disqualification for teaching in public schools is unconstitutionally broad.

Justices concurring: Brennan, Black, Douglas, Fortas, Warren, C.J.
Justices dissenting: Clark, Harlan, Stewart, White

584. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

The Commerce Clause forbids application of Illinois use tax statute to a seller whose only connection with customers in the state is by common carrier or by mail.

Justices concurring: Stewart, Brennan, Harlan, Clark, White, Warren, C.J.
Justices dissenting: Fortas, Black, Douglas

585. *Holding v. Blankenship*, 387 U.S. 94 (1967).

An Oklahoma obscenity statute empowering a commission to investigate and to recommend prosecutions of offending parties is unconstitutional on authority of *Bantam Books v. Sullivan,* 372 U.S. 58 (1963).

586. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

A California constitutional provision adopted on referendum repealing "open housing" law and prohibiting state abridgement of realty owner's right to sell and lease, or to refuse to sell and lease, as he pleases violates the Equal Protection Clause.

Justices concurring: White, Douglas, Brennan, Fortas, Warren, C.J.
Justices dissenting: Harlan, Black, Clark, Stewart

587. *Berger v. New York*, 388 U.S. 41 (1967).

A New York eavesdrop statute that does not require particularity with respect to the crime suspected and conversations sought, sufficiently limit period of order's effectiveness, terminate order once desired conversation is overheard, or require notice or showing of exigent circumstances to justify dispensing with notice, violates Fourth and Fourteenth Amendments.

Justices concurring: Clark, Douglas, Brennan, Fortas, Warren, C.J.
Justices dissenting: Black, Harlan, White

588. *Loving v. Virginia*, 388 U.S. 1 (1967).

A Virginia statute prohibiting interracial marriage violates Equal Protection Clause.

589. *Washington v. Texas*, 388 U.S. 14 (1967).

A Texas statute prohibiting persons charged as co-participants in the same crime from testifying for one another violated the Sixth and Fourteenth Amendments.

590. *Whitehill v. Elkins*, 389 U.S. 54 (1967).

A Maryland loyalty oath is unconstitutionally vague when read with surrounding authorization and supplementary statutes that infringe on rights of association.

Justices concurring: Douglas, Black, Brennan, Fortas, Marshall, Warren, C.J.
Justices dissenting: Harlan, Stewart, White

591. *Lucas v. Rhodes*, 389 U.S. 212 (1967).

Ohio's congressional districting statute violates principles of population equality established in *Wesberry v. Sanders,* 376 U.S. 1 (1964).

Justices concurring: Warren, C.J., Black, Douglas, Brennan, White, Fortas
Justices dissenting: Harlan, Stewart

592. *Rockefeller v. Wells*, 389 U.S. 421 (1967).

A district court decision holding unconstitutional New York's congressional districting statute is summarily affirmed.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, Stewart, White, Fortas, Marshall
Justice dissenting: Harlan

593. *Zschernig v. Miller*, 389 U.S. 429 (1968).

An Oregon statute that barred an alien from taking personal property intestate unless American citizens had reciprocal rights with alien's country, unless American citizens had right to receive payment within United States from estates of decedents dying in that foreign country, and unless Oregon courts were presented proof that alien heir would receive benefit, use, and control of inheritance without confiscation, was void as an intrusion by state into field of foreign affairs reserved to Federal Government.

Justices concurring: Douglas, Black, Brennan, Stewart, Fortas, Warren, C.J.
Justices concurring specially: Harlan
Justice dissenting: White

594. *Dinis v. Volpe*, 389 U.S. 570 (1968).

A district court decision holding Massachusetts congressional districting statute unconstitutional is summarily affirmed.

595. *Louisiana Financial Assistance Comm'n v. Poindexter*, 389 U.S. 571 (1968).

A district court decision holding unconstitutional a tuition grant statute authorizing payments to children attending private schools as part of an anti-desegregation program is summarily affirmed.

596. *Kirk v. Gong*, 389 U.S. 574 (1968).

A district court decision holding unconstitutional a Florida congressional districting statute is affirmed.

597. *James v. Gilmore*, 389 U.S. 572 (1968).

A district court decision holding unconstitutional a Texas loyalty oath statute is summarily affirmed.

598. *Lee v. Washington*, 390 U.S. 333 (1968).

District court decisions holding that Alabama statutes requiring racial segregation in prisons and jails violate the Equal Protection Clause is summarily affirmed.

599. *Scafati v. Greenfield*, 390 U.S. 713 (1968).

District court decision holding unconstitutional as applied to a prisoner who had been sentenced prior to, but paroled after, enactment of a Massachusetts statute that forbade a prisoner from earning good conduct deductions for the first six months after his reincarceration following violation of parole is summarily affirmed.

600. *Levy v. Louisiana*, 391 U.S. 68 (1968).

Louisiana's wrongful death statute creating a right of action in a surviving child or children as interpreted to mean only legitimate child or children denies illegitimate children equal protection of the laws.

Justices concurring: Douglas, Brennan, White, Fortas, Marshall, Warren, C.J.
Justices dissenting: Harlan, Black, Stewart

601. *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

A Louisiana statute barring wrongful death recovery by parents of illegitimate child but allowing recovery by parent of legitimate child violates equal protection.

602. *Rabeck v. New York*, 391 U.S. 462 (1968).

A provision of New York's obscenity law is unconstitutionally vague.

Justices concurring: Warren, C.J., Black, Douglas, Brennan, Stewart, White, Fortas, Marshall
Justices dissenting: Harlan

603. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

An Illinois statute, itself no longer in code but held to be incorporated in the general juror challenge statute, that authorizes automatic challenge for cause of any potential juror scrupled against capital punishment in capital cases, is invalid.

Justices concurring: Stewart, Brennan, Fortas, Marshall, Warren, C.J.
Justices concurring specially: Douglas
Justices dissenting: Black, Harlan, White

604. *Williams v. Rhodes*, 393 U.S. 23 (1968).

Series of Ohio election statutes that imposed insurmountable obstacles to the success of independent parties and candidates in obtaining a place on the ballot violate the Equal Protection Clause.

Justices concurring: Black, Douglas, Brennan, Fortas, Marshall
Justices concurring specially: Harlan
Justices dissenting: Warren, C.J., Stewart, White

605. *Louisiana Educ. Comm'n for Needy Children v. Poindexter*, 393 U.S. 17 (1968).

A district court decision holding unconstitutional a Louisiana tuition grant statute as part of an anti-desegregation program is summarily affirmed.

606. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

An Arkansas statute prohibiting the teaching of evolution in public schools of the state violates the First and Fourteenth Amendments.

607. *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968).

A New Jersey statute providing exemption from property taxes only of those nonprofit corporations chartered in New Jersey denies equal protection to a Pennsylvania corporation qualified to do business in New Jersey.

Justices concurring: Warren, C.J., Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall
Justice dissenting: Black

608. *South Carolina State Bd. of Educ. v. Brown*, 393 U.S. 222 (1968).

A district court decision holding unconstitutional a South Carolina statute providing for scholarship grants for children attending private schools as part of antidesegregation program is summarily affirmed.

609. *Kirkpatrick v. Preisler*, 394 U.S. 526 (1968).

A Missouri congressional districting statute is unconstitutional because the population deviations from precise mathematical equality among districts were not unavoidable.

Justices concurring: Brennan, Black, Douglas, Marshall, Warren, C.J.
Justice concurring specially: Fortas
Justices dissenting: Harlan, Stewart, White

610. *Accord: Wells v. Rockefeller*, 394 U.S. 542 (1969),voiding New York's congressional districting plan.

611. *Stanley v. Georgia*, 394 U.S. 557 (1969).

A Georgia statute construed to prohibit possession in the home of obscene materials for one's own private and personal use violates First and Fourteenth Amendments.

612. *Street v. New York*, 394 U.S. 576 (1969).

A New York statute insofar as it punishes verbal abuse of the flag violates the First and Fourteenth Amendments.

Five-to-four division of Court not on this issue.

613. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

A Connecticut statute imposing a one-year residency requirement on eligibility for welfare assistance infringes the right to travel and violates the Equal Protection Clause.

Justices concurring: Brennan, Douglas, Fortas, Stewart, White, Marshall
Justices dissenting: Warren, C.J., Black, Harlan

614. *Accord: Reynolds v. Smith*, 394 U.S. 618 (1969).

Pennsylvania's one-year residence requirement for eligibility for welfare assistance infringes the right to travel and violates equal protection.

615. *Moore v. Ogilvie*, 394 U.S. 814 (1969).

An Illinois statute requiring independent candidates to present 25,000 signatures, including 200 signatures from each of at least 50 of the state's 200 counties, violates the Equal Protection Clause.

Justices concurring: Douglas, Black, Brennan, White, Fortas, Marshall, Warren, C.J.
Justices dissenting: Stewart, Harlan

616. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

A Wisconsin prejudgment garnishment statute that authorizes freezing a defendant's wages between garnishment and culmination of suit without affording the defendant a hearing violates the Due Process Clause.

Justices concurring: Douglas, Brennan, Stewart, White, Marshall, Warren, C.J.
Justice concurring specially: Harlan
Justice dissenting: Black

617. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Ohio's Criminal Syndicalism Statute, which proscribes advocacy of use of force in absence of requirement that such advocacy be directed to inciting or producing imminent lawless action and be likely to incite or produce such action, violates the First and Fourteenth Amendments.

618. *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969).

A New York statute limiting eligibility to vote in school district elections to persons who own taxable real property in district or who are parents of children enrolled in the local public schools violates the Equal Protection Clause.

Justices concurring: Warren, C.J., Douglas, Brennan, White, Marshall
Justices dissenting: Stewart, Black, Harlan

619. *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

A Louisiana statute limiting eligibility to vote on issuance of municipal utility revenue bonds to property owners violates the Equal Protection Clause.

Justices concurring: Warren, C.J., Douglas, Brennan, White, Marshall
Justices concurring specially: Black, Stewart, Harlan

620. *Turner v. Fouche*, 396 U.S. 346 (1970).

A Georgia statute limiting eligibility for school board membership to property holders violates the Equal Protection Clause.

621. *Wyman v. Bowens*, 397 U.S. 49 (1970).

A district court decision holding unconstitutional a New York statute denying welfare assistance to persons coming into state with the intent to obtain such assistance is summarily affirmed.

622. *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970).

A Missouri statutory scheme for election of trustees of junior college district that allocated trustees to lesser populated districts rather than those of greater populations violated the Equal Protection Clause.

Justices concurring: Black, Douglas, Brennan, White, Marshall
Justices dissenting: Burger, C.J., Harlan, Stewart

623. *In re Winship*, 397 U.S. 358 (1970).

A New York statute providing that proof of acts establishing delinquency of a minor must be by a preponderance of the evidence violates Due Process Clause, which requires proof beyond a reasonable doubt.

Justices concurring: Brennan, Douglas, Harlan, White, Marshall
Justices dissenting: Burger, C.J., Black, Stewart

624. *Baldwin v. New York*, 399 U.S. 66 (1970).

A New York statute providing for trial without jury in New York City of misdemeanors punishable upon conviction with sentences of up to one year violates Sixth and Fourteenth Amendments, which require jury trials when possible sentence is six months or more.

Justices concurring: White, Brennan, Marshall
Justices concurring specially: Black, Douglas
Justices dissenting: Burger, C.J., Harlan, Stewart

625. *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970).

Arizona constitutional and statutory provisions that limit eligibility to vote in referendum on issuance of general obligation bonds to property owners violate the Equal Protection Clause.

Justices concurring: White, Black, Douglas, Brennan, Marshall
Justices dissenting: Stewart, Harlan, Burger, C.J.

626. *Williams v. Illinois*, 399 U.S. 235 (1970).

An Illinois statute providing for extension of jail sentences to work off unpaid fine at $5 a day violates the Equal Protection Clause as applied to an indigent convict unable to pay his fine.

627. *Rockefeller v. Socialist Workers Party*, 400 U.S. 806 (1970).

A district court decision holding unconstitutional New York statutory provisions for geographic dispersion of signatures on candidates' petitions and discriminating against independent candidates' ability to

obtain signatures in ways absent from major party candidates is summarily affirmed.

628. *Parish School Bd. v. Stewart*, 400 U.S. 884 (1970).

A district court decision holding unconstitutional Louisiana constitutional and statutory provisions limiting eligibility to vote in general obligation bond authorization elections is summarily affirmed.

629. *Bower v. Vaughan*, 400 U.S. 884 (1970).

A district court decision holding unconstitutional Arizona's one-year residency requirement for treatment in state hospital is summarily affirmed.

630. *Rafferty v. McKay*, 400 U.S. 954 (1970).

A district court decision holding unconstitutional a California loyalty oath similar to that condemned in *Baggett v. Bullitt,* 377 U.S. 360 (1964), is summarily affirmed.

631. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

A Wisconsin statute providing for "posting" of "excessive" drinkers to bar them from taverns and similar places denies procedural due process by not requiring notice and opportunity to be heard.

632. *Groppi v. Wisconsin*, 400 U.S. 505 (1971).

A Wisconsin statute that categorically precludes a change of venue for trial of misdemeanor cases violates Sixth and Fourteenth Amendments.

Justices concurring: Stewart, Douglas, Harlan, Brennan, White, Marshall
Justices concurring specially: Blackmun, Burger, C.J.
Justice dissenting: Black

633. *Boddie v. Connecticut*, 401 U.S. 371 (1971).

Connecticut's statutory imposition of fees as a prerequisite to obtain judicial dissolution of marriage violates due process as applied to persons unable to pay the fees.

Justices concurring: Harlan, Stewart, White, Marshall, Blackmun
Justices concurring specially: Douglas, Brennan
Justice dissenting: Black

634. *Tate v. Short*, 401 U.S. 395 (1971).

A Texas statute (and ordinance of City of Houston) that provide for imprisonment of persons unable to pay a fine for period calculated at $5 a day violate the Equal Protection Clause.

635. *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

An anti-busing law that flatly forbids assignment of any student on account of race and prohibits busing for such purpose is unconstitutional.

636. *Bell v. Burson*, 402 U.S. 535 (1971).

A Georgia statute providing for automatic suspension of driver's license upon involvement in auto accident unless security for amount of damages is posted violates due process in not first affording driver a hearing to establish a reasonable possibility that judgment may be rendered against him as result of accident.

637. *Nyquist v. Lee*, 402 U.S. 935 (1971).

A district court decision holding unconstitutional New York's anti-busing law is summarily affirmed.

638. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

Legislative apportionment and districting statute of Indiana, though its multimember features are not unconstitutional, provides for too much population inequality and is void.

Justices concurring: White, Black, Douglas, Brennan, Marshall, Blackmun, Burger, C.J.
Justices dissenting: Harlan, Stewart

639. *Connell v. Higginbotham*, 403 U.S. 207 (1971).

A Florida loyalty oath provision that requires a public employee to swear he does not believe in the violent overthrow of the government or be dismissed violates due process by not providing for an inquiry into his reasons for refusing to take the oath.

Justices concurring: Burger, C.J., Black, Harlan, White, Blackmun
Justices concurring specially: Marshall, Douglas, Brennan
Justice dissenting: Stewart

640. *Graham v. Richardson*, 403 U.S. 365 (1971).

An Arizona statute that denies welfare assistance to aliens who have not been in the United States for 15 years violates equal protection and intrudes into the Federal Government's exclusive powers over admission of aliens.

641. *Sailer v. Leger*, 403 U.S. 365 (1971).

A Pennsylvania statute that limits welfare assistance to United States citizens violates equal protection and intrudes into the Federal Government's exclusive powers over admission of aliens.

642. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

A Pennsylvania statute providing for reimbursement of sectarian schools for expenses of providing certain secular educational services violates the Establishment Clause of the First Amendment as applied to the states through the Fourteenth.

Justices concurring: Burger, C.J., Harlan, Stewart, Blackmun
Justices concurring specially: Black, Douglas, Brennan, Marshall
Justice dissenting: White

643. *Earley v. DiCenso*, 403 U.S. 602 (1971).

A Rhode Island statute providing for salary supplements to be paid to teachers in sectarian schools violates the Establishment Clause.

644. *Accord: Sanders v. Johnson*, 403 U.S. 955 (1971).

A district court decision holding unconstitutional Connecticut Nonpublic School Secular Education Act is affirmed.

645. *Pease v. Hansen*, 404 U.S. 70 (1971).

A Montana durational residency requirement as condition on eligibility to state-financed public assistance is unconstitutional under *Shapiro v. Thompson,* 394 U.S. 618 (1969).

646. *Reed v. Reed*, 404 U.S. 71 (1971).

An Idaho statute giving preference to males over females for appointment as administrator of a decedent's estate violates the Equal Protection Clause.

647. *Dunn v. Rivera*, 404 U.S. 1054 (1972).

A district court decision holding unconstitutional Connecticut one-year residency requirement for eligibility to welfare assistance is summarily affirmed.

648. *Wyman v. Lopez*, 404 U.S. 1055 (1972).

A district court decision holding unconstitutional New York one-year residency requirement for eligibility to welfare assistance is summarily affirmed.

649. *Lindsey v. Normet*, 405 U.S. 56 (1972).

An Oregon statute requiring tenants who wish to appeal housing eviction order to file bond in twice the amount of rent expected to accrue during pendency of appeal violates the Equal Protection Clause.

650. *Bullock v. Carter*, 405 U.S. 134 (1972).

Texas' filing fee system, which imposes on candidates the costs of the primary election operation and affords no alternative opportunity

for candidates unable to pay the fees to obtain access to the ballot, violates the Equal Protection Clause.

651. *Dunn v. Blumstein*, 405 U.S. 330 (1972).

Tennessee's one-year residency requirement as a condition of registration to vote burdens right to travel and violates the Equal Protection Clause.

Justices concurring: Marshall, Douglas, Brennan, Stewart, White
Justices concurring specially: Blackmun
Justice dissenting: Burger, C.J.

652. *Caniffe v. Burg*, 405 U.S. 1034 (1972).

A district court decision invalidating a Massachusetts statute that imposes as a condition for registering to vote an additional 6-month state residency requirement on persons who have already resided within the town or district for six months as violating the Equal Protection Clause is summarily affirmed.

653. *Davis v. Kohn*, 405 U.S. 1034 (1972).

A district court decision invalidating, as impermissibly burdening the right to vote and the right to travel, a Vermont one-year residency requirement for voting, is summarily affirmed.

654. *Cody v. Andrews*, 405 U.S. 1034 (1972).

A district court decision invalidating on equal protection grounds a North Carolina one-year residency requirement for voting is summarily affirmed.

655. *Donovan v. Keppel*, 405 U.S. 1034 (1972).

A district court decision invalidating on equal protection grounds a Minnesota six-month residency requirement for voting is summarily affirmed.

656. *Whitcomb v. Affeldt*, 405 U.S. 1034 (1972).

A district court decision invalidating as burdening the right to vote and violating equal protection an Indiana six-month residency requirement for voting is summarily affirmed.

657. *Amos v. Hadnott*, 405 U.S. 1035 (1972).

A district court decision invalidating on equal protection grounds Alabama's six-month county residency requirement and three-month precinct residency requirement for voting is summarily affirmed.

658. *Virginia State Bd. of Elections v. Bufford*, 405 U.S. 1035 (1972).

A district court decision holding that Virginia's one-year residency requirement for voting violates equal protection is summarily affirmed.

659. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

A Massachusetts statute making it a crime to dispense any contraceptive article to an unmarried person, except to prevent disease, is unconstitutional.

Justices concurring: Brennan, Douglas, Stewart, Marshall
Justices concurring specially: White, Blackmun
Justice dissenting: Burger, C.J.

660. *Gooding v. Wilson*, 405 U.S. 518 (1972).

A Georgia statute making it a crime to use language of or to another tending to cause a breach of the peace, which is not limited to "fighting words," is unconstitutionally vague and overbroad.

Justices concurring: Brennan, Douglas, Stewart, White, Marshall
Justices dissenting: Blackmun, Burger, C.J.

661. *Stanley v. Illinois*, 405 U.S. 645 (1972).

An Illinois statute that presumes without a hearing the unfitness of the father of illegitimate children to have custody upon death or disqualification of the mother denies him due process and equal protection.

Justices concurring: White, Douglas, Brennan, Stewart, Marshall
Justices dissenting: Burger, C.J., Blackmun

662. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

A Louisiana workmen's compensation statute, which relegates unacknowledged illegitimate children to a status inferior to legitimate and acknowledged illegitimate children, violates the Equal Protection Clause.

Justices concurring: Powell, Douglas, Brennan, Stewart, White, Marshall, Burger, C.J.
Justices concurring specially: Blackmun
Justice dissenting: Rehnquist

663. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Wisconsin's compulsory school attendance law, insofar as it does not exempt Amish children from coverage following completion of the eighth grade, violates the Free Exercise Clause of the First Amendment, applicable via the Fourteenth Amendment.

Justices concurring: Burger, C.J., Brennan, Stewart, White, Marshall, Blackmun, (in part) Douglas
Justices dissenting (in part): Douglas

664. *Brooks v. Tennessee*, 406 U.S. 605 (1972).

A Tennessee statute that requires a criminal defendant if he is going to testify to do so before any other witness for him violates the Fifth, Sixth, and Fourteenth Amendments.

Justices concurring: Brennan, Douglas, White, Marshall, Powell
Justice concurring specially: Stewart
Justices dissenting: Burger, C.J., Blackmun, Rehnquist

665. *Jackson v. Indiana*, 406 U.S. 715 (1972).

Indiana's pretrial commitment procedure for allegedly incompetent defendants, which provides more lenient standards for commitment than the procedure for those persons not charged with any offense, and more stringent standards for release, violates both due process and equal protection.

666. *James v. Strange*, 407 U.S. 128 (1972).

A Kansas statute enabling the state to recover in subsequent civil proceedings legal defense fees for indigent defendants violates the Equal Protection Clause because it dispenses with the protective exemptions that state law erected for other civil judgment debtors.

667. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Florida's replevin statutes, which permit installment sellers or other persons alleging entitlement to property to cause the seizure of the property without any notice or opportunity to be heard on the issues, violate the Due Process Clause.

Justices concurring: Stewart, Douglas, Brennan, Marshall
Justices dissenting: White, Blackmun, Burger, C.J.

668. *Parham v. Cortese*, 407 U.S. 67 (1972). *Pennsylvania's replevin statute, which permits installment sellers to cause the seizure of property without affording notice or opportunity to contest to the persons possessing the property, violates the Due Process Clause.* Same division of Justices as Fuentes v. Shevin.

669. *State Dep't of Health & Rehab. Servs. v. Zarate,*407 U.S. 918 (1972).

A district court decision holding unconstitutional under the Equal Protection Clause Florida's denial of welfare assistance to noncitizens is summarily affirmed.

670. *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972).

A North Carolina statute that authorized the creation of a new school district in a city that was part of a larger county school system is void because its effect would be to impede the dismantling of the

dual school system by affording a refuge to white students fleeing desegregation.

671. *Furman v. Georgia*, 408 U.S. 238 (1972).

Statutory imposition of capital punishment upon criminal conviction either at discretion of jury or of the trial judge may not be carried out. Georgia's statute in the view of two Justices is unconstitutional because the death penalty is cruel and unusual punishment per se, in violation of the Eighth and Fourteenth Amendments, while in the view of three Justices the statute is unconstitutional as applied because of the discriminatory or arbitrary manner in which death is imposed upon convicted defendants in violation of the Eighth and Fourteenth Amendments.

Justices concurring specially: Douglas, Brennan, Stewart, White, Marshall
Justices dissenting: Burger, C.J., Blackmun, Powell, Rehnquist

672. *Texas Bd. of Barber Examiners v. Bolton*, 409 U.S. 807 (1972).

A district court decision holding invalid under the Equal Protection Clause Texas statutes prohibiting licensed cosmetologists from working with male customers and prohibiting licensed barbers from working with female customers is summarily affirmed.

673. *Essex v. Wolman*, 409 U.S. 808 (1972).

A district court decision holding void under the Establishment Clause of the First Amendment an Ohio statute providing a reimbursement grant to parents of children attending nonpublic schools is summarily affirmed.

674. *Robinson v. Hanrahan*, 409 U.S. 38 (1972).

An Illinois statute providing for mailing of vehicle forfeiture proceeding notification to the home address of a vehicle owner is unconstitutional as applied to person known to the state to be incarcerated and not at home.

675. *Amos v. Sims*, 409 U.S. 942 (1972).

A district court decision holding unconstitutional an Alabama legislative apportionment law is summarily affirmed.

676. *Fugate v. Potomac Electric Power Co.*, 409 U.S. 942 (1972).

A district court decision holding invalid under the Equal Protection Clause a Virginia statute allowing reimbursement to utilities required by interstate highway construction to relocate their lines in cities and towns but denying reimbursement to utilities required by interstate highway construction to relocate lines in counties is summarily affirmed.

677. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

An Ohio statute authorizing trial for certain ordinance violations and traffic offenses before mayor responsible for village finances when the fines, forfeitures, costs, and fees imposed in the mayor's courts provided a substantial portion of village funds denied defendants opportunity for trial before an impartial and disinterested tribunal.

Justices concurring: Brennan, Douglas, Stewart, Marshall, Blackmun, Powell, Burger, C.J.
Justices dissenting: White, Rehnquist

678. *Evco v. Jones*, 409 U.S. 91 (1972).

New Mexico's gross receipts tax is unconstitutionally applied to proceeds from transactions whereby material is produced in state under contract for delivery to out-of-state clients because it impermissibly burdens interstate commerce.

679. *Georges v. McClellan*, 409 U.S. 1120 (1973).

A district court decision holding unconstitutional under the Due Process Clause a Rhode Island prejudgment attachment statute is summarily affirmed.

680. *Gomez v. Perez*, 409 U.S. 535 (1973).

A Texas law denying right of enforced paternal support to illegitimate children while granting it to legitimate children violates the Equal Protection Clause.

681. *Roe v. Wade*, 410 U.S. 113 (1973).

A Texas statute making it a crime to procure or to attempt to procure an abortion except on medical advice to save the life of the mother infringes upon a woman's right of privacy protected by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, Burger, C.J.
Justices dissenting: White, Rehnquist

682. *Doe v. Bolton*, 410 U.S. 179 (1973).

A Georgia statute permitting abortions under prescribed circumstances nevertheless invalidly imposed a number of procedural limitations: that the abortion be performed in an accredited hospital, be approved by a staff committee and two licensed physicians other than woman's own doctor, and be available only to residents.

Justices concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, Burger, C.J.
Justices dissenting: White, Rehnquist

683. *Mahan v. Howell*, 410 U.S. 315 (1973).

A portion of a Virginia apportionment statute assigning large numbers of naval personnel to actual location of station when evidence showed substantial numbers resided in surrounding areas distorted population balance of districts and was void.

684. *Whitcomb v. Communist Party of Indiana*, 410 U.S. 976 (1973).

A district court decision holding invalid under the First and Fourteenth Amendments an Indiana statute requiring political party to submit oath that party has no relationship to a foreign government as a condition of ballot access is summarily affirmed.

685. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

A New Mexico use tax may not constitutionally be applied on personal property that an Indian tribe purchased out-of-state and installed as a permanent improvement on an off-reservation ski resort owned and operated by tribe.

686. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973).

Arizona's income tax is invalidly applied to Navajo Indian residing on reservation and whose income is wholly derived from reservation sources.

687. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973).

A New Jersey statute denying assistance to families in which parents are not ceremonially married denies equal protection to children in such families.

Justices concurring: Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, Burger, C.J.
Justice dissenting: Rehnquist

688. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

A Wisconsin statute as interpreted to permit revocation of parole without a hearing denies due process of law.

689. *Parker v. Levy*, 411 U.S. 978 (1973).

A district court decision voiding as an arbitrary denial of equal protection Louisiana's constitutional provision and statute distributing a property relief fund among political subdivisions is summarily affirmed.

690. *Miller v. Gomez*, 412 U.S. 914 (1973).

A district court decision holding a denial of equal protection a New York statute denying a jury trial on the issue of dangerousness to persons being committed to hospitals for the criminally insane after a felony indictment but before trial is summarily affirmed.

691. *Vlandis v. Kline*, 412 U.S. 441 (1973).

A Connecticut statute creating an irrebuttable presumption that a student from out-of-state at the time he applied to a state college remained a nonresident for tuition purposes for his entire student career violated the Due Process Clause.

Justices concurring: Stewart, Brennan, Marshall, Blackmun, Powell
Justice concurring specially: White
Justices dissenting: Burger, C.J., Rehnquist, Douglas

692. *Wardius v. Oregon*, 412 U.S. 470 (1973).

An Oregon statute requiring a defendant to give pretrial notice of alibi defense and names of supporting witnesses but denying the defendant any reciprocal right of discovery of rebuttal evidence denies him due process of law.

693. *White v. Regester*, 412 U.S. 755 (1973).

The establishment of multimember legislative districts in certain Texas urban areas in the context of pervasive electoral discrimination against blacks and Mexican-Americans denied equal protection of laws.

694. *White v. Weiser*, 412 U.S. 783 (1973).

Texas' congressional districting law creates districts with too great a population disparity and is void under the Equal Protection Clause.

695. *Levitt v. Committee for Public Educ. & Religious Liberty*, 413 U.S. 472 (1973).

A New York statute to reimburse nonpublic schools for administrative expenses incurred in carrying out state-mandated examination and record-keeping requirements, but requiring no accounting and separating of religious and nonreligious uses, violates the Establishment Clause.

Justices concurring: Burger, C.J., Stewart, Blackmun, Powell, Rehnquist
Justices concurring specially: Douglas, Brennan, Marshall
Justice dissenting: White

696. *Sugarman v. Dougall*, 413 U.S. 634 (1973).

A New York statute providing that only United States citizens may hold permanent positions in competitive civil service violates the Equal Protection Clause.

Justices concurring: Blackmun, Douglas, Brennan, Stewart, White, Marshall, Powell, Burger, C.J.
Justice dissenting: Rehnquist

697. *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

New York education and tax laws providing grants to nonpublic schools for maintenance and repairs of facilities and providing tuition

reimbursements and income tax benefits to parents of children attending nonpublic schools violate the Establishment Clause.

Justices concurring: Powell, Douglas, Brennan, Stewart, Marshall, Blackmun
Justices concurring and dissenting: Burger, C.J., Rehnquist
Justice dissenting: White

698. *Sloan v. Lemon*, 413 U.S. 825 (1973).

A Pennsylvania statute providing for reimbursement of parents for portion of tuition expenses in sending children to nonpublic schools violates the Establishment Clause.

Justices concurring: Powell, Douglas, Brennan, Stewart, Marshall, Blackmun
Justices dissenting: White, Rehnquist, Burger, C.J.

699. *Grit v. Wolman*, 413 U.S. 901 (1973).

N Ohio statute granting tax credits to parents of private school children violates the Establishment Clause.

700. *Stevenson v. West*, 413 U.S. 902 (1973).

South Carolina's legislative apportionment statute is invalid.

701. *Nelson v. Miranda*, 413 U.S. 902 (1973).

Arizona constitutional and statutory provisions denying public employment to aliens violate the Equal Protection Clause.

702. *Texas v. Pruett*, 414 U.S. 802 (1973).

A federal court decision that a Texas statutory system that denies good time credit to convicted felons in jail pending appeal but allows good time credit to incarcerated nonappealing felons unconstitutionally burdens the right of appeal is summarily affirmed.

703. *Kusper v. Pontikes*, 414 U.S. 51 (1973).

An Illinois statute prohibiting anyone who has voted in one party's primary election from voting in another party's primary election for at least 23 months violates the First and Fourteenth Amendments.

Justices concurring: Stewart, Douglas, White, Marshall, Powell
Justice concurring specially: Burger, C.J.
Justices dissenting: Blackmun, Rehnquist

704. *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

A New York statute providing for cancellation of public contracts and disqualification of contractors from doing business with the state for refusal to waive immunity from prosecution and to testify concerning state contracts violates the Fifth Amendment privilege against self-incrimination.

705. *Danforth v. Rodgers*, 414 U.S. 1035 (1973).

A district court decision invalidating an Missouri abortion statute is summarily affirmed.

706. *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974).

An Indiana statute prescribing a loyalty oath as a qualification for access to the ballot violates the First and Fourteenth Amendments.

707. *O'Brien v. Skinner*, 414 U.S. 524 (1974).

New York election law that permits persons incarcerated outside their county of residence while awaiting trial to register and vote absentee, but denying absentee privilege to persons incarcerated in their county of residence, denies equal protection.

Justices concurring: Burger, C.J., Douglas, Brennan, Stewart, White, Marshall, Powell
Justices dissenting: Blackmun, Rehnquist

708. *Wallace v. Sims*, 415 U.S. 902 (1974).

A district court decision holding invalid Alabama's legislative apportionment statute is summarily affirmed.

709. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

An Arizona statute imposing a one-year county residency requirement for indigents' eligibility for nonemergency medical care at state expense infringes the upon right to travel and violates the Equal Protection Clause.

Justices concurring: Marshall, Brennan, Stewart, White, Powell
Justices concurring specially: Douglas, Blackmun, Burger, C.J.
Justice dissenting: Rehnquist

710. *Davis v. Alaska*, 415 U.S. 308 (1974).

An Alaska statute protecting anonymity of juvenile offenders, as applied to prohibit cross-examination of a prosecution witness for possible bias, violates the Confrontation Clause.

Justices concurring: Burger, C.J., Douglas, Brennan, Stewart, Marshall, Blackmun, Powell
Justices dissenting: White, Rehnquist

711. *Smith v. Goguen*, 415 U.S. 566 (1974).

A Massachusetts statute punishing anyone who treats the flag "contemptuously" without anchoring the proscription to specified conduct and modes is unconstitutionally vague.

Justices concurring: Powell, Douglas, Brennan, Stewart, Marshall
Justice concurring specially: White

Justices dissenting: Blackmun, Rehnquist, Burger, C.J.

712. *Lubin v. Panish*, 415 U.S. 709 (1974).

A California statute imposing a filing fee as the only means to get on the ballot denied indigents equal protection.

713. *Schwegmann Bros. Giant Super Markets v. Louisiana Milk Comm'n*, 416 U.S. 922 (1974).

A district court decision holding invalid as a burden on interstate commerce a Louisiana statute construed to permit a commission to regulate prices at which dairy products are sold outside the state to Louisiana retailers is affirmed.

714. *Indiana Real Estate Comm'n v. Satoskar*, 417 U.S. 938 (1974).

A district court decision invalidating an Indiana statute limiting real estate dealer licenses to citizens is summarily affirmed.

715. *Marburger v. Public Funds for Public Schools*, 417 U.S. (1974).

District court decisions invalidating under the Establishment Clause New Jersey laws providing reimbursement to parents of nonpublic school children for textbooks and other materials are summarily affirmed.

716. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

A Florida statute compelling newspapers to publish free replies by political candidates criticized by newspapers violates the First Amendment.

717. *Spence v. Washington*, 418 U.S. 405 (1974).

A Washington State statute prohibiting "improper use" of flag or display of the flag with any emblem superimposed on it was invalidly applied to a person who taped a peace symbol on the flag in a way so as not to damage it and who then displayed it upside down from his own property.

Justices concurring: Brennan, Stewart, Marshall, Powell
Justices concurring specially: Douglas, Blackmun
Justices dissenting: Rehnquist, White, Burger, C.J.

718. *Cahn v. Long Island Vietnam Moratorium Comm.*, 418 U.S. 906 (1974).

An appellate court decision holding invalid on its face a New York statute restricting display of the American flag, and prohibiting superimposition of symbols on a flag, is summarily affirmed.

719. *Franchise Tax Board v. United Americans*, 419 U.S. 890 (1974).

A district court decision striking down under First Amendment a California statute providing state income-tax reductions for taxpayers sending their children to nonpublic schools is summarily affirmed.

Justices concurring: Brennan, Douglas, Stewart, Marshall, Blackmun, Powell
Justices dissenting: White, Rehnquist, Burger, C.J.

720. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

Constitutional and statutory provisions that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service violates the Sixth Amendment right of defendants to be tried before juries composed of a representative cross section of the community.

Justices concurring: White, Douglas, Brennan, Stewart, Marshall, Blackmun, Powell
Justice concurring specially: Burger, C.J.
Justice dissenting: Rehnquist

721. *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975).

Georgia statutes permitting a writ of garnishment to be issued in pending suits on the conclusory affidavit of plaintiff, prescribing filing of a bond as the only method of dissolving the writ, which deprives defendant of the use of the property pending the litigation, and making no provision for an early hearing, violates Fourteenth Amendment's Due Process Clause.

Justices concurring: White, Douglas, Brennan, Stewart, Marshall
Justice concurring specially: Powell
Justices dissenting: Blackmun, Rehnquist, Burger, C.J.

722. *Goss v. Lopez*, 419 U.S. 565 (1975).

An Ohio statute authorizing suspension without a hearing of public school students for up to 10 days for misconduct denies students procedural due process in violation of the Fourteenth Amendment.

Justices concurring: White, Douglas, Brennan, Stewart, Marshall
Justices dissenting: Powell, Blackmun, Rehnquist, Burger, C.J.

723. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

A Georgia statute making it a misdemeanor to publish or broadcast the name of a rape victim may not be applied to such publishing or broadcasting when the name is part of a public record; consistent with the First Amendment, publication of such public record information is absolutely privileged.

724. *Austin v. New Hampshire*, 420 U.S. 656 (1975).

A New Hampshire commuters income tax imposed on nonresidents violates the Privileges and Immunities Clause, Art. IV. § 2, cl. 1, because the state imposed no income tax on its residents' domestic income and exempted from tax income earned by its residents outside the state, which meant that the tax fell exclusively on nonresidents

and was not offset even approximately by other taxes imposed upon residents alone.

Justices concurring: Marshall, Brennan, Stewart, White, Powell, Rehnquist, Burger, C.J.
Justice dissenting: Blackmun

725. *Stanton v. Stanton*, 421 U.S. 7 (1975).

Utah's age of majority statute applied in the context of child support requirements obligating parental support of a son to age 21 but a daughter only to age 18 is an invalid gender classification under the Equal Protection Clause of the Fourteenth Amendment.

726. *Hill v. Stone*, 421 U.S. 289 (1975).

Texas constitution and statutes and city charter limiting the right to vote in city bond issue elections to persons who have listed property for taxation in the election district in the year of the election violates the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell
Justices dissenting: Rehnquist, Stewart, Burger, C.J.

727. *Meek v. Pittenger*, 421 U.S. 349 (1975) (subsequently overruled).

Pennsylvania laws authorizing direct provision to nonpublic school children of "auxiliary services", *i.e.*, counseling, testing, speech and hearing therapy, etc., and loans to the nonpublic schools for instructional material and equipment, constitute unlawful assistance to religion in violation of the First Amendment.

Justices concurring: Stewart, Douglas, Brennan, Marshall, Blackmun, Powell
Justices dissenting: Burger, C.J., Rehnquist

728. *Bigelow v. Virginia*, 421 U.S. 809 (1975).

A Virginia statute making it a misdemeanor, by sale or circulation of any publication, to encourage or prompt the procuring of an abortion, as applied to the editor of a weekly newspaper who published an advertisement of an out-of-state abortion, violates the First Amendment.

Justices concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, Burger, C.J.
Justices dissenting: Rehnquist, White

729. *Herring v. New York*, 422 U.S. 853 (1975).

A New York statute granting the trial judge in a nonjury criminal case the power to deny counsel the opportunity to make a summation of the evidence before the rendition of judgment violates the Sixth Amendment.

Justices concurring: Stewart, Douglas, Brennan, White, Marshall, Powell

Justices dissenting: Rehnquist, Blackmun, Burger, C.J.

730. *Turner v. Department of Employment Security*, 423 U.S. 44 (1975).

A Utah statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before expected childbirth until six weeks following violates the Fourteenth Amendment's Due Process Clause.

Justices concurring: Brennan, Stewart, White, Marshall, Powell
Justices dissenting: Rehnquist, Blackmun, Burger (from summary action only), C.J.

731. *Schwartz v. Vanasco*, 423 U.S. 1041 (1976).

A district court decision invalidating as overbroad under the First Amendment New York law prohibiting attacks on candidate based on race, sex, religion, or ethnic background and prohibiting misrepresentations of candidate's qualifications, positions, or political affiliation is summarily affirmed.

732. *Tucker v. Salera*, 424 U.S. 959 (1976).

A district court decision voiding a Pennsylvania election law provision requiring that candidates of "political bodies" collect nominating petition signatures between the 10th and 7th Wednesdays prior to primary election and file them no later than the 7th Wednesday prior to primary, insofar as it disqualifies papers signed after the 7th Wednesday, is summarily affirmed.

733. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

A state statute declaring it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs violates the First Amendment right of citizens to receive such information.

Justices concurring: Blackmun, Brennan, Stewart, White, Marshall, Powell
Justice concurring specially: Burger, C.J.
Justice dissenting: Rehnquist

734. *California State Bd. of Pharmacy v. Terry*, 426 U.S. 913 (1976).

A district court decision holding to violate the First Amendment a California statute prohibiting the advertisement of the retail price of prescription drugs and prohibiting representation that price is a discount price, is summarily affirmed.

735. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

Minnesota laws imposing personal property taxes cannot under the Supremacy Clause be constitutionally applied to an Indian's mobile home located on the reservation.

736. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

Missouri's abortion law that required, *inter alia*, spousal and parental consent before an abortion could be performed in appropriate circumstances, and that proscribed the saline amniocentesis abortion procedure after the first 12 weeks of pregnancy, was an unconstitutional infringement upon the liberty of pregnant women who wished to terminate their pregnancies.

Justices concurring: Blackmun, Brennan, Stewart, Marshall, Powell
Justice dissenting: Stevens (on parental consent)
Justices dissenting: White, Rehnquist, Burger, C.J.

737. *Gerstein v. Coe*, 428 U.S. 901 (1976).

An appellate court decision invalidating the parental and spousal consent requirements of Florida's abortion statute is summarily affirmed on the basis of *Planned Parenthood v. Danforth*.

738. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

A North Carolina statute making the death penalty mandatory upon conviction of first-degree murder violates the Eighth Amendment, because determination to impose death must be individualized.

Justices concurring: Stewart, Powell, Stevens
Justices concurring specially: Brennan, Marshall
Justices dissenting: Rehnquist, Blackmun, White, Burger, C.J.

739. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

A Louisiana statute making the death penalty mandatory upon conviction of first-degree murder violates the Eighth Amendment.

740. *Williams v. Oklahoma*, 428 U.S. 907 (1976).

Oklahoma's death penalty statute violates the Eighth Amendment for the same reasons that North Carolina's and Louisiana's were held invalid in *Woodson* and *Roberts, supra*.

741. *Sendak v. Arnold*, 429 U.S. 968 (1976).

An Indiana statute requiring all abortions, including those during first trimester of pregnancy, to be performed in a hospital or licensed health facility was held unconstitutional by the district court and decision is summarily affirmed.

Justices concurring: Brennan, Stewart, Marshall, Blackmun, Powell, Stevens
Justices dissenting: White, Rehnquist, Burger, C.J.

742. *Exon v. McCarthy*, 429 U.S. 972 (1976).

A district court holding that a Nebraska statutory scheme that fails to provide a method by which independent candidates for President

may appear on ballot other than through certification by political party violates the First and Fourteenth Amendments is summarily affirmed.

743. *Craig v. Boren*, 429 U.S. 190 (1976).

Oklahoma's statutory prohibition of sale of "nonintoxicating" 3.2% beer to males under 21 and to females under 18 constituted an impermissible gender-based classification that denied equal protection to males 18–20.

Justices concurring: Brennan, White, Marshall, Blackmun, Powell, Stevens
Justice concurring specially: Stewart
Justices dissenting: Burger, C.J., Rehnquist

744. *Lefkowitz v. C.D.R. Enterprises*, 429 U.S. 1031 (1977).

A district court decision holding invalid as a discrimination against aliens a New York law granting public works employment preference to citizens who have resided in state for at least 12 months is summarily affirmed.

745. *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

A New York transfer tax on securities transactions structured so that transactions involving an out-of-state sale are taxed more heavily than most transactions involving a sale within the state discriminates against interstate commerce in violation of the Commerce Clause.

746. *Guste v. Weeks*, 429 U.S. 1056 (1977).

A district court decision voiding a Louisiana statute that effectively forbade abortions, that prohibited publicizing availability of abortion services, that required spousal or parental consent, and that forbade state employees to recommend abortions, is summarily affirmed.

747. *Bowen v. Women's Services*, 429 U.S. 1067 (1977).

A district court decision invalidating Indiana's parental consent requirement for abortion upon minor during first 12 weeks of pregnancy is summarily affirmed.

748. *Wooley v. Maynard*, 430 U.S. 705 (1977).

A New Hampshire requirement that state license plates bear the motto "Live Free or Die" and making it a misdemeanor to obscure the motto coerces dissemination of an ideological message by person on his own property and violates First Amendment.

Justices concurring: Burger, C.J., Brennan, Stewart, White, Marshall, Powell, Stevens
Justices dissenting: Rehnquist, Blackmun

749. *Trimble v. Gordon*, 430 U.S. 762 (1977).

An Illinois law allowing illegitimate children to inherit by intestate succession only from their mothers while legitimate children may take from both parents denies illegitimates the equal protection of the laws.

Justices concurring: Powell, Brennan, White, Marshall, Stevens
Justices dissenting: Burger, C.J., Stewart, Blackmun, Rehnquist

750. *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).

Retroactive repeal of a New Jersey statutory covenant under which bonds had been sold by the Port Authority, the covenant having limited the authority's ability to subsidize rail passenger transportation from revenues and reserves pledged as security for the bonds, impaired the obligations of the contract in violation of Article I, § 10, cl. 1

Justices concurring: Blackmun, Rehnquist, Stevens, Burger, C.J.
Justices dissenting: Brennan, White, Marshall

751. *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977).

Louisiana's statutory qualification of ownership of assessed property in a jurisdiction in which an airport is located as condition of appointment to the airport commission is invalid.

Justices concurring: Burger, C.J., Brennan, Stewart, White, Marshall, Blackmun, Powell, Stevens
Justice dissenting: Rehnquist

752. *Roberts v. Louisiana*, 431 U.S. 633 (1977).

A Louisiana statute imposing a mandatory death sentence upon one convicted of first-degree murder of police officer engaged in performance of his duties violates the Eighth Amendment.

Justices concurring: Stewart, Powell, Stevens
Justices concurring specially: Brennan, Marshall
Justices dissenting: Burger, C.J., Blackmun, White, Rehnquist

753. *Carey v. Population Services Int'l*, 431 U.S. 678 (1977).

A New York law making it a crime (1) for any person to sell or distribute contraceptives to minors under 16, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over, and (3) for anyone to advertise or display contraceptives, violates First and Fourteenth Amendments.

Justices concurring: Brennan, Stewart, Marshall, Blackmun
Justices concurring specially: White, Powell, Stevens
Justices dissenting: Burger, C.J., Rehnquist

754. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

A New York statute automatically removing from office and disqualifying from any office for the next five years any political party officer who refuses to testify or to waive immunity against subsequent criminal prosecution when subpoenaed before an authorized tribunal violates Fifth Amendment self-incrimination clause.

Justices concurring: Burger, C.J., Stewart, White, Blackmun, Powell
Justices concurring specially: Brennan, Marshall
Justice dissenting: Stevens

755. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

A New York statute barring from access to state financial assistance for higher education aliens who have not either applied for citizenship or affirmed the intent to apply when they qualify violates the Equal Protection Clause.

Justices concurring: Blackmun, Brennan, White, Marshall, Stevens
Justices dissenting: Burger, C.J., Powell, Stewart, Rehnquist

756. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977).

A Washington statute requiring that all apples sold or shipped into the state in closed containers be identified by no grade on containers other than an applicable federal grade or a designation that apples are ungraded violates the Commerce Clause by burdening and discriminating against interstate sale of apples.

757. *Wolman v. Walter*, 433 U.S. 229 (1977) (subsequently overruled).

Ohio's loan of instructional material and equipment to nonpublic religious schools and transportation and services for field trips for nonpublic school pupils violates the First Amendment religion clauses.

Justices concurring: Blackmun, Brennan, Stewart, Marshall, Stevens
Justices dissenting: Burger, C.J., White, Rehnquist, Powell (as to field trips only)

758. *Shaffer v. Heitner*, 433 U.S. 186 (1977).

A Delaware statute authorizing a court of the state to take jurisdiction of a lawsuit by sequestering property of a defendant that happens to be located in state violates the Due Process Clause because it permits state courts to exercise jurisdiction in the absence of sufficient contacts among defendant, litigation, and state.

759. *Jernigan v. Lendall*, 433 U.S. 901 (1977).

A district court decision invalidating an Arkansas law that requires independent candidates for office to file for office no later than first Tuesday in April is summarily affirmed.

760. *Coker v. Georgia*, 433 U.S. 584 (1977).

A Georgia statute authorizing the death penalty as punishment for rape violates the Eighth Amendment.

Justices concurring: White, Stewart, Blackmun, Stevens
Justices concurring specially: Brennan, Marshall, Powell
Justices dissenting: Burger, C.J., Rehnquist

761. *New York v. Cathedral Academy*, 434 U.S. 125 (1977).

New York's authorization for reimbursement to nonpublic schools for performance of certain state-mandated services for the remainder of school year to replace a reimbursement program declared unconstitutional also violates First Amendment religion clause.

Justices concurring: Stewart, Brennan, Marshall, Blackmun, Powell, Stevens
Justices dissenting: White, Rehnquist, Burger, C.J.

762. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

A Wisconsin statute that requires court permission to marry for any resident having minor children in his custody and who is under a court order to support and that conditions permission on a showing that the support obligation has been met and that the children are not and are not likely to become public charges, violates Equal Protection Clause.

Justices concurring: Marshall, Brennan, White, Blackmun, Burger, C.J.
Justices concurring specially: Stewart, Powell, Stevens
Justice dissenting: Rehnquist

763. *Ballew v. Georgia*, 435 U.S. 223 (1978).

A Georgia statute directing certain trials in criminal cases to be before five-person juries unconstitutionally impairs the right to trial by jury.

764. *McDaniel v. Paty*, 435 U.S. 618 (1978).

Tennessee's statutory qualification for delegates to state constitutional conventions, which incorporates a constitutional ban on ministers or priests serving as members of the legislature, violates the Free Exercise Clause.

765. *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

A Massachusetts criminal statute that banned banks and business corporations from making expenditures to influence referendum votes on any questions not affecting the property, business, or assets of the corporation violated the First Amendment.

Justices concurring: Powell, Stewart, Blackmun, Stevens, Burger, C.J.
Justices dissenting: White, Brennan, Marshall, Rehnquist

766. *Landmark Communications v. Virginia*, 435 U.S. 829 (1978).

A Virginia statute making it a misdemeanor to divulge information regarding proceedings before a state judicial review commission cannot constitutionally be applied to persons who are not parties before the commission.

767. *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

An "Alaska Hire" statute mandating that state residents be preferred to nonresidents in employment on oil and gas pipeline work violates Article IV, § 2, the Privileges and Immunities Clause.

768. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

A New Jersey law prohibiting importation into the state for disposal at landfills of solid or liquid waste violates the Commerce Clause.

Justices concurring: Stewart, Brennan, White, Marshall, Blackmun, Powell, Stevens
Justices dissenting: Rehnquist, Burger, C.J.

769. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

Minnesota's statutory imposition on existing negotiated collective bargaining agreements of different terms respecting pensions impaired the employer's rights under the Contracts Clause.

Justices concurring: Stewart, Powell, Rehnquist, Stevens, Burger, C.J.
Justices dissenting: Brennan, White, Marshall

770. *Lockett v. Ohio*, 438 U.S. 586 (1978).

An Ohio statute authorizing imposition of death penalty upon conviction of first-degree murder unconstitutionally restricted consideration of mitigating factors by the sentencing party.

Justices concurring: Burger, C.J., Stewart, Powell, Stevens
Justices concurring specially: White, Marshall, Blackmun
Justices dissenting: Rehnquist

771. *Duren v. Missouri*, 439 U.S. 357 (1979).

A Missouri statute, implementing a constitutional provision, which provides for the excusal of any women requesting exemption from jury service, operates to violate the fair cross section requirement of Sixth and Fourteenth Amendments because of the under representation of women jurors that results.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Stevens, Burger, C.J.
Justice dissenting: Rehnquist

772. *Colautti v. Franklin*, 439 U.S. 379 (1979).

Provisions of a Pennsylvania abortion law that require the physician to make a determination that the fetus is not viable and if it is viable to exercise the same care to preserve the fetus' life and health that would be required in the case of a fetus intended to be born alive are void for vagueness under the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Blackmun, Brennan, Stewart, Marshall, Powell, Stevens
Justices dissenting: White, Rehnquist, Burger, C.J.

773. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

An Illinois law requiring new political parties and independent candidates to obtain signatures of 5% of the number of persons who voted at the previous election for such office in order to get on the ballot in political subdivisions of the state, insofar as it applies to mandate the obtaining of a greater number and proportion of signatures than is required to get on the ballot for statewide office, lacks a rational basis and violates the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: Marshall, Brennan, Stewart, White, Powell
Justices concurring specially: Blackmun, Stevens, Rehnquist, Burger, C.J.

774. *Orr v. Orr*, 440 U.S. 268 (1979).

An Alabama statute that imposes alimony obligations on husbands but not on wives violates the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: Brennan, Stewart, White, Marshall, Blackmun, Stevens
Justices dissenting (on other grounds): Powell, Rehnquist, Burger, C.J.

775. *Ashcroft v. Freiman*, 440 U.S. 941 (1979).

A federal court decision invalidating under the Fourteenth Amendment's Due Process Clause a Missouri statute requiring doctor to verbally inform any woman seeking an abortion that, if a live born infant results, the woman will lose her parental rights, is summarily affirmed.

776. *Quern v. Hernandez*, 440 U.S. 951 (1979).

A district court decision voiding as denial of due process under Fourteenth Amendment an Illinois attachment law because it permits attachment prior to filing of complaint and prior to notice to debtor is summarily affirmed.

777. *Burch v. Louisiana*, 441 U.S. 130 (1979).

Statutory implementation of a Louisiana constitutional provision permitting conviction for a nonpetty offense by five out of six jurors

violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments.

778. *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

An Oklahoma statute prohibiting transportation or shipment for sale outside the state of natural minnows seined or procured from waters within the state violates the Commerce Clause.

Justices concurring: Brennan, Stewart, White, Marshall, Blackmun, Powell, Stevens
Justices dissenting: Rehnquist, Burger, C.J.

779. *Caban v. Mohammed*, 441 U.S. 380 (1979).

A New York law permitting an unwed mother but not an unwed father to block the adoption of their child by withholding consent is an impermissible gender distinction violating the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: Powell, Brennan, White, Marshall, Blackmun
Justices dissenting: Stewart, Stevens, Rehnquist, Burger, C.J.

780. *Japan Line v. County of Los Angeles*, 441 U.S. 434 (1979).

Imposition of a California *ad valorem* property tax upon cargo containers that are based, registered, and subjected to property tax in Japan results in multiple taxation of instrumentalities of foreign commerce and violates the Commerce Clause.

Justices concurring: Blackmun, Brennan, Stewart, White, Marshall, Powell, Stevens, Burger, C.J.
Justice dissenting: Rehnquist

781. *Beggans v. Public Funds for Public Schools*, 442 U.S. 907 (1979).

A federal court decision invalidating a New Jersey statute that allowed taxpayers a personal deduction from gross income for each of their dependent children attending nonpublic elementary or secondary schools as a violation of the First Amendment's religion clause is summarily affirmed.

782. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979).

A West Virginia statute that makes it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender violates the First and Fourteenth Amendments.

783. *Bellotti v. Baird*, 443 U.S. 622 (1979).

A Massachusetts law requiring parental consent for an abortion for a woman under age 18 and providing for a court order permitting

abortion for good cause if parental consent is refused violates the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Powell, Stewart, Rehnquist, Burger, C.J.
Justices concurring specially: Stevens, Brennan, Marshall, Blackmun
Justice dissenting: White

784. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980).

A Texas public nuisance statute authorizing state judges, on the basis of a showing that a theater exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene is an invalid prior restraint in violation of the First and Fourteenth Amendments.

Justices concurring: Brennan, Stewart, Marshall, Blackmun, Stevens
Justices dissenting (on other grounds): Powell, Burger, C.J.
Justices dissenting: White, Rehnquist

785. *Vitek v. Jones*, 445 U.S. 480 (1980).

A Nebraska statute that authorizes authorities to summarily transfer a prison inmate from jail to another institution if a physician finds that he suffers from a mental disease or defect and cannot be given proper treatment in jail violates the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment unless the transfer is accompanied by adequate procedural protections.

Justices concurring: White, Brennan, Marshall, Powell, Stevens
Justices dissenting (on other grounds): Stewart, Blackmun, Rehnquist, Burger, C.J.

786. *Payton v. New York*, 445 U.S. 573 (1980).

A New York statute authorizing police officers to enter a private residence without a warrant and without exigent circumstances to effectuate a felony arrest violates the Fourth and Fourteenth Amendments.

Justices concurring: Stevens, Brennan, Stewart, Marshall, Blackmun, Powell
Justices dissenting: White, Rehnquist, Burger, C.J.

787. *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980).

Missouri's workers' compensation law denying a widower benefits on his wife's work-related death unless he either is mentally or physically incapacitated or proves dependence on her earnings, but granting a widow death benefits regardless of her dependency, is gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Burger, C.J.
Justice dissenting: Rehnquist

788. *Lewis v. BT Investment Managers, Inc.,*447 U.S. 27 (1980).

A Florida statute prohibiting out-of-state banks, bank holding companies, and trust companies from owning or controlling a business within the state that sells investment advisory services violates the Commerce Clause.

789. *Carey v. Brown*, 447 U.S. 455 (1980).

An Illinois statute that prohibits picketing of residences or dwellings, but exempts peaceful picketing of such buildings that are places of employment in which there is a labor dispute, violates the Equal Protection Clause of the Fourteenth Amendment.

Justices concurring: Brennan, Stewart, White, Marshall, Powell, Stevens
Justices dissenting: Rehnquist, Blackmun, Burger, C.J.

790. *Beck v. Alabama*, 447 U.S. 625 (1980).

Alabama's capital punishment statute, which forbids giving the jury the option of convicting a defendant of a lesser included offense but requires it to convict on the capital offense or acquit, violates the Eighth and Fourteenth Amendments.

791. *Minnesota v. Planned Parenthood*, 448 U.S. 901 (1980).

A federal court decision holding that a Minnesota statute authorizing grants for pre-pregnancy family planning to hospitals and health maintenance organizations but prohibiting such grants to other nonprofit organizations if they perform abortions violates equal protection clause is summarily affirmed.

792. *Stone v. Graham*, 449 U.S. 39 (1980).

A Kentucky statute requiring a copy of Ten Commandments, purchased with private contributions, to be posted on the wall of each public classroom in the state violates the Establishment Clause of the First Amendment.

Justices concurring: Brennan, White, Marshall, Powell, Stevens
Justices dissenting: Burger, C.J., Blackmun, Stewart, Rehnquist

793. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980).

Florida's statutory authorization for county to retain as its own interest accruing on interpleader fund deposited in registry of county court was a taking violating the Fifth and Fourteenth Amendments.

794. *Weaver v. Graham*, 450 U.S. 24 (1981).

A Florida statute repealing an earlier law and reducing the amount of "gain time" for good conduct and obedience to prison rules deducted

from a convicted prisoner's sentence is an invalid *ex post facto* law as applied to one whose crime was committed prior to the statute's enactment.

795. *Jefferson County v. United States*, 450 U.S. 901 (1981).

A court of appeals decision holding invalid a Colorado statute that imposed use tax on government-owned, contractor operated facility as constituting *ad valorem* general property tax on Federal Government property and thus contravening the Supremacy Clause is summarily affirmed.

796. *Democratic Party v. Wisconsin,*450 U.S. 107 (1981).

A Wisconsin law mandating national convention delegates chosen at party's state convention to vote at the national convention for the candidate prevailing in the state's preference primary, in which voters may participate without regard to party affiliation, violates the First Amendment right of association of the national party, whose rules preclude seating of delegates who were not selected in accordance with national party rules, including the limiting of the selection process to those voters affiliated with the party.

Justices concurring: Stewart, Brennan, White, Marshall, Stevens, Burger, C.J.
Justices dissenting: Powell, Blackmun, Rehnquist

797. *Kirchberg v. Feenstra*, 450 U.S. 455 (1981).

A Louisiana statute giving husband unilateral right to dispose of jointly-owned community property without wife's consent is an impermissible sex classification and violates the Equal Protection Clause.

798. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

An Iowa statute barring 65-foot double-trailer trucks on state's highways, while all neighboring states permit them, violates the Commerce Clause.

Justices concurring: Powell, White, Blackmun, Stevens
Justices concurring specially: Brennan, Marshall
Justices dissenting: Rehnquist, Stewart, Burger, C.J.

799. *Maryland v. Louisiana*, 451 U.S. 725 (1981).

Louisiana's "first-use tax" statute, which, because of exceptions and credits, imposes a tax only on natural gas moving out-of-state, impermissibly discriminates against interstate commerce, and another provision that required pipeline companies to allocate the cost of tax to ultimate consumer is preempted by federal law.

800. *Little v. Streater*, 452 U.S. 1 (1981).

A Connecticut statute requiring person in paternity action who requests blood grouping tests to bear cost of tests denies due process in violation of Fourteenth Amendment to an indigent against whom state has required institution of paternity action.

801. *Campbell v. John Donnelly & Sons*, 453 U.S. 916 (1981).

A court of appeals decision holding to violate the First Amendment a Maine statute prohibiting roadside billboards, except for signs announcing place and time of religious or civic events, election campaign signs, and signs erected by historic and cultural institutions, is summarily affirmed.

802. *Louisiana Dairy Stabilization Bd. v. Dairy Fresh Corp.*, 454 U.S. 884 (1981).

A court of appeals decision holding to violate the Commerce Clause a Louisiana milk industry regulatory statute, which required all dairy product processors, including out-of-state processors, who sell dairy products to retailer or distributor for resale in state to pay assessment per unit of milk for use in administration and enforcement of statute, is summarily affirmed.

803. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

A court of appeals decision holding to violate the First Amendment a Washington statute that authorized courts to issue temporary and permanent injunctions, without providing prompt trial on merits, against any business that regularly sells or exhibits "lewd matter" is summarily affirmed.

804. *Firestone v. Let's Help Florida*, 454 U.S. 1130 (1982).

A court of appeals decision holding to violate the First Amendment a Florida statute that restricts size of contributions to political committees organized to support or oppose referenda is summarily affirmed.

805. *Treen v. Karen B.*, 455 U.S. 913 (1982).

A court of appeals decision holding to violate the Establishment Clause of the First Amendment a Louisiana statute authorizing school boards to permit students to participate in one-minute prayer period at start of school day, upon parental consent, is summarily affirmed.

806. *Santosky v. Kramer*, 455 U.S. 745 (1982).

A New York law authorizing termination of parental rights upon proof by only a fair preponderance of the evidence violates the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Blackmun, Brennan, Marshall, Powell, Stevens
Justices dissenting: Rehnquist, White, O'Connor, Burger, C.J.

807. *California State Bd. of Equalization v. United States*, 456 U.S. 901 (1982).

A court of appeals decision invalidating as an impermissible infringement of the immunity of the United States from state taxation a California sales tax based on gross rentals paid by United States to lessors of data processing and other equipment, which permitted the lessor to maximize profit only by separately stating and collecting a tax from the lessee, is summarily affirmed.

808. *Brown v. Hartlage*, 456 U.S. 45 (1982).

A Kentucky statute prohibiting candidates from offering material benefits to voters in consideration for their votes violates the First Amendment's freedom of speech clause as applied to a candidate's promise to serve at a salary less than that fixed by law if elected.

809. *Mills v. Habluetzel*, 456 U.S. 91 (1982).

A Texas statute imposing a one-year period from date of birth to bring action to establish paternity of illegitimate child, paternity being necessary for child to obtain support from father at any time during his minority, denies equal protection of the laws.

810. *Larson v. Valente*, 456 U.S. 228 (1982).

A Minnesota charitable solicitations law exempting from registration and reporting only those religious organizations that receive more than half of their total contributions from members or affiliated organizations is an impermissible denominational preference and violates the First Amendment's Establishment Clause.

Justices concurring: Brennan, Marshall, Blackmun, Powell, Stevens
Justices dissenting: White, Rehnquist (on merits); O'Connor, Burger, C.J. (on standing)

811. *Greene v. Lindsey*, 456 U.S. 444 (1982).

A Kentucky statute authorizing service of process in forcible entry and detainer action by posting summons in a conspicuous place if no one could be found on premises denies due process on showing that notices are often removed before defendants find them.

Justices concurring: Brennan, White, Marshall, Blackmun, Powell, Stevens
Justices dissenting: O'Connor, Rehnquist, Burger, C.J.

812. *Zobel v. Williams*, 457 U.S. 55 (1982).

An Alaska law providing a dividend distribution to all state's adult residents from earnings on oil and mineral development in state de-

nies equal protection of the laws by determining amount of dividend for each person by the length of residency in state.

Justices concurring: Burger, C.J., Brennan, White, Marshall, Blackmun, Powell, Stevens
Justice concurring specially: O'Connor
Justice dissenting: Rehnquist

813. *Plyler v. Doe*, 457 U.S. 202 (1982).

A Texas statute withholding state funds from local school districts for the education of any children not legally admitted into United States and authorizing boards to deny enrollment to such children denies equal protection of the laws.

Justices concurring: Brennan, Marshall, Blackmun, Powell, Stevens
Justices dissenting: Burger, C.J., White, Rehnquist, O'Connor

814. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

A Massachusetts statute requiring, under all circumstances, exclusion of press and public during testimony of minor victim of a sex offense violates the First Amendment.

Justices concurring: Brennan, White, Marshall, Blackmun, Powell
Justice concurring specially: O'Connor
Justices dissenting: Burger, C.J., Rehnquist, Stevens

815. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

Illinois take-over statute, which extensively regulates tender offerors and imposes registration and reporting requirements, because it directly regulates and prevents interstate tender offers and because the burdens on interstate commerce are excessive compared with local interests served, violates the Commerce Clause.

Justices concurring: White, Blackmun, Powell, Stevens, O'Connor, Burger, C.J.
Justices dissenting: Marshall, Brennan, Rehnquist (all on mootness grounds)

816. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

A New York statute requiring landlords to permit installation of cable television wiring on their property and limiting fee charged to that determined to be reasonable by a commission (which set a one-time $1 fee) constituted a taking of property in violation of the Fifth and Fourteenth Amendments.

817. *Washington v. Seattle School Dist.*, 458 U.S. 457 (1982).

A Washington statute, enacted by initiative vote of the electorate, barring school boards from busing students for racially integrative purposes, denies equal protection of the laws.

Justices concurring: Blackmun, Brennan, Marshall, White, Stevens
Justices dissenting: Powell, Rehnquist, O'Connor, Burger, C.J.

818. *Enmund v. Florida*, 458 U.S. 782 (1982).

Florida's felony-murder statute, authorizing the death penalty solely for participation in a robbery in which another robber kills someone, violates the Eighth Amendment.

Justices concurring: White, Brennan, Marshall, Blackmun, Stevens
Justices dissenting: O'Connor, Powell, Rehnquist, Burger, C.J.

819. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982).

A Nebraska state statute requiring a permit before anyone withdraws ground water from any well located in the state and transports it across state line and providing for denial of permit unless the state to which the water will be transported grants reciprocal rights to withdraw and transport water into Nebraska violates the Commerce Clause.

Justices concurring: Stevens, Brennan, White, Marshall, Blackmun, Powell, Burger, C.J.
Justices dissenting: Rehnquist, O'Connor

820. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).

An Ohio statute requiring candidates to disclose the names and addresses of campaign contributors and the recipients of campaign expenditures is invalid, under the First Amendment, as applied to a minor political party whose members and supporters may be subjected to harassment or reprisals.

Justices concurring: Marshall, Brennan, White, Powell, Burger, C.J.
Justice concurring specially: Blackmun
Justices concurring in part and dissenting in part: O'Connor, Rehnquist, Stevens

821. *Larkin v. Grendel's Den*, 459 U.S. 116 (1982).

A Massachusetts statute permitting any church to block issuance of a liquor license to any establishment to be located within 500 feet of the church violates the Establishment Clause by delegating governmental decisionmaking to a church.

Justices concurring: Burger, C.J., Brennan, White, Marshall, Blackmun, Powell, Stevens
Justice dissenting: Rehnquist

822. *King v. Sanchez*, 459 U.S. 801 (1982).

Federal district court's decision invalidating New Mexico legislative reapportionment as violating the one person, one vote requirement of the Equal Protection Clause because the "votes cast" formula resulted in substantial population variances among districts, is summarily affirmed.

823. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

Minnesota's ink and paper use tax violates the First Amendment by providing "differential treatment" for the press.

Justices concurring: O'Connor, Brennan, Marshall, Powell, Stevens, Burger, C.J.
Justices concurring specially: White, Blackmun
Justice dissenting: Rehnquist

824. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

An Ohio statute requiring independent candidates for President and Vice-President to file nominating petitions by March 20 in order to qualify for the November ballot is unconstitutional as substantially burdening the associational rights of the candidates and their supporters.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, Burger, C.J.
Justices dissenting: Rehnquist, White, Powell, O'Connor

825. *Kolender v. Lawson*, 461 U.S. 352 (1983).

A California statute requiring that a person detained in a valid *Terry* stop provide "credible and reliable" identification is unconstitutionally vague, in violation of the Fourteenth Amendment's Due Process Clause.

Justices concurring: O'Connor, Brennan, Marshall, Blackmun, Powell, Stevens
Justices dissenting: White, Rehnquist

826. *Pickett v. Brown*, 462 U.S. 1 (1983).

Tennessee's two-year statute of limitations for paternity and child support actions violates the equal protection rights of illegitimates.

827. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983).

A Missouri statute requiring that all abortions performed after the first trimester of pregnancy be performed in a hospital unreasonably infringes upon the right of a woman to have an abortion.

Justices concurring (on this issue only): Powell, Brennan, Marshall, Blackmun, Stevens, Burger, C.J.
Justices dissenting: O'Connor, White, Rehnquist

828. *Karcher v. Daggett*, 462 U.S. 725 (1983).

New Jersey's congressional districting statute creating districts in which the deviation between largest and smallest districts was 0.7%, or 3,674 persons, violates Art. I, § 2's "equal representation" requirement as not resulting from a good-faith effort to achieve population equality.

Justices concurring: Brennan, Marshall, Blackmun, Stevens, O'Connor
Justices dissenting: White, Powell, Rehnquist, Burger, C.J.

829. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

An Indiana statute providing for constructive notice to mortgagee of tax sale of real property violates the Due Process Clause of the Fourteenth Amendment; instead, personal service or notice by mail is required.

Justices concurring: Marshall, Brennan, White, Blackmun, Stevens, Burger, C.J.
Justices dissenting: O'Connor, Powell, Rehnquist

830. *Healy v. United States Brewers Ass'n*, 464 U.S. 909 (1983).

An appeals court decision invalidating as an undue burden on interstate commerce the beer price "affirmation" provisions of Connecticut's liquor control laws, which restrict out-of-state sales to prices set for in-state sales, is summarily affirmed.

831. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984).

New York's corporate franchise tax unconstitutionally discriminates against interstate commerce by allowing an offsetting credit for receipts from products shipped from an in-state place of business.

832. *Wallace v. Jaffree*, 466 U.S. 924 (1984).

An appeals court decision holding invalid under the Establishment Clause an Alabama statute authorizing the recitation in public schools of a government-composed prayer is summarily affirmed.

833. *Bernal v. Fainter*, 467 U.S. 216 (1984).

A Texas requirement that a notary public be a United States citizen furthers no compelling state interest and denies equal protection of the laws to resident aliens.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Stevens, O'Connor, Burger, C.J.
Justice dissenting: Rehnquist

834. *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984).

A West Virginia gross receipts tax on businesses selling tangible property at wholesale unconstitutionally discriminates against interstate commerce because it exempts local manufacturers.

Justices concurring: Powell, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Burger, C.J.
Justice dissenting: Rehnquist

835. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

Maryland's prohibition on charitable organizations paying more than 25% of solicited funds for expenses of fundraising violates the Four-

teenth Amendment by creating an unnecessary risk of chilling protected First Amendment activity.

Justices concurring: Blackmun, Brennan, White, Marshall, Stevens
Justices dissenting: Rehnquist, Powell, O'Connor, Burger, C.J.

836. *Brown v. Brandon*, 467 U.S. 1223 (1984).

A federal district court decision that an Ohio congressional districting plan is invalid because population variances were shown to be not unavoidable and were not justified by legitimate state interest is summarily affirmed.

837. *Bacchus Imports, Ltd. v. Dias,* ,468 U.S. 263 (1984).

Hawaii's excise tax on wholesale liquor sales, exempting sales of specified local products, violates the Commerce Clause by discriminating in favor of local commerce.

Justices concurring: White, Marshall, Blackmun, Powell, Burger, C.J.
Justices dissenting: Stevens, Rehnquist, O'Connor

838. *Deukmejian v. National Meat Ass'n*, 469 U.S. 1100 (1985).

An appeals court holding that California tax on sales by out-of-state beef processors discriminates against interstate commerce in violation of the Commerce Clause, there being no corresponding and comparable tax on in-state processors, is summarily affirmed.

839. *Westhafer v. Worrell Newspapers*, 469 U.S. 1200 (1985).

An appeals court decision holding invalid under the First Amendment an Indiana statute punishing as contempt the publication of the name of an individual against whom a sealed indictment or information has been filed is summarily affirmed.

840. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

Alabama's domestic preference tax, imposing a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state insurance companies, violates the Equal Protection Clause.

Justices concurring: Powell, White, Blackmun, Stevens, Burger, C.J.
Justices dissenting: O'Connor, Brennan, Marshall, Rehnquist

841. *Board of Educ. v. National Gay Task Force*, 470 U.S. 903 (1985).

A court of appeals decision holding unconstitutionally overbroad in violation of the First and Fourteenth Amendments an Oklahoma statute prohibiting advocating, encouraging, or promoting homosexual conduct is affirmed by equally divided vote.

842. *Hunter v. Underwood*, 471 U.S. 222 (1985).

A provision of Alabama Constitution requiring disenfranchisement for crimes involving moral turpitude, adopted in 1901 for the purpose of racial discrimination, violates the Equal Protection Clause.

843. *Williams v. Vermont*, 472 U.S. 14 (1985).

Vermont's use tax discriminating between residents and nonresidents in application of a credit for automobile sales taxes paid to another state violates the Equal Protection Clause.

Justices concurring: White, Brennan, Marshall, Stevens, Burger, C.J.
Justices dissenting: Blackmun, Rehnquist, O'Connor

844. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

An Alabama statute authorizing a one-minute period of silence in public schools "for meditation or voluntary prayer" violates the Establishment Clause, the record indicating that the sole legislative purpose in amending the statute to add "or voluntary prayer" was to return voluntary prayer to the public schools.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, Powell
Justice concurring specially: O'Connor
Justices dissenting: White, Rehnquist, Burger, C.J.

845. *Jensen v. Quaring*, 472 U.S. 478 (1985).

An appeals court decision holding invalid Nebraska's driver's licensing requirement that applicant be photographed, and that photo be affixed to license, as burdening the free exercise of sincerely held religious beliefs against submitting to being photographed, is affirmed by equally divided vote.

846. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

Washington "moral nuisance" statute is invalid under the First Amendment to the extent that it proscribes exhibition of films or sale of publications inciting "lust," defined as referring to normal sexual desires.

Justices concurring: White, Blackmun, Rehnquist, Stevens, O'Connor, Burger, C.J.
Justices dissenting on other grounds: Brennan, Marshall

847. *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985).

A New Mexico property tax exemption for Vietnam War veterans who became residents before May 8, 1976, violates the Equal Protection Clause as not meeting the rational basis test.

Justices concurring: Burger, C.J., Brennan, White, Marshall, Blackmun
Justices dissenting: Stevens, Rehnquist, O'Connor

848. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

A Connecticut statute requiring employers to honor the Sabbath day of the employee's choice violates the Establishment Clause.

Justices concurring: Burger, C.J., Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor
Justice dissenting: Rehnquist

849. *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986).

A Pennsylvania statute incorporating the common-law rule that defamatory statements are presumptively false violates the First Amendment as applied to a libel action brought by a private figure against a media defendant; instead, the plaintiff must bear the burden of establishing falsity.

Justices concurring: O'Connor, Brennan, Marshall, Blackmun, Powell
Justices dissenting: Stevens, White, Rehnquist, Burger, C.J.

850. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986).

New York's affirmation law, having the practical effect of controlling liquor prices in other states, violates the Commerce Clause.

Justices concurring: Marshall, Powell, O'Connor, Burger, C.J.
Justice concurring specially: Blackmun
Justices dissenting: Stevens, White, Rehnquist

851. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (subsequently overruled in part).

A Pennsylvania statute prescribing a variety of requirements for performance of an abortion, including informed consent, reporting of various information concerning the mother's history and condition, and standard-of-care and second-physician requirements after viability, infringes a woman's *Roe v. Wade* right to have an abortion.

Justices concurring: Blackmun, Brennan, Marshall, Powell, Stevens
Justices dissenting: Burger, C.J., White, Rehnquist, O'Connor

852. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

New York Civil Service Law's employment preference for New York residents who are honorably discharged veterans and were New York residents when they entered military service violates the Equal Protection Clause.

Justices concurring: Brennan, Marshall, Blackmun, Powell
Justices concurring specially: White, Burger, C.J.
Justices dissenting: Stevens, O'Connor, Rehnquist

853. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

A Connecticut statute imposing a "closed primary" under which persons not registered with a political party may not vote in its primaries violates the First and Fourteenth Amendments by preventing political parties from entering into political association with individuals of their own choosing.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell
Justices dissenting: Stevens, Scalia, O'Connor, Rehnquist, C.J.

854. *Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986).

An appeals court decision invalidating Arizona statute prohibiting grant of public funds to any organization performing abortion-related services is summarily affirmed.

855. *Wilkinson v. Jones*, 480 U.S. 926 (1987).

An appeals court decision holding unconstitutionally vague and overbroad Utah statute barring cable television systems from showing "indecent material" is summarily affirmed.

856. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

Arkansas' sales tax exemption for newspapers and for "religious, professional, trade, and sports journals" published within the state violates the First and Fourteenth Amendments as a content-based regulation of the press.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, O'Connor
Justice concurring specially: Stevens
Justices dissenting: Scalia, Rehnquist, C.J.

857. *Miller v. Florida*, 482 U.S. 423 (1987).

Florida's revised sentencing guidelines law, under which the presumptive sentence for certain offenses was raised, contravenes the *ex post facto* clause of Article I as applied to someone who committed those offenses before the revision.

858. *Booth v. Maryland*, 482 U.S. 496 (1987).

A Maryland statute requiring preparation of a "victim impact statement" describing the effect of a crime on a victim and his family violates the Eighth Amendment to the extent that it requires introduction of the statement at the sentencing phase of a capital murder trial. *Booth* was overruled in *Payne v. Tennessee,* 501 U.S. 808 (1991).

Justices concurring: Powell, Brennan, Marshall, Blackmun, Stevens
Justices dissenting: White, O'Connor, Scalia, Rehnquist, C.J.

859. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

A Louisiana statute mandating balanced treatment of "creation-science" and "evolution-science" in the public schools is an invalid establishment of religion in violation of the First Amendment.

Justices concurring: Brennan, Marshall, Powell, Stevens, O'Connor
Justice concurring specially: White
Justices dissenting: Scalia, Rehnquist, C.J.

860. *Sumner v. Shuman*, 483 U.S. 66 (1987).

A Nevada statute under which a prison inmate convicted of murder while serving a life sentence without possibility of parole is automatically sentenced to death is invalid under the Eighth Amendment as preventing the sentencing authority from considering as mitigating factors aspects of a defendant's character or record.

Justices concurring: Blackmun, Brennan, Marshall, Powell, Stevens, O'Connor
Justices dissenting: White, Scalia, Rehnquist, C.J.

861. *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987).

A Washington manufacturing tax, applicable to products manufactured in-state and sold out-of-state, but containing an exemption for products manufactured and sold in-state, discriminates against interstate commerce in violation of the Commerce Clause.

Justices concurring: Stevens, Brennan, White, Marshall, Blackmun, O'Connor
Justices dissenting: Scalia, Rehnquist, C.J.

862. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987).

Pennsylvania statutes imposing lump-sum annual taxes on operation of trucks on state's roads violate the Commerce Clause as discriminating against interstate commerce.

Justices concurring: Stevens, Brennan, White, Marshall, Blackmun
Justices dissenting: O'Connor, Powell, Rehnquist, C.J., Scalia

863. *Hartigan v. Zbaraz*, 484 U.S. 171 (1987).

A federal appeals court ruling holding unconstitutional a provision of the Illinois Parental Notice Abortion Act requiring that minors wait 24 hours after informing parents before having an abortion is affirmed by equally divided vote.

864. *City of Manassas v. United States*, 485 U.S. 1017 (1988).

A federal appeals court decision invalidating as discriminatory against the United States a Virginia statute that imposes a personal property tax on property leased from the United States, but not on property leased from the Virginia Port Authority or from local transportation districts, is summarily affirmed.

865. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988).

An Ohio statute granting a tax credit for ethanol fuel if the ethanol was produced in Ohio, or if produced in another state that grants a similar credit to Ohio-produced ethanol fuel, discriminates against interstate commerce in violation of the Commerce Clause.

866. *Maynard v. Cartwright*, 486 U.S. 356 (1988).

Oklahoma statutory aggravating circumstances, permitting imposition of capital punishment upon a jury's finding that a murder was "especially heinous, atrocious, or cruel," are unconstitutionally vague in violation of the Eighth Amendment.

867. *Meyer v. Grant*, 486 U.S. 414 (1988).

A Colorado law punishing as felony the payment of persons who circulate petitions for ballot initiative abridges the right to engage in political speech, and therefore violates the First and Fourteenth Amendments.

868. *Clark v. Jeter*, 486 U.S. 456 (1988).

Pennsylvania's 6-year statute of limitations for paternity actions violates the Equal Protection Clause as insufficiently justified under heightened scrutiny review.

869. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988).

The Kentucky Supreme Court's rule containing categorical prohibition of attorney direct mail advertising targeted at persons known to face particular legal problems violates First and Fourteenth Amendments.

Justices concurring: Brennan, White, Marshall, Blackmun, Stevens, Kennedy
Justices dissenting: O'Connor, Scalia, Rehnquist, C.J.

870. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988).

An Ohio statute tolling its 4-year limitations period for breach of contract and fraud actions brought against out-of-state corporations that do not appoint an agent for service of process within the state—and thereby subject themselves to the general jurisdiction of Ohio courts—violates the Commerce Clause.

Justices concurring:: Kennedy, Brennan, White, Marshall, Blackmun, Stevens, O'Connor
Justice concurring specially: Scalia
Justice dissenting: Rehnquist, C.J.

871. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988).

The Virginia Supreme Court rule imposing residency requirement for admission to the bar on motion, without taking the bar exam, by

persons licensed to practice law in other jurisdictions, violates the Privileges and Immunities Clause of Article IV, § 2.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, Stevens, O'Connor
Justices dissenting: Rehnquist, C.J., Scalia

872. *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988).

Three different aspects of North Carolina's Charitable Solicitations Act unconstitutionally infringe freedom of speech. These aspects are: limitations on reasonable fees that professional fundraisers may charge; a requirement that professional fundraisers disclose to potential donors the percentage of donated funds previously used for charity; and a requirement that professional fundraisers be licensed.

Justices concurring: Brennan, White, Marshall, Blackmun, Scalia, Kennedy
Justice concurring in part and dissenting in part: Stevens
Justices dissenting: Rehnquist, C.J., O'Connor

873. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

An Oklahoma statutory scheme, setting no minimum age for capital punishment, and separately providing that juveniles may be tried as adults, violates Eighth Amendment by permitting capital punishment to be imposed for crimes committed before age 16.

Justices concurring: Stevens, Brennan, Marshall, Blackmun
Justice concurring specially: O'Connor
Justices dissenting: Scalia, White, Rehnquist, C.J.

874. *Coy v. Iowa*, 487 U.S. 1012 (1988).

An Iowa procedure, authorized by statute, placing a one-way screen between defendant and complaining child witnesses in sex abuse cases, thereby sparing witnesses from viewing defendant, violates the Confrontation Clause right to face-to-face confrontation with one's accusers.

Justices concurring: Scalia, Brennan, White, Marshall, Stevens, O'Connor
Justices dissenting: Blackmun, Rehnquist, C.J.

875. *Allegheny Pittsburgh Coal Co. v. Webster County Comm'n*, 488 U.S. 336 (1989).

A West Virginia county's tax assessments denied equal protection to property owners whose assessments, based on recent purchase price, ranged from 8 to 35 times higher than comparable neighboring property for which the assessor failed over a 10-year period to readjust appraisals.

876. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989).

A Texas sales tax exemption for publications published or distributed by a religious faith and consisting of teachings of that faith or

writings sacred to that faith violates the Establishment Clause of the First Amendment.

Justices concurring: Brennan, Marshall, Stevens
Justices concurring specially: White, Blackmun, O'Connor
Justices dissenting: Scalia, Kennedy, Rehnquist, C.J.

877. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989).

Provisions of the California Elections Code forbidding the official governing bodies of political parties from endorsing or opposing candidates in primary elections, and imposing other requirements on the organization and composition of the governing bodies, are invalid under the First Amendment. The ban on endorsements violates free speech and associational rights; the organizational restrictions violate associational rights.

878. *Barnard v. Thorstenn*, 489 U.S. 546 (1989).

A Virgin Islands rule requiring one year's residency prior to admission to the bar violates the Privileges and Immunities Clause of Art. IV, § 2. Justifications for the rule do not constitute "substantial" reasons for discriminating against nonresidents; nor does the discrimination bear a "substantial relation" to legitimate objectives.

Justices concurring: Kennedy, Brennan, Marshall, Blackmun, Stevens, Scalia
Justices dissenting: Rehnquist, C.J., White, O'Connor

879. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

Michigan's income tax law, by providing exemption for retirement benefits of state employees but not for retirement benefits of federal employees, discriminates against federal employees in violation of 4 U.S.C. § 111 and in violation of the constitutional doctrine of intergovernmental tax immunity.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, O'Connor, Scalia, Rehnquist, C.J.
Justice dissenting: Stevens

880. *Quinn v. Millsap*, 491 U.S. 95 (1989).

A provision of the Missouri Constitution, interpreted by the Missouri Supreme Court as requiring property ownership as a qualification for appointment to a "board of freeholders" charged with making recommendations for reorganization of St. Louis city and county governments, violates the Equal Protection Clause.

881. *The Healy v. Beer Institute*, 491 U.S. 324 (1989).

Connecticut's beer price affirmation law, requiring out-of-state shippers to affirm that prices charged in-state wholesalers are no higher

than prices charged contemporaneously in three bordering states, violates the Commerce Clause.

Justices concurring: Blackmun, Brennan, White, Marshall, Kennedy
Justice concurring specially: Scalia
Justices dissenting: Rehnquist, C.J., Stevens, O'Connor

882. *Texas v. Johnson*, 491 U.S. 397 (1989).

Texas' flag desecration statute, prohibiting any physical mistreatment of the American flag that the actor knows would seriously offend other persons, is inconsistent with the First Amendment as applied to an individual who burned an American flag as part of a political protest.

Justices concurring: Brennan, Marshall, Blackmun, Scalia, Kennedy
Justices dissenting: Rehnquist, C.J., White, O'Connor, Stevens

883. *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

A Florida statute making it unlawful to print the name of a sexual assault victim is invalid under the First Amendment as applied to uphold an award of damages against a newspaper for publishing a sexual assault victim's name when the information was truthful, was lawfully obtained, and was otherwise publicly available as a result of a botched press release from the sheriff's department.

Justices concurring: Marshall, Brennan, Blackmun, Stevens, Kennedy
Justice concurring specially: Scalia
Justices dissenting: White, O'Connor, Rehnquist, C.J.

884. *McKoy v. North Carolina*, 494 U.S. 433 (1990).

North Carolina's capital sentencing statute, interpreted to prevent a jury from considering any mitigating factor that the jury does not unanimously find, violates the Eighth Amendment. Instead, each juror must be allowed to consider and give effect to what he or she believes to be established mitigating evidence.

Justices concurring: Marshall, Brennan, White, Blackmun, Stevens
Justice concurring specially: Kennedy
Justices dissenting: Scalia, O'Connor, Rehnquist, C.J.

885. *Butterworth v. Smith*, 494 U.S. 624 (1990).

A Florida statute prohibiting the disclosure of grand jury testimony violates the First Amendment insofar as it prohibits a grand jury witness from disclosing, after the term of the grand jury has ended, information covered by his own testimony.

886. *Peel v. Illinois Attorney Disciplinary Comm'n*, 496 U.S. 91 (1990).

An Illinois rule of professional responsibility violates the First Amendment by completely prohibiting an attorney from holding himself out as a civil trial specialist certified by the National Board of Trial Advocacy.

Justices concurring: Stevens, Brennan, Blackmun, Kennedy
Justice concurring specially: Marshall
Justices dissenting: White, O'Connor, Scalia, Rehnquist, C.J.

887. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

Minnesota's requirement that a woman under 18 notify both her parents before having an abortion is invalid as a denial of due process because "it does not reasonably further any legitimate state interest." However, an alternative judicial bypass system saves the statute as a whole.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, O'Connor
Justices dissenting: Kennedy, White, Scalia, Rehnquist, C.J.

888. *Connecticut v. Doehr*, 501 U.S. 1 (1991).

A Connecticut statute authorizing a private party to obtain prejudgment attachment of real estate without prior notice to the owner, and without a showing of extraordinary circumstances, violates the Due Process Clause of the Fourteenth Amendment as applied in conjunction with a civil action for assault and battery.

889. *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105 (1991).

New York State's "Son of Sam" law, under which a criminal's income from works describing his crime is placed in escrow and made available to victims of the crime, violates the First Amendment. The law establishes a financial disincentive to create or publish works with a particular content, and is not narrowly tailored to serve the state's compelling interests in ensuring that criminals do not profit from their crimes, and that crime victims are compensated.

Justices concurring: O'Connor, White, Stevens, Scalia, Souter, Rehnquist, C.J.
Justices concurring specially: Blackmun, Kennedy

890. *Norman v. Reed*, 502 U.S. 279 (1992).

Two provisions of Illinois' election law unconstitutionally infringe on the right of ballot access guaranteed under the First and Fourteenth Amendments. The first provision, as interpreted by the Illinois Supreme Court, prevented a "new political party" in Cook County from using the name of a party already "established" in the city of Chicago. The second required that new political parties qualify for the ballot by submitting petitions signed by 25,000 voters from each voting district to be represented in a multi-district political subdivision.

Justices concurring: Souter, White, Blackmun, Stevens, O'Connor, Kennedy, Rehnquist, C.J.
Justice dissenting: Scalia

891. *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

An Oklahoma statute requiring that all coal-fired Oklahoma utilities burn a mixture containing at least 10% Oklahoma-mined coal discriminates against interstate commerce in violation of the implied "negative" component of the Commerce Clause.

Justices concurring: White, Blackmun, Stevens, O'Connor, Kennedy, Souter
Justices dissenting: Rehnquist, C.J., Scalia, Thomas

892. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

A Louisiana statute allowing an insanity acquittee no longer suffering from mental illness to be confined indefinitely in a mental institution until he is able to demonstrate that he is not dangerous to himself or to others violates due process.

Justices concurring: White, Blackmun, Stevens, O'Connor, Souter
Justices dissenting: Kennedy, Thomas, Scalia, Rehnquist, C.J.

893. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

Application of the state's use tax to mail order sales by an out-of-state company with neither outlets nor sales representatives in the state places an undue burden on interstate commerce in violation of the "negative" or "dormant" Commerce Clause. A physical presence within the taxing state is necessary in order to meet the "substantial nexus" requirement of the Commerce Clause.

894. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992).

Alabama's fee for in-state disposal of hazardous wastes generated out-of-state is invalid as a direct discrimination against interstate commerce. Alabama failed to establish that the discrimination against interstate commerce is justified by any factor other than economic protectionism, and failed to show that its valid interests (*e.g.*, protection of health, safety, and the environment) can not be served by less discriminatory alternatives. The fee is not supportable by analogy to quarantine laws, since the state permits importation of hazardous wastes if the fee is paid.

895. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Nat. Resources Dep't*, 504 U.S. 353 (1992).

Waste import restrictions of Michigan's Solid Waste Management Act violate the Commerce Clause. The restrictions, which prohibit landfills from accepting out-of-county waste unless explicitly authorized by the county's solid waste management plan, directly discriminate against

interstate commerce and are not justified as serving any valid health and safety purposes that can not be served adequately by nondiscriminatory alternatives.

896. *Kraft Gen. Foods v. Iowa Dep't of Revenue*, 505 U.S. 71 (1992).

An Iowa statute imposing a business tax on corporations facially discriminates against foreign commerce in violation of the Commerce Clause by allowing corporations to take a deduction for dividends received from domestic, but not foreign, subsidiaries.

897. *Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

One aspect of the Pennsylvania Abortion Control Act of 1982—a requirement for spousal notification—is invalid as an undue interference with a woman's right to an abortion.

898. *Edenfield v. Fane*, 507 U.S. 761 (1993).

A rule of the Florida Board of Accountancy banning "direct, in-person, uninvited solicitation" of business by certified public accountants is inconsistent with the free speech guarantees of the First Amendment.

Justices concurring: Kennedy, White, Blackmun, Stevens, Scalia, Souter, Thomas, Rehnquist, C.J.
Justice dissenting: O'Connor

899. *Oregon Waste Systems, Inc. v. Department of Envtl. Quality,*511 U.S. 93 (1994).

Oregon's imposition of a surcharge on in-state disposal of solid waste generated in other states—a tax three times greater than the fee charged for disposal of waste that was generated in Oregon—constitutes an invalid burden on interstate commerce. The tax is facially discriminatory against interstate commerce, is not a valid compensatory tax, and is not justified by any other legitimate state interest.

Justices concurring: Thomas, Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg
Justices dissenting: Rehnquist, C.J., Blackmun

900. *Associated Industries v. Lohman*, 511 U.S. 641 (1994).

Missouri's uniform, statewide use tax constitutes an invalid discrimination against interstate commerce in those counties in which the use tax is greater than the sales tax imposed as a local option, even though the overall statewide effect of the use tax places a lighter aggregate tax burden on interstate commerce than on intrastate commerce.

901. *Montana Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994).

Montana's tax on the possession of illegal drugs, to be "collected only after any state or federal fines or forfeitures have been satisfied," constitutes punishment, and violates the prohibition, derived from the Double Jeopardy Clause, against successive punishments for the same offense.

Justices concurring: Stevens, Blackmun, Kennedy, Souter, Ginsburg
Justices dissenting: Rehnquist, C.J., O'Connor, Scalia, Thomas

902. *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

A Massachusetts milk pricing order, imposing an assessment on all milk sold by dealers to Massachusetts retailers, is an unconstitutional discrimination against interstate commerce because the entire assessment is then distributed to Massachusetts dairy farmers in spite of the fact that about two-thirds of the assessed milk is produced out of state. The discrimination imposed by the pricing order is not justified by a valid factor unrelated to economic protectionism.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg
Justices concurring specially: Scalia, Thomas
Justices dissenting: Rehnquist, C.J., Blackmun

903. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

A provision of the Oregon Constitution, prohibiting judicial review of the amount of punitive damages awarded by a jury unless the court can affirmatively say there is no evidence to support the verdict, is invalid under the Due Process Clause of the Fourteenth Amendment. Judicial review of the amount awarded was one of the few procedural safeguards available at common law, yet Oregon has removed that safeguard without providing any substitute procedure, and with no indication that the danger of arbitrary awards has subsided.

Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, Souter, Thomas
Justices dissenting: Ginsburg, Rehnquist, C.J.

904. *Board of Educ. of Kiryas Joel Village v. Grumet*, 512 U.S. 687 (1994).

A New York State law creating a special school district for an incorporated village composed exclusively of members of one small religious sect violates the Establishment Clause.

Justices concurring: Souter, Blackmun, Stevens, O'Connor, Ginsburg
Justice concurring specially: Kennedy
Justices dissenting: Scalia, Thomas, Rehnquist, C.J.

905. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

Ohio's prohibition on the distribution of anonymous campaign literature abridges the freedom of speech. The law, aimed at speech de-

signed to influence voters in an election, is a limitation on political expression subject to exacting scrutiny. Neither of the interests asserted by Ohio justifies the limitation.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer
Justice concurring specially: Thomas
Justices dissenting: Scalia, Rehnquist, C.J.

906. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

An amendment to the Arkansas Constitution denying ballot access to congressional candidates who have already served three terms in the House of Representatives or two terms in the Senate is invalid as conflicting with the qualifications for office set forth in Article I of the U.S. Constitution, (specifying age, duration of U.S. citizenship, and state inhabitancy requirements). Article I sets the exclusive qualifications for a United States Representative or Senator.

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer
Justices dissenting: Thomas, O'Connor, Scalia, Rehnquist, C.J.

907. *Hurley v. Irish-American Gay Group*, 515 U.S. 557 (1995).

Application of Massachusetts' public accommodations law to require the private organizers of a St. Patrick's Day parade to allow participation in the parade by a gay and lesbian group wishing to proclaim its members' gay and lesbian identity violates the First Amendment because it compels parade organizers to include in the parade a message they wish to exclude.

908. *Miller v. Johnson*, 515 U.S. 900 (1995).

Georgia's congressional districting plan violates the Equal Protection Clause. The district court's finding that race was the predominant factor in drawing the boundaries of the Eleventh District was not clearly erroneous. The state did not meet its burden under strict scrutiny review to demonstrate that its districting was narrowly tailored to achieve a compelling interest.

Justices concurring: Kennedy, O'Connor, Scalia, Thomas, Rehnquist, C.J.
Justices dissenting: Stevens, Ginsburg, Breyer, Souter

909. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

North Carolina's intangibles tax on a fraction of the value of corporate stock owned by North Carolina residents inversely proportional to the corporation's exposure to the state's income tax, violates the "dormant" Commerce Clause. The tax facially discriminates against interstate commerce, and is not a "compensatory tax" designed to make interstate commerce bear a burden already borne by intrastate commerce.

910. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Rhode Island's statutory prohibition against advertisements that provide the public with accurate information about retail prices of alcoholic beverages abridges freedom of speech protected by the First Amendment, and is not shielded from constitutional scrutiny by the Twenty-first Amendment. There is not a "reasonable fit" between the blanket prohibition and the state's goal of reducing alcohol consumption.

Justices concurring: Stevens, Scalia (in part), Kennedy (in part), Souter (in part), Thomas (in part), Ginsburg (in part)
Justices concurring specially: Scalia, Thomas, O'Connor, Souter, Breyer, Rehnquist, C.J.

911. *Romer v. Evans*, 517 U.S. 620 (1996).

Amendment 2 to the Colorado Constitution, which prohibits all legislative, executive, or judicial action at any level of state or local government if that action is designed to protect homosexuals, violates the Equal Protection Clause of the Fourteenth Amendment. The amendment, adopted by statewide referendum in 1992, does not bear a rational relationship to a legitimate governmental purpose.

Justices concurring: Kennedy, Stevens, O'Connor, Souter, Ginsburg, Breyer
Justices dissenting:: Scalia, Thomas, Rehnquist, C.J.

912. *Shaw v. Hunt*, 517 U.S. 899 (1996).

North Carolina's congressional districting law, containing the racially gerrymandered 12th Congressional District as well as another majority-black district, violates the Equal Protection Clause because, under strict scrutiny applicable to racial classifications, creation of District 12 was not narrowly tailored to serve a compelling state interest. Creation of District 12 was not necessary to comply with either section 2 or section 5 of the Voting Rights Act, and the lower court found that the redistricting plan was not actually aimed at ameliorating past discrimination.

Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas
Justices dissenting: Stevens, Ginsburg, Souter, Breyer

913. *Bush v. Vera*, 517 U.S. 952 (1996).

Three congressional districts created by Texas law constitute racial gerrymanders that are unconstitutional under the Equal Protection Clause. The district court correctly held that race predominated over legitimate districting considerations, including incumbency, and consequently strict scrutiny applies. None of the three districts is narrowly tailored to serve a compelling state interest.

Justices concurring: O'Connor, Kennedy, Rehnquist, C.J.

Justices concurring specially: O'Connor, Kennedy, Thomas, Scalia
Justices dissenting: Stevens, Ginsburg, Breyer, Souter

914. *United States v. Virginia*, 518 U.S. 515 (1996).

Virginia's exclusion of women from the educational opportunities provided by Virginia Military Institute denies to women the equal protection of the laws. A state must demonstrate "exceedingly persuasive justification" for gender discrimination, and Virginia has failed to do so in this case.

Justices concurring: Ginsburg, Stevens, O'Connor, Kennedy, Souter, Breyer
Justice concurring specially: Rehnquist, C.J.
Justice dissenting: Scalia

915. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

Mississippi statutes that condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay for preparation of a trial transcript violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Justices concurring: Ginsburg, Stevens, O'Connor, Souter, Breyer
Justice concurring specially: Kennedy
Justice dissenting: Rehnquist, C.J., Thomas, Scalia

916. *Lynce v. Mathis*, 519 U.S. 433 (1997).

A Florida statute canceling early release credits awarded to prisoners as a result of prison overcrowding violates the Ex Post Facto Clause, Art. I, § 10, cl. 1, as applied to a prisoner who had already been awarded the credits and released from custody.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer, Rehnquist, C.J.
Justice concurring specially: Thomas, Scalia

917. *Chandler v. Miller*, 520 U.S. 305 (1997).

A Georgia statute requiring that candidates for state office certify that they have passed a drug test effects a "search" that is plainly not tied to individualized suspicion, and does not fit within the "closely guarded category of constitutionally permissible suspicionless searches," and hence violates the Fourth Amendment. Georgia has failed to establish existence of a "special need, beyond the normal need for law enforcement," that can justify such a search.

Justices concurring: Ginsburg, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Breyer
Justice dissenting: Rehnquist, C.J.

918. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

Maine's property tax law, which contains an exemption for charitable institutions but limits that exemption to institutions serving principally Maine residents, is a form of protectionism that violates the "dormant" Commerce Clause as applied to deny exemption status to a nonprofit corporation that operates a summer camp for children, most of whom are not Maine residents.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Breyer
Justice dissenting: Scalia, Thomas, Ginsburg, Rehnquist, C.J.

919. *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287 (1998).

A New York law that effectively denies only nonresident taxpayers an income tax deduction for alimony paid violates the Privileges and Immunities Clause of Art. IV, § 2. New York did not adequately justify its failure to treat resident and nonresident taxpayers with substantial equality.

Justices concurring: O'Connor, Stevens, Scalia, Souter, Thomas, Breyer
Justice dissenting: Ginsburg, Kennedy, Rehnquist, C.J.

920. *Knowles v. Iowa*, 525 U.S. 113 (1998).

An Iowa statute authorizing law enforcement officers to conduct a full-blown search of an automobile when issuing a traffic citation violates the Fourth Amendment. The rationales that justify a search incident to arrest do not justify a similar search incident to a traffic citation.

921. *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999).

Three conditions that Colorado placed on the petition process for ballot initiatives—that petition circulators be registered voters, that they wear identification badges, and that initiative sponsors report the names and addresses of circulators and the amounts paid to each—impermissibly restrict political speech in violation of the First and Fourteenth Amendments.

Justices concurring: Ginsburg, Stevens, Scalia, Kennedy, Souter
Justice concurring specially: Thomas
Justice concurring in part and dissenting in part: O'Connor, Souter, Rehnquist, C.J.

922. *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999).

Alabama's franchise tax law discriminates against foreign corporations in violation of the Commerce Clause. The law establishes a domestic corporation's tax base as the par value of its capital stock, a value that the corporation may set at whatever level it chooses. The tax base of a foreign corporation, on the other hand, contains balance sheet items that the corporation cannot so manipulate.

923. *Saenz v. Roe*, 526 U.S. 489 (1999).

A provision of California's Welfare and Institutions Code limiting new residents, for the first year they live in California, to the level of welfare benefits that they would have received in the state of their prior residence abridges the right to travel in violation of the Fourteenth Amendment.

Justices concurring: Stevens, O'Connor, Scalia, Kennedy, Souter, Ginsburg, Breyer
Justices dissenting: Rehnquist, C.J., Thomas

924. *Rice v. Cayetano*, 528 U.S. 495 (2000).

A provision of the Hawaii Constitution restricting the right to vote for trustees of the Office of Hawaiian Affairs to persons who are descendants of people inhabiting the Hawaiian Islands in 1778 is a race-based voting qualification that violates the Fifteenth Amendment. Ancestry can be—and in this case is—a proxy for race.

Justices concurring: Kennedy, Rehnquist, C.J., O'Connor, Scalia, Thomas
Justices concurring specially: Breyer, Souter
Justices dissenting: Stevens, Ginsburg

925. *Carmell v. Texas,*529 U.S. 513 (2000).

A Texas law that eliminated a requirement that the testimony of a sexual assault victim age 14 or older must be corroborated by two other witnesses violates the Ex Post Facto Clause of Art. I, § 10 as applied to a crime committed while the earlier law was in effect. So applied, the law falls into the category of an *ex post facto* law that requires less evidence in order to convict. Under the old law, the petitioner could have been convicted only if the victim's testimony had been corroborated by two witnesses, while under the amended law the petitioner was convicted on the victim's testimony alone.

Justices concurring: Stevens, Scalia, Souter, Thomas, Breyer
Justices dissenting: Ginsburg, Rehnquist, C.J., O'Connor, Kennedy

926. *Troxel v. Granville,*530 U.S. 57 (2000).

A Washington State law allowing "any person" to petition a court "at any time" to obtain visitation rights whenever visitation "may serve the best interests" of a child is unconstitutional as applied to an order requiring a parent to allow her child's grandparents more extensive visitation than the parent wished. Because no deference was accorded to the parent's wishes, the parent's due process liberty interest in making decisions concerning her child's care, custody, and control was violated.

Justices concurring: O'Connor, Rehnquist, C.J., Ginsburg, Breyer
Justices concurring specially: Souter, Thomas
Justices dissenting: Stevens, Scalia, Kennedy

927. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

A New Jersey "hate crime" statute that allows a judge to extend a sentence upon finding by a preponderance of the evidence that the defendant, in committing a crime for which he has been found guilty, acted with a purpose to intimidate because of race, violates the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's requirements of speedy and public trial by an impartial jury. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and established beyond a reasonable doubt.

Justices concurring: Stevens, Scalia, Souter, Thomas, Ginsburg
Justices concurring specially: Thomas
Justices dissenting: O'Connor, Rehnquist, C.J., Kennedy, Breyer

928. *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

California's "blanket primary" law violates the First Amendment associational rights of political parties. The law lists all candidates on one ballot and allows primary voters to choose freely among candidates without regard to party affiliation. The law "adulterate[s]" a party's candidate-selection process by forcing the party to open up that process to persons wholly unaffiliated with the party, and is not narrowly tailored to serve a compelling state interest.

Justices concurring: Scalia, Rehnquist, C.J., O'Connor, Kennedy, Souter, Thomas, Breyer
Justices dissenting: Stevens, Ginsburg

929. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

Application of New Jersey's public accommodations law to require the Boy Scouts of America to admit an avowed homosexual as a member and assistant scout master violates the organization's First Amendment associational rights. The general mission of the Scouts, to instill values in young people, is expressive activity entitled to First Amendment protection, and requiring the Scouts to admit a gay scout leader would contravene the Scouts' asserted policy disfavoring homosexual conduct.

Justices concurring: Rehnquist, C.J., O'Connor, Scalia, Kennedy, Thomas
Justices dissenting: Stevens, Souter, Ginsburg, Breyer

930. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Nebraska's statute criminalizing the performance of "partial birth abortions" is unconstitutional under principles set forth in *Roe v. Wade* and *Planned Parenthood v. Casey*. The statute lacks an exception for instances in which the banned procedure is necessary to preserve the health of the mother, and, because it applies to the commonplace dila-

tion and evacuation procedure as well as to the dilation and extraction method, imposes an "undue burden" on a woman's right to an abortion.

Justices concurring: Breyer, Stevens, O'Connor, Souter, Ginsburg
Justices dissenting: Rehnquist, C.J., Scalia, Kennedy, Thomas

931. *Cook v. Gralike*, 531 U.S. 510 (2001).

Provisions of the Missouri Constitution requiring identification on primary and general election ballots of congressional candidates who failed to support term limits in the prescribed manner are unconstitutional. States do not have power reserved by the Tenth Amendment to give binding instructions to their congressional representatives, and the "Elections Clause" of Article I, section 4, does not authorize the regulation. The Missouri ballot requirements do not relate to "times" or "places," and are not valid regulations of the "manner" of holding elections.

Justices concurring: Stevens, Scalia, Kennedy, Ginsburg, Breyer
Justices concurring specially: Rehnquist, C.J., Kennedy, Thomas, O'Connor, Souter

932. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

A Pennsylvania prohibition on disclosure of the contents of an illegally intercepted electronic communication violates the First Amendment as applied in this case. The defendants, a talk show host and a community activist, played no part in the illegal interception, and obtained the tapes lawfully. The subject matter of the disclosed conversation, involving a threat of violence in a labor dispute, was "a matter of public concern."

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer
Justices dissenting: Rehnquist, C.J., Scalia, Thomas

933. *Lorillard Tobacco Co. v. Reilly,*533 U.S. 525 (2001).

Massachusetts' restrictions on outdoor advertising and point-of-sale advertising of smokeless tobacco and cigars violate the First Amendment. The regulations prohibit outdoor advertising within 1,000 feet of a school, park, or playground, and prohibit "point-of-sale" advertising placed lower than five feet above the floor of retail establishments. These restrictions do not satisfy the fourth step of the *Central Hudson* test for regulation of commercial speech. That step requires a "reasonable fit" between the means and ends of a regulation, yet the regulations are not "narrowly tailored" to achieve such a fit.

Justices concurring: O'Connor, Scalia, Kennedy, Souter (point-of-sale restrictions only), Thomas
Justices dissenting: Stevens, Ginsburg, Breyer, Souter (outdoor advertising only)

934. *Ring v. Arizona*, 536 U.S. 584 (2002).

Arizona's capital sentencing law violates the Sixth Amendment right to jury trial by allowing a sentencing judge to find an aggravating circumstance necessary for imposition of the death penalty. The governing principle was established in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), holding that any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The required finding of an aggravating circumstance exposed the defendant to a greater punishment than that authorized by the jury's guilty verdict.

Justices concurring: Ginsburg, Stevens, Scalia, Kennedy, Souter, Thomas
Justice concurring specially: Breyer
Justices dissenting: O'Connor, Rehnquist, C.J.

935. *Atkins v. Virginia*, 536 U.S. 304 (2002).

Virginia's capital punishment law is invalid to the extent that it authorizes execution of the mentally retarded. Execution of a mentally retarded individual constitutes cruel and unusual punishment prohibited by the Eighth Amendment. Circumstances have changed since the Court upheld the practice in *Penry v. Lynaugh,* 492 U.S. 302 (1989); since that time 16 states have prohibited the practice, none has approved it, and thus "a national consensus" has developed against execution of the mentally retarded. The Court's "independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures" that have created this national consensus.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer
Justices dissenting: Rehnquist, C.J., Scalia, Thomas

936. *Stogner v. California*, 539 U.S. 607 (2003).

A California statute that permits resurrection of an otherwise time-barred criminal prosecution for sexual abuse of a child, and that was itself enacted after the pre-existing limitations period had expired for the crimes at issue, violates the Ex Post Facto Clause of Art. I, § 10, cl. 1.

Justices concurring: Breyer, Stevens, O'Connor, Souter, Ginsburg
Justices dissenting: Kennedy, Scalia, Thomas, Rehnquist, C.J.

937. *Virginia v. Black*, 538 U.S. 343 (2003).

The provision of Virginia's cross-burning statute stating that a cross burning "shall be *prima facie* evidence of an intent to intimidate" is unconstitutional.

Justices concurring: O'Connor, Stevens, Breyer, Rehnquist, C.J.
Justices concurring specially: Souter, Kennedy, Ginsburg

Justices dissenting: Scalia, Thomas

938. *Lawrence v. Texas*, 539 U.S. 558 (2003).

A Texas statute making it a crime for two people of the same sex to engage in sodomy violates the Due Process Clause of the Fourteenth Amendment. The right to liberty protected by the Due Process Clause includes the right of two adults, "with full and mutual consent from each other, [to] engag[e] in sexual practices common to a homosexual lifestyle."

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer
Justice concurring specially: O'Connor
Justices dissenting: Scalia, Thomas, Rehnquist, C.J.

939. *Blakely v. Washington*, 542 U.S. 296 (2004).

Washington State's sentencing law, which allows a judge to impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence," is inconsistent with the Sixth Amendment right to trial by jury.

Justices concurring: Scalia, Stevens, Souter, Thomas, Ginsburg
Justices dissenting: O'Connor, Breyer, Kennedy, Rehnquist, C.J.

940. *Granholm v. Heald*, 544 U.S. 460 (2005).

Michigan and New York laws that allow in-state wineries to sell wine directly to consumers but prohibit or discourage out-of-state wineries from doing so discriminate against interstate commerce in violation of the Commerce Clause, and are not authorized by the Twenty-first Amendment.

Justices concurring: Kennedy, Scalia, Souter, Ginsburg, Breyer
Justices dissenting: Stevens, O'Connor, Thomas, Rehnquist, C.J.

941. *Halbert v. Michigan*, 545 U.S. 605 (2005).

A Michigan statute making appointment of appellate counsel discretionary with the court for indigent criminal defendants who plead nolo contendere or guilty is unconstitutional to the extent that it deprives indigents of the right to the appointment of counsel to seek "first-tier review" in the Michigan Court of Appeals.

Justices concurring: Ginsburg, Stevens, O'Connor, Kennedy, Souter, Breyer
Justices dissenting: Thomas, Scalia, Rehnquist, C.J.

942. *Roper v. Simmons*, 543 U.S. 551 (2005).

Missouri's law setting the minimum age at 16 for persons eligible for the death penalty violates the Eighth Amendment's ban on cruel and unusual punishment as applied to persons who were under 18 at the time they committed their offense.

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer

Justices dissenting: O'Connor, Scalia, Thomas, Rehnquist, C.J.

943. *Jones v. Flowers*, 547 U.S. 220 (2006).

Arkansas statute violated due process when interpreted not to require the Arkansas Commissioner of State Lands to take additional reasonable steps to notify a property owner of intent to sell the property to satisfy a tax delinquency, after the initial notice was returned by the Post Office unclaimed.

Justices concurring: Roberts, C.J., Stevens, Souter, Ginsburg, Breyer
Justices dissenting: Thomas, Scalia, Kennedy

944. *Randall v. Sorrell*, 548 U.S. 230 (2006).

Vermont campaign finance statute's limitations on both expenditures and contributions violated freedom of speech.

Justices concurring: Breyer, Roberts, C.J., Alito, Kennedy, Thomas, Scalia
Justices dissenting: Stevens, Souter, Ginsberg

945. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 237 (2007).

Texas capital sentencing statute impermissibly prevented sentencing "jurors from giving meaningful consideration to constitutionally relevant mitigating evidence."

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito

946. *Brewer v. Quarterman*, 550 U.S. 286, 288 (2007).

"Texas capital sentencing statute impermissibly prevented sentencing jury from giving meaningful consideration to constitutionally relevant mitigating evidence."

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito

947. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

Louisiana's statute that permits the death penalty for rape of a child under 12 is unconstitutional because the Eighth Amendment bars "the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim."

Justices concurring: Kennedy, Stevens, Souter, Ginsburg, Breyer
Justices dissenting: Alito, Roberts, C.J., Scalia, Thomas

948. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

A District of Columbia statute that banned virtually all handguns, and required that any other type of firearm in the home be dissembled or bound by a trigger lock at all times violates the Second Amendment, which the Court held to protect individuals' right to bear arms.

Justices concurring: Scalia, Roberts, C.J., Kennedy, Thomas, Alito
Justices dissenting: Stevens, Souter, Ginsburg, Breyer

949. *Brown v. Entertainment Merchants Association*, 564 U.S. ___, No. 08–1448, slip op. (2011).

California state law that imposed a civil fine of up to $1,000 for selling or renting "violent video games" to minors, and required their packaging to be so labeled, struck down as violation of the First Amendment, despite argument that, as related to the sale of these games to minors, that this form of speech fell out of First Amendment scrutiny.

Justices concurring: Scalia, Kennedy, Souter, Ginsburg, Sotomayor, Kagan
Justices concurring specially: Alito, Roberts, C.J.
Justices dissenting: Thomas, Breyer

950. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. ___, No. 10–238, slip op. (2011).

Court struck down as violation of the First Amendment an Arizona voluntary public financing system which granted an initial allotment to the campaigns of candidates for state office who agreed to certain requirements and limitations, and made matching funds available if the expenditures of a privately financed opposing candidate, combined with the expenditures of any independent groups supporting that opposing candidacy, exceeded the publically funded campaign's initial allotment.

Justices concurring: Roberts, C.J., Scalia, Kennedy, Thomas, Alito
Justices dissenting: Kagan, Ginsburg, Breyer, Sotomayor

951. *Sorrell v. IMS Health, Inc.*, 564 U.S. ___, No. 10–779, slip op. (2011).

New Hampshire restrictions on pharmacies and "data-miners" selling or leasing information on the prescribing behavior of doctors for marketing purposes and related restrictions limiting the use of that information by pharmaceutical companies struck down as content-based and speaker-based restrictions on free speech, since there were numerous exceptions, including provisions allowing such prescriber-identifying information to be used for health care research.

Justices concurring: Kennedy, Roberts, C.J., Scalia, Thomas, Alito, Sotomayor
Justices dissenting: Breyer, Ginsburg, Kagan

952. *Miller v. Alabama*, 567 U.S. ___, No. 10–9646, slip op. (2012).

Court struck down on Eighth Amendment grounds Alabama and Arkansas statutes mandating life imprisonment without possibility of parole for juvenile offenders convicted of homicide.

Justices concurring: Kagan, Kennedy, Ginsburg, Breyer, Sotomayor
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito

953. *American Tradition Partnership, Inc. v. Bullock*, 564 U.S. ___, No. 11–1179, slip op. (2012).

Montana law barring corporate expenditures in support of, or opposition to, a candidate or a political party struck down as violative of First Amendment, despite legislative record that independent corporate expenditures can lead to corruption or appearance of corruption.

Justices concurring (per curiam): Roberts, C.J., Scalia, Kennedy, Thomas, Alito
Justices dissenting: Breyer, Ginsburg, Sotomayor, Kagan

954. *Hall v. Florida*, 572 U.S. ___, No. 12–10882, slip op. (2014).

Florida state law that provides a "bright line" cutoff based on IQ test scores to determine if a defendant is ineligible for capital punishment because of intellectual disability violates the Eighth Amendment because IQ scores are imprecise in nature and may only be used as a factor of analysis in death penalty cases.

Justices concurring: Kennedy, Ginsburg, Breyer, Sotomayor, Kagan
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito

955. *McCullen v. Coakley*, 573 U.S. ___, No. 12–1168, slip op. (2014).

Massachusetts statute requiring a 35-foot buffer zone at entrances and driveways of abortion facilities violates the First Amendment, as the zone created is not narrowly tailored to serve governmental interests in maintaining public safety and preserving access to reproductive healthcare facilities because less intrusive alternatives were available to the state.

Justices concurring: Roberts, C.J., Ginsburg, Breyer, Sotomayor, Kagan
Justices concurring in judgment: Scalia, Kennedy, Thomas, Alito

956. *Harris v. Quinn*, 573 U.S. ___, No. 11–681, slip op. (2014).

An Illinois law requiring a Medicaid recipient's "personal assistant" (who is part of a bargaining unit but not a member of the bargaining union) to pay an "agency" fee to the union violates the First Amendment's prohibitions against compelled speech and could not be justified under the rationale of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Justices concurring: Roberts, C.J., Scalia, Kennedy, Thomas, Alito
Justices dissenting: Ginsburg, Breyer, Sotomayor, Kagan

957. *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. ___, No. 13–485, slip op. (2015).

Maryland's personal income tax scheme—which taxed Maryland residents on their worldwide income and nonresidents on income earned in the state and did not offer Maryland residents a full credit for income taxes they paid to other states—violates the "Dormant Com-

merce Clause" because it "fails the internal consistency test" and it "inherently discriminates" against interstate commerce.

Justices concurring: Roberts, C.J., Kennedy, Breyer, Alito, Sotomayor
Justices dissenting: Scalia, Thomas, Ginsburg, Kagan

958. *Obergefell v. Hodges*, 576 U.S. ___, No. 14–556, slip op. (2015).

The laws of Michigan, Kentucky, Ohio, and Tennessee defining marriage as a union between one man and one woman violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment because the fundamental right to marry protected by Due Process Clause and the central precepts of equality undergirding the Equal Protection Clause prohibit states from excluding same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

Justices concurring: Kennedy, Ginsburg, Breyer, Sotomayor, Kagan
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito

959. *Franchise Tax Bd. of Cal. v. Hyatt*, No. 14–1175, slip op. (2016).

Nevada's sovereign immunity statute, as interpreted by the Nevada Supreme Court, by not affording a California state agency the same limited immunity that is provided to Nevada state agencies, embodies a policy of hostility toward its sister state in violation of the Full Faith and Credit Clause and cannot be reconciled with the principle of constitutional equality among the states.

Justices concurring: Kennedy, Ginsburg, Breyer, Sotomayor, Kagan
Justices concurring in judgment: Alito
Justices dissenting: Roberts, C.J., Thomas

960. *Birchfield v. North Dakota*, 579 U.S. ___, No. 14–1468, slip op. (2016).

A North Dakota law providing criminal sanctions against an arrestee who refuses to submit to a warrantless blood alcohol concentration test administered by taking a blood sample from the arrestee cannot be justified as a search incident to an arrest or on the basis of implied consent and, therefore, violates the Fourth Amendment.

Justices concurring: Roberts, C.J., Breyer, Alito, Kagan
Justices concurring in judgment: Ginsburg, Sotomayor
Justices dissenting: Thomas

961. *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, No. 15–274, slip op. (2016).

A Texas law, which requires that (1) physicians performing or inducing an abortion have admitting privileges at a local hospital and (2) abortion facilities meet the minimum standards for ambulatory surgical centers under Texas law, imposes a substantial obstacle to a woman seeking an abortion, imposing an undue burden on a liberty interest protected by the Fourteenth Amendment's Due Process Clause.

Justices concurring: Kennedy, Ginsburg, Breyer, Sotomayor, Kagan
Justices dissenting: Roberts, C.J., Thomas, Alito

II. ORDINANCES HELD UNCONSTITUTIONAL

1. *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829).

A city ordinance that levied a tax on stock issued by the United States impaired the federal borrowing power and was void (Art. VI).

Justices concurring: Marshall, C.J., Washington, Duvall, Story
Justices dissenting: Johnson, Thompson

2. *Cannon v. City of New Orleans*, 87 U.S. (20 Wall.) 577 (1874).

A New Orleans ordinance of 1852, imposing a charge for use of piers measured by tonnage of vessel, levied an invalid tonnage duty.

3. *Murray v. City of Charleston*, 96 U.S. 432 (1878).

A Charleston, South Carolina, tax ordinance which withheld from interest payments on municipal bonds a tax levied after issuance of such bonds at a fixed rate of interest impaired the obligation of contract (Art. I, § 10).

Justices concurring: Strong, Waite, C.J., Clifford, Bradley, Swayne, Harlan, Field
Justices dissenting: Miller, Hunt

4. *Moran v. City of New Orleans*, 112 U.S. 69 (1884).

A New Orleans ordinance, so far as it imposed license tax upon persons owning and running towboats to and from the Gulf of Mexico, was an invalid regulation of commerce.

5. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U.S. 650 (1885).

A municipal ordinance granting to a public utility an exclusive right to supply the city with gas, and state constitutional provision abolishing outstanding monopolistic grants, impaired the obligation of contract when enforced against a previously chartered utility which, through consolidation, had inherited the monopolistic, exclusive privileges of two utility corporations chartered prior to the constitutional proviso and ordinance.

6. *New Orleans Water-Works Co. v. Rivers*, 115 U.S. 674 (1885).

When a utility is chartered with an exclusive privilege of supplying a city with water, a subsequently enacted ordinance authorizing an individual to supply water to a hotel impaired the obligation of contract.

7. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

A San Francisco ordinance regulating certain phases of the laundry business, as arbitrarily enforced against Chinese, held to violate the equal protection of the laws.

8. *Leloup v. Port of Mobile*, 127 U.S. 640 (1888).

A Mobile, Alabama, ordinance that levied an occupational license tax on a telegraph company doing an interstate business was void.

9. *McCall v. California*, 136 U.S. 104 (1890).

A San Francisco ordinance that imposed a license tax on a soliciting agent for a foreign corporation was void as levying a tax on interstate commerce.

Justices concurring: Lamar, Miller, Field, Bradley, Harlan, Blatchford
Justices dissenting: Fuller, C.J., Gray, Brewer

10. *Brennan v. City of Titusville*, 153 U.S. 289 (1894).

An ordinance of a Pennsylvania city requiring a license tax of a soliciting agent for a manufacturer in another state was held invalid as imposing a tax upon interstate commerce.

11. *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898).

A Washington city ordinance that authorized construction of a municipal water works impaired the obligation of a contract previously negotiated with a private utility providing the same service.

12. *City of Los Angeles v. Los Angeles City Water Co.*, 177 U.S. 558 (1900).

Ordinance expanding city limits beyond those to be served by a utility leasing a municipality's water works and effecting diminution of the rates stipulated in the original agreement without any equivalent compensation impaired the obligation of contract between the utility and the city.

13. *City of Detroit v. Detroit Citizens' St. Ry.*, 184 U.S. 368 (1902).

City ordinances that adjusted the rate of fare stipulated in agreements made with a street railway company held to impair the obligation of contract.

14. *Caldwell v. North Carolina*, 187 U.S. 622 (1903).

Greensboro ordinance imposing a license on photographic business, as applied to an agent of an out-of-state corporation, was held an invalid regulation of commerce.

15. *Postal Telegraph-Cable Co. v. Borough of Taylor*, 192 U.S. 64 (1904).

Ordinance of Taylor, Pennsylvania authorizing an inspection fee on telegraph companies doing an interstate business held to be an unreasonable and invalid regulation of commerce.

Justices concurring: Peckham, Fuller, C.J., Brown, White, McKenna, Holmes, Day
Justices dissenting: Harlan, Brewer

16. *City of Cleveland v. Cleveland City Ry.*, 194 U.S. 517 (1904).

Ordinance reducing the rate of fares to be charged by railway companies lower than cited in previous ordinances held to impair the obligation of contract.

17. *Dobbins v. City of Los Angeles*, 195 U.S. 223 (1904).

No change in the neighborhood having occurred between passage of two zoning ordinances, the second, which excluded a gas company from erecting a plant within the area authorized by the first ordinance, was held to effect an arbitrary deprivation of property without due process of law.

18. *City of Cleveland v. Cleveland Electric Ry.*, 201 U.S. 529 (1906).

Ordinance according to a consolidated municipal railway an extension of the duration date of franchises issued to its predecessors, in consideration of which substantial sums were expended on improvements, gave rise to a new contract, which was impaired by later attempt on the part of the city to reduce the rate stipulated in the franchises thus extended.

19. *Rearick v. Pennsylvania*, 203 U.S. 507 (1906).

A Sunbury, Pennsylvania ordinance imposing a license fee for the solicitation of orders for the sale of merchandise not of the parties own manufacture imposed an invalid burden on interstate commerce when applied to a Pennsylvania agent of an Ohio company who solicited orders for the latter's products and upon receipt of the latter, consigned to a designated purchaser, consummated the sale by delivering the merchandise to such purchaser and, upon the latter's approval of the parcel delivered, collected the purchase price for transmission to the Ohio employer.

20. *Mayor of Vicksburg v. Vicksburg Waterworks Co.*, 206 U.S. 496 (1907).

Municipal contract with utility fixing the maximum rate to be charged for supplying water to inhabitants was invalidly impaired by subsequent ordinances altering said rates.

21. *Londoner v. City of Denver*, 210 U.S. 373 (1908).

The due process requirements of notice and hearing in connection with the assessment of taxes were violated by a municipal assessment ordinance which afforded the taxpayer the privilege of filing objections but no opportunity to support his objections by argument and proof in open hearing.

Justices concurring: Moody, Harlan, Brewer, White, Peckham, McKenna, Day
Justices dissenting: Fuller, C.J., Holmes

22. *City of Minneapolis v. Street Ry.*, 215 U.S. 417 (1910).

Minneapolis ordinance of 1907, directing the sale of six train tickets for 25¢, was void as impairing the contract which arose from passage of the ordinance of 1875 granting to a railway a franchise expiring in 1923 and establishing a fare of not less than 5¢.

23. *Eubank v. City of Richmond*, 226 U.S. 137 (1912).

Municipal ordinance requiring authorities to establish building lines on separate blocks back of the public streets and across private property upon the request of less than all the owners of the property affected invalidly authorized the taking of property, not for public welfare but for the convenience of other property owners; and therefore violated due process.

24. *Williams v. City of Talladega*, 226 U.S. 404 (1912).

A $100 license fee imposed by ordinance of an Alabama city on a foreign telegraph company, part of whose business income was derived from the transmission of messages for the Federal Government was void as a tax on a federal instrumentality (Art. VI).

25. *Grand Trunk Western Ry. v. City of South Bend*, 227 U.S. 544 (1913).

South Bend, Indiana, ordinance of 1901 repealing portion of an ordinance of 1866 authorizing a railroad to lay double tracks on one of its streets impaired the obligation of contract contrary to Art. I, § 10.

Justices concurring: Lamar, Holmes, White, C.J., Lurton, Van Devanter, McKenna, Day (separately)
Justices dissenting: Hughes, Pitney

26. *City of Owensboro v. Cumberland Telephone Co.*, 230 U.S. 58 (1913).

An ordinance of a Kentucky municipality which required a telephone company to remove from the streets poles and wires installed under a prior ordinance granting permission to do so, without restriction as to the duration of such privilege, or, in the alternative, pay a rental not prescribed in the original ordinance impaired an obligation of contract contrary to Art. I, § 10.

Justices concurring: Lurton, White, C.J., Holmes, Van Devanter, Lamar
Justices dissenting: Day, McKenna, Hughes, Pitney

27. *Boise Water Co. v. Boise City*, 230 U.S. 84 (1913).

An ordinance of an Idaho municipality, adopted in 1906, that subjected a water company to monthly rental fees for the use of its streets invalidly impaired the obligation of contract arising under an ordinance of 1889 which granted a predecessor company the privilege of laying water pipes under the city streets without payment of any charge for the exercise of such right.

28. *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100 (1913).

An ordinance of a Nebraska municipality adopted in 1908 requiring, without any showing of the necessity therefor, a utility to remove its poles and wires from the city streets invalidly impaired an obligation of contract arising from an ordinance of 1884 granting in perpetuity the privilege of erecting and maintaining poles and wires for the transmission of power.

29. *Adams Express Co. v. City of New York*, 232 U.S. 14 (1914).

New York city ordinances requiring an express company to obtain a local license, exacting license fees for express wagons and drivers, and requiring drivers to be citizens, to the extent that they extended to interstate commerce, imposed invalid burdens on such commerce.

Accord: U.S. Express Co. v. City of New York, 232 U.S. 35 (1914).

30. *City of Sault Ste. Marie v. International Transit Co.*, 234 U.S. 333 (1914).

Michigan city municipal ordinance which compelled operator of a ferry between Canadian and Michigan points to take out a license imposed an invalid burden on the privilege of engaging in foreign commerce.

31. *South Covington Ry. v. City of Covington*, 235 U.S. 537 (1915).

Kentucky municipal ordinance, insofar as it sought to regulate the number of street cars to be run, and the number of passengers allowed in each car, between interstate points imposed an unreasonable burden on interstate commerce. Also, the requirement that temperature in the cars never be permitted to be below 50° was unreasonable and violated due process.

32. *Gast Realty Co. v. Schneider Granite Co.*, 240 U.S. 55 (1916).

St. Louis ordinance which levied one-fourth of the cost of paving on property fronting on the street and the remaining three-fourths upon all property in the taxing district according to area and without equality as to depth denied equal protection of the laws.

33. *Buchanan v. Warley*, 245 U.S. 60 (1917).

A Louisville, Kentucky, ordinance which forbade "colored" persons to occupy houses in blocks where the majority of the houses were occupied by whites was deemed to prevent sales of lots in such blocks to African Americans and to deprive the latter of property without due process of law.

34. Accord: *Harmon v. Tyler*, 273 U.S. 668 (1927), voiding a similar New Orleans ordinance.

35. Accord: *City of Richmond v. Deans*, 281 U.S. 704 (1930), voiding a similar Richmond, Virginia, ordinance.

36. *Northern Ohio Traction & Light Co. v. Ohio ex rel. Pontius*, 245 U.S. 574 (1918).

Resolution of Stark County commissioners in 1912 purporting to revoke an electric railway franchise previously granted in perpetuity by appropriate county authorities in 1892 amounted to state action impairing the obligation of contract.

Justices concurring: McReynolds, White, C.J., McKenna, Holmes, Van Devanter, Pitney
Justices dissenting: Clarke, Brandeis

37. *City of Denver v. Denver Union Water Co.*, 246 U.S. 178 (1918).

Rates fixed by a Denver ordinance pertaining to the charges to be collected for services by a water company deprived the latter of its property without due process of law by reason of yielding a return of 4.3% compared with prevailing rates in the city of 6% and higher obtained on secured and unsecured loans.

Justices concurring: Pitney, White, C.J., McReynolds, Day, Van Devanter, McKenna
Justices dissenting: Holmes, Brandeis, Clarke

38. *City of Covington v. South Covington St. Ry.*, 246 U.S. 413 (1918).

A Kentucky city ordinance of 1913 purporting to grant a 25-year franchise for a street railway over certain streets to the best bidder impaired the obligation of contract of an older street railway accorded a perpetual franchise over the same street.

Justices concurring: Holmes, Pitney, White, C.J., McReynolds, Day, Van Devanter, McKenna
Justices dissenting: Clark, Brandeis

39. *Detroit United Ry. v. City of Detroit*, 248 U.S. 429 (1919).

A Detroit ordinance that compelled street railway company to carry passengers on continuous trips over franchise lines to and over nonfranchise lines, and vice versa, for a fare no greater than its franchises entitled it to charge upon the former alone impaired the obligation of the franchise contracts; and insofar as its enforcement would result in a deficit, also deprived the company of its property without due process.

Justices concurring: Day, Pitney, White, C.J., McReynolds, Van Devanter, McKenna
Justices dissenting: Clarke, Holmes, Brandeis

40. *City of Los Angeles v. Los Angeles Gas Corp.*, 251 U.S. 32 (1919).

A Los Angeles ordinance authorizing city to establish lighting system of its own could not effect removal of fixtures of a lighting com-

pany occupying streets pursuant to rights granted by a prior franchise without paying compensation required by Due Process Clause.

Justices concurring: McKenna, White, C.J., Holmes, Day, Van Devanter, McReynolds, Brandeis
Justices dissenting: Pitney, Clarke

41. *City of Houston v. Southwestern Tel. Co.*, 259 U.S. 318 (1922).

A Houston ordinance was void because the rates it fixed were confiscatory and deprived the utility of its property without due process of law.

42. *City of Paducah v. Paducah Ry.*, 261 U.S. 267 (1923).

Fares prescribed by an ordinance of Kentucky city were confiscatory and deprived the utility of property without due process of law.

43. *Texas Transp. Co. v. City of New Orleans*, 264 U.S. 150 (1924).

A New Orleans license tax ordinance could not be validly enforced as to the business of a corporation employed as agent by owners of vessels engaged exclusively in interstate and foreign commerce, where its business was a necessary adjunct of said commerce and consisted of the soliciting and engaging of cargo, the nomination of vessels to carry it, arranging for delivery on wharf and for stevedores, payment of ships' disbursements, issuing bills of lading, and collecting freight charges.

Justices concurring: Sutherland, Taft, C.J., Sanford, McReynolds, Butler, McKenna, Van Devanter
Justices dissenting: Brandeis, Holmes

44. *Real Silk Mills v. City of Portland*, 268 U.S. 325 (1925).

A Portland, Oregon, ordinance that exacted a license fee and a bond for insuring delivery from solicitors who go from place to place taking orders for goods for future delivery and receiving deposits in advance was invalid as unduly burdening interstate commerce when enforced against solicitors taking orders for an out-of-state corporation which confirmed the orders, shipped the merchandise directly to the customers, and permitted the solicitors to retain the deposited portion of the purchase as compensation.

45. *Mayor of Vidalia v. McNeely*, 274 U.S. 676 (1927).

An ordinance of Louisiana municipality that exacted license as a condition precedent for operation of a ferry across boundary waters separating two states imposed an invalid burden on interstate commerce.

46. *Delaware, L. & W.R.R. v. Town of Morristown*, 276 U.S. 182 (1928).

A New Jersey municipal ordinance that compelled use of railroad station grounds for a public hackstand without compensation deprived the railroad of property without due process.

Justices concurring: Brandeis, Holmes (separately)

47. *Sprout v. City of South Bend*, 277 U.S. 163 (1928).

An Indiana municipal ordinance that exacted from motor bus operators a license fee adjusted to the seating capacity of a bus could not be validly enforced against an interstate carrier, for the fee was not exacted to defray expenses of regulating traffic in the interest of safety, or to defray the cost of road maintenance or as an occupation tax imposed solely on account of intrastate business.

48. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

A Massachusetts municipal zoning ordinance that placed owner's land in a residential district with resulting inhibition of use for commercial purposes deprived the owner of property without due process because the requirement did not promote health, safety, morals, or general welfare.

49. *Washington ex rel. Seattle Title Trust Co. v. Roberge,*278 U.S. 116 (1928).

A municipal (Washington) zoning ordinance that conditioned issuance of a permit to enlarge a home for the aged in a residential area on the approval of the owners of two-thirds of the property within 400 feet of the proposed building violated due process because the condition bore no relationship to public health, safety, and morals and entailed an improper delegation of legislative power to private citizens.

50. *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

A Griffin, Georgia, ordinance that exacted a permit for the distribution of literature by hand or otherwise violated freedom of press as guaranteed by the Due Process Clause of the Fourteenth Amendment by imposing censorship in advance of publication.

51. *Hague v. CIO*, 307 U.S. 496 (1939).

A Jersey City ordinance forbidding distribution of printed matter and the holding, without permits, of public meetings in streets and other public places withheld freedom of speech and assembly contrary to the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Roberts, Black, Frankfurter, Douglas, Stone, Reed, Hughes (concurred with opinions of Robert Stone), C.J.
Justices dissenting: McReynolds, Butler

52. *Schneider v. New Jersey*, 308 U.S. 147 (1939).

Irvington, New Jersey, ordinance prohibiting solicitation and distribution of circulars by canvassing from house to house, unless licensed by the police, violates the First Amendment as applied to one who delivered religious literature and solicited contributions door to door.

Justices concurring: Hughes, C.J., Butler, Stone, Roberts, Reed, Frankfurter, Douglas, Black
Justice dissenting: McReynolds

53. Accord: *Kim Young v. California*, 308 U.S. 147 (1939).

Los Angeles ordinance invalid on same basis.

54. Accord: *Snyder v. City of Milwaukee,*308 U.S. 147 (1939).

Milwaukee ordinance invalid on same basis.

55. Accord: *Nichols v. Massachusetts*, 308 U.S. 147 (1939).

Worcester, Massachusetts, ordinance invalid on same basis.

56. *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940).

The New York City sales tax cannot be collected on sales to vessels engaged in foreign commerce of fuel oil manufactured from imported crude petroleum in bond. Thus enforced, the city ordinance is invalid as an infringement of congressional regulations of foreign and interstate commerce (Art. I, § 8, cl. 3).

57. *Carlson v. California*, 310 U.S. 106 (1940).

A Shasta County, California, ordinance making it unlawful for any person to carry or display any sign or badge in the vicinity of any place of business for the purpose of inducing others to refrain from buying or working there, or for any person to loiter or picket in the vicinity of any place of business for such purpose, violates freedom of speech and press guaranteed by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Hughes, C.J., Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy
Justice dissenting: McReynolds

58. *Jamison v. Texas*, 318 U.S. 413 (1943).

A Dallas ordinance made it unlawful to throw any handbills, circulars, cards, newspapers or any advertising material upon any street or sidewalk in the city. As applied, the ordinance prohibited the dissemination of information, a denial of the freedom of the press, and where the handbills contained an invitation to participate in a reli-

gious activity, a denial of freedom of religion, in violation of the First and Fourteenth Amendments.

59. *Largent v. Texas*, 318 U.S. 418 (1943).

A Paris City ordinance making it unlawful for any person to solicit orders or to sell books, wares or merchandise within the residential portion of Paris without a permit is invalid as applied. The ordinance abridges the freedom of religion, speech, and press guaranteed by the Fourteenth Amendment in that it forbids the distribution of religious publications without a permit, the issuance of which is in the discretion of a municipal officer.

60. *Jones v. City of Opelika*, 319 U.S. 103 (1943).

An Opelika, Alabama, ordinance imposing licenses and taxes on various businesses cannot constitutionally be applied to the business of selling books and pamphlets on the streets or from house to house. As applied the ordinance infringes liberties of speech and press and religion guaranteed by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Stone, C.J., Black, Douglas, Murphy, Rutledge
Justices dissenting: Reed, Roberts, Frankfurter, Jackson

61. *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943).

An ordinance of the City of Jeanette providing that all persons soliciting orders for merchandise of any kind, or persons delivering such articles under such orders, must procure a license and pay a fee, violates the First and Fourteenth Amendments when applied to persons soliciting orders for religious books and pamphlets, because "[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution."

Justices concurring: Stone, C.J., Black, Douglas, Murphy, Rutledge
Justices dissenting: Roberts, Reed, Frankfurter, Jackson

62. *Martin v. City of Struthers*, 319 U.S. 141 (1943).

An ordinance of Struthers, Ohio, made it unlawful for any person distributing handbills, circulars, or other advertisements to ring the door bell, sound the door knocker, or otherwise summon occupants of any residence to the door for the purpose of receiving such handbills, etc. The ordinance, as applied to one distributing leaflets advertising a religious meeting, interfered with the rights of freedom of speech and press guaranteed by the First Amendment. The ordinance, by failing to distinguish between householders who are willing to receive the literature and those who are not, extended further than was necessary for protection of the community.

Justices concurring: Stone, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge

Justices dissenting: Roberts, Reed, Jackson

63. *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

A McCormick, South Carolina, ordinance required agents selling books to pay a license fee of $1.00 per day or $15.00 per year. The constitutional guarantee of religious freedom under the First and Fourteenth Amendments precludes exacting a book agent's license fee from a distributor of religious literature notwithstanding that his activities are confined to his hometown and his livelihood is derived from contributions requested for the literature distributed.

Justices concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Rutledge
Justices dissenting: Roberts, Frankfurter, Jackson

64. *Nippert v. City of Richmond*, 327 U.S. 416 (1946).

A Richmond, Virginia, City Code imposed upon persons "engaged in business as solicitors an annual license tax of $50.00 plus one-half of one per centum of their gross receipts or commissions for the preceding license year in excess of $1,000.00." Permit of Director of Public Safety was required before issuance of the license. The ordinance violated the Commerce Clause because it discriminated against out-of-state merchants in favor of local ones and operated as a barrier to the introduction of out-of-state merchandise.

Justices concurring: Stone, C.J., Reed, Frankfurter, Rutledge, Burton
Justices dissenting: Black, Douglas, Murphy

65. *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947).

A New York City law provided that, for the privilege of carrying on within the city any trade, business, or profession, every person shall pay a tax of one-tenth of one per centum upon all receipts received in or allocable to the city during the year. The excise tax levied on the gross receipts of a stevedoring corporation is invalid as a burden on interstate and foreign commerce in violation of the Commerce Clause.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Douglas (dissenting in part), Murphy (dissenting in part), Jackson, Rutledge (dissenting in part), Burton
Justice dissenting: Black

66. *Saia v. New York*, 334 U.S. 558 (1948).

A Lockport ordinance forbidding use of sound amplification excepted public dissemination, through loudspeakers, of news, matters of public concern, and athletic activities, provided that the latter be done under permission obtained from the Chief of Police. The ordinance is unconstitutional on its face as a prior restraint on speech, in violation of the First Amendment, made applicable to the states by

the Fourteenth Amendment. No standards were prescribed for the exercise of discretion by the Chief of Police.

Justices concurring: Vinson, C.J., Black, Douglas, Murphy, Rutledge
Justices dissenting: Reed, Frankfurter, Jackson, Burton

67. *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

A Chicago ordinance proscribed the making of improper noises or other conduct contributing to a breach of the peace. Petitioner was convicted of violating said ordinance by reason of the fact that he had addressed a large audience in an auditorium where he had vigorously criticized various political and racial groups as well as the disturbances produced by an angry and turbulent crowd protesting his appearance. At this trial, the judge instructed the jury that any behavior that stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, violates the ordinance. As construed and applied by the trial court the ordinance violates the right of free speech guaranteed by the First Amendment and made applicable to the states by the Fourteenth Amendment.

Justices concurring: Black, Reed, Douglas, Murphy, Rutledge
Justices dissenting: Vinson, C.J., Frankfurter, Jackson, Burton

68. *Kunz v. New York*, 340 U.S. 290 (1951).

Because of prior denunciation of other religious beliefs, appellant's license to conduct religious meetings on New York City streets was revoked. A local ordinance forbade the holding of such meetings without a license but contained no provisions for revocation of such licenses and no standard to guide administrative action in granting or denying permits. Appellant was convicted for holding religious meetings without a permit. The ordinance was held to grant discretionary power to control in advance the right of citizens to speak on religious issues and to impose a prior restraint on the exercise of freedom of speech and religion.

Justices concurring: Vinson, C.J., Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton
Justices dissenting: Jackson

69. *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

A Madison, Wisconsin, ordinance prohibited the sale of milk as pasteurized unless it had been processed and bottled at an approved plant within a radius of five miles from the central square of Madison. An Illinois corporation, engaged in gathering and distributing milk from farms in Illinois and Wisconsin was denied a license to sell milk within the city solely because its pasteurization plants were more than five miles away. The ordinance unjustifiably discriminated against interstate commerce in violation of the Commerce Clause.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark
Justices dissenting: Black, Douglas, Minton

70. *Gelling v. Texas*, 343 U.S. 960 (1952).

Marshall City, Texas, motion picture censorship ordinance, as enforced, was unconstitutional as denying freedom of speech and press protected by the Due Process Clause of the Fourteenth Amendment.

71. *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

A Pawtucket ordinance read: "No person shall address any political or religious meeting in any public park, but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park." Because services of a Jehovah's Witnesses sect differed from those conducted by other religious groups, in that the former were marked by lectures rather than confined to orthodox rituals, that sect was prevented from holding religious meetings in parks. Thus applied, the ordinance was held to violate the First and Fourteenth Amendments, including the Equal Protection Clause.

72. *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956).

Section 903 of the New York City Charter provides that whenever a city employee invokes the privilege against self-incrimination to avoid answering inquiries into his official conduct by a legislative committee, his employment shall terminate. The summary dismissal thereunder, without notice and hearing, of a teacher at City College who was entitled to tenure and could be discharged only for cause and after notice, hearing and appeal, violated the Due Process Clause of the Fourteenth Amendment. Invocation of the privilege to justify refusal to answer questions of a congressional committee concerning membership in the Communist Party in 1948–1949 cannot be viewed as the equivalent either to a confession of guilt or a conclusive presumption of perjury.

Justices concurring: Black (concurring specially), Douglas (concurring specially), Warren, C.J., Frankfurter, Clark
Justices dissenting: Reed, Burton, Minton, Harlan

73. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955).

Atlanta ordinance that reserved certain public parks and golf courses for white persons only violated the Equal Protection Clause of the Fourteenth Amendment.

74. *West Point Grocery Co. v. City of Opelika*, 354 U.S. 390 (1957).

Ordinance of Opelika, Alabama, provided that a wholesale grocery business that delivers groceries in the city from points without

the city must pay an annual privilege tax of $250. As applied to a Georgia corporation that solicits orders in the city and consummates purchases by deliveries originating in Georgia, the tax is invalid under the Commerce Clause.

Justices concurring: Warren, C.J., Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker
Justice dissenting: Black

75. *Lambert v. California*, 355 U.S. 225 (1957).

Los Angeles Municipal Code made it unlawful for a person who has been convicted of a crime punishable in California as a felony to remain in the city longer than five days without registering with the Chief of Police. Applied to a person who is not shown to have had actual knowledge of his duty to register, this ordinance violates the Due Process Clause of the Fourteenth Amendment of the Constitution.

Justices concurring: Warren, C.J., Black, Douglas, Clark, Brennan
Justices dissenting: Frankfurter, Burton, Harlan, Whittaker

76. *Staub v. City of Baxley*, 355 U.S. 313 (1958).

Baxley, Georgia, made it an offense to "solicit" membership in any "organization, union or society" requiring the payment of "fees [or] dues" without first receiving a permit from the Mayor and Council. Issuance or refusal may occur after the character of the applicant, the nature of the organization in which memberships are to be solicited, and its effect upon the general welfare of the City have been considered. Appellant had been convicted for soliciting memberships in a labor union without a license. The ordinance is void on its face because it makes enjoyment of freedom of speech contingent upon the will of the Mayor and City Council and thereby constitutes a prior restraint upon that freedom contrary to the Fourteenth Amendment of the Constitution.

Justices concurring: Warren, C.J., Douglas, Black, Burton, Harlan, Brennan, Whittaker
Justices dissenting: Frankfurter, Clark

77. *Smith v. California*, 361 U.S. 147 (1959).

A Los Angeles City ordinance making it unlawful for any bookseller to possess any obscene publication denies him freedom of press, as guaranteed by the Due Process Clause of the Fourteenth Amendment, when it is judicially construed to make him absolutely liable criminally for mere possession of a book, later adjudged to be obscene, notwithstanding that he had no knowledge of its contents. Such construction would tend to restrict the books he sells to those he has inspected and thereby to limit the public's access to constitutionally protected publications.

Justices concurring: Clark, Warren, C.J., Whittaker, Brennan, Stewart, Black (separately), Frankfurter (separately), Douglas (separately), Harlan (dissenting in part; separately)

78. *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

Little Rock and North Little Rock, Arkansas, ordinances that, as a condition of exempting charitable organizations from an annual business license tax, required the disclosure of the identity of the officers and members of said organizations, as enforced against the N.A.A.C.P., denied members of the latter freedom of association, press, and speech as guaranteed by the Due Process Clause of the Fourteenth Amendment.

Justices concurring: Brennan, Clark, Frankfurter, Stewart, Warren, C.J., Whittaker, Harlan, Black (separately), Douglas (separately)

79. *Talley v. California*, 362 U.S. 60 (1960).

Los Angeles ordinance that forbade distribution under any circumstance of any handbill that did not have printed on it the name and address of the person who prepared, distributed, or sponsored it was void on its face as abridging freedom of speech and press guaranteed by the Due Process Clause of the Fourteenth Amendment. The ordinance was not limited to identifying those responsible for fraud, false advertising, libel, disorder, or littering.

Justices concurring: Warren, C.J., Stewart, Harlan (separately), Douglas, Black
Justices dissenting: Clark, Frankfurter, Whittaker

80. *Schroeder v. City of New York*, 371 U.S. 208 (1962).

New York City Water Supply Act, insofar as it authorized notification of land owners, whose summer resort property would be adversely affected by city's diversion of water, by publication of notices in January in New York City official newspaper and in newspapers in the county where the resort property was located as well as by notices posted on trees and poles along the waterway adjacent to such property, did not afford the quality of notice, *i.e.*, to the owners' permanent home address, required by the Due Process Clause of the Fourteenth Amendment.

81. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

San Francisco ordinance authorizing warrantless entry of residential property to inspect for housing code violations violates Fourth and Fourteenth Amendments.

82. *See v. City of Seattle*, 387 U.S. 541 (1967).

Seattle ordinance authorizing warrantless entry of commercial property to inspect for fire code violations violates Fourth and Fourteenth Amendments.

83. *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

Chicago motion picture censorship ordinance is unconstitutional in several procedural respects.

84. *Avery v. Midland County*, 390 U.S. 474 (1968).

Enactment of Midland County, Texas commissioners court drawing boundaries for districts of election of members does not comply with required "one-man, one-vote" standard.

Justices concurring: White, Black, Douglas, Brennan, Warren, C.J.
Justices dissenting: Harlan, Fortas, Stewart

85. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

Dallas ordinance providing for classification of motion pictures as not suitable for viewing by young persons does not provide adequate standards and is void for vagueness.

Justices concurring: Marshall, Black, Douglas, Brennan, Stewart, White, Fortas, Warren, C.J.
Justices dissenting: Harlan

86. *Hunter v. Erickson*, 393 U.S. 385 (1969).

Amendment to Akron, Ohio city charter providing that any ordinance enacted by council dealing with discrimination in housing was not to be effective until approved by referendum whereas no other enactment had to be so submitted violated Equal Protection Clause.

Justices concurring: White, Douglas, Brennan, Fortas, Marshall, Warren, C.J.
Justices concurring specially: Harlan, Stewart
Justices dissenting: Black

87. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

Cincinnati ordinance making it unlawful for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by is unconstitutionally vague and violates rights to assembly and association.

Justices concurring: Stewart, Douglas, Harlan, Brennan, Marshall
Justices concurring specially: Black
Justices dissenting: White, Blackmun, Burger, C.J.

88. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

A Jacksonville, Florida vagrancy ordinance is void for vagueness because it fails to give a person fair notice that his contemplated conduct is forbidden, because it encourages arbitrary and erratic enforcement of the law, because it makes criminal activities which by modern standards are normally innocent, and because it vests unfettered discretion in police.

89. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972).

A Chicago ordinance prohibiting all picketing within a certain distance of any school except labor picketing violates the Equal Protection Clause by impermissibly distinguishing between types of peaceful picketing.

90. *Cason v. City of Columbus*, 409 U.S. 1053 (1972).

A Columbus, Ohio ordinance prohibiting use of abusive language toward another as applied by court below without limitation to fighting words cannot sustain conviction.

91. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974).

New Orleans ordinance interpreted by state courts to punish the use of opprobrious words to police officer without limitation of offense to uttering of fighting words is invalid.

Justices concurring: Brennan, Douglas, Stewart, White, Marshall
Justice concurring specially: Powell
Justices dissenting: Blackmun, Rehnquist, Burger, C.J.

92. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

A Jacksonville, Florida ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, is facially invalid as an infringement of First Amendment rights.

Justices concurring: Powell, Douglas, Brennan, Stewart, Marshall, Blackmun
Justices dissenting: White, Rehnquist, Burger, C.J.

93. *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976).

An Oradell, New Jersey ordinance requiring that advance written notice be given to local police by any person desiring to canvass, solicit, or call from house to house for a charitable or political purpose was held void for vagueness.

Justices concurring: Burger, C.J., Brennan, Stewart, White, Marshall, Blackmun, Powell
Justice dissenting: Rehnquist

94. *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977).

A Wilingboro, New Jersey ordinance prohibiting posting of real estate "For Sale" and "Sold" signs for the purpose of stemming what the township perceived as flight of white homeowners violated the First Amendment.

95. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

An East Cleveland zoning ordinance that limited housing occupancy to members of single family and restrictively defined family so

as to prevent an extended family, *i.e.*, two grandchildren by different children residing with grandmother, violated the Due Process Clause.

Justices concurring: Powell, Brennan, Marshall, Blackmun
Justice concurring specially: Stevens
Justices dissenting: Stewart, Rehnquist, White; Burger (on other grounds)

96. *Carter v. Miller*, 434 U.S. 356 (1978).

A lower court's invalidation on equal protection grounds of a Chicago ordinance that permanently denies public chauffeur's license to applicants previously convicted of certain crimes, but making revocation of previously licensed persons convicted of the same offenses discretionary, is affirmed by an equally divided Court.

97. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

A Schaumburg, Illinois ordinance prohibiting door-to-door or on-the-street solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes" violates First and Fourteenth Amendment speech protections.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Stevens, Burger, C.J.
Justice dissenting: Rehnquist

98. *Edwards v. Service Machine & Shipbuilding Corp.*, 449 U.S. 913 (1980).

A court of appeals decision voiding on Commerce Clause grounds an ordinance of St. Mary Parish, Louisiana requiring non-local job seekers and local workers seeking new jobs to obtain an identification card, to provide fingerprints and a photograph, and to pay a fee, is summarily affirmed.

99. *Town of Southampton v. Troyer*, 449 U.S. 988 (1980).

A court of appeals decision invalidating on First Amendment grounds an ordinance of Southampton, New York barring door-to-door solicitation without prior consent of the occupant, but excepting canvassers who have lived in the municipality at least six months, is affirmed.

100. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981).

A Mount Ephraim, New Jersey zoning ordinance construed to bar the offering of live entertainment within the township violated the First Amendment.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell
Justice concurring specially: Stevens
Justices dissenting: Burger, C.J., Rehnquist

101. *Metromedia v. City of San Diego*, 453 U.S. 490 (1981).

A complex ban on billboard displays within the City of San Diego, excepting certain onsite signs and 12 categories of particular signs, violates First Amendment.

Justices concurring: White, Stewart, Marshall, Powell
Justices concurring specially: Brennan, Blackmun, Stevens (in part)
Justices dissenting: Burger, C.J., Rehnquist

102. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

A Berkeley, California ordinance limiting to $250 any contributions to committees formed to support or oppose ballot measures submitted to popular vote violates the First Amendment.

Justices concurring: Burger, C.J., Brennan, Powell, Rehnquist, Stevens
Justices concurring specially: Marshall, Blackmun, O'Connor
Justice dissenting: White

103. *Rusk v. Espinosa*, 456 U.S. 951 (1982).

A court of appeals decision affirming a federal district court injunction of an Albuquerque, New Mexico ordinance, as a violation of the First Amendment, is summarily affirmed. The ordinance regulated solicitation by charitable organizations but exempted solicitation by religious groups for religious but not for secular purposes.

104. *Giacobbe v. Andrews*, 459 U.S. 801 (1982).

A federal district court decision holding that New York City's plan for apportioning 10 at-large seats for the City Council among the City's five boroughs violates the one person, one vote requirements of the Equal Protection Clause, which was summarily affirmed by the U.S. Court of Appeals for the Second Circuit, is summarily affirmed.

105. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (subsequently overruled in part).

An Akron, Ohio ordinance regulating the circumstances of abortions is unconstitutional in the following respects: by requiring all abortions performed after the first trimester to be performed in a hospital, by requiring parental consent or court order for abortions performed on minors under age 15, by requiring the attending physician to provide detailed information on which "informed consent" may be premised, by requiring a 24-hour waiting period, and by requiring disposal of fetal remains in a "humane and sanitary manner."

Justices concurring: Powell, Brennan, Marshall, Blackmun, Stevens, Burger, C.J.
Justices dissenting: O'Connor, White, Rehnquist

106. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

A Cleburne, Texas zoning requirement of a special use permit for operation of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses are permitted without such special use permits is a denial of equal protection as applied, the record containing no rational basis for the distinction.

Justices concurring: White, Powell, Rehnquist, Stevens, O'Connor, Burger, C.J.
Justices concurring specially: Marshall, Brennan, Blackmun

107. *Hudnut v. American Booksellers Ass'n*, 475 U.S. 1001 (1986).

Appeals court decision holding invalid under the First Amendment an Indianapolis ordinance prohibiting as pornography "graphic sexually explicit subordination of women" without regard to appeal to prurient interests or offensiveness to community standards is summarily affirmed.

108. *City of Houston v. Hill*, 482 U.S. 451 (1987).

Houston ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty is facially overbroad in violation of the First Amendment.

Justices concurring: Brennan, White, Marshall, Blackmun, Stevens
Justices concurring specially: Powell, O'Connor, Scalia
Justice dissenting: Rehnquist, C.J.

109. *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

Los Angeles Board of Airport Commissioners resolution banning all "First Amendment activities" at airport is facially overbroad in violation of the First Amendment.

110. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

Lakewood, Ohio ordinance vesting in the mayor unbridled discretion to grant or deny a permit for location of news racks on public property violates the First Amendment.

Justices concurring: Brennan, Marshall, Blackmun, Scalia
Justices dissenting: White, Stevens, O'Connor

111. *City of Richmond v. J.A. Croson Co.,*488 U.S. 469 (1989).

Richmond, Virginia requirement that contractors awarded city construction contracts must subcontract at least 30% of the dollar amount to "minority business enterprises" violates the Equal Protection Clause.

Justices concurring: O'Connor, White, Stevens, Kennedy, Rehnquist, C.J.
Justice concurring specially: Scalia
Justices dissenting: Marshall, Brennan, Blackmun

112. *New York City Bd. of Estimate v. Morris*, 489 U.S. 688 (1989).

New York City Charter procedures for electing City's Board of Estimate, consisting of three members elected citywide (the Mayor, the comptroller, and the president of the City Council) and the elected presidents of the city's five boroughs, violate the one-person, one-vote requirements derived from the Equal Protection Clause.

Justices concurring: White, Marshall, O'Connor, Scalia, Kennedy, Rehnquist, C.J.
Justices concurring specially: Blackmun, Brennan, Stevens

113. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

Dallas licensing scheme for "sexually oriented" businesses, as applied to businesses that engage in protected First Amendment activity, constitutes an invalid prior restraint on protected activity. The ordinance fails to place a time limit within which the licensing authority must act, and fails to provide a prompt avenue for judicial review.

Justices concurring: O'Connor, Stevens, Kennedy
Justices concurring specially: Brennan, Marshall, Blackmun
Justices dissenting: White, Scalia, Rehnquist, C.J.

114. *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992).

St. Paul, Minnesota's Bias-Motivated Crime Ordinance, which punishes the display of a symbol which one knows will arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender, is facially invalid under the First Amendment because it discriminates solely on the basis of the subjects that speech addresses.

Justices concurring: Scalia, Kennedy, Souter, Thomas, Rehnquist, C.J.
Justices concurring specially: White, Blackmun, O'Connor, Stevens

115. *Lee v. Weisman*, 505 U.S. 577 (1992).

Providence, Rhode Island's use of members of the clergy to offer prayers at official public secondary school graduation ceremonies violates the First Amendment's Establishment Clause. The involvement of public school officials with religious activity was "pervasive," to the point of creating a state-sponsored and state-directed religious exercise in a public school; officials not only determined that an invocation and benediction should be given, but also selected the religious participant and provided him with guidelines for the content of nonsectarian prayers.

Justices concurring: Kennedy, Blackmun, Stevens, O'Connor, Souter
Justices dissenting: Scalia, White, Thomas, Rehnquist, C.J.

116. *Lee v. International Soc'y for Krishna Consciousness*, 505 U.S. 830 (1992).

A regulation of the Port Authority of New York and New Jersey banning leafleting ("the sale or distribution of . . . printed or written

material" to passers-by) within the airport terminals operated by the facility is invalid under the First Amendment.

Justices concurring (per curiam): Blackmun, Stevens, O'Connor, Kennedy, Souter
Justices dissenting: Rehnquist, C.J., White, Scalia, Thomas

117. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

Cincinnati's refusal, pursuant to an ordinance prohibiting distribution of commercial handbills on public property, to allow the distribution of commercial publications through freestanding news racks located on public property, while at the same time allowing similar distribution of newspapers and other noncommercial publications, violates the First Amendment.

Justices concurring: Stevens, Blackmun, O'Connor, Scalia, Kennedy, Souter
Justices dissenting: Rehnquist, C.J., White, Thomas

118. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

Hialeah, Florida's ordinances banning the killing of animals in a ritual sacrifice are unconstitutional as infringing the free exercise of religion by members of the Santeria religion.

Justices concurring: Kennedy, White, Stevens, Scalia, Souter, Thomas, Rehnquist, C.J.
Justices concurring specially: Blackmun, O'Connor

119. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

Clarkstown, New York's "flow control" ordinance, which requires all solid waste within the town to be processed at a designated transfer station before leaving the municipality, discriminates against interstate commerce and is invalid under the Commerce Clause.

Justices concurring: Kennedy, Stevens, Scalia, Thomas, Ginsburg
Justice concurring specially: O'Connor
Justices dissenting: Souter, Blackmun, Rehnquist, C.J.

120. *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

Ladue, Missouri's ordinance, which prohibits all signs but makes exceptions for several narrow categories, violates the First Amendment by prohibiting a resident from placing in the window of her home a sign containing a political message. By prohibiting residential signs that carry political, religious, or personal messages, the ordinance forecloses "a venerable means of communication that is both unique and important."

121. *City of Chicago v. Morales*, 527 U.S. 41 (1999).

Chicago's Gang Congregation Ordinance, which prohibits "criminal street gang members" from "loitering" with one another or with other persons in any public place after being ordered by a police offi-

cer to disperse, violates the Due Process Clause of the Fourteenth Amendment. The ordinance violates the requirement that a legislature establish minimal guidelines for law enforcement.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer
Justices dissenting: Scalia, Thomas, Rehnquist, C.J.

122. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150 (2002).

The Ohio village's ordinance making it a misdemeanor offense to engage in door-to-door advocacy without first registering with the mayor and receiving a permit, required to be shown to an officer or resident who so requests, violates the First Amendment. The free and unhampered distribution of pamphlets is "an age-old form of missionary evangelism," and is also important for the dissemination of ideas unrelated to religion. The ordinance is not narrowly tailored to serve the village's "important," interests in preventing crime, preventing fraud, and protecting privacy.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer
Justices concurring specially: Scalia, Thomas
Justice dissenting: Rehnquist, C.J.

123. *Polar Tankers, Inc. v. City of Valdez, Alaska*, 557 U.S. ___, No. 08–310 (2009).

Alaska city's "ordinance imposing a personal property tax upon '[b]oats and vessels of at least 95 feet in length' that regularly travel to the City, are kept or used within the City, or which annually take on at least $1 million worth of cargo or engage in other business transactions of comparable value in the City," violates the Tonnage Clause (Art. I, § 10, cl. 3).

Justices concurring: Breyer, Scalia, Kennedy, Ginsburg, Alito
Justices concurring specially: Roberts, C.J., Thomas
Justice dissenting: Stevens, Souter

124. *McDonald v. Chicago*, 561 U.S. ___, No. 08–1521, slip op. (2010).

A Chicago ordinance effectively banning handgun possession by almost all private citizens who reside in the city, and an Oak Park, Illinois ordinance that makes it "unlawful for any person to possess . . . any firearm" including handguns, violate the Second Amendment. A plurality of the Court found that the Second Amendment is fully applicable to the states through the Fourteenth Amendment, as self-defense through use of firearms is "fundamental to the Nation's scheme of ordered liberty," and handguns are the preferred firearm for protection of one's home and family. Justice Thomas found that the Second Amendment was applicable to the states under the Privileges or Immunities Clause.

Justices concurring: Roberts, C.J., Scalia, Kennedy, Alito
Justices concurring specially: Thomas
Justices dissenting: Stevens, Breyer, Ginsburg, Sotomayor

125. *City of Los Angeles v. Patel*, 576 U.S. ___, No. 13–1175, slip op. (2014).

A Los Angeles ordinance that gives police the ability to inspect hotel registration records without advance notice and arrest hotel employees for noncompliance is facially unconstitutional. Inspections under the ordinance constitute administrative searches for purposes of the Fourth Amendment and, as such, may only proceed if the subject of the search has been afforded an opportunity to obtain precompliance review before a neutral decision-maker.

Justices concurring: Kennedy, Ginsburg, Breyer, Sotomayor, Kagan
Justices dissenting: Roberts, C.J., Scalia, Thomas, Alito

126. *Reed v. Town of Gilbert*, 576 U.S. ___, No. 13–502, slip op. (2015).

A municipality's sign code imposing more stringent restrictions on signs directing the public to a public event than on signs conveying political or ideological messages is a content-based regulation that is not narrowly tailored to serve compelling interests in preserving the aesthetics of a town and promoting traffic safety.

Justices concurring: Roberts, C.J., Scalia, Kennedy, Thomas, Alito, Sotomayor
Justices concurring in judgment only: Ginsburg, Breyer, Kagan

III. STATE AND LOCAL LAWS HELD PREEMPTED BY FEDERAL LAW

1. *Society for the Propagation of the Gospel v. New Haven*, 21 U.S. (8 Wheat.) 464 (1823).

The property of a charitable corporation chartered by the Crown, being specifically protected by the treaty of peace of 1783, an act of Vermont adopted in 1794 and purporting to convey such property to local subdivisions was void.

2. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

Because of conflict with the federal licensing act of 1793 authorizing vessels to navigate coastal waters, a New York statute granting to certain persons an exclusive right to navigate New York waters was void.

3. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

A Georgia law that imposed penalties on white persons who, without first obtaining a license, established a residence within the limits of the Cherokee Nation, was unenforceable because of a conflict with treaties negotiated by the United States with such Indian tribes and because it extended to an area beyond the jurisdiction of the state.

4. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

A Pennsylvania statute (1826) that penalized an owner's recovery of a runaway slave violated Art. IV, § 2, cl. 3, and federal legislation implementing the latter provision.

Justices concurring: Story, Catron, McKinley, Taney (separately), C.J., Thompson (separately), Baldwin (separately), Wayne (separately), Daniel (separately), McLean (separately)

5. *Searight v. Stokes*, 44 U.S. (3 How.) 151 (1845).

Because, under federal acts ceding to Pennsylvania that part of the Cumberland Road within its limits, and Pennsylvania laws accepting the same, the carriage of mail over such road was to be free from toll, and later Pennsylvania law imposing tolls on coaches transporting passengers could not extend to the mail carried in such coaches.

Justices concurring: Taney, C.J., Story, Wayne, Catron, McKinley, Nelson
Justices dissenting: McLean, Daniel

6. *Neil, Moore & Co. v. Ohio*, 44 U.S. (3 How.) 720 (1845).

An Ohio toll levied on passengers transported on mail coaches traversing Cumberland Road in that state, but which exempted passengers traveling on other coaches, was void by reason of conflict with

the terms of federal and Ohio acts adopted in relation to transfer and acceptance of said part of the road by Ohio.

Justices concurring: Taney, C.J., Story, McLean, Wayne, Catron, McKinley, Nelson
Justice dissenting: Daniel

7. *Sinnot v. Davenport*, 63 U.S. (22 How.) 227 (1860).

An Alabama statute requiring owners of steamboats navigating the waters of that state to register under the penalty of a $500 fine for each offense was in conflict with the act of Congress providing for the enrollment and license of vessels engaged in the coastwise trade and therefore inoperative.

Accord: Foster v. Davenport, 63 U.S. (22 How.) 244 (1860), which held that this statute also was inoperative when applied to a lighter and a towboat assisting the movement wholly within Alabama territorial waters of vessels engaged in foreign and interstate commerce.

8. *Van Allen v. The Assessors*, 70 U.S. (3 Wall.) 573 (1866).

A New York law authorizing localities to tax as personal property national bank stock held by residents, but which imposed no comparable tax on shares of state banks, violated federal legislation authorizing state taxation of national bank stock at rates no higher than those imposed on state bank shares. Taxation of the capital of state banks did not provide such equality, for that part of the capital of state banks invested in federal securities was exempt.

Justices concurring: Grier, Davis, Nelson, Clifford, Miller, Field
Justices dissenting: Chase, C.J., Wayne, Swayne

9. *Accord: Bradley v. Illinois*, 71 U.S. (4 Wall.) 459 (1867), voiding a similar Illinois tax law on the ground that a tax on the capital of state banks was not the equivalent of the state tax on shares of national banks and accordingly the tax on the latter was in conflict with federal law consenting to taxation of national bank shares at rates not in excess of those imposed on shares of state banks.

10. *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867).

A California statute vesting state courts with in rem jurisdiction over vessels for causes of action cognizable in admiralty invalidly infringed the admiralty jurisdiction exclusively conferred upon federal courts by § 9 of the Judiciary Act.

11. *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1867).

Iowa statute providing an *in rem* remedy in state courts for maritime causes of action was void by reason of conflict with § 9 of the

Judiciary Act of 1789, which vested admiralty jurisdiction exclusively in the federal courts.

12. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867).

When a treaty with Indian tribes exempted their lands from levy, sale, and forfeiture, Kansas could not validly collect its tax on lands held in severalty by members of such tribes under patents issued them pursuant to such treaty. Tribal Indians thus recognized by the National Government are exempt from the jurisdiction of the state.

13. *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867).

A New York statute imposing a tax on lands reserved to an Indian tribe by treaty was void, notwithstanding provision therein that sale of land for nonpayment of the tax would not affect the right of occupancy by the Indians.

14. *Bank v. Supervisors*, 74 U.S. (7 Wall.) 26 (1868).

New York tax could not be collected on United States notes expressly exempted from state taxation by federal law authorizing their issuance as legal tender.

15. *The Belfast*, 74 U.S. (7 Wall.) 624 (1869).

Inasmuch as a shipper's lien under a contract of carriage between ports within the same State is a maritime lien enforceable by *in rem* proceedings exclusively within the admiralty jurisdiction of federal court, an Alabama law creating a maritime lien enforceable by *in rem* proceedings in its own courts was void.

16. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1878).

Florida legislative grant of a telegraphic monopoly held "inoperative" as in conflict with a congressional act dealing with the construction of telegraph lines and based on its commerce and postal power.

Justices concurring: Waite, C.J., Clifford, Strong, Bradley, Swayne, Miller
Justices dissenting: Field, Hunt

17. *Sprague v. Thompson*, 118 U.S. 90 (1886).

Georgia law requiring out-of-state coastal vessels, subject to certain discriminating exemptions, to take on a pilot upon entering Georgia ports, was void by reason of conflict with federal pilotage law.

18. *Western Union Tel. Co. v. Massachusetts*, 125 U.S. 530 (1888).

Massachusetts law, authorizing an injunction to restrain tax delinquents from doing business until payments are made, could not be validly invoked to restrain a telegraph company operating lines over United States military and post roads pursuant to federal authorization.

19. *Harman v. City of Chicago*, 147 U.S. 396 (1893).

A Chicago ordinance imposing a license tax on tug boats licensed under federal authority and engaged in interstate commerce held invalid.

20. *Gulf, C. & S. F. Ry. v. Hefley*, 158 U.S. 98 (1895).

Texas statute regulating railroad rates, when applied to interstate freight transportation, was held to conflict with Interstate Commerce Act.

21. *Ohio v. Thomas*, 173 U.S. 276 (1899).

Ohio statute which regulated the use of oleomargarine in the state held void as applied to a soldiers' home in Ohio created by Congress and administered as a federal institution.

22. *Home Savings Bank v. City of Des Moines*, 205 U.S. 503 (1907).

An Iowa law levying a tax on a state bank, assessed on its shares measured by the value of its capital, surplus, and individual earnings, was void insofar as the assessment embraced federal bonds owned by the bank and was in conflict with a federal enactment exempting such bonds from state taxes.

Justices concurring: Moody, Brewer, White, McKenna, Holmes, Day
Justices dissenting: Fuller, C.J., Harlan, Peckham

23. *Northern Pacific Ry. v. Washington*, 222 U.S. 370 (1912).

Consistent with doctrine of national supremacy and preemption, state laws, including one of the State of Washington, regulating hours of service embracing employees of interstate carriers, became inoperative immediately upon the adoption of the Federal Hours of Service Law notwithstanding that the latter did not go into effect until a year after its passage.

24. *Southern Ry. v. Reid*, 222 U.S. 424 (1912).

A North Carolina statute requiring carriers to transport interstate freight as soon as it was received was unenforceable due to conflict with § 2 of the Hepburn Act of 1906 (34 Stat. 584), forbidding interstate railway carriers to make shipments until rates had been fixed and published by the Interstate Commerce Commission, which had not yet acted on this matter.

Justices concurring: McKenna, Holmes, Hughes, Van Devanter, Lamar, White, C.J.
Justice dissenting: Lurton

Accord: Southern Ry. v. Reid & Beam, 222 U.S. 444 (1912).

Accord: Southern Ry. v. Burlington Lumber Co., 225 U.S. 99 (1912).

25. *Chicago, R. I. & P. Ry. v. Hardwick Elevator Co.*, 226 U.S. 426 (1913).

Congress, by enactment of the Hepburn Act (34 Stat. 584 (1906)) having preempted the field of regulation pertaining to the duty of carriers to deliver cars in interstate commerce, a Minnesota Reciprocal Demurrage Law imposing like regulations was void.

26. *Accord: St. Louis, I. Mt. & S. Ry. v. Edwards*, 227 U.S. 265 (1913).

Arkansas Demurrage Law of 1907 penalizing carriers for failure to notify consignees of arrival of shipments was similarly held void.

27. *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913).

A Kentucky law which precluded an interstate carrier from contracting to limit its liability to an agreed or declared value was void as conflicting with the Carmack Amendment, which preempted the field of regulation pertaining to the liability of interstate carriers for loss and damage to interstate shipments.

28. *Accord: Chicago, B. & Q. Ry. v. Miller*, 226 U.S. 513 (1913).

An Iowa law and a provision of the Nebraska Constitution were held to have been superseded by the Carmack Amendment.

29. *Accord: Chicago, St. P., M. & O. Ry. v. Latta*, 226 U.S. 519 (1913).

A Nebraska constitutional provision was held to have been superseded by the Carmack Amendment.

30. *McDermott v. Wisconsin*, 228 U.S. 115 (1913).

A Wisconsin food labeling law was invalid insofar as it exacted labeling requirements, as to articles in interstate commerce, that conflicted with those required under the Federal Pure Food and Drug Act, imposed an invalid burden on interstate commerce.

31. *Missouri, K. & T. Ry. v. Harriman Bros.*, 227 U.S. 657 (1913).

Because the federal Carmack Amendment preempted the field of regulation pertaining to determination of an interstate railroad's liability for loss or damages to goods in transit, Texas law outlawing contractual stipulations specifying a period of limitations for filing of claims by a shipper which was briefer than that sanctioned by the federal law was unenforceable.

Justices concurring: Lurton, McKenna, Holmes, Hughes (separately), Day, Van Devanter, Lamar, White, C.J.
Justice dissenting: Pitney

32. *St. Louis, S. F. & T. Ry. v. Seale*, 229 U.S. 156 (1913).

When the Federal Employers' Liability Act was applicable, by reason that the injured employee was engaged in interstate commerce, a

Texas law affording a remedy for said injuries was superseded by reason of the supremacy of the former.

Justices concurring: Van Devanter, McKenna, Holmes, Day, Lurton, Hughes, Pitney, White, C.J.
Justice dissenting: Lamar

33. *New York Cent. R.R. v. Hudson County,*227 U.S. 248 (1913).

Congress having expressly included ferries used in connection with interstate railroads in its legislation regulating interstate commerce, two New Jersey municipal ordinances fixing passenger rates for travel on ferries between New Jersey and New York points were superseded and therefore invalid.

34. *Chicago, B. & Q. R.R. v. Hall*, 229 U.S. 511 (1913).

An attachment, under Iowa law, of a railroad worker's wages, which was obtained less than four months prior to the worker's having been adjudicated bankrupt, conflicted with a provision of federal bankruptcy law that nullified liens obtained within four months prior to the filing of a petition in bankruptcy and hence was not entitled to full faith and credit in Nebraska courts.

35. *Erie R.R. v. New York*, 233 U.S. 671 (1914).

Congress's having completely preempted the field by its Hours of Service Act of 1907, notwithstanding that the act did not take effect until 1908, a New York labor law of 1907 regulating hours of service of railroad telegraph operators engaged in interstate commerce was invalid.

36. *Globe Bank v. Martin*, 236 U.S. 288 (1915).

Attachments and liens on real estate of a bankrupt, acquired pursuant to Kentucky laws within four months prior to the filing of a petition in bankruptcy under federal law, were null and void, and distribution of the proceeds from the sale of such real estate was governed by federal rather than by state law.

37. *Southern Ry. v. Railroad Comm'n*, 236 U.S. 439 (1915).

An Indiana statute requiring railway companies to place grab-irons and hand-holds on the sides and ends of every car having been superseded by the Federal Safety Appliance Act, penalties imposed under the former could not be recovered as to cars operated on interstate railroads, although engaged only in intrastate traffic.

38. *Kirmeyer v. Kansas*, 236 U.S. 568 (1915).

A Kansas prohibition law could not be validly enforced to prevent Kansas dealer from accepting orders for alcoholic beverages which were

to be completed by interstate delivery to Kansas purchasers from a point in Missouri; under the federal Wilson Act the interstate transportation did not end until delivery to the consignee was completed.

39. *Charleston & W. Car. Ry. v. Varnville Furniture Co.,*237 U.S. 597 (1915).

A South Carolina law that imposed a penalty on carriers for their failure to adjust claims within 40 days imposed an invalid burden on interstate commerce and also was in conflict with the federal Carmack Amendment.

40. *Rossi v. Pennsylvania*, 238 U.S. 62 (1915).

A Pennsylvania liquor law could not be enforced against one who solicited orders for the delivery of alcoholic beverages to be shipped to the consignee from another state; under the federal Wilson Act of 1890 liquor shipped in interstate commerce did not become subject to state regulation until after delivery to the consignee.

41. *New York Central R.R. v. Winfield*, 244 U.S. 147 (1917).

Congress, by enactment of the Federal Employees' Liability Act, having preempted the field as to determination of the liability of interstate railroad carriers to compensate employees for injuries sustained while engaged in interstate commerce, award under New York Workmen's Compensation Act for injuries sustained in interstate commerce by railway employee could not be upheld.

Justices concurring: Van Devanter, Holmes, Pitney, McReynolds, Day, McKenna, White, C.J.
Justices dissenting: Brandeis, Clarke

42. *Accord: Erie R.R. v. Winfield*, 244 U.S. 170 (1917).

For the same reason, a New Jersey Workmen's Compensation Act was held inapplicable to a railway worker injured while engaged in interstate commerce.

Justices concurring: Van Devanter, Holmes, Day, Pitney, McKenna, McReynolds, White, C.J.
Justices dissenting: Brandeis, Clarke

43. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

New York Workmen's Compensation Act was unconstitutional as applied to employees engaged in maritime work, for it afforded a remedy unknown to common law, and hence was not among the common law remedies saved to suitors from exclusive federal admiralty jurisdiction by the Judiciary Act of 1789.

Justices concurring: McReynolds, Day, Van Devanter, McKenna, White, C.J.
Justices dissenting: Holmes (separately), Pitney (separately), Brandeis, Clarke

Accord: Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917).

Justices concurring: McReynolds, Day, Van Devanter, McKenna, White, C.J.
Justices dissenting: Holmes, Pitney, Brandeis, Clarke

44. *Accord: Steamship Bowdoin Co. v. Industrial Accident Comm'n of California*, 246 U.S. 648 (1918), as to the inoperative effect of a California Workmen's Compensation Act.

45. *American Express Company v. Caldwell*, 244 U.S. 617 (1917).

Consistent with natural supremacy, a South Dakota law regulating advance of interstate rates could not be applied to changes in intrastate rates which a carrier put into effect pursuant to an order of the Interstate Commerce Commission to abate discrimination against interstate traffic.

Justices concurring: Brandeis, Holmes, Pitney, McReynolds, Day, Clarke, Van Devanter, White, C.J.
Justice dissenting: McKenna

46. *New Orleans & N.E.R.R. v. Scarlet*, 249 U.S. 528 (1919).

Mississippi "Prima Facie" act, relieving plaintiff of burden of proof to establish negligence, could not constitutionally be applied by a state court in suits under the Federal Employees' Liability Act.

Accord: Yazoo & M.V.R.R. v. Mullins, 249 U.S. 531 (1919).

47. *Pennsylvania R.R. v. Public Service Comm'n*, 250 U.S. 566 (1919).

Pennsylvania law, as applied to an interstate train terminated by a mail car, forbidding operation of any train consisting of United States mail, or express, cars without rear end of car being equipped with a platform with guard rails and steps was inoperative by reason of conflict with federal legislation and regulations which preempted the field.

Justices concurring: Holmes, McKenna, Day, Van Devanter, Pitney, McReynolds, Brandeis, White, C.J.
Justice dissenting: Clarke

48. *Postal Telegraph-Cable Co. v. Warren-Godwin Co.*, 251 U.S. 27 (1919).

By virtue of federal legislation preempting the field, Mississippi law could not be applied to determine validity of a contract by a telegraph company limiting its responsibility when its lower rate is paid for unrepeated interstate messages.

Justices concurring: Holmes, McKenna, Day, Van Devanter, McReynolds, Brandeis, Clarke, White, C.J.
Justice dissenting: Pitney

49. *Western Union Tel. Co. v. Boegli*, 251 U.S. 315 (1920).

Federal legislation having preempted the field, Indiana law could no longer subject a telegraph company to a penalty for failure to deliver promptly in Indiana a message sent from a point in Illinois.

50. *Merchant's Nat'l Bank v. Richmond*, 256 U.S. 635 (1921).

A Richmond, Virginia, ordinance and a Virginia statute that, as construed, levied a tax on state and national bank shares at the aggregate rate of $1.75 per $100 of valuation and upon intangibles at the aggregate rate of 85 per $100 valuation, a substantial proportion of which property was in the hands of individual taxpayers, were void as in conflict with federal law prohibiting discriminatory taxation of national bank shares for the reason that the tax was imposed on the national bank stocks to the aggregate value of more than $8,000,000 whereas the value of state bank stocks taxed was only $6,000,000.

51. *First Nat'l Bank v. California*, 262 U.S. 366 (1923).

A California law that escheated to a state bank deposits unclaimed for 20 years, notwithstanding that no notice of residence has been filed with the bank by the depositor or any claimant, was invalid as applied to deposits in national banks because of conflict with federal law.

52. *Bunch v. Cole*, 263 U.S. 250 (1923).

When lease of an Indian allotment, made by the allottee in excess of the powers of alienation granted by federal law, is declared null and void by federal law, Oklahoma statute, as judicially applied, which gave the lease the effect of a tenancy at will and as controlling the amount of compensation which the allottee may recover for use and occupation by the lessees also was void, consistently with the principle of national supremacy.

53. *Sperry Oil Co. v. Chisholm*, 264 U.S. 488 (1924).

An Oklahoma law that required that a lease on a family homestead be executed by the wife as well as by the husband was inoperative, consistently with the principle of national supremacy, to the extent that under federal law Congress had empowered a Cherokee Indian to make an oil or gas lease on his restricted "homestead" allotment subject only to the approval of the Secretary of the Interior.

54. *Missouri ex rel. Burnes Nat'l Bank v. Duncan*, 265 U.S. 17 (1924).

Because the Federal Reserve Act authorizes national banks to act as executors, a Missouri law was ineffective, under the principle of national supremacy, to withhold such powers from such banks.

Justices concurring: Holmes, Sanford, Brandeis, McKenna, Van Devanter, Butler, Taft, C.J.

Justices dissenting: Sutherland, McReynolds

55. *Asakura v. City of Seattle*, 265 U.S. 332 (1924).

A Seattle ordinance that limited the pawnbroking business to citizens was void as applied to a Japanese alien lawfully admitted into the United States and protected by a treaty with Japan according to nationals of the latter country the right to carry on a "trade."

56. *Missouri Pacific R.R. v. Stroud*, 267 U.S. 404 (1925).

When carrier had two routes by which freight might move between two points in a state, the second of which was partly interstate, a suit against the carrier for discrimination in the furnishing of cars which arose out of use of the interstate route in conformity with the carrier's practice was governed by the Interstate Commerce Act, and the Missouri law governing such discrimination was superseded and inapplicable (Art. VI).

57. *Lancaster v. McCarty*, 267 U.S. 427 (1925).

A federal law (39 Stat. 441 (1916)) that authorized carriers to limit liability upon property received for transportation to value declared by shipper, where the rates were based on such value pursuant to authority of Interstate Commerce Commission, superseded Texas law in respect to a claim for damage to goods shipped intrastate between Texas points for the reason that the tariff and classification had been adopted by the carrier pursuant to an order of the Commission requiring it to remove discrimination against interstate commerce which had resulted from lower Texas intrastate rates.

58. *Davis v. Cohen*, 268 U.S. 638 (1925).

When the Federal Transportation Act of 1920 provided that suits on claims arising out of federal wartime control of the railroads might be brought against a federal agent, if instituted within two years after federal control had ended, Massachusetts law allowing amendments of proceedings prior to judgment, could not be invoked to substitute the Agent as defendant more than two years after federal control had ended; the suit in which the substitution was attempted had erroneously been filed against the railroad rather than against the Federal Director General during the period of federal control, and since the substitution amounted to filing a new action, invocation of the Massachusetts law was repugnant to the Federal Transportation Act's provisions as to limitations.

59. *First Nat'l Bank v. Anderson*, 269 U.S. 341 (1926).

As applied to national banks, an Iowa tax law providing for a levy on shares of such banks at rates less favorable than the rates

applied to moneyed capital invested in competition with such banks was repugnant to federal law prohibiting such discrimination (Art. VI).

60. *Oregon-Washington Co. v. Washington*, 270 U.S. 87 (1926).

Federal legislation having preempted the field, a Washington law that established a quarantine against importation of hay and alfalfa meal, except in sealed containers, coming from areas in other states harboring the alfalfa weevil, was inoperative.

Justices concurring: Taft, C.J., Holmes, Van Devanter, Brandeis, Butler, Sanford, Stone
Justices dissenting: McReynolds, Sutherland

61. *Napier v. Atlantic Coast Line R.R.,*272 U.S. 605 (1926).

The Federal Boiler Inspection Act having occupied the field of regulation pertaining to locomotive equipment on interstate highways, a Georgia law requiring cab curtains and automatic fire box doors was preempted.

62. *Missouri Pacific R.R. v. Porter*, 273 U.S. 341 (1927).

Congress's having occupied the field by its own legislation, an Arkansas law that prohibited carriers from incorporating into their bills of lading stipulations exempting the carriers from liability for loss of shipments by fire not due to the carriers' negligence was preempted.

63. *First Nat'l Bank v. Hartford*, 273 U.S. 548 (1927).

Wisconsin tax law, as imposed on shares of a national bank, was in conflict with a federal law prohibiting state taxation of such shares at rates in excess of those levied on moneyed capital employed in competition with the business of such banks and was therefore inoperative as to the shares of such banks.

64. *Accord: Minnesota v. First Nat'l Bank*, 273 U.S. 561 (1927), holding inoperative for the same reason a Minnesota law taxing national bank shares.

65. *Accord: Commercial Nat'l Bank v. Custer County*, 275 U.S. 502 (1927), holding inoperative a similar Montana tax law.

66. *Accord: Keating v. Public Nat'l Bank*, 284 U.S. 587 (1932), holding inoperative for the same reason a New York tax law.

67. *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499 (1928).

A Montana law that levied a tax on national bank shares was inconsistent with a federal law prohibiting a levy on such shares "at a

greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

68. *Hunt v. United States*, 278 U.S. 96 (1928).

Arizona game laws were not enforceable in a national game preserve and could not be invoked to prevent the killing of wild deer in the preserve as ordered by federal officers acting under the authority of federal law.

69. *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929).

An Arkansas insolvency law was superseded by the Federal Bankruptcy Act to the extent that a creditor of one who invoked the state laws was entitled to have his claim paid by the state receiver in conformity with the order of distribution sanctioned by the federal law.

Justices concurring: Butler, Holmes, Stone, Sanford, Van Devanter, Taft, C.J.
Justices dissenting: McReynolds, Brandeis, Sutherland

70. *Nielsen v. Johnson*, 279 U.S. 47 (1929).

An Iowa inheritance tax law that discriminated against nonresident alien heirs violated a treaty with Denmark.

71. *Carpenter v. Shaw*, 280 U.S. 363 (1930).

An Oklahoma law that imposed a 3% tax on the gross value of royalties from oil and gas was void as a tax on the right reserved to Indians as owners and lessors of the fee when applied to Indians who had received allotments exempted under the Atoka agreement and leased by them for production of oil and gas (Art. VI).

72. *Lindgren v. United States*, 281 U.S. 38 (1930).

The right of action given under the Federal Merchant Marine Act to the personal representative to recover damages on behalf of beneficiaries for the death of a seaman resulting from negligence was exclusive and precluded a right of recovery because of unseaworthiness predicated upon the death statute of Virginia, where the injury was sustained.

73. *Baizley Iron Works v. Span*, 281 U.S. 222 (1930).

A Pennsylvania Workmen's Compensation Act could not be invoked to obtain recovery for injuries sustained by a workman while painting angle irons in the engine room of a ship tied to a pier in navigable waters; recovery was controlled exclusively by federal maritime law.

Justices concurring: McReynolds, Sutherland, Butler, Van Devanter
Justices dissenting: Stone, Holmes, Brandeis

74. *Accord: Employers' Liability Assurance Co. v. Cook*, 281 U.S. 233 (1930).

A Texas workman's compensation law is inapplicable for the same reason.

Justices concurring: McReynolds, Butler, Sutherland, Van Devanter, Stone (separately), Holmes (separately), Brandeis (separately)

75. *Santovincenzo v. Egan*, 284 U.S. 30 (1931).

A New York law pertaining to the descent of property of an alien decedent was inoperative as to the property of an alien because of the conflicting provisions of a treaty negotiated with the nation to which the decedent owed allegiance.

76. *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931).

Federal bankruptcy courts are empowered to sell the real estate of bankrupts free from liens for state taxes; lien laws of Ohio stipulating that the liens were to attach to the property were ineffective to prevent the federal court from transferring the liens from the property to the proceeds of the sale.

77. *Henkel v. Chicago, St. P., M. & O. Ry.*, 284 U.S. 444 (1932).

A Minnesota statute fixing amounts to be paid as compensation or in fees to expert witnesses could not be applied to determine costs in a federal court proceeding because the statute was superseded by a federal enactment determining the fees to be paid witnesses.

78. *Murray v. Gerrick & Co.*, 291 U.S. 315 (1934).

Washington Workman's Compensation Act, adopted after the United States had acquired exclusive jurisdiction over a tract that became Puget Sound Navy Yard, could not be invoked by the widow and child of a worker fatally injured while working for a contractor in the Yard because Congress by law had consented only to suits by a personal representative under the Washington Wrongful Death Statute.

79. *Jennings v. United States Fidelity & Guaranty Co.*, 294 U.S. 216 (1935).

Section of Indiana Bank Collection Code which purported to make the owners of paper which a bank had collected, but which it had not satisfied, preferred claimants in the event of the bank's failure, regardless of whether the funds representing such paper could be traced or identified as part of the bank's assets or intermingled with or converted into other assets of the bank, was inoperative as to a national bank by reason of conflict with applicable federal law.

80. *Accord: Old Company's Lehigh v. Meeker Co.*, 294 U.S. 227 (1935), embracing a comparable New York statutory provision.

81. *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935).

A Pennsylvania law that levied a tax on trust companies was in conflict with provisions of federal law proscribing discriminatory taxation of national bank shares by virtue of deductions allowed trust company for amounts represented by shares owned in Pennsylvania corporations already taxed or exempted, without any corresponding deduction on account of nontaxable federal securities owned or on account of national bank shares already taxed.

Justices concurring: Roberts, Hughes, C.J., Van Devanter, Butler, McReynolds, Sutherland
Justices dissenting: Cardozo, Brandeis, Stone

82. *Oklahoma v. Barnsdall Corp.*, 296 U.S. 521 (1936).

An Oklahoma law that levied a tax on the gross production of oil, as applied to oil produced by lessees of lands of Indian tribes, was not authorized by a federal law consenting to levy of a different tax, and hence was inoperative as a tax on a federal instrumentality.

83. *Lawrence v. Shaw*, 300 U.S. 345 (1937).

A North Carolina property tax law could not be enforced so as to levy a tax on bank deposits made by petitioner as guardian of an incompetent veteran of World War I; by the terms of applicable federal law bank deposits which resulted from the receipt of federal veterans benefits payments were exempted from local taxation.

84. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

A Pennsylvania alien registration statute, imposing requirements at variance with those set forth in the Federal Alien Registration Act of 1940 containing a comprehensive scheme for the regulation of aliens, is rendered unenforceable by reason of conflict with federal legislative and treaty-making powers.

Justices concurring: Roberts, Black, Reed, Frankfurter, Douglas, Murphy
Justices dissenting: Stone, Hughes, C.J., McReynolds

85. *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 (1941).

Because the Federal Farm Loan Act exempts federal land banks from state taxes, other than those on property acquired in the course of dealings, the North Dakota sales tax cannot validly be collected on the sale of materials to a federal land bank to be used in improving real estate (Art. VI, cl. 2).

86. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942).

Consistently with the Supremacy Clause, federal laws and regulations relating to the entire process of manufacture of renovated butter supersede state laws under which Alabama officials inspected and seized packing stock butter acquired by a manufacturer of renovated butter for interstate commerce.

Justices concurring: Roberts, Black, Reed, Douglas, Jackson
Justices dissenting: Stone, C.J., Frankfurter, Murphy, Byrnes

87. *Tulee v. Washington*, 315 U.S. 681 (1942).

Being repugnant to the terms of a treaty concluded with the Yakima Indians reserving to the members of the tribe the right to take fish at all usual places in common with the citizens of Washington Territory, a Washington law requiring such Indians to pay license fees for the exercise of such privilege cannot be enforced.

88. *Pollock v. Williams*, 322 U.S. 4 (1944).

Florida Statute of 1941, §§ 817.09 and 817.10, made it a misdemeanor to induce advances with intent to defraud by a promise to perform labor, and further made failure to perform labor for which money had been obtained *prima facie* evidence of intent to defraud. The statute violates the Thirteenth Amendment and the Federal Antipeonage Act for it cannot be said that a plea of guilty is uninfluenced by the statute's threat to convict by its prima facie evidence section.

Justices concurring: Roberts, Black, Frankfurter, Douglas, Murphy, Jackson, Rutledge
Justices dissenting: Stone, C.J., Reed

89. *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945).

A Florida law providing that no one shall be licensed as a "business agent" of a labor union without meeting certain specified standards and that all labor unions in the state must file annual reports disclosing certain information and pay an annual fee circumscribes the "full freedom" to choose collective bargaining agents secured to employees by the National Labor Relations Act.

Justices concurring: Stone, C.J., Black, Reed, Douglas, Murphy, Jackson, Rutledge
Justices dissenting: Roberts, Frankfurter

90. *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946).

An Iowa statute requiring a permit for construction of a dam in navigable waters is preempted to the extent that it purports to authorize a state veto of a hydro-electric project licensed by the Federal Power Commission pursuant to the Federal Power Act. While the Federal Power Act authorizes the Commission to require a licensee to comply with

requirements of state law that are not inconsistent with federal purposes, these federal purposes may not be subordinated to state control through operation of the state permitting requirement.

Justices concurring: Burton, Stone, C.J., Black, Reed, Douglas, Murphy, Rutledge
Justice dissenting: Frankfurter

91. *Bethlehem Steel Co. v. New York Employment Relations Bd.*, 330 U.S. 767 (1947).

Where the National Labor Relations Board had asserted general jurisdiction over unions of foreman employed by industries subject to the National Labor Relations Act but had refused to certify such unions as collective bargaining representatives on the ground that to do so at the time would obstruct rather than further effectuation of the purposes of the Act, certification of such unions by the New York Employment Relations Board under a state act is invalid as in conflict with the National Labor Relations Act and the Commerce Clause of the Constitution.

92. *Accord: Plankington Packing Co. v. WERB*, 338 U.S. 953 (1950).

A decision of the Wisconsin Supreme Court upholding a similar action by the Wisconsin Employment Relations Board is summarily reversed.

93. *Rice v. Santa Fe Elevator Corp.,*331 U.S. 218 (1947).

By amendments of the United States Warehouse Act, Congress terminated the dual system of regulation and substituted an exclusive system of federal regulations of warehouses licensed under the federal act. Such warehouses therefore no longer need to obtain Illinois licenses or comply with Illinois laws regulating those phases of the warehouse business which have been regulated under the federal act. Compliance with Illinois law is limited to those phases of the business that the federal act expressly subjects to state law.

Justices concurring: Vinson, C.J., Black, Reed, Douglas, Murphy, Jackson, Burton
Justices dissenting: Frankfurter, Rutledge

94. *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118 (1948).

A South Carolina law providing that any railroad line within the state must be owned and operated only by state-created corporations may not be applied to prevent a Virginia corporation, so authorized by the Interstate Commerce Commission under § 5 of the Interstate Commerce Act, from owning and operating an entire railway system with mileage in South Carolina.

95. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

California's requirement that every person bringing fish ashore in the state for sale obtain a commercial fishing license, but denying such a license to any person ineligible for citizenship, precluded a resident Japanese alien from earning his living as a commercial fisherman in the ocean waters off the state and was invalid both under the Equal Protection Clause of the Fourteenth Amendment and under a federal statute (42 U.S.C. § 1981).

Justices concurring: Vinson, C.J., Black, Frankfurter, Douglas, Murphy, Rutledge, Burton
Justices dissenting: Reed, Jackson

96. *La Crosse Tel. Corp. v. WERB*, 336 U.S. 18 (1949).

Certification by the state employment relations board under a Wisconsin labor relations act of a union as the collective bargaining representative of employees engaged in interstate commerce is invalid as in conflict with the National Labor Relations Act; the employer is invalid as applied to deny utility employees the right to strike. As applied, the law conflicts with the National Labor Relations Act.

Justices concurring: Vinson, C.J., Black, Reed, Douglas, Jackson, Clark
Justices dissenting: Frankfurter, Burton, Minton

97. *H. P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949).

Denial of a license under the New York Agricultural and Market Law violated the Commerce Clause of the Constitution and the Federal Agricultural Marketing Act where the denial was based on grounds that the expanded facilities would reduce the supply of milk for local markets and result in destructive competition in a market already adequately served.

Justices concurring: Vinson, C.J., Reed, Douglas, Jackson, Burton
Justices dissenting: Black, Frankfurter, Murphy, Rutledge

98. *Wissner v. Wissner*, 338 U.S. 655 (1950).

The California community property law could not be invoked to sustain an award to a deceased soldier's widow of one-half of the proceeds of an insurance policy issued under the National Life Insurance Act; the federal law accords the insured soldier the right to designate his beneficiary, in this instance, his mother, and his widow, not having been designated, is expressly precluded from acquiring a vested right to these proceeds.

99. *New Jersey Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665 (1950).

Collection by a New Jersey taxing district of a tax on intangible property of a stock insurance company, computed without deducting

the principal amount of certain United States bonds and accrued interest thereon was invalid by reason of conflict with federal law exempting federal obligations from state and local taxation.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark, Minton
Justice dissenting: Black

100. *United Automobile Workers v. O'Brien*, 339 U.S. 454 (1950).

The strike vote provision of the Michigan Mediation Law, which prohibits the calling of a strike unless a state-prescribed procedure for mediation is followed and unless a majority of the employees in a state-defined bargaining unit authorizes the strike, conflicts with the National Labor Relations Act and is invalid.

101. *Bus Employees v. WERB*, 340 U.S. 383 (1951).

The Wisconsin Public Utility Anti-Strike Law, which substituted arbitration upon order of the Wisconsin Employment Relations Board for collective bargaining whenever an impasse is reached in the bargaining process, is invalid as applied to deny utility employees the right to strike. As applied, the law conflicts with the National Labor Relations Act.

Justices concurring: Vinson, C.J., Black, Reed, Douglas, Jackson, Clark
Justices dissenting: Frankfurter, Burton, Minton

102. *Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952).

Tennessee Retailers' Sales Tax Act could not be enforced as to sales of commodities to a contractor employed by the Atomic Energy Commission; the contractor's activities were those of the Commission and exempt under federal law.

103. *Accord: General Electric Co. v. Washington*, 347 U.S. 909 (1954), embracing exemption of a similar contractor from Washington business and occupation tax law.

104. *Dameron v. Brodhead*, 345 U.S. 322 (1953).

Where a serviceman domiciled in one state is assigned to military duty in another state, the latter state (here Colorado) is barred by § 514 of the Soldiers and Sailor's Civil Relief Act of 1940 from imposing a tax on his tangible personal property temporarily located within its borders, even when the state of his domicile has not taxed such property.

Justices concurring: Vinson, C.J., Reed, Frankfurter, Jackson, Burton, Clark, Minton
Justices dissenting: Black, Douglas

105. *Franklin Nat'l Bank v. New York*, 347 U.S. 373 (1954).

Insofar as the New York Banking Law forbids national banks to use the word "saving" or "savings in their business or advertising," it conflicts with federal laws expressly authorizing national banks to receive deposits and to exercise incidental powers and is void.

Justices concurring: Warren, C.J., Black, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
Justice dissenting: Reed

106. *Castle v. Hayes Freight Lines*, 348 U.S. 61 (1954).

An Illinois law providing for a 90-day suspension of a motor carrier upon a finding of 10 or more violations of regulations calling for a balanced distribution of freight loads in relation to the truck's axles cannot be applied to an interstate motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act. A state may not suspend the carrier's rights to use the state's highways in its interstate operations. The Illinois law, as applied to such carrier, also violates the Commerce Clause.

107. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

The Smith Act, as amended, 18 U.S.C. § 2385, which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act, which proscribes the same conduct. The scheme of federal regulation is so pervasive as to make reasonable the inference that the Congress left no room for the states to supplement it—enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program.

Justices concurring: Warren, C.J., Black, Frankfurter, Douglas, Clark, Harlan
Justices dissenting: Reed, Burton, Minton

108. *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956).

A "right to work" provision of the Nebraska Constitution cannot be invoked to invalidate a "union shop" agreement between an interstate railroad and unions of its employees for the reason that such "union shop" agreement is expressly authorized by § 2(11) of the Railway Labor Act.

109. *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

An Arkansas statute requiring licensing of contractors cannot be applied to a federal contractor operating pursuant to a contract issued under authority of the Armed Services Procurement Act of 1947.

110. *Guss v. Utah Labor Bd.*, 353 U.S. 1 (1957).

The Utah Labor Board, acting pursuant to Utah law, may not exercise jurisdiction over a labor dispute involving an employer engaged in interstate commerce if the NLRB declined to exercise jurisdiction and had not ceded jurisdiction to the state board pursuant to § 10(a) of the National Labor Relations Act.

Justices concurring: Warren, C.J., Black, Frankfurter, Douglas, Harlan, Brennan
Justices dissenting: Burton, Clark

111. *Public Util. Comm'n v. United States*, 355 U.S. 534 (1958).

A California statute making contingent upon prior approval by its Public Utilities Commission of the Federal Government's practice, sanctioned by federal procurement law, of negotiating special rates with carriers for the transportation of federal property in California is void as conflicting with the federal practices.

Justices concurring: Black, Frankfurter, Douglas, Clark, Brennan, Whittaker
Justices dissenting: Warren, C.J., Burton, Harlan

112. *City of Chicago v. Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958).

As applied to a newly organized motor carrier hired by interstate railroads operating in and out of Chicago to transfer interstate passengers and their baggage between different railway terminals in that City, the provision in the Chicago Municipal Code requiring any new transfer service to obtain a certificate of convenience and necessity plus approval of the City Council is unconstitutional. Chicago has no power to decide whether the new motor carrier can operate a service which is an integral part of interstate railway transportation subject to regulations under the Federal Interstate Commerce Act.

Justices concurring: Warren, C.J., Black, Douglas, Clark, Brennan, Whittaker
Justices dissenting: Frankfurter, Burton, Harlan

113. *Teamsters Union v. Oliver*, 358 U.S. 283 (1959).

An Ohio antitrust law cannot be invoked to prohibit enforcement of a collective bargaining agreement between a group of interstate motor carriers and local labor unions, which agreement stipulates that truck drivers owning and driving their own vehicles shall be paid the prescribed wages plus at least a prescribed minimum rental for the use of their vehicles. The state antitrust law, insofar as it is applied to prevent contracting parties from enforcing agreement upon a subject matter as to which the National Labor Relations Act directs them to bargain, is invalid.

Justices concurring: Black, Douglas, Clark, Harlan, Brennan
Justice dissenting: Whittaker

114. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The failure of the NLRB to assume jurisdiction does not leave California free to apply its laws defining torts and regulating labor relations for purposes of awarding damages to an employer for economic injuries resulting from the picketing of his plant by labor unions not selected by his employees as their bargaining agent. Since the employer is engaged in interstate commerce, California laws cannot be applied to matters falling within the compass of the National Labor Relations Act.

Justices concurring: Harlan, Clark, Whittaker, Stewart (separately)

115. *Accord: DeVries v. Baumgartner's Electric Co.*, 359 U.S. 498 (1959), as to a South Dakota law.

Justices concurring: Frankfurter, Brennan, Warren, C.J., Black, Douglas
Justices dissenting: Clark, Harlan, Whittaker, Stewart

116. *Accord: Superior Court v. Washington ex rel. Yellow Cab*, 361 U.S. 373 (1960), as to a Washington law.

117. *Accord: Bogle v. Jakes Foundry Co.*, 362 U.S. 401 (1960), as to a Tennessee law.

118. *Accord: McMahon v. Milam Mfg. Co.*, 368 U.S. 7 (1961), as to a Mississippi law.

119. *Accord: Marine Engineers v. Interlake Co.*, 370 U.S. 173 (1962), as to a Minnesota law.

120. *Accord: Waxman v. Virginia*, 371 U.S. 4 (1962), as to a Virginia law prohibiting picketing by non-employees.

121. *Accord: Construction Laborers v. Curry*, 371 U.S. 542 (1963), involving enjoinder of picketing as violating Georgia right-to-work law.

Justice concurring: Harlan (separately)

122. *Accord: Journeymen & Plumbers' Union v. Borden*, 373 U.S. 690 (1962), as to a Texas law.

Justices concurring: Harlan, Warren, C.J., Brennan, Black, Stewart, White
Justices dissenting: Douglas, Clark

123. *Accord: Iron Workers Local 207 v. Perko,*373 U.S. 701 (1963), as to an Ohio law.

Justices concurring: Harlan, Warren, C.J., White, Brennan, Stewart, Black
Justices dissenting: Douglas, Clark

124. *Boynton v. Virginia*, 364 U.S. 454 (1960).

A Virginia statute making it a misdemeanor for any person to remain on the premises of another after having been forbidden to do so could not be enforced against a Negro for refusing to leave the section reserved for white people in a restaurant in a bus terminal by reason of conflict with provision of Interstate Commerce Act forbidding interstate motor vehicle bus carriers from subjecting persons to unjust discrimination.

Justices concurring: Black, Douglas, Warren, C.J., Brennan, Stewart, Frankfurter, Harlan
Justices dissenting: Whittaker, Clark

125. *United States v. Oregon*, 366 U.S. 643 (1961).

An Oregon escheat law could not be applied to support state's claim to property of a resident who died without a will or heirs in a Veterans' Hospital in Oregon; the United States has asserted title to the property under a superseding federal law.

Justices concurring: Black, Warren, C.J., Brennan, Stewart, Frankfurter, Harlan, Clark
Justices dissenting: Douglas, Whittaker

126. *United States v. Shimer*, 367 U.S. 374 (1961).

Pennsylvania Deficiency Judgment Act had been displaced by applicable provisions of the Federal Servicemen's Readjustment Act of 1944, and regulations issued thereunder, and could not be invoked to bar suit by the Veterans' Administration against a veteran to recover the indemnity for a defaulted home loan which it had guaranteed and which had been foreclosed by the lender.

Justices concurring: Harlan, Brennan, Stewart, Warren, C.J., Clark, Whittaker, Frankfurter
Justices dissenting: Black, Douglas

127. *Federal Land Bank v. Kiowa County*, 368 U.S. 146 (1961).

A Kansas statute declaring that oil and gas leases and the royalties derived therefrom were taxable as personal property could not be applied to subject to local taxation an oil and gas lease and income therefrom derived by a Federal Land Bank from property acquired in satisfaction of a debt; under supervening federal law such Land Banks were exempted from all taxes "except taxes on real estate."

Justice concurring specially: Black

128. *United States v. Union Central Life Ins. Co.*, 368 U.S. 291 (1961).

A Michigan law regulating the manner in which a federal tax lien must be recorded was in conflict with applicable provisions of the In-

ternal Revenue Code and therefore was ineffective for purposes of withholding priority to the Government's lien.

Justices concurring: Black, Frankfurter, Brennan, Warren, C.J., Clark, Stewart, Whittaker, Harlan
Justice dissenting: Douglas

129. *Campbell v. Hussey*, 368 U.S. 297 (1961).

Congress having preempted the field by enactment of the Federal Tobacco Inspection Act establishing uniform standards for classification of tobacco, a Georgia law which required Type 14 tobacco grown in Georgia to be identified with a white tag could not be enforced.

Justices concurring: Douglas, Whittaker (separately), Warren, C.J., Brennan, Stewart, Clark
Justices dissenting: Black, Frankfurter, Harlan

130. *Free v. Bland*, 369 U.S. 663 (1962).

Treasury regulations creating a right of survivorship in United States Savings Bonds preempted application of conflicting provisions of Texas Community Property Law which prohibited a married couple from taking advantage of such survivorship regulations whenever the purchase price of said bonds was paid out of community property.

131. *State Bd. of Ins. v. Todd Shipyards*, 370 U.S. 451 (1962).

A Texas law imposing a premium tax on insured parties who purchased insurance from insurers not licensed to sell insurance in Texas could not be collected, consistently with the Federal McCarran-Ferguson Act, on insurance contracts purchased in New York from a London insurer by the terms of which premiums thereon and claims thereunder were payable in New York.

Justices concurring: Douglas, Brennan, Warren, C.J., Stewart, Harlan, Clark
Justice dissenting: Black

132. *Lassiter v. United States*, 371 U.S. 10 (1962).

Louisiana laws that segregated passengers in terminal facilities of common carriers were unconstitutional by reason of conflict with federal law and the Equal Protection Clause.

133. *United States v. Buffalo Savings Bank*, 371 U.S. 228 (1963).

A New York law that provided that payments out of proceeds of a foreclosure of property to discharge state tax liens should be deemed "expenses" of the mortgage foreclosure sale was ineffective to defeat priority accorded by federal law to federal tax liens antedating liens for state and local real property taxes and assessments.

Justices concurring: Warren, C.J., Black, Brennan, Stewart, Goldberg, Harlan, Clark, White

Justice dissenting: Douglas

134. *Paul v. United States*, 371 U.S. 245 (1963).

A California statute that authorized the fixing of minimum wholesale and retail prices for milk could not be enforced as to purchases of milk for military consumption or for resale at commissaries at federal military installations in California; conflicting federal statutes and regulations governing procurement with appropriated funds of goods for the Armed Forces required competitive bidding or negotiation reflecting active competition which would be nullified by minimum prices determined by factors not specified in federal law.

Justices concurring: Douglas, Black, Warren, C.J., White, Brennan, Clark
Justices dissenting: Stewart, Harlan, Goldberg

135. *Michigan Nat'l Bank v. Robertson*, 372 U.S. 591 (1963).

Suability of an out-of-state national bank in courts of Nebraska is determined by applicable provisions of the federal banking laws and not by recourse to a Nebraska statute defining the venue of local actions involving liability under the Nebraska Installment Loan Act.

Justices concurring: Black (separately), Douglas (separately)

136. *Accord: Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963), as to venue in Texas.

Justices concurring: White, Stewart, Brennan, Warren, C.J., Goldberg
Justices dissenting: Harlan, Douglas, Black

137. *Sperry v. Florida*, 373 U.S. 379 (1963).

A Florida law regulating admission to the bar could not be enforced, consistently with the principle of national supremacy, to prevent a person admitted to practice before the United States Patent Office as a Patent Attorney from serving clients in the latter capacity in Florida.

138. *Bus Employees v. Missouri*, 374 U.S. 74 (1963).

Missouri's King-Thompson Act, which authorized the governor to seize and operate a public utility when the public welfare was jeopardized by a strike threat, was inconsistent with 29 U.S.C. § 157 of the National Labor Relations Act defining the rights of employees as to collective bargaining and, consistently with national supremacy, could not be enforced.

139. *Corbett v. Stergios*, 381 U.S. 124 (1965).

Iowa's reciprocal inheritance law conditioning the right of nonresident aliens to take Iowa real property by intestate succession upon existence of a reciprocal right of United States citizens to take real

property upon same terms and conditions in alien's country could not under United States-Greece treaty and Supremacy Clause bar Greek national from inheriting property.

140. *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967).

A Florida unemployment compensation law disqualifying for benefits any person unemployed as a result of a labor dispute when applied to disqualify a person who has filed an unfair labor practice charge against her employer because of her discharge conflicts with federal labor law and is void under Supremacy Clause.

141. *Rosado v. Wyman*, 397 U.S. 397 (1970).

A New York statute changing levels of benefits and deleting items to be included in levels of benefit which reduced moneys to recipients conflicted with federal law which required states to adjust upward in terms of increases costs of living amounts deemed necessary for subsistence.

Justices concurring: Harlan, Douglas, Brennan, Stewart, White, Marshall
Justices dissenting: Black, Burger, C.J.

142. *Lewis v. Martin*, 397 U.S. 552 (1970).

A California statute reducing the amount of dependent children funds going to any household by the amount of funds imputed to presence of a "man-in-the-house" who was not legally obligated to support the child or children conflicts with federal law as interpreted by valid HEW regulations.

Justices concurring: Douglas, Harlan, Brennan, Stewart, White, Marshall
Justices dissenting: Burger, C.J., Black

143. *California Dep't of Human Resources Dev. v. Java*, 402 U.S. 121 (1971).

A California statute providing for suspension of unemployment compensation if the former employer appeals an eligibility decision of a departmental examiner, the suspension to last until decision of the appeal, conflicts with the federal act's requirement that compensation must be paid when due.

144. *Perez v. Campbell*, 402 U.S. 637 (1971).

An Arizona statute providing that a discharge in bankruptcy shall not operate to relieve a judgment creditor under the Motor Vehicle Safety Responsibility Act of any obligation under the Act conflicts with the provision of the federal bankruptcy law which discharges a debtor of all but specified judgments.

145. *Townsend v. Swank*, 404 U.S. 282 (1971).

An Illinois statute and implementing regulations which made needy dependent children 18 through 20 years old eligible for welfare benefits if they were attending high school or vocational training school but not if they were attending college or university conflicts with federal social security law.

146. *Sterrett v. Mothers' & Children's Rights Org.*, 409 U.S. 809 (1972).

A district court decision holding invalid as in conflict with the federal Social Security Act an Indiana statute denying benefits to persons aged 16 to 18 who are eligible but for the fact that they are not regularly attending school is summarily affirmed.

147. *Philpott v. Welfare Board*, 409 U.S. 413 (1973).

A New Jersey statute providing for recovery by the state of reimbursement for financial assistance when the recipient subsequently obtains funds cannot be applied to obtain reimbursement out of federal disability insurance benefits inasmuch as federal law bars subjecting such funds to any legal process.

148. *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

A Burbank, California ordinance placing an 11 p.m. to 7 a.m. curfew on jet take-offs from its local airport is invalid as in conflict with the regulatory scheme of federal statutory control.

Justices concurring: Douglas, Brennan, Blackmun, Powell, Burger, C.J.
Justices dissenting: Rehnquist, Stewart, White, Marshall

149. *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973).

A Washington State statute construed to prohibit net fishing by members of the Tribe conflicts with the Tribe's treaty rights and is invalid.

150. *Beasley v. Food Fair*, 416 U.S. 653 (1974).

North Carolina's right-to-work law giving employees discharged by reason of union membership a cause of action against their employer cannot be applied to supervisors in view of 29 U.S.C. § 164(a), which provides that no law should compel an employer to treat a supervisor as an employee.

151. *Letter Carriers v. Austin*, 418 U.S. 264 (1974).

A Virginia statute creating cause of action for "insulting words" as construed to permit recovery for use in labor dispute of words "scab" and similar words is preempted by federal labor law.

Justices concurring: Marshall, Brennan, Stewart, White, Blackmun

Justice concurring specially: Douglas
Justices dissenting: Powell, Rehnquist, Burger, C.J.

152. *Moe v. Confederated Salish & Kootenai Tribes,*425 U.S. 463 (1976).

Montana laws imposing personal property taxes, vendor license fees, and a cigarette sales tax may not constitutionally be applied to reservation Indians under Supremacy Clause because federal statutory law precludes such application.

153. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

A New Mexico law providing for the roundup and sale by a state agency of "estrays" cannot under the Supremacy Clause be constitutionally applied to unbranded and unclaimed horses and burros on public lands of the United States that are protected by federal law.

154. *Machinists & Aerospace Workers v. WERC*, 427 U.S. 132 (1976).

A Wisconsin statute proscribing concerted efforts by employees to interfere with production, except through actual strikes, cannot under the Supremacy Clause be constitutionally applied to union members' concerted refusal to work overtime during negotiations for renewal of an expired contract since such conduct was intended by Congress to be regulable by neither the states nor the NLRB.

Justices concurring: Brennan, White, Marshall, Blackmun, Power, Burger, C.J.
Justices dissenting: Stevens, Stewart, Rehnquist

155. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

California's statutory imposition of weight requirements in packaging for sale of bacon and flour which did not allow for loss of weight resulting from moisture loss during distribution while the applicable federal law does is invalid (1) as to bacon because of express federal law and (2) as to flour because adherence to state law would defeat a purpose of the federal law.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Stevens, Burger, C.J.
Justices dissenting: Rehnquist, Stewart as to flour

156. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977).

A Virginia statute prohibiting nonresidents from fishing within certain state waters is preempted by federal enrollment and licensing laws that grant an affirmative right to fish in coastal waters.

157. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

Alabama statutory height and weight requirements for prison guards have an impermissible discriminatory effect upon women, and under the Supremacy Clause must yield to the federal fair employment law.

Justices concurring: Stewart, Brennan, Marshall, Blackmun, Powell, Rehnquist, Stevens, Burger, C.J.
Justice dissenting: White

158. *Maher v. Buckner*, 434 U.S. 898 (1977).

A Connecticut statutory rule rendering ineligible for welfare benefits individuals who have transferred assets within seven years of applying for benefits unless they can prove the transfer was made for "reasonable consideration" is inconsistent with the Social Security Act and therefore void.

159. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

Certain provisions of a Washington statute imposing design or safety standards on oil tankers using state waters and banning operation in those waters of tankers exceeding certain weights, as well as certain pilotage requirements, are invalid as conflicting with federal law.

Justices concurring: Ginsburg, Kennedy, Souter, Breyer, Rehnquist, C.J.
Justices concurring specially: O'Connor, Thomas
Justice dissenting: Stevens

160. *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

California's community property statute, under which property acquired during the marriage by either spouse belongs to both, may not be applied to award a divorced spouse an interest in the other spouse's pension benefits under the Railroad Retirement Act, because the act precludes subjecting benefits to any legal process to deprive recipients.

Justices concurring: Blackmun, Brennan, White, Marshall, Powell, Stevens, Burger, C.J.
Justices dissenting: Stewart, Rehnquist

161. *Miller v. Youakim*, 440 U.S. 125 (1979).

An Illinois law differentiating between children who reside in foster homes with relatives and those who do not reside with relatives and giving the latter greater benefits than the former conflicts with federal law, which requires the same benefits be provided regardless of whether the foster home is operated by a relative.

162. *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979).

Arizona's imposition of tax upon electricity produced in state and sold outside the state, which is not offset against other taxes as is the case with electricity sold within state, violates a federal statute prohibiting any state from taxing the generation or transmission of electricity in a manner that discriminates against out-of-state consumers, and thus is unenforceable.

163. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980).

A California statute requiring all wine producers and wholesalers to file fair trade contracts or price schedules with the state and to follow the price lists is a resale price maintenance scheme that violates the Sherman Act.

164. *Ventura County v. Gulf Oil Corp.*, 445 U.S. 947 (1980).

Ventura County, California zoning ordinances governing oil exploration and extraction activities cannot be applied to a company which holds a lease from the United States Government because federal law preempts the field.

165. *Washington v. Confederated Colville Tribes,*447 U.S. 134 (1980).

Imposition of a Washington State motor vehicle excise tax and mobile home, camper, and trailer taxes on vehicles owned by the Tribe or its members and used both on and off the reservation violates federal law and cannot stand under the Supremacy Clause.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, Stevens, Burger, C.J.
Justices dissenting: Stewart, Rehnquist

166. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

Imposition of Arizona's motor carrier license tax and use fuel tax on a non-Indian enterprise authorized to do business in Arizona but operating entirely on reservation conflicts with federal law and cannot stand under the Supremacy Clause.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Burger, C.J.
Justices dissenting: Stevens, Stewart, Rehnquist

167. *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980).

Arizona's imposition of tax upon on-reservation sale of farm machinery to Indian tribe by non-Indian, off-reservation enterprise conflicts with federal law and is invalid under the Supremacy Clause.

Justices concurring: Marshall, Brennan, White, Blackmun, Burger, C.J.
Justices dissenting: Stewart, Powell, Rehnquist, Stevens

168. *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

An Iowa statute subjecting to damages a common carrier who abandons service and thereby injures shippers is preempted by the Interstate Commerce Act, which empowers the ICC to approve cessation of service on branch lines upon carrier petitions.

169. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

A New Jersey workmen's compensation provision denying employers the right to reduce retiree's pension benefits by the amount of a compensation award under the act is preempted by federal pension regulation law.

170. *Maryland v. Louisiana*, 451 U.S. 725 (1981).

Louisiana's "first-use tax" statute which, because of exceptions and credits, imposes a tax only on natural gas moving out-of-state, impermissibly discriminates against interstate commerce, and another provision that required pipeline companies to allocate cost of the tax to the ultimate consumer is preempted by federal law.

171. *McCarty v. McCarty*, 453 U.S. 210 (1981).

California community property statute, to the extent it treated retired pay of Army officers as property divisible between spouses on divorce, is preempted by federal law.

Justices concurring: Blackmun, White, Marshall, Powell, Stevens, Burger, C.J.
Justices dissenting: Rehnquist, Brennan, Stewart

172. *Agsalud v. Standard Oil Co.*, 454 U.S. 801 (1981).

A court of appeals decision holding preempted by federal pension law Hawaii law requiring employers to provide their employees with a comprehensive prepaid health care plan is summarily affirmed.

173. *Blum v. Bacon*, 457 U.S. 132 (1982).

A provision of New York's emergency assistance program precluding assistance to persons receiving AFDC to replace a lost or stolen AFDC grant is contrary to valid federal regulations proscribing inequitable treatment under the emergency assistance program.

174. *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta,*458 U.S. 141 (1982).

California's prohibition on unreasonable restraints on alienation, construed to prohibit "due-on-sale" clauses in mortgage contracts, is preempted by Federal Home Loan Bank Board regulations permitting federal savings and loan associations to include such clauses in their contracts.

Justices concurring: Blackmun, Brennan, White, Marshall, O'Connor, Burger, C.J.
Justices dissenting: Rehnquist, Stevens

175. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982).

A New Mexico tax imposed on the gross receipts that a non-Indian construction company received from a tribal school board for construction of a school for Indian children on reservation is preempted by federal law.

Justices concurring: Marshall, Brennan, Blackmun, Powell, O'Connor, Burger, C.J.
Justices dissenting: Rehnquist, White, Stevens

176. *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983).

A Tennessee tax on the net earnings of banks, applied to interest earned on obligations of the United States, is void as conflicting with 31 U.S.C. § 3124.

177. *Busbee v. Georgia*, 459 U.S. 1166 (1983).

A federal district court decision that Georgia's congressional redistricting plan is invalid as having a racially discriminatory purpose in conflict with the Voting Rights Act is summarily affirmed.

178. *Pennsylvania Public Utility Comm'n v. CONRAIL*, 461 U.S. 912 (1983).

A federal district court decision holding that federal statutes (the Federal Railroad Safety Act and the locomotive boiler inspection laws) preempt a Pennsylvania law requiring locomotives to maintain speed records and indicators, summarily affirmed by an appeals court, is summarily affirmed.

179. *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983).

Prohibition on pass-through to consumers of an increase in Alabama's oil and gas severance tax is invalid as conflicting with the Natural Gas Act to the extent that it applies to sales of gas in interstate commerce.

180. *Philco Aviation v. Shacket*, 462 U.S. 406 (1983).

An Illinois statute recognizing the validity of an unrecorded, oral sale of an aircraft is preempted by the Federal Aviation Act's provision that unrecorded "instruments" of transfer are invalid.

181. *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983).

The New York Human Rights Law is preempted by ERISA to the extent that it prohibits practices that are lawful under the federal law.

182. *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855 (1983).

A Texas property tax on bank shares, computed on the basis of a bank's net assets without any deduction for the value of United States obligations held by the bank, is invalid as conflicting with Rev. Stat. § 3701 (31 U.S.C. § 3124).

Justices concurring: Blackmun, Brennan, White, Marshall, Powell, Burger, C.J.
Justices dissenting: Rehnquist, Stevens

183. *Arcudi v. Stone & Webster Engineering*, 463 U.S. 1220 (1983).

An appeals court holding that a Connecticut statute requiring employers to provide health and life insurance to former employees is pre-

empted by ERISA as related to an employee benefit plan, is summarily affirmed.

184. *Aloha Airlines v. Director of Taxation*, 464 U.S. 7 (1983).

A Hawaii "property tax" on the gross income of airlines operating within the state is preempted by a federal prohibition on state taxes on carriage of air passengers "or on the gross receipts derived therefrom."

185. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

California's franchise law, requiring judicial resolution of certain claims, is preempted by the United States Arbitration Act, which precludes judicial resolution in state or federal courts of claims that contracting parties agree to submit to arbitration.

Justices concurring: Burger, C.J., Brennan, Marshall, Blackmun, Powell
Justice concurring in part and dissenting in part: Stevens
Justices dissenting: O'Connor, Rehnquist

186. *Texas v. KVUE–TV*, 465 U.S. 1092 (1984).

An appeals court holding that a Texas statute regulating the broadcast of political advertisements is preempted by the Federal Election Campaign Act of 1971 to the extent that it imposes sponsorship identification requirements on advertising for candidates for federal office, and to the extent that it conflicts with federal regulation of political advertising rates, is summarily affirmed.

187. *Michigan Canners Ass'n v. Agricultural Marketing Bd.,*467 U.S. 461 (1984).

A Michigan statute making agricultural producers' associations the exclusive bargaining agents and requiring payment of service fees by non-member producers is preempted as conflicting with federal policy of the Agricultural Fair Practices Act of 1967, protecting the right of farmers to join or not join such associations.

188. *Capital Cities Cable, Inc. v. Crisp,*467 U.S. 691 (1984).

The Oklahoma Constitution's general ban on advertising of alcoholic beverages, as applied to out-of-state cable television signals carried by in-state operators, is preempted by federal regulations implementing the Communications Act.

189. *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256 (1985).

A South Dakota statute requiring local governments to distribute federal payments in lieu of taxes in the same manner that they distribute general tax revenues conflicts with the Payment in Lieu of Taxes Act, which provides that the recipient local government may use the payment for any governmental purpose.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, O'Connor, Burger, C.J.
Justices dissenting: Rehnquist, Stevens

190. *Gerace v. Grocery Mfrs. of America*, 474 U.S. 801 (1985).

An appeals court decision holding that federal laws (the Food, Drug, and Cosmetic Act; the Meat Inspection Act; and the Poultry Products Act) preempt a New York requirement that cheese alternatives be labeled "imitation" is summarily affirmed.

191. *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. 282 (1986).

A Wisconsin statute debarring from doing business with the state persons or firms guilty of repeat violations of the National Labor Relations Act is preempted by that Act.

192. *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986).

A New Jersey statute creating an oil spill compensation fund is preempted by the Comprehensive Environmental Response, Compensation, and Liability Act to the extent that the state fund is used to finance cleanup activities at sites listed in the National Contingency Plan.

Justices concurring: Marshall, Brennan, White, Blackmun, Rehnquist, O'Connor, Burger, C.J.
Justice dissenting: Stevens

193. *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986).

A North Dakota statute disclaiming jurisdiction over actions brought by tribal Indians suing non-Indians in state courts over claims arising in Indian country is preempted by federal Indian law (Pub. L. 280).

Justices concurring: O'Connor, White, Marshall, Blackmun, Powell, Burger, C.J.
Justices dissenting: Rehnquist, Brennan, Stevens

194. *Offshore Logistics, Inc. v. Tallentire,*477 U.S. 207 (1986).

Louisiana's wrongful death statute is preempted by the Death on the High Seas Act as applied to a helicopter crash 35 miles off shore.

Justices concurring: O'Connor, White, Blackmun, Rehnquist, Burger, C.J.
Justices dissenting: Powell, Brennan, Marshall, Stevens

195. *Roberts v. Burlington Industries*, 477 U.S. 901 (1986).

An appeals court holding that New York severance pay requirements were preempted by ERISA is summarily affirmed.

196. *Brooks v. Burlington Industries*, 477 U.S. 901 (1986).

An appeals court holding that North Carolina severance pay requirements were preempted by ERISA is summarily affirmed.

197. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

North Carolina's legislative redistricting plan, creating multimember districts having the effect of impairing the opportunity of black voters to participate in the political process, is invalid under § 2 of the Voting Rights Act.

Justices concurring: Brennan, White, Marshall, Blackmun, Stevens
Justices concurring specially: O'Connor, Powell, Rehnquist, Burger.
Justices concurring in part and dissenting in part: Stevens, Marshall, Blackmun.

198. *Rose v. Arkansas State Police*, 479 U.S. 1 (1986).

A provision of Arkansas' workers' compensation act requiring that death benefits be reduced by the amount of any federal benefits paid is preempted by a federal requirement that federal benefits be "in addition to any other benefit due"; a contrary ruling by an Arizona appeals court is summarily reversed.

199. *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

A section of New York's alcoholic beverage control law establishing retail price maintenance violates section 1 of the Sherman Act, and is not saved by the Twenty-First Amendment.

Justices concurring: Powell, Brennan, White, Marshall, Blackmun, Stevens, Scalia
Justices dissenting: O'Connor, Rehnquist, C.J.

200. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

A California statute governing the operation of bingo games is preempted as applied to Indian tribes conducting on-reservation games.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, Rehnquist, C.J.
Justices dissenting: Stevens, O'Connor, Scalia

201. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

A Riverside County, California ordinance regulating the operation of bingo and various card games is preempted as applied to Indian tribes conducting on-reservation games.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, Rehnquist, C.J.
Justices dissenting: Stevens, O'Connor, Scalia

202. *Perry v. Thomas*, 482 U.S. 483 (1987).

The Federal Arbitration Act preempts a section of California Labor Code providing that actions for collection of wages may be maintained "without regard to the existence of any private agreement to arbitrate."

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Scalia, Rehnquist, C.J.
Justices dissenting: Stevens, O'Connor

203. *Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988).

A federal appeals court decision that Montana's coal severance and gross proceeds taxes, as applied to Indian-owned coal produced by non-Indians, are preempted by federal Indian policies underlying the Mineral Leasing Act of 1938, is summarily affirmed.

204. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).

A Michigan statute requiring approval of the Michigan Public Service Commission before a natural gas company may issue long-term securities is preempted as applied to companies subject to FERC regulation under the Natural Gas Act.

205. *Bennett v. Arkansas*, 485 U.S. 395 (1988).

An Arkansas statute authorizing seizure of prisoners' property in order to defray costs of incarceration is invalid as applied to Social Security benefits, exempted from legal process by 42 U.S.C. § 407(a).

206. *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988).

A Georgia statute barring garnishment of funds or benefits of employee benefit plans subject to ERISA is preempted by ERISA § 514(a) as a state law that "relates to" covered plans.

Justices concurring: White, Brennan, Marshall, Stevens, Rehnquist, C.J.
Justices dissenting: Kennedy, Blackmun, O'Connor, Scalia

207. *Felder v. Casey*, 487 U.S. 131 (1988).

Wisconsin's notice-of-claim statute, requiring that persons suing state or local governments or officials in state court must give notice and then refrain from filing suit for an additional period, is preempted as applied to civil rights actions brought in state court under 42 U.S.C. § 1983.

Justices concurring: Brennan, White, Marshall, Blackmun, Stevens, Scalia, Kennedy
Justices dissenting: O'Connor, Rehnquist, C.J.

208. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

Virginia tort law governing product design defects is preempted by federal common law as applied to suits against government contractors for damages resulting from design defects in military equipment if the equipment conformed to reasonably precise specifications and if the contractor warned the government of known dangers.

Justices concurring: Scalia, White, O'Connor, Kennedy, Rehnquist, C.J.
Justices dissenting: Brennan, Marshall, Blackmun, Stevens

209. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

A Florida statute prohibiting the use of the direct molding process to duplicate unpatented boat hulls, and creating a cause of action in favor of the original manufacturer, is preempted by federal patent law as conflicting with the balance Congress has struck between patent protection and free trade in industrial design.

210. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

Michigan's income tax law, by providing exemption for retirement benefits of state employees but not for retirement benefits of Federal employees, discriminates against federal employees in violation of 4 U.S.C. § 111 and in violation of the constitutional doctrine of intergovernmental tax immunity.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, O'Connor, Scalia, Rehnquist, C.J.
Justice dissenting: Stevens

211. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

A provision of Pennsylvania's motor vehicle financial responsibility law prohibiting subrogation and reimbursement from a claimant's tort recovery for benefits received from a self-insured health care plan is preempted by ERISA as "relat[ing] to [an] employee benefit plan."

Justices concurring: O'Connor, White, Marshall, Blackmun, Scalia, Kennedy, Rehnquist, C.J.
Justice dissenting: Stevens

212. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).

A Texas common law claim that an employee was wrongfully discharged to prevent his attainment of benefits under a plan covered by ERISA is preempted as a "State law" that "relates to" a covered benefit plan. The state cause of action also "conflicts directly" with an exclusive ERISA cause of action.

213. *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992).

The County of Yakima, Washington's excise tax on sales of allotted Indian land does not constitute permissible "taxation of land" within the meaning of § 6 of the General Allotment Act, and is invalid.

214. *Barker v. Kansas*, 503 U.S. 594 (1992).

A Kansas tax on military retirement benefits is inconsistent with 4 U.S.C. § 111, which allows states to tax federal employees' compensation if the tax does not discriminate "because of the source" of the compensation. No similar tax is applied to state and local government retirees, and there are no significant differences between the two classes of taxpayers that justify the different tax treatment.

215. *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992).

Illinois' "dual impact" laws designed to protect both employees and the general public by requiring training and licensing of hazardous waste equipment operators are preempted by § 18(b) of the Occupational Safety and Health Act, 29 U.S.C. § 667(b), which requires states to obtain federal approval before enforcing occupational safety and health standards relating to issues governed by federal standards.

216. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Two claims, based on New Jersey law and brought against cigarette companies for damages for lung cancer allegedly resulting from smoking, are preempted under the Federal Cigarette Labeling and Advertising Act: failure-to-warn claims requiring a showing that the tobacco companies' post-1969 advertising should have included additional warnings, and fraudulent misrepresentation claims predicated on state law restrictions on advertising.

217. *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114 (1993).

Oklahoma may not impose income taxes or motor vehicle taxes on members of the Sac and Fox Nation who live in "Indian country," whether the land is within reservation boundaries, on allotted lands, or in dependent communities. Such tax jurisdiction is considered to be preempted unless Congress has expressly provided to the contrary.

218. *Department of Treasury v. Fabe*, 508 U.S. 491 (1993).

An Ohio statute setting priority of claims against insolvent insurance companies is preempted by the federal priority statute, 31 U.S.C. § 3713, which accords first priority to the United States, to the extent that the Ohio law protects the claims of creditors who are not policyholders. Insofar as it protects the claims of policyholders, the law is saved from preemption by section 2(b) of the McCarran-Ferguson Act.

Justices concurring: Blackmun, White, Stevens, O'Connor, Rehnquist, C.J.
Justices dissenting: Kennedy, Scalia, Souter, Thomas

219. *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

The Illinois Consumer Fraud Act, to the extent that it authorizes actions in state court challenging as "unfair or deceptive" marketing practices an airline company's changes in its frequent flyer program, is preempted by the Airline Deregulation Act, which prohibits states from "enact[ing] or enforc[ing] any law . . . relating to [air carrier] rates, routes, or services."

Justices concurring: Ginsburg, Kennedy, Souter, Breyer, Rehnquist, C.J.
Justices concurring specially: O'Connor, Thomas

Justice dissenting: Stevens

220. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995).

Oklahoma may not impose its motor fuels excise tax upon fuel sold by Chickasaw Nation retail stores on tribal trust land. The legal incidence of the motor fuels tax falls on the retailer, located within Indian country, and the petitioner did not properly raise the issue of whether Congress had authorized such taxation in the Hayden-Cartwright Act.

221. *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996).

A federal law empowering national banks in small towns to sell insurance (12 U.S.C. § 92) preempts a Florida law prohibiting banks from dealing in insurance. The federal law contains no explicit statement of preemption, but preemption is implicit because the state law stands as an obstacle to the accomplishment of one of the federal law's purposes.

222. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

A Montana law declaring an arbitration clause unenforceable unless notice that the contract is subject to arbitration appears in underlined capital letters on the first page of the contract is preempted by the Federal Arbitration Act.

Justices concurring: Ginsburg, Stevens, O'Connor, Scalia, Kennedy, Souter, Breyer, Rehnquist, C.J.
Justice dissenting: Thomas

223. *Foster v. Love*, 522 U.S. 67 (1997).

A Louisiana statute that provides for an "open primary" in October for election of Members of Congress and that provides that any candidate receiving a majority of the vote in that primary "is elected," conflicts with the federal law, 2 U.S.C. §§ 1 and 7, that provides for a uniform federal election day in November, and is void to the extent of conflict. "[A] contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day . . . clearly violates § 7."

224. *United States v. Locke*, 529 U.S. 89 (2000).

Four Washington State regulations governing oil tanker operations and manning are preempted. Primarily through Title II of the Ports and Waterways Safety Act of 1972, Congress has occupied the field of regulation of general seaworthiness of tankers and their crews, and there is no room for these state regulations imposing training and English language proficiency requirements on crews and imposing staffing requirements for navigation watch. State reporting requirements applicable to certain marine incidents are also preempted.

225. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003).

Alabama's usury statute is preempted by sections 85 and 86 of the National Bank Act as applied to interest rates charged by national banks.

Justices concurring: Stevens, O'Connor, Kennedy, Souter, Ginsburg, Breyer, Rehnquist, C.J.
Justices dissenting: Scalia, Thomas

226. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

California's Holocaust Victim Insurance Relief Act, which requires any insurance company doing business in the state to disclose information about policies that it or "related" companies sold in Europe between 1920 and 1945, is preempted as interfering with the Federal Government's conduct of foreign relations.

Justices concurring: Souter, O'Connor, Kennedy, Breyer, Rehnquist, C.J.
Justices dissenting: Ginsburg, Stevens, Scalia, Thomas

227. *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004).

Suits brought in state court alleging that HMOs violated their duty under the Texas Health Care Liability Act "to exercise ordinary care when making health care treatment decisions" are preempted by ERISA § 502(a), which authorizes suit "to recover benefits due [a participant] under the terms of his plan."

228. *Gonzales v. Raich*, 545 U.S. 1 (2005).

California law allowing use of marijuana for medical purposes is preempted by the Controlled Substances Act's categorical prohibition of the manufacture and possession of marijuana.

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer
Justices dissenting: O'Connor, Thomas, Rehnquist, C.J.

229. *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006).

Arkansas statute that imposes lien on tort settlements in an amount equal to Medicaid costs, even when Medicaid costs exceed the portion of the settlement that represents medical costs, is preempted by the Federal Medicaid law insofar as the Arkansas statute applies to amounts other than medical costs.

230. *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

Part III of the opinion found a Texas redistricting statute to violate the federal Voting Rights Act because it diluted the voting power of Latinos.

Justices concurring in Part III: Kennedy, Stevens, Souter, Ginsberg, Breyer
Justices dissenting from Part III: Roberts, C.J., Alito, Scalia, Thomas

231. *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007).

A national bank's state-chartered subsidiary real estate lending business is subject to federal, not state, law.

Justices concurring: Ginsburg, Alito, Breyer, Kennedy, Souter
Justices dissenting: Stevens, Roberts, C.J., Scalia

232. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008).

The Federal Food, Drug, and Cosmetic Act bars common-law claims challenging the safety and effectiveness of medical devices that have been given premarket approval by the FDA.

Justices concurring: Scalia, Roberts, C.J., Kennedy, Souter, Thomas, Breyer, Alito, Stevens
Justice dissenting: Ginsburg

233. *Rowe v. New Hampshire Motor Transport Association*, 128 S. Ct. 989 (2008).

The federal Motor Carrier Act of 1980, which prohibits states from enacting any law related to a motor carrier price, route, or service, preempts two provisions of a Maine statute that regulate the delivery of tobacco to customers within the state.

234. *Haywood v. Drown*, 556 U.S. ___, No. 07–10374, slip op. (2009).

New York statute that gave the state's supreme courts—its trial courts of general jurisdiction—jurisdiction over suits brought under 42 U.S.C. § 1983, except in the case of suits seeking money damages from corrections officers, was preempted because it was "contrary to Congress's judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages."

Justices concurring: Stevens, Kennedy, Souter, Ginsburg, Breyer
Justices dissenting: Thomas, Roberts, C.J., Scalia, Alito

235. *PLIVA Inc. v. Mensing*, 564 U.S. ___, No. 09–993 (2011).

Louisiana statute which provides for liability where a manufacturer has a duty to warn of a products is preempted by federal labeling requirements, despite the fact that the manufacturer of a generic drug could have sought assistance from the Food and Drug Administration to convince manufacturers of the brand-name equivalent drug to change their labeling, allowing the generic manufacturer to follow suit.

Justices concurring: Thomas, Roberts, C.J., Scalia, Alito
Justice concurring in all but Part III–B–2: Kennedy
Justices dissenting: Sotomayor, Ginsburg, Breyer, Kagan

236. *National Meat Ass'n v. Harris*, 565 U.S. ___, No. 10–224, slip op. (2012).

California state statute dictating what slaughterhouses must do with pigs that cannot walk preempted by provision of the Federal Meat

Inspection Act (FMIA) expressly preempting state requirements that are in addition to, or different than, those made under the FMIA, where FMIA is more permissive.

237. *Kurns v. Railroad Friction Products Corp.*, 565 U.S. ___, No. 10–879, slip op. (2012).

Pennsylvania state-law tort claim by the estate of maintenance engineer alleging defective design of locomotive components and failure to warn of attendant dangers held preempted by the Locomotive Inspection Act, where purpose of the Act was found to be regulation of locomotive equipment generally and not limited to regulation of activities of locomotive operators or use of locomotives while engaged in transportation.

Justices concurring: Thomas, Roberts, C.J., Scalia, Kennedy, Alito, Kagan
Justices dissenting in part: Sotomayor, Ginsburg, Breyer

238. *Arizona v. United States*, 567 U.S. ___, No. 11–182, slip op. (2012).

Arizona state penalties for violating federal alien registration requirements held preempted by federal law that occupied the field; state sanctions against unauthorized aliens seeking employment or working held preempted by comprehensive system of federal employer sanctions that eschewed employee sanctions; state authority for police arrests of individuals believed to be deportable on criminal grounds held preempted as upsetting careful policy balance struck by Congress; state policy of checking immigration status of individuals stopped by police during ordinary course of state law enforcement activities held not to be preempted on its face because federal law contemplated and facilitated status checks.

Justices concurring: Kennedy, Roberts, C.J., Ginsburg, Breyer, Sotomayor
Justices dissenting in part: Scalia, Thomas, Alito

SUPREME COURT DECISIONS
OVERRULED BY SUBSEQUENT DECISION

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

Following the celebration of its one-hundredth anniversary, the *Constitution of the United States of America: Analysis and Interpretation* is currently undergoing significant revisions as part of an ongoing review of the document. In order to provide an objective list of cases in which the Court has overturned a prior ruling, the following list encompasses only those cases in which the Court has explicitly stated that it is overruling a prior case, or issues a decision that is the functional equivalent of an express overruling. In instances where a majority of the Court distinguishes (but does not overrule) an earlier holding, that case is not included in this listing, as only the Supreme Court has the prerogative of overruling its own decisions. *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989); Agostini v. Felton, 521 U.S. 203, 237 (1997). As the review of this list continues, other decisions may be added to or deleted from this list based on this criterion.

The present compilation was initially based primarily upon the following sources:

Justice Brandeis dissenting in *Burnet v. Coronado Oil & Gas Co.* 285 U.S. 393, 406–409 nn.1–4 (1932).
Emmet E. Wilson, *Stare Decisis, Quo Vadis?* 33 *Geo. L.J.* 251, 254 n.17, 265 (1945);
William O. Douglas, *Stare Decisis*, 49 *Colum. L. Rev.* 735–43, 756–58 (1949);
Albert R. Blaustein and Andrew H. Field, *Overruling Opinions in the Supreme Court*, 57 *Mich. L. Rev.* 151, 184–94 (1958).

Asterisks (*) identify cases expressly overruled.

	Overruling Case	*Overruled Case*
*	1. Hudson v. Guestier 10 U.S. (6 Cr.) 281, 285 (1810)	Rose v. Himley 8 U.S. (4 Cr.) 241 (1808)
	2. Gordon v. Ogden 28 U.S. (3 Pet.) 33, 34 (1830)	Wilson v. Daniel 3 U.S. (3 Dall.) 401 (1798)
	3. Greene v. Lessee of Neal 31 U.S. (6 Pet.) 291 (1832)	Patton v. Easton 14 U.S. (1 Wheat.) 476 (1816) Powell's Lessee v. Harmon 27 U.S. (2 Pet.) 241 (1829)
	4. Louisville, C. & C.R.R. v. Letson 43 U.S. (2 How.) 497, 554–556 (1844)	Commercial and Railroad Bank v. Slocomb 39 U.S. (14 Pet.) 60 (1840); Strawbridge v. Curtiss 7 U.S. (3 Cr.) 267 (1806); and qualifying, Bank of the United States v. Deveaux 9 U.S. (5 Cr.) 61 (1809)
*	5. The Genessee Chief 53 U.S. (12 How.) 443, 456 (1851)	The Steamboat Thomas Jefferson 23 U.S. (10 Wheat.) 428 (1825); The Orleans v. Phoebus 36 U.S. (11 Pet.) 175 (1837)
*	6. Gazzam v. Phillip's Lessee 61 U.S. (20 How.) 372, 377–378 (1858)	Brown's Lessee v. Clements 44 U.S. (3 How.) 650 (1845)

	Overruling Case	*Overruled Case*
	7. Suydam v. Williamson 65 U.S. (24 How.) 427 (1861)	Williamson v. Berry 49 U.S. (8 How.) 495 (1850); Williamson v. Irish Presbyterian Congregation 49 U.S. (8 How.) 565 (1850); Williamson v. Ball 49 U.S. (8 How.) 566 (1850)
*	8. Mason v. Eldred 73 U.S. (6 Wall.) 231, 238 (1868)	Sheehy v. Mandeville 10 U.S. (6 Cr.) 253 (1810)
	9. The Belfast 74 U.S. (7 Wall.) 624, 641 (1869)	Allen v. Newberry 62 U.S. (21 How.) 244 (1858) (in part)
	10. Knox v. Lee (Legal Tender Cases) 79 U.S. (12 Wall.) 457, 553 (1871)	Hepburn v. Griswold 75 U.S. (8 Wall.) 603 (1870)
	11. Trebilcock v. Wilson 79 U.S. (12 Wall.) 687 (1871)	Roosevelt v. Meyer 68 U.S. (1 Wall.) 512 (1863)
*	12. Hornbuckle v. Toombs 85 U.S. (18 Wall.) 648, 652–653 (1874)	Noonan v. Lee 67 U.S. (2 Black) 499 (1863); Orchard v. Hughes 68 U.S. (1 Wall.) 73, 77 (1864); Dunphy v. Kleinsmith 78 U.S. (11 Wall.) 610 (1871)
*	13. Union Pac. Ry. v. McShane 89 U.S. (22 Wall.) 444 (1874)	Kansas Pac. Ry. v. Prescott 83 U.S. (16 Wall.) 603 (1873) (in part)
*	14. County of Cass v. Johnston 95 U.S. 360 (1877)	Harshman v. Bates County 92 U.S. 569 (1875)
*	15. Fairfield v. County of Gallatin 100 U.S. 47 (1879)	Town of Concord v. Savings-Bank 92 U.S. 625 (1875)
*	16. Tilghman v. Proctor 102 U.S. 707 (1880)	Mitchell v. Tilghman 86 U.S. (19 Wall.) 287 (1873)
	17. Kilbourn v. Thompson 103 U.S. 168, 192–200 (1881)	Anderson v. Dunn 19 U.S. (6 Wheat.) 204 (1821)
*	18. United States v. Phelps 107 U.S. 320, 323 (1883)	Shelton v. The Collector 72 U.S. (5 Wall.) 113, 118 (1867)
*	19. Kountze v. Omaha Hotel Co. 107 U.S. 378, 387 (1883)	Stafford v. The Union Bank of Louisiana 57 U.S. (16 How.) 135 (1853)
*	20. Morgan v. United States 113 U.S. 476, 496 (1885)	Texas v. White 74 U.S. (7 Wall.) 700 (1869)
	21. Wabash, St. L. & P. Ry. Co. v. Illinois 118 U.S. 557 (1886)	Peik v. Chicago & N.W. Ry. 94 U.S. 164 (1877) ("substantially though not expressly overruled")
	22. Philadelphia Steamship Co. v. Pennsylvania 122 U.S. 326 (1887)	State Tax on Railway Gross Receipts 82 U.S. (15 Wall.) 284 (1873) ("basic grounds of decision repudiated")
	23. *In re* Ayers 123 U.S. 443 (1887)	Osborn v. Bank of the United States 22 U.S. (9 Wheat.) 738 (1824)
*	24. Leloup v. Port of Mobile 127 U.S. 640, 647 (1888)	Osborne v. City of Mobile 83 U.S. (16 Wall.) 479 (1873)
*	25. Leisy v. Hardin 135 U.S. 100, 118 (1890)	Pierce v. New Hampshire 46 U.S. (5 How.) 504 (1847)
*	26. Brenham v. German-American Bank 144 U.S. 173, 187 (1892)	Rogers v. Burlington 10 U.S. (3 Wall.) 654 (1866); Mitchell v. Burlington 71 U.S. (4 Wall.) 270 (1867)

	Overruling Case	*Overruled Case*
*	27. Roberts v. Lewis 153 U.S. 367, 377 (1894)	Giles v. Little 104 U.S. 291 (1881)
	28. Pollock v. Farmers' Loan & Trust Co. 158 U.S. 601 (1895)	Hylton v. United States 3 U.S. (3 Dall.) 171 (1796)
*	29. Garland v. Washington 232 U.S. 642, 646 (1914)	Crain v. United States 162 U.S. 625 (1896)
*	30. United States v. Nice 241 U.S. 591, 601 (1916)	Matter of Heff 197 U.S. 488 (1905)
	31. Pennsylvania R.R. v. Towers 245 U.S. 6, 17 (1917)	Lake Shore & Mich. So. Ry. v. Smith 173 U.S. 684 (1899) (in part)
*	32. Rosen v. United States 245 U.S. 467, 470 (1918)	United States v. Reid 53 U.S. (12 How.) 361 (1851)
*	33. Boston Store v. American Graphophone Co. 246 U.S. 8, 25 (1918)	Henry v. Dick Co. 224 U.S. 1 (1912)
*	34. Terral v. Burke Constr. Co. 257 U.S. 529, 533 (1922)	Doyle v. Continental Ins. Co. 94 U.S. 535 (1877); Security Mut. Life Ins. Co. v. Prewitt 202 U.S. 246 (1906)
*	35. Lee v. Chesapeake & Ohio Ry. 260 U.S. 653, 659 (1923)	*Ex parte* Wisner 203 U.S. 449 (1906); and qualifying, *In re* Moore 209 U.S. 490 (1908)
*	36. Alpha Cement Co. v. Massachusetts 268 U.S. 203, 218 (1925)	Baltic Mining Co. v. Massachusetts 231 U.S. 68 (1913)
	37. Chesapeake & Ohio Ry. v. Leitch 276 U.S. 429 (1928) (rehearing)	Chesapeake & Ohio Ry. v. Leitch 275 U.S. 507 (1927)
*	38. Gleason v. Seaboard Ry. 278 U.S. 349, 357 (1929)	Friedlander v. Texas & Pac. Ry. 130 U.S. 416 (1889) (in part)
*	39. Farmers Loan Co. v. Minnesota 280 U.S. 204, 209 (1930)	Blackstone v. Miller 188 U.S. 189 (1903)
*	40. East Ohio Gas Co. v. Tax Comm'n 283 U.S. 465, 472 (1931)	Pennsylvania Gas Co. v. Public Serv. Comm'n 252 U.S. 23 (1920)
*	41. Chicago & E.I.R.R. v. Industrial Comm'n 284 U.S. 296 (1932)	Erie R.R. v. Collins 253 U.S. 77 (1920); Erie R.R. v. Szary 253 U.S. 86 (1920)
	42. Fox Film Corp. v. Doyal 286 U.S. 123 (1932)	Long v. Rockwood 277 U.S. 142 (1928)
	43. New York ex rel. Northern Finance Corp. v. Lynch 290 U.S. 601 (1933)	Macallen Co. v. Massachusetts 279 U.S. 620 (1929)
*	44. Funk v. United States 290 U.S. 371, 373, 386 (1933)	Stein v. Bowman 38 U.S. (13 Pet.) 209 (1839) (in part); Hendrix v. United States 219 U.S. 79 (1911); Logan v. United States 144 U.S. 263 (1892); Jin Fuey Moy v. United States 254 U.S. 189 (1920)
*	45. West Coast Hotel Co. v. Parrish 300 U.S. 379 (1937)	Adkins v. Children's Hospital 261 U.S. 525 (1923); Morehead v. New York ex rel. Tipaldo 298 U.S. 587 (1936)
	46. Railroad Comm'n v. Pacific Gas Co. 302 U.S. 388 (1938) (rehearing)	Railroad Comm'n v. Pacific Gas Co. 301 U.S. 669 (1937)

	Overruling Case	*Overruled Case*
*	47. Helvering v. Producers Corp. 303 U.S. 376 (1938)	Gillespie v. Oklahoma 257 U.S. 501 (1922); Burnet v. Coronado Oil & Gas Co. 285 U.S. 393 (1932)
*	48. Erie R.R. v. Tompkins 304 U.S. 64, 69, 79 (1938)	Swift v. Tyson 41 U.S. (16 Pet.) 1 (1842)
*	49. Graves v. New York ex rel. O'Keefe 306 U.S. 466 (1939)	Dobbins v. Commissioners of Erie County 41 U.S. (16 Pet.) 435 (1842); Collector v. Day 78 U.S. (11 Wall.) 113 (1871); New York ex rel. Rogers v. Graves 299 U.S. 401 (1937); Brush v. Commissioners 300 U.S. 352 (1937)
	50. Rochester Tel. Corp. v. United States 307 U.S. 125 (1939)	Procter & Gamble v. United States 225 U.S. 282 (1912)
*	51. O'Malley v. Woodrough 307 U.S. 277 (1939)	Evans v. Gore 253 U.S. 245 (1920) Miles v. Graham 268 U.S. 501 (1925)
*	52. Madden v. Kentucky 309 U.S. 83 (1940)	Colgate v. Harvey 296 U.S. 404 (1935)
*	53. Helvering v. Hallock 309 U.S. 106 (1940)	Helvering v. St. Louis Trust Co. 296 U.S. 39 (1935); Becker v. St. Louis Trust Co. 296 U.S. 48 (1935)
	54. Tigner v. Texas 310 U.S. 141 (1940)	Connolly v. Union Sewer Pipe Co. 184 U.S. 540 (1902)
*	55. United States v. Darby 312 U.S. 100 (1941)	Hammer v. Dagenhart 247 U.S. 251 (1918); Carter v. Carter Coal Co. 298 U.S. 238 (1936) (limited)
*	56. United States v. Chicago, M., St. P. & P.R.R. 312 U.S. 592 (1941)	United States v. Lynah 188 U.S. 445 (1903) (in part); United States v. Heyward 250 U.S. 633 (1919)
*	57. Nye v. United States 313 U.S. 33 (1941)	Toledo Newspaper Co. v. United States 247 U.S. 402 (1918)
*	58. California v. Thompson 313 U.S. 109 (1941)	Di Santo v. Pennsylvania 273 U.S. 34 (1927)
	59. United States v. Classic 313 U.S. 299 (1941)	Newberry v. United States 256 U.S. 232 (1921)
*	60. Olsen v. Nebraska ex rel. Western Reference and Bond Ass'n 313 U.S. 236 (1941)	Ribnik v. McBride 277 U.S. 350 (1928)
*	61. Alabama v. King & Boozer 314 U.S. 1 (1941)	Panhandle Oil Co. v. Knox 277 U.S. 218 (1928); Graves v. Texas Co., 298 U.S. 393 (1936)
	62. Toucey v. N.Y. Life Ins. Co. 314 U.S. 118 (1941)	Supreme Tribe of Ben-Hur v. Cauble 255 U.S. 356 (1921)
	63. Edwards v. California 314 U.S. 160 (1941)	City of New York v. Miln 36 U.S. (11 Pet.) 102 (1837)
*	64. State Tax Comm'n v. Aldrich 316 U.S. 174 (1942)	First Nat'l Bank v. Maine 284 U.S. 312 (1932)
*	65. Williams v. North Carolina 317 U.S. 287 (1942)	Haddock v. Haddock 201 U.S. 562 (1906)

	Overruling Case	*Overruled Case*
*	66. Brady v. Roosevelt S.S. Co. 317 U.S. 575 (1943)	Johnson v. Fleet Corp. 280 U.S. 320 (1930)
*	67. Jones v. Opelika 319 U.S. 103 (1943) (re-argument);	Jones v. Opelika 316 U.S. 584 (1942)
	68. Oklahoma Tax Comm'n v. United States 319 U.S. 598 (1943)	Childers v. Beaver 270 U.S. 555 (1926)
*	69. West Virginia State Bd. of Educ. v. Barnette 319 U.S. 624 (1943)	Minersville School Dist. v. Gobitis 310 U.S. 586 (1940)
	70. FPC v. Hope Natural Gas Co. 320 U.S. 591 (1944)	United Railways v. West 280 U.S. 234 (1930) (in part)
	71. Mercoid Corp. v. Mid-Continent Co. 320 U.S. 661 (1944)	Leeds & Catlin Co. v. Victor Talk. Mach. (No. 2) 213 U.S. 325 (1909) (limited)
	72. Mahnich v. Southern S.S. Co. 321 U.S. 96 (1944)	Plamals v. Pinar Del Rio 277 U.S. 151 (1928) (in part)
*	73. Smith v. Allwright 321 U.S. 649 (1944)	Grovey v. Townsend 295 U.S. 45 (1935)
	74. United States v. South-Eastern Underwriters Ass'n 322 U.S. 533 (1944)	Paul v. Virginia 75 U.S. (8 Wall.) 168 (1869)
*	75. Girouard v. United States 328 U.S. 61 (1946)	United States v. Schwimmer 279 U.S. 644 (1929); United States v. Macintosh 283 U.S. 605 (1931); United States v. Bland 283 U.S. 636 (1931)
	76. Halliburton Co. v. Walker 329 U.S. 1 (1946) (rehearing)	Halliburton Co. v. Walker 326 U.S. 696 (1946)
	77. MacGregor v. Westinghouse Co. 329 U.S. 402 (1947) (rehearing)	MacGregor v. Westinghouse Co. 327 U.S. 758 (1946)
*	78. Angel v. Bullington 330 U.S. 183 (1947)	David Lupton's Sons v. Auto. Club of Am. 225 U.S. 489 (1912) (rendered obsolete by prior change in law)
	79. Zap v. United States 330 U.S. 800 (1947) (rehearing)	Zap v. United States 328 U.S. 624 (1946)
	80. Thibaut v. Car and General Ins. Corp. 332 U.S. 828 (1947) (on rehearing)	Thibaut v. Car and General Ins. Corp. 332 U.S. 751 (1947)
	81. Sherrer v. Sherrer 334 U.S. 343 (1948)	Andrews v. Andrews 188 U.S. 14 (1903) (in part)
	82. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co. 335 U.S. 525 (1949)	Adair v. United States 208 U.S. 161 (1908) Coppage v. Kansas 236 U.S. 1 (1915)
*	83. Commissioner v. Estate of Church 335 U.S. 632, 637 (1949)	May v. Heiner 281 U.S. 238 (1930)
	84. Ott v. Mississippi Barge Line 336 U.S. 169 (1949)	St. Louis v. Ferry Company 78 U.S. (11 Wall.) 423 (1870); Old Dominion Steamship Co. v. Virginia 198 U.S. 299 (1905); Ayer & Lord Co. v. Kentucky 202 U.S. 409 (1906)
*	85. Oklahoma Tax Comm'n v. Texas Co. 336 U.S. 342 (1949)	Choctaw & Gulf R.R. v. Harrison 235 U.S. 292 (1914); Indian Oil Co. v. Oklahoma 240 U.S. 522 (1916);

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*	87. United States v. Rabinowitz 339 U.S. 56, 66, 85 (1950)	Trupiano v. United States 334 U.S. 699 (1948); McDonald v. United States 335 U.S. 451 (1948)
*	88. Joseph Burstyn Inc. v. Wilson, 343 U.S. 495, 502 (1952)	Mutual Film Corp. v. Ohio Indus. Comm'n 236 U.S. 230 (1915)
*	89. Brown v. Board of Education 347 U.S. 483, 491, 494–495 (1954)	Cumming v. Richmond County Bd. of Educ. 175 U.S. 528 (1899); Gong Lum v. Rice 275 U.S. 78 (1927)
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*	98. Mapp v. Ohio 367 U.S. 643, 653–655 (1961);	Wolf v. Colorado 338 U.S. 25 (1949) (in part); Irvine v. California 347 U.S. 128 (1954) (in part)
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*	100. Wesberry v. Sanders 376 U.S. 1 (1964)	Colegrove v. Barrett 330 U.S. 804 (1947)
*	101. Smith v. Evening News Ass'n 371 U.S. 195, 199 (1962);	Westinghouse Employees v. Westinghouse Corp. 348 U.S. 437 (1955) (in part)
*	102. Construction Laborers v. Curry 371 U.S. 542, 552, 554 (1963)	Building Union v. Ledbetter Co. 344 U.S. 178 (1952) (in part)
*	103. Gideon v. Wainwright 372 U.S. 335 (1963)	Betts v. Brady 316 U.S. 455 (1942)

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